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NEW JERSEY STATE BOARD OF
VETERINARY MEDICAL EXAMINERS
on this date of: 3/28/05

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF VETERINARY MEDICAL EXAMINERS

CERTIFIED TRUE COPY

IN THE MATTER OF THE SUSPENSION
OR REVOCATION OF THE LICENSE
OF

JAMES M. CLINTON, D.V.M.
License Number: VI 1112

FOR LICENSURE TO PRACTICE
VETERINARY MEDICINE IN THE
STATE OF NEW JERSEY

Administrative Action

FINAL DECISION AND ORDER

This matter was initially opened to the New Jersey State Board of Veterinary Medical Examiners, (hereinafter the "Board"), on the Attorney General's filing of an Administrative Complaint on April 8, 2003, against James M. Clinton, D.V.M. ("Respondent" or "Dr. Clinton") by Adriana E. Baudry, Deputy Attorney General. Dr. Clinton filed a Pro Se answer to the Complaint with the Board on or about April 19, 2002, in which he denied all of the charges and allegations.

The single count Administrative Complaint alleged that the respondent maintained his veterinary practice, known as the Animal Eye Clinic of South Jersey, in a dirty and unsanitary condition, following a June 27, 2001 inspection of his professional premises by the Enforcement Bureau, of the Division of Consumer Affairs, in violation of N.J.S.A. 45:16-8.2. Additionally, the Complaint contended that Dr. Clinton maintained and stored over 1600 expired and/or misbranded medications and kept and stored Controlled Dangerous

Substances, such as Ketaset and Ketavet, in unlocked, unsecured cabinets. Finally, the Complaint asserted that the outlined conduct constituted: 1) gross or repeated acts of negligence contrary to the mandates of N.J.S.A. 45:1-21(c) and (d), respectively; 2) professional misconduct in violation of N.J.S.A. 45:1-21(e); and 3) evidence of an incapacity to discharge the functions of a licensee in a manner consistent with the public's health, safety and welfare contrary to N.J.S.A. 45:1-21(i).

Following the respondent's filing of an Answer denying the allegations, the matter was transferred to the Office of Administrative Law as a contested on May 22, 2002. The hearing commenced on March 18, 2003 and concluded on October 8, 2003. The Initial Decision of Administrative Law Judge Richard F. Wells was issued on March 26, 2004 and received by the Board on April 1, 2004. Administrative Law Judge Wells concluded that the Attorney General had failed to meet its burden of proof with regard to any of the charges brought against Dr. Clinton and recommended that the administrative complaint against the respondent be dismissed.

Deputy Attorney General Baudry requested an extension to file Exceptions to the decision to which the respondent consented. The Board granted the extension and her exceptions were filed on May 7, 2004. Respondent's Reply to the Exceptions were received and filed with the Board on May 10, 2004. Subsequent to its receipt and review of these documents, the Board scheduled oral argument of counsel on the filed exceptions for its monthly meeting of July 28, 2004. Following the grant of respondent's request for an adjournment of oral argument on the matter, the parties agreed to submit their respective arguments on the filed Exceptions in writing to the Board rather than appear for oral

presentation of the arguments. These written submissions were received by the Board by July 23, 2004.

After due consideration of the Administrative Law Judge's Initial Decision, the transcripts, exhibits, Exceptions and Replies to the Exceptions, the Board, at its regularly scheduled meeting of July 28, 2004, adopted as its final decision the findings of fact, in large measure, and the conclusions of law, in part, of the Administrative Law Judge (hereinafter "ALJ").

The Board accepts many of the factual findings of the ALJ, however, it reached a different conclusion with regard to some of the facts. For example, the Board accepts the ALJ's findings of fact that the June 27, 2001, inspection of the respondent's practice did not result in findings that the waiting room and the public bathroom were dirty and unsanitary on that date. However, this does not alter the fact that the record contains un rebutted testimony by the consumer that these areas of Dr. Clinton's clinic were very dirty and smelled of urine on April 19, 2001, when he appeared at the practice. The Board therefore modifies the findings as articulated later in this Order.

