

SB 394 State Board of Veterinary Medical Examiners - Sunset Extension and Program Evaluation – Robert A. Smith – Support

WRITTEN TESTIMONY OF ROBERT A. SMITH

My name is Robert Smith. I am a citizen of Anne Arundel County.

I thank the committee for the opportunity to provide this testimony.

I strongly support the portion of this legislation that requires the State Board of Veterinary Medical Examiners to report each year on its disciplinary activities for the previous fiscal year.

I thank the Department of Legislative Services (DLS) Sunset Review team for their recognition of the profound public concern about the Board's disciplinary activities and for including this language in their recommended legislation.

From my personal, frustrating experience as a complainant, I firmly believe that the Board needs to be more transparent about, and more accountable for, its disciplinary activities. Hopefully, this legislation will help further these objectives.

I understand the balance that the Board must maintain between confidentiality for the veterinarian and transparency for the public in its disciplinary actions. There are laws governing the protection of confidentiality. Transparency in essence becomes a byproduct. Where information is not deemed protected, it should be transparent to the public.

In this regard, the American Association of Veterinary State Boards (AAVSB) Veterinary Practice Act Model for regulatory boards states – “It is strongly recommended that Boards make public as much disciplinary action information as Jurisdiction law allows . . .” Thus, one may conclude from this recommendation is that *where discretion allows*, the Board should make every effort to make information about disciplinary actions available to the public. I urge the Board to adopt this AAVSB recommendation and propose its inclusion in COMAR.

A key area of disciplinary actions that could benefit from this greater use of Board discretion to promote transparency is when the Board routinely preempts a veterinarian's choice of a public contested case hearing to dispose of the case through a confidential, informally negotiated, formal resolution. The resultant final public order will include only those details agreed upon during this process. The Board has the broad discretion to achieve greater transparency for the public by ensuring that greater detail is included in, rather than excluded from, these public documents.

I urge that consideration be given to having annual report include Board improvements to promote transparency of the disciplinary process for the public. Finally, I recommend that the annual report be made available to the public and that the public be provided an opportunity for comment. Public feedback is the primary check on the Board's discretionary disciplinary activities.

Below I will provide some information on my personal experience with the disciplinary complaint process and on my subsequent detailed research regarding dynamics of Board operations and their adverse impact on transparency.

When your family's beloved companion animal is injured or dies unexpectedly while in the care of a veterinary facility, you want answers to explain how this occurred. You do this, not for punitive reasons, but to seek closure by assuring yourself that your beloved family member received suitable care. Mistakes happen and they can be logically explained. However, it is when you are unable to get a reasonable explanation for a tragic event – and you are stonewalled in your attempts to get full medical records; or you are told some critical records were inadvertently destroyed; or the limited medical records that you do receive are lacking critical details regarding care and reflect conflicting or incorrect information – that you question the appropriateness of care and consider the possibility of veterinary malpractice. This was our family's experience.

When we filed our complaint we did so solely to get to the truth and to a determination about the appropriateness of care that our beloved seven year-old, male dachshund received before he died unexpectedly, under suspicious circumstances, at a specialty veterinary facility after an ultrasound evaluation to diagnose the cause of diarrhea. He was playful and energetic when we took him to the facility the prior evening. [We were told to deliver him the prior evening so the specialist could conduct the examination the next morning before she departed for vacation].

The limited veterinary records that we did we receive showed shortcomings that were startling and inexplicable. Among these were documents that displayed some test results were received before they were requested. A board certified specialist recorded our male dachshund's gender as female. This same specialist who conducted the ultrasound examination had documented her diagnosis in the record, but strangely did not document her claimed recommended treatment plan that she later asserted she had verbally conveyed to a colleague to inform us. Records showed our dachshund encountered breathing difficulties during the ultrasound that were so severe the ultrasound had to be suspended for an hour so he could be evaluated and X-rays taken. [When we later requested a copy of these X-rays, we were told they had been destroyed in a flood.] After the ultrasound, he was held in a cage for several hours without any notification to us of this incident. We repeatedly called throughout the afternoon to check his status and asked when we could bring him home. We were informed he was fine and a veterinarian would soon return our call. A veterinarian did not return these calls.

