DOCKET NO. 2003-08

IN THE MATTER OF § TEXAS STATE BOARD OF

THE LICENSE OF § VETERINARY MEDICAL EXAMINERS

§ GARY SMRSTICK, D.V.M.

AGREED ORDER

On this the 13th day of February, 2003 came on to be considered by the Texas State Board of Veterinary Medical Examiners (“Board”) the matter of the license of Gary Smrstick, D.V.M. (“Respondent”). Pursuant to Section 801.408, Texas Occupations Code and Board Rule 575.27, an informal conference was held on January 7, 2003. The Respondent attended without counsel. The Board was represented at the conference by the Board’s Enforcement Committee.

Respondent, without admitting the truth of the findings and conclusions set out in this Agreed Order, wishes to waive a formal adjudicative hearing and thereby informally dispose of the issues without a formal adjudication. Respondent agrees to comply with the terms and conditions set forth in this Order. In waiving an adjudicative hearing, Respondent acknowledges his understanding of the alleged violations and the adequacy and sufficiency of the notice provided to him.

Upon the recommendation of the Enforcement Committee and with Respondent’s consent, the Board makes the following Findings of Fact and Conclusions of Law and enters this Agreed Order as set forth below.

Findings of Fact

1. On September 12, 2001, the Williamson County Humane Society (WCHS) received a female cat (“Nosey”) with an injured nose. Guy Bilyeu, the WCHS Executive Director, presented the cat to Gary Smrstick, D.V.M., Austin, Texas for his professional opinion as to whether the cat should be euthanized.

2. Dr. Smrstick examined the cat, determined that the cat had an infected injury of the external nasal area and an ear infection, and suggested that medications could be prescribed in light of the fact that the cat appeared to be in good shape. Dr. Smrstick prescribed Clavamox and Otomax for 10 days and wrote out a medical sheet for the WCHS to follow. Dr. Smrstick recommended surgery once the infection cleared, to correct the nasal injury. The WCHS medicated the cat for 10 days and Dr. Smrstick examined her again on September 27, 2001. Dr. Smrstick told Mr. Bilyeu that the cat looked okay and that the injured area on the nose might scab over. Additional medications were prescribed.

3. Dr. Smrstick examined “Nosey” again on October 4, 2001. At some later point, Mr. Bilyeu
discussed with Dr. Smrstick the idea of a human plastic surgeon reconstructing the cat’s nose. Dr. Smrstick declined to do the surgery himself. Dr. Smrstick tried unsuccessfully to work out a surgery schedule with the plastic surgeon. Todd Riggan, D.V.M., offered to assist and have the surgery done at his clinic. Following surgery, the nasal lesion was determined to be cancerous.

4. Because Dr. Smrstick examined the cat and prescribed treatment, the cat was Dr. Smrstick’s patient.

5. Dr. Smrstick testified that he does not personally compound the solution used to anesthetize his patients. Anesthesia compounding is performed by non-licensed persons according to a chart or scale based on the weight of the animal.

6. Dr. Smrstick did not maintain individual patient records for “Nosey” that meet the Board’s requirements. Names, dosages, concentration, and routes of administration of the anesthesia are lacking. Other details necessary to substantiate the treatment and procedure performed are not specified. Details about the anesthetic procedures are not included.

7. The controlled substances records maintained at the WCHS do not contain, for each drug listed, the date of acquisition; quantity purchased; date administered or dispensed; quantity administered or dispensed; name of client and patient receiving the drug; diagnosis; and balance on hand.

8. Dr. Smrstick stated that he is not personally knowledgeable of and responsible for the security of the controlled substances that he uses in his practice at the WCHS. He has not established adequate security to prevent unauthorized access to controlled substances and to prevent the diversion of controlled substances.

9. By letter of May 21, 2002, a Board investigator requested that Dr. Smrstick provide the Board with a narrative of his dealings with the cat “Nosey” along with pertinent patient records. Dr. Smrstick did not respond to this request.

10. By certified letter dated August 9, 2002, the Board investigator again requested of Dr. Smrstick the same information and further requested that the information be provided within 21 days. Dr. Smrstick signed for the certified letter but did not respond as requested.

11. On September 16, 2002, Mr. Michael Miller, investigator, wrote to Dr. Smrstick (certified letter) again asking for information on “Nosey” and informing Dr. Smrstick that the Board was opening a complaint against him for failing to cooperate with the Board as required by Board Rule 573.74. Dr. Smrstick signed for the certified letter. On September 26, 2002 Dr. Smrstick finally responded in writing to the Board.
12. Dr. Smrstick's failure to respond to the Board's requests during a four-month period resulted in unnecessary delays in the investigation of the case involving "Nosey."

Conclusions of Law

1. Respondent is required to comply with the provisions of the Veterinary Licensing Act, Chapter 801, Texas Occupations Code, and with the Board's Rules.

2. Based on Finding of Fact 5, Dr. Smrstick has violated Rule 573.44 COMPOUNDING DRUGS, of the Board's Rules of Professional Conduct, which requires that compounding be done only by a veterinarian or by a pharmacist on the receipt of a valid prescription from a veterinarian.

3. Based on Finding of Fact 6, Dr. Smrstick has violated Rule 573.52, PATIENT RECORD KEEPING, of the Board's Rules of Professional Conduct, which requires that individual patient record be maintained at the veterinarian's place of business, and such records should include names, dosages, concentration, and routes of administration of each drug prescribed, and other details necessary to substantiate the examination, diagnosis, and treatment provided, and/or surgical procedure performed.

4. Based on Finding of Fact 7, Dr. Smrstick has violated Rule 573.50, CONTROLLED SUBSTANCES RECORDS KEEPING FOR DRUGS ON HAND.

5. Based on Finding of Fact 8, Dr. Smrstick has violated Rule 573.61, MINIMUM SECURITY FOR CONTROLLED SUBSTANCES, which requires that licensees establish adequate security to prevent unauthorized access to controlled substances and to prevent the diversion of controlled substances.

6. Based on Findings of Fact 9 through 12, Dr. Smrstick has violated RULE