Additionally, the Board adopted the ALJ's conclusions of law as to his determination that the Attorney General failed to establish that Dr. Clinton had engaged in gross and/or repeated acts of negligence, professional misconduct and that he had demonstrated an incapacity to discharge the functions of a licensee in a manner consistent with the public's health, safety and welfare, contrary to N.J.S.A. 45:1-21 (d), (e) and (i), respectively. The Board adopts the ALJ's findings that, on the day of the inspection, the veterinary facility was being painted and undergoing HVAC and alarm system work, experiencing roof leaks all while Dr. Clinton was attending to patients and conducting his practice on his busiest

day of the week. Although the countertops in the interior hallway were cluttered, the Board accepts the ALJ's determination that this condition appeared in part to be due to the moving of medications by the inspectors. While the Board determined that a combination of all of this activity while the practice was attempting to provide veterinary medical care is inappropriate and not optimal veterinary practice conduct, it concluded, as articulated below, that the only unsanitary condition, in violation of N.J.S.A. 45:16-8.2 and 45:1-21(h), was the lack of hot water in the facility.

The Board, however, rejected the ALJ's conclusions that the Attorney General offered no sufficient, competent and credible evidence as to the existence of unsanitary conditions in the respondent's veterinary practice. The ALJ opined that the failure on the part of the Attorney General to present evidence of any generally accepted veterinary standards relative to appropriate sanitary practices, either in the form of written documentation or expert testimony, in veterinary medicine rendered it impossible to determine whether the respondent had deviated therefrom. Therefore, the ALJ concluded that the respondent had not practiced in unsanitary conditions.

The Board, on the contrary, concluded that Dr. Clinton did in fact maintain his facility in a dirty and unsanitary condition in violation of N.J.S.A. 45:16-8.2 and 45:1-21(h).¹ Specifically, the Board found that there was uncontroverted and unrebutted evidence in the record of conditions in the respondent's clinic from the consumer testimony. Moreover,

¹ The ALJ, on page 18 of his Initial Decision, reported that the Attorney General had amended its charges against Dr. Clinton to include an allegation that the respondent had violated the mandates of N.J.S.A. 45:1-21(h) as well. This statutory subsection permits the Board to discipline the respondent if it is established that he has violated any act or regulation administered by the Board. Therefore, the Board, in concluding that Dr. Clinton practiced veterinary medicine in an unsanitary manner, contrary to N.J.S.A. 45:16-8.2, also

the Board found that the unsanitary condition of the lack of hot water observed during the inspection of the respondent's veterinary office was so basic and within the ken of a lay fact finder that the testimony of an expert or the submission of some written and established veterinary standards was not required and unnecessary. For example, there is evidence in the record that the waiting room smelled of urine, the floors were dirty and that said dirt could be felt through the shoes, the bathroom toilet and floors were unclean and needed a "good scrub," the examination table had clumps of hair and wet cotton balls at the time the consumer was asked to place his dog on the table to be examined and that there was no hot water in any of the faucets. Dr. Clinton did not dispute any of the consumer's testimony as to the condition of his practice on the day of his appearance or the findings of the inspection that there was no hot water. The Board finds that the combination of these conditions are so fundamental and basic as to the operation of any business, especially a medical facility that any lay person could conclude that these constitute an unsanitary condition. Hence, the Board concluded that no expert testimony or written standards as to the operation of a veterinary facility is required in this matter.

As such, the Board concluded that the respondent failed to maintain his veterinary facility in a clean and sanitary condition as required by N.J.S.A. 45:16-8.2 and was therefore subject to disciplinary sanctions. Moreover, the Board specifically rejected the ALJ's broad based conclusion that expert testimony establishing generally acceptable standards in the practice of veterinary medicine and/or maintenance of an animal hospital are required in all cases alleging unsanitary conditions in order to determine whether said conditions exist.

found that he had violated the mandates of N.J.S.A. 45:1-21(h).