Our dachshund was allegedly discovered by staff in his cage in critical condition seven hours after the ultrasound. Comparison of monitoring records with critical care records and patient history records showed an inexplicable two-hour gap between the time he was discovered and the time he was actually treated for his critical condition. When a veterinarian first contacted us, it was in the evening and to notify us that our dachshund was on life support and that we should consider euthanasia. We were absolutely stunned by this shocking, unexpected announcement. We chose to keep him on life support overnight in an attempt to give him every opportunity to recover, but he expired a short time later.

To us this was much more than a minor recordkeeping oversights. Based on the records, we came to suspect that no veterinarian had been present at this 24-hour facility during the afternoon and early evening hours the day of our dachshund's death, and possibly did not arrive until up to two hours *after* he was found in critical condition. We believed that through filing a complaint against the two facility veterinarians who had responsibility for our dachshund's care and the

specialist who conducted the ultrasound [and evaluated and dismissed the breathing episode], that the Board's investigation would determine the facts.

Our complaint laid out the implicating evidence in great detail. After we filed our complaint, no Board investigator interviewed us or otherwise discussed the allegations in our complaint. We are not aware if the investigator conducted an actual investigation or even interviewed any veterinary facility staff.

After many months of anticipation, we received a letter from the Board notifying us of the outcome and enclosing a copy of a Consent Agreement and Order (Consent Agreement) regarding only the veterinarian who was responsible for our dachshund's care after the ultrasound. [I have attached a copy of the Consent Agreement in which I have redacted the veterinarian's name.] The letter transmitting the Consent Agreement stated that the complaints against the specialist and the veterinarian who had initial responsibility for our dachshund's care had been dismissed. The letter also stated that the opinion of a board certified specialist was considered in our case.

Much to our disappointment, the enclosed Consent Agreement's plea bargained findings of fact [in the first paragraph of the second page] consisted of one incoherent sentence that illogically combined the elements of two distinctly unrelated events into one incomprehensible finding. In subsequent telephone conversations with the Board executive director and assistant attorney general, both said they were not capable of interpreting the finding for me.

We found it most disturbing that this Consent Agreement was not coherent, and found it unfathomable that Board officials could not even interpret the language for us. Moreover, the document lacked basic details we had seen in some other Consent Agreements. For example, it made no mention of our dachshund's death or the facility where the events occurred. It offered no discussion regarding our more serious supported allegations. And, it left unaddressed any aspect of the appropriateness of actual medical care prior to our dachshund's death.

[Strangely, the Consent Agreement even cited an erroneous date for the offense. We subsequently wrote to the responsible assistant attorney general who acknowledged the date error, but did not take appropriate action to officially correct this formal government public document.]

In the end, by pursuing a complaint with the Board, we were thoroughly exasperated. We had even more questions about the appropriateness of care by the veterinary facility because we knew that additional facts were contained in a board certified specialist's opinion and in the original charging document, both of which we were officially denied access. We were left feeling twice victimized – once by the facility veterinarians and again by the Board. We were never able to get a satisfactory answer why the Consent Agreement contained so little detail.

[COMAR 15.14.02.13 is woefully inadequate on its guidance for the crafting of the decisions and orders. It basically states these documents must be in writing and accompanied by findings of fact. And, "The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." There is no requirement for clarity.]

During the time after we received the Consent Order, my wife and I conducted extensive research of the Board's disciplinary activities to determine how this happened to us and why. What we found is that by thoroughly reviewing and analyzing the Board's disciplinary rules, processes, and practices one can deduce that these have been historically administered in a manner that, while not illegal, causes bureaucratic disenfranchisement for those who file complaints by systematically depriving them of fundamental information regarding their cases, *even when their cases result in final, formal orders.*

There are at least four interrelated causes for this dilemma –

1-The Board's disciplinary process and discretionary practices have clearly favored confidentiality for veterinarians at the expense of transparency for the complainant and the public. In her February 21st testimony before the House of Delegates Committee on Environment and Transportation, the Board executive director attributed concerns that complainants have about the Board's disciplinary process to complainants' confusion about what the Board does and who the Board represents. She then stated that the Board does not represent the consumer or the veterinarian; it represents the State of Maryland. This statement, while superficially factual, sidesteps reality and the real issue for complainants.