Finally, while the Board accepted the ALJ's factual findings that some items were moved during the inspection, it rejected his conclusion that as such some of the photographs taken by the investigators during the inspection of Dr. Clinton's veterinary practice were thus "staged" and did not portray how the facility or subject matter of the photograph actually looked, and that they had little or no probative value. While it appears, for example, that some medications were moved out of cabinets in order for the expiration dates to appear in a photograph, and thus the position of the medications may have little value as to whether the office was cluttered, it is ordinary procedure to move such items in order to attempt to document expiration dates. However, the Board did not base any of its findings of unsanitary conditions on the facts and conclusions that the respondent's veterinary practice was cluttered since it is acknowledged that medications and other items were moved to elucidate other issues. The Board's review and findings on other issues in this matter rendered its consideration of this issue unnecessary.

Once the Board concluded that the Attorney General had established a basis for disciplinary action against Dr. Clinton, it afforded the parties the opportunity to present mitigating and aggravating evidence and/or to provide further argument as to penalties. A hearing regarding the mitigation of penalty was held before the Board on September 22, 2004. During this hearing, respondent's counsel asserted, without documentation, that his client's clinic equipment had been damaged by the Enforcement Bureau investigators during their June 2001 inspection of his veterinary practice. Specifically, he maintained that the investigators had caused over \$3,000.00 worth of damage to Dr. Clinton's practice by exposing x-ray film and destroying instruments. The Board granted the respondent's request to keep the record open for a reasonable period of time in order to permit him to

submit documentation to substantiate his attorney's representations and to afford the Deputy Attorney General an opportunity to respond.

Additionally, during the mitigation hearing, DAG Baudry requested costs for the use of the State be imposed on the respondent. The Board accepted into evidence certifications from the Deputy Attorney General and Executive Director Leslie G. Aronson which delineated Office of Administrative Law hearing costs, Enforcement Bureau investigation costs, attorneys' fees and court reporting and transcription costs totaling \$48,507.03.

The respondent, via a correspondence dated September 28, 2004, submitted invoices to the Board totaling \$2827.50 which he purported to be for the repair and/or replacement of a damaged Phaco hand piece. Based on his submission of the invoices, the respondent sought a reduction or offset in any penalty imposed by the Board. DAG Baudry submitted a written objection, dated October 6, 2004, to the Board's consideration of the mitigation evidence presented by Dr. Clinton. She argued that any repair work performed on the respondent's equipment was not a consequence of any action taken by the Enforcement Bureau. She further highlighted for the Board that the inspection had occurred on June 27, 2001, six months prior to the date of the first invoice and more than three (3) years prior to Dr. Clinton ever advising that the damage had occurred during the inspection. Finally, DAG Baudry attached to her submission a letter dated July 9, 2001 to the Board from the respondent in which he detailed his objections to the June 27th inspection but failed to mention any damage by the inspectors. DAG Baudry therefore requested that the Board order Dr. Clinton to pay all fees and costs associated with the prosecution of this matter and not be afforded any offset for the claimed damage.

Respondent's attorney responded to the Deputy's correspondence in a letter October 14, 2004, in which he requested, among other things, that the Board reject the requirement that the respondent pay all fees and costs associated with the prosecution of this matter.

Following submission of the mitigation evidence, the record was closed on October 15, 2004. The time for the filing of the Board's final written determination detailing its decision was extended by successive Orders of Extensions due to numerous interceding events including requests by the parties for extension of due dates, conflicts in the scheduling of appearances before the Board and the replacement of four existing and the addition of one new Board member during the pendency of this matter.

DISCUSSION

The primary issue in dispute in this matter is whether Dr. Clinton practiced veterinary medicine in clean and sanitary conditions. As stated earlier, the Board has adopted as its final decision the ALJ's conclusions that the Attorney General failed to establish that the respondent had engaged in gross and/or repeated acts of negligence and professional misconduct contrary to N.J.S.A. 45:1-21(c), (d) and (e) and/or that he demonstrated an incapacity to discharge his functions as a licensee in a manner consistent with the public's health, safety and welfare contrary to N.J.S.A. 45:1-21(i).