The reality is that complainants' individual rights to representation and transparency are subsumed within rights of the general public that are supposed to be represented by the Board. Complainants [the victims] have no *individual* rights to representation, information, or redress in the Board's complaint process. I should note that the Board has never defined the term "Complainant" or clearly described the complainant's role and rights in COMAR 15.14.02. [Interestingly, on July 17, 2018, during the DLS Preliminary Evaluation, the Board significantly revised its "Filing a Complaint" webpage to provide information that had previously been absent regarding complainant expectations and the complainant's role and rights.] Conversely, veterinarians have exclusive individual rights to separate representation, information, due process, and confidentiality that are clearly articulated in COMAR 15.14.02.

However, the real issue here is not about who the Board does or does not represent, it is about *how* the Board represents the public's interests and, thus, the complainant's interests. In particular, it is about the grossly inequitable balance between transparency for the public [and the complainant] and confidentiality for the veterinarian that has resulted from the Board's *discretionary* disciplinary practices, and the reasons for this inequity.

2-The Public Information Act, in regard to licensee disciplinary actions, allows the release of only the final disciplinary orders to the public. Thus, when the Board decides to dismiss cases or take informal action against veterinarians, the public is entitled to nothing more than to know the cases were dismissed. The public will not know if any informal action was taken. And, in those complaints that result in final disciplinary orders, the public is entitled only to that information which is contained in the final disciplinary orders; nothing more.

3- It is the Board that has the unchecked discretion to determine which complaint details are included in, or excluded from, final disciplinary orders. In its response to the DLS Preliminary Evaluation for the Sunset Review, the Board stated "The concern that the Board does not provide sufficient rationale to the complainant is largely the result of §4-333 of the

Public Information Act, which generally prohibits disclosure of information and findings that do not result in a formal disciplinary action.”

What the Board did not say is that it is the Board that has the broad discretion to determine which actions and information will ultimately fall under this prohibition. The Board may choose to simply dismiss a case or it may exercise discretion to impose only informal advice or admonishment. Either would fall under the prohibition.

What may not be commonly known is that the Board may use its unchecked discretion to significantly limit the disclosure of specifics regarding veterinary violations even in the final, formal disciplinary actions. This is accomplished through confidential, informally negotiated resolutions with veterinarians. Any details excluded from the resultant final order are protected from disclosure by confidentiality provisions. This action tends to serve the interests of veterinarian confidentiality at the detriment of transparency for complainants and the public.

How does this occur in practice? When the Board issues a charging document in a formal disciplinary proceeding, it offers veterinarians the opportunity to either accept the full charges with the proposed punishment [which will be documented in the final order] or pursue due process through a public contested case hearing. However, even if the veterinarians elect to pursue hearings, the cases will likely never proceed in this manner. Instead, the Board exercises its broad discretion and authority as a commonplace practice to intentionally preempt these time-consuming public proceedings in order to achieve formal settlements through confidential, informal negotiations. [I believe the Board would have great difficulty recalling the most recent year in which a case actually proceeded to a contested case hearing.] The benefit for the board by doing this is the far more expeditious disposition of the cases and with significantly less resource expenditure. The harm is to transparency for the public.

In its efforts to avoid hearings and achieve settlements, the Board’s resultant confidential, negotiated final orders may exclude significant charging document details regarding the severity and totality of veterinary violations, and include only that language that is agreed upon between the Board and the veterinarian to dispose of the case, no matter how diluted or disjointed the language may be. One must wonder if this commonplace Board practice has encouraged veterinarians with particularly egregious charges against them to elect contested case hearings knowing that the Board is extremely reluctant to proceed in this manner. This then gives veterinarians leverage against the Board to significantly plea down the charges. [I should note that the attorney for the disciplined veterinarian in our case subsequently produced and presented a continuing education course, approved by the Board, on the veterinary disciplinary process.]