The complaint also alleges that the respondent maintained his veterinary clinic in an unsanitary condition, including the maintenance of expired and/or misbranded medications and unsecured controlled dangerous substances, all in violation of N.J.S.A. 45:16-8.2 and N.J.S.A. 45:1-21(h). Although the Board has adopted the ALJ's factual findings relative to the condition of the respondent's office, the Board draws a different conclusion from the facts. The Board has examined the record in this matter concerning the condition of the

respondent's clinic and finds that he has maintained his veterinary practice in an unsanitary condition contrary to the mandates of N.J.S.A. 45:16-8.2 and N.J.S.A. 45:1-21(h).

The Board notes the testimony of Frank Schultheis, the consumer complainant in this matter, concerning his visit to Dr. Clinton's clinic for veterinary medical services for his dog. Mr. Schultheis testified that he appeared at the respondent's office on April 19, 2001 with his pet. [T1:12]². He initially noticed the smell of urine in the waiting room. [T1:13]. Additionally, he testified that the waiting room floor was dirty and that he could feel "the crud on the soles" of his shoes. [T1:13-14]. He further testified that the bathroom, which he utilized while waiting to see Dr. Clinton, was in the same condition as the waiting room, "very dirty." [T1:15]. He maintained that the toilet which was rusty, the fixtures and the floor all "needed a good scrub." [T1:15]. As to the condition of the examination room, the consumer testified that he refused to place his dog on the respondent's examination table because it contained "clumps of fistful of hair" and wet cotton balls. [T1:16-17]. He contended that he was "skeeved" by the table on which the respondent asked him to place his dog. [T1:18]. Finally, the consumer testified that, after he advised the respondent that he and his dog were leaving, he stopped at a store to purchase some wipes with which to clean the dog's feet because she had walked on the respondent's floors. [T1:19].

The ALJ dismissed and disregarded the consumer's testimony because he found that the Enforcement Bureau investigators were unable to corroborate these conditions

² "T1_" refers to the March 18, 2003, transcript in the matter of James M. Clinton, V.M.D., OAL Docket Number: BDS 2865-02.

when it inspected the premises two months later. However, the Board finds that Mr. Schultheis' testimony is uncontroverted and unrebutted evidence in the record detailing the condition of the respondent's veterinary practice on April 19, 2001. This testimony clearly demonstrates that the clinic was not clean and sanitary on the date the complainant brought his dog to see the respondent. The Board therefore concludes that the conditions as described by the consumer constitute unclean and unsanitary conditions in violation of N.J.S.A. 45:16-8.2 and N.J.S.A. 45:1-21(h).

Moreover, the Board finds that the fact that the Enforcement Bureau investigators did not find conditions similar to those observed by the consumer complainant two months after his visit to the respondent's clinic does not undermine Mr. Schultheis' unrebutted testimony. The Board notes parenthetically, that the ALJ found as a fact that, on the day of the inspection, the examination room was being cleaned by the respondent's employees while the inspectors were performing the inspection. The testimony of Inspector Deborah Zuccarelli indicates that the examination room and specifically, the examination table were dirty and that the photographs of the table did not accurately reflect the condition of the item because the respondent's wife and an employee were vacuuming and cleaning it during the inspection and prior to the inspector's ability to take the photograph. The Board therefore concludes that the actual condition of at least the examining room prior to the cleaning is at best unknown.

Secondly, the ALJ found that on June 27, 2001, the date of the inspection of the respondent's clinic, the facility had no hot water. Further, the ALJ found that June 27th was Dr. Clinton's busiest day of the week in that the practice was open early and had evening hours as well. Finally, the ALJ concluded that Dr. Clinton continued to conduct his

practice on the date of the inspection. The Board finds that hot water is essential in a veterinary practice in order to establish and maintain sanitary conditions. Without access to hot water, the Board concludes that the respondent at a bare minimum was unable to adequately wash and sanitize his hands and clean and sterilize utensils and equipment. The Board finds that these conditions present a disregard of public health and safety. Failure to properly sterilize, disinfect and sanitize hands, utensils and equipment presents a serious risk and potential of cross-contamination. The Board must therefore conclude that these conditions in a veterinary practice at any time, but certainly on the practice's busiest day of the week, clearly constitute unsanitary conditions contrary to the mandates of N.J.S.A., 45:16-8.2 and N.J.S.A. 45:1-21(h).