The resultant final order, which is the only disciplinary work product the complainant and public are allowed to see, may well deprive them of full transparency of crucial particulars regarding the true appropriateness of care and/or the extent of veterinary violations in their cases. The general public is also deprived the true, transparent information needed to inform their choice of a veterinarian to care for their family’s companion animal.

In her February 21st testimony to the House of Delegates Committee on Environment and Transportation, the Board’s executive director affirmed this broad exercise of discretion in the crafting of formal decisions. She stated that the Board’s formal decisions recently – in the past

two or three years – contain more detail where they were not as specific in years past. Her affirmation begs two questions – What has caused the Board to suddenly begin crafting these decisions to contain more detail? And, why were these not as specific in the past? The laws and regulations are relatively unchanged.

I surmise that the DLS Preliminary and Sunset Reviews, along with the associated public input and legislative scrutiny helped serve as a catalyst for the Board's recent inclusion of more detail in these documents. This is great for today's complainants and overall public transparency if it continues. But, what recourse is available for those who were bureaucratically disenfranchised by the Board's past practice?

4- The Board made a deliberate effort to use informal resolutions to clear a backlog of cases and expedite new cases. A detailed review of the Board's historical data of disciplinary actions will clearly show that beginning in 2009, the Board began disposing of significantly more complaints. There is no law or regulatory change to explain this increase in throughput.

In the Maryland Department of Agriculture (MDA) Annual Reports for fiscal years 2011-2017, the MDA Office of the Attorney General claimed as a significant accomplishment that it assisted the Board in significantly decreasing the backlog, and in efficiently processing new complaints through informal resolutions. Thus, the use of informal resolutions to achieve final, formal orders was admittedly employed as the foremost tool to more expeditiously dispose of cases.

One might ask why the Board used this tool as the foremost measure in formal disciplinary actions, especially given the potential adverse impact on public transparency. Was it because the Board could exercise this measure with impunity because complainants had no standing in this process, and no appeal rights or any other administrative avenue of recourse? Was it just simpler and easier to capitulate to veterinarians who had capable legal representation as well entitlement to extensive administrative due process and judicial appeal rights? Was the benefit to the Board worth the cost of depriving the public of the true nature of veterinary violations and the resultant undermining of public trust?

In conclusion, this legislative proposal for annual reporting of the Board's disciplinary activities is an opportunity to maintain a focus on the types of inequities presented in my testimony. The Board represents the State of Maryland and, therefore, the public. When the Board's unchecked discretionary power results in actions taken which may tip the scales more in favor of veterinarian confidentiality and Board expediency than in the public interest and transparency, that power should be regulated or receive appropriate oversight to ensure it is not exercised against the public good. The annual reporting of disciplinary activities could help support this aim.

I thank you for this opportunity.

STATE OF MARYLAND
DEPARTMENT OF AGRICULTURE
BEFORE THE STATE BOARD OF VETERINARY MEDICAL EXAMINERS

IN THE MATTER OF:

[REDACTED] D.V.M.

DOCKET NO. 10-08

LICENSE NO. [REDACTED]

* * * * *

CONSENT AGREEMENT AND ORDER

This Consent Agreement and Order (Consent Agreement), dated this 24th day of JULY, 2011, is between the Maryland State Board of Veterinary Medical Examiners (Board) and [REDACTED] D.V.M. ([REDACTED]), License No. [REDACTED]. This Consent Agreement resolves the charge filed by the Board on February 23, 2011, alleging that Dr. [REDACTED] violated the Maryland Veterinary Practice Act and Code of Maryland Regulations with respect to veterinary medical care and treatment provided to Robert and Patricia Smith's 7 year-old neutered male Dachshund, "Casey," on August 26, 2006. On March 13, 2011, Dr. [REDACTED] requested a hearing before the Board to dispute the charge. Thereafter, the parties entered into discussions and were able to reach a resolution. By entering into this Consent Agreement, Dr. [REDACTED] waives the right to a hearing and appeal on the charging document in Docket No. 10-08.