Moreover, the Board specifically rejects the ALJ's legal determination that the Attorney General's failure to establish appropriate sanitary standards, via the submission of expert testimony on the subject or written standards, protocols, guidelines or rules governing the practice of veterinary medicine or veterinary facilities, is fatal to this case on that subject or to all similar cases. The Board concludes that certain unsanitary conditions are so basic and primary that expert testimony or standards are not necessary. Additionally, the Board finds that no expert testimony is needed to opine that a facility is or define the word "clean" as required by N.J.S.A. 45:16-8.2. That is true in the present matter. The Board finds that no expert is needed to advise or testify that no hot water in an active veterinary medicine practice or dirty floors on which one can "feel the crud" on their shoes or examination tables containing hair and used items are unclean and unsanitary conditions that are not commonplace and should not be tolerated in a veterinary medical facility.

Finally, the ALJ found that certain pictures taken by the investigators of the Enforcement Bureau during its inspection of the respondent's veterinary practice were staged and did not accurately portray the condition of the facility. The ALJ notes that, for example in one picture marked into evidence, bottles were accumulated by the investigators, placed in boxes in the hallway by the investigators and then pictures were taken. He concluded that this scenario produced a staged picture and determined that it had little or no probative value. As discussed earlier, the Board has adopted as its final determination the ALJ's conclusion of law that the respondent's maintenance of over 1600 expired and/or misbranded medications did not constitute an unsanitary condition, in violation of N.J.S.A. 45:16-8.2. However, the Board notes that the gathering of certain evidence, whether it be medications, bottles, equipment etc, by the investigators for picture taking purposes does not in and of itself determine that the picture or scenario has been staged and that these pictures will have no value in the prosecution of matters. Rather, certain evidence can be gathered by this method for clarity or efficiency purposes or to indicate, as appears to be the situation at present, the quantity of the evidence.

PENALTY DISCUSSION

As to the monetary penalties assessed against the respondent in this matter, the Board has taken into consideration the respondent's mitigation evidence as well as the certifications submitted for costs and attorney fees by the Attorney General. The certification submitted in this matter requested that the respondent be held responsible for costs and fees totaling over \$48,000.00. The Board finds that the respondent must be assessed a civil penalty in order to protect the interests of the public and to deter Dr. Clinton from practicing in an unsanitary condition again. However, in recognition of the

ultimate findings in this case by the Board and the fact that many of the allegations of the administrative complaint were not substantiated by the investigation into this matter, the Board has determined to impose a civil penalty on the respondent but stayed the greater portion of its payment. Additionally, the Board, following its consideration of this entire matter, has imposed some investigative costs on Dr. Clinton but has granted the respondent's request for an offset as a result of his mitigation evidence.

As to the imposition of costs, the Board finds the certifications submitted as to the inspection by the Enforcement Bureau, as well as other documentation, sufficiently detailed its activities and are reasonable in the amount charged and the hours dedicated to this matter. The record indicates that two (2) investigators conducted the inspection for over eight (8) hours and one (1) inspector was present for two (2) hours. The inspectors interviewed the respondent and his staff, took pictures and physically inspected the premises gathering evidence. Later, they, among other responsibilities, prepared a detailed report concerning their findings and archived the gathered evidence. The Board concludes that record sufficiently details their actions and that the costs assessed for said activities were reasonable, and in accord with costs we have reviewed for similar investigations in the past. However, in light of a lack of detail in the actual certifications submitted, and the limited ultimate findings in this matter, the Board has reduced the costs as indicated below. As to the costs of the reporting services, these costs are traditionally imposed on and borne by the respondent, and are therefore imposed.

As to the portion of the application to recoup the costs and charges associated with the administrative court costs for the hearings, which total \$24,028.50, the Board denies the request to impose these costs on the respondent. It is not customary for a respondent

to bear the costs of the use of the administrative court and the Board declines to deviate from this widely accepted position.

As to the Attorney General's request for attorneys' fees, the Board recognizes and appreciates the professional legal work demonstrated by both attorneys in this matter. The Board finds that the submitted certification relative to attorneys' fees adequately details the actual time spent and the activities performed. Additionally, the Board finds the hourly rate employed, which we note has been in effect for many years without change and has been accepted by boards many times in the past, to be reasonable. Consistent with the guidelines set by the Superior Court of New Jersey in the matter of Poritz v. Stang, 288 N.J. Super. 217 (A.D. 1996), the Board weighed and balanced the State's interests in vindicating the statutory scheme and in protecting the public, against a licensee's interest in being assessed an objectively reasonable amount of fees in connection with a violation of the applicable statutes and regulations. [Poritz v. Stang, at 222].

In this matter, the respondent was found by the Board to have violated the statute requiring him to maintain his veterinary clinic in a clean and sanitary condition. The Board found no basis to hold him responsible for the violation of the more severe allegations including gross or repeated acts of negligence or professional misconduct. The Board has concluded that requiring the respondent to pay a civil penalty, the costs of the inspection of his veterinary practice and other investigative costs in this matter and the court reporting services is reasonable given the Board's findings. The Board has determined to exercise its discretion so as not to impose additional costs and therefore decline to impose attorney fees in this matter. The Board concludes that the costs imposed on Dr. Clinton satisfies its

purposes of punishment and deterrence from continued or further violation of its statutes and protects his interests in being assessed a reasonable amount of fees.

Finally, Dr. Clinton has requested a reduction in any imposition of penalties and/or costs as a result of evidence he presented during the mitigation hearing in this matter. Specifically, the respondent proconted invoices totaling \$2827.50 which he contends represents the costs he expended for the repair and/or replacement of equipment damaged during the inspection of his veterinary premises. The Board notes that Dr. Clinton did not repair the equipment until at least six (6) months after the date of the inspection but yet claims that said equipment was damaged by the Board's investigators. The Board makes no findings that the Enforcement Bureau investigators in fact caused or are responsible in any way for the alleged damage to his property on the date of the inspection. However, given the ultimate limited findings made from the investigation and the lack of detail in the investigative costs affidavits, the Board has determined to reduce the amount of investigative costs imposed and to offset those costs in the amount of \$2827.50.

ACCORDINGLY, IT IS on this 28TH day

OF MARCH 2005, ORDERED that:

1. The respondent James M. Clinton, D.V.M., is hereby formally reprimanded for maintaining his veterinary practice in a dirty and unsanitary condition in violation of N.J.S.A. 45:16-8.2 and N.J.S.A. 45:1-21(h).

2. Respondent shall hereafter cease and desist from maintaining his veterinary practice in a dirty and unsanitary condition contrary to the mandates of N.J.S.A. 45:16-8.2 and N.J.S.A. 45:1-21(h).

3. The respondent is hereby assessed a civil penalty in the amount of \$5,000.00 for the violation of N.J.S.A. 45:16-8.2 and N.J.S.A. 45:1-21(h). The amount of \$4,000.00 of this penalty shall be stayed. The remaining \$1,000.00 penalty shall be paid within thirty (30) days of the date of entry of this Order by certified check or money order made payable to the State of New Jersey and forwarded to Leslie G. Aronson, Executive Director of the Board, at 124 Halsey Street, Post Office Box 45020, Newark, New Jersey 07101.

4. Respondent shall pay costs to the State in the amount of \$5,893.53. This sum reflects the cost of investigation in this matter totaling \$5,131.08 and court reporting and transcription services in the amount of \$762.45. However, the total amount of costs is hereby reduced to \$3,066.03, as detailed in Paragraph 5. Such costs shall be paid within thirty (30) days of the date of entry of this Order by certified check or money order in the amount of \$3,066.03 made payable to the State of New Jersey, and forwarded to Leslie G. Aronson, Executive Director of the Board, at the address listed above in Paragraph 3.

5. The respondent is hereby granted an offset of \$2827.50, on the total amount of investigative costs assessed.

STATE BOARD OF VETERINARY MEDICAL EXAMINERS

By: Mark W. Logan VMD
MARK LOGAN, V.M.D.
President