Under State law, the Board is the licensing authority responsible for regulating the practice of veterinary medicine in this State, which includes filing disciplinary actions against veterinarians charged with violating provisions of the Maryland Veterinary Practice Act, Agriculture Article §§ 2-301 et seq., Annotated Code of Maryland and related regulations. As part of its authority, the Board "may refuse, suspend, or revoke any application or license, and censure or place on probation any licensee . . . if the veterinarian . . . [f]ails to comply with Board rules and regulations after receiving a license." Md. Code Ann., Agric. Art., § 2-310(8). In addition, the Board may impose a civil penalty of not more than \$5,000 for a first offense or \$10,000 for a second or subsequent offense in lieu of or in addition to suspending a veterinarian's license. Md. Code Ann., Agric. Art., § 2-310.1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

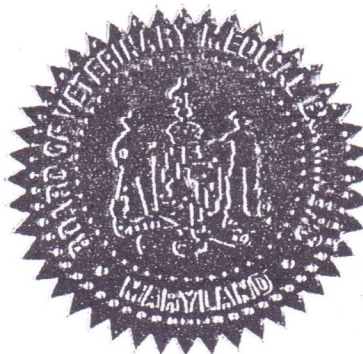
Dr. [REDACTED] by entering into and signing this Consent Agreement, while generally and specifically denying liability in this case, agrees to this Consent Agreement, acknowledging that the Board has sufficient evidence to find, as fact, and conclude as a matter of law, that she did violate COMAR 15.14.01.10 pertaining to record keeping by failing to properly maintain the ICU flow sheet in conjunction with her telephone log/reminder to contact the patient's owners, Robert and Patricia Smith, regarding the patient's ultrasound test results for the Smith's seven-year-old male Dachshund, "Casey," on August 26, 2006. Taking into account all of the facts and circumstances, the Board concluded that the following sanctions were reasonable and appropriate.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is this ^{24th JHH} 22 day of June, 2011, by the Maryland State Board of Veterinary Medical Examiners, **ORDERED** that:

- a. Dr. [REDACTED] is assessed a civil penalty in the amount of Three Hundred Dollars (\$300.00), payment to be made to the Maryland State Board of Veterinary Medical Examiners "SBVME" within 30 days of the date of this Order.
- b. Dr. [REDACTED] license is suspended for a period of one week; however, this suspension is stayed.
- c. Dr. [REDACTED] shall serve a period of probation of six months from the date of this Order. While on probation, the veterinarian shall obey all laws and regulations governing the practice of veterinary medicine in this State and the conditions of this Consent Agreement. Violation of probation means that the veterinarian is charged and the Board ultimately concludes that the veterinarian violated the Veterinary Practice Act, related regulations, or the terms of this Consent Agreement during the period of probation. Violation of probation may result in further disciplinary action and sanctions.

John L. Heizer, D.V.M.
John L. Heizer, D.V.M.
Vice President
Maryland State Board of Veterinary Medical Examiners



CONSENT

I, [REDACTED] acknowledge that I have had an opportunity to consult with legal counsel before entering into and signing this document. By this Consent, I hereby acknowledge the legal authority and the jurisdiction of the Board over this matter and to issue and enforce this Consent Agreement. In order to resolve this matter, I agree to accept and submit to the foregoing Consent Agreement, consisting of three pages, including this page.

I sign this Consent without reservation as my voluntary act after having had an opportunity to consult with counsel, and I acknowledge that I fully understand the language, meaning, and terms of this Consent Agreement.

6/22/11
Date

[REDACTED], D.V.M.

NOTARY

STATE OF Maryland
CITY/COUNTY OF Montgomery

I HEREBY CERTIFY that on this 22nd day of June, 2011, before me, a Notary Public of the State and City/County aforesaid, personally appeared [REDACTED], D.V.M., and made oath in due form of law that the foregoing Consent Agreement and Order was her voluntary act and deed.

AS WITNESS my hand and notarial seal.

Jacalyn M. Foti
Notary Public Jacalyn M. Foti

My Commission expires:

9/1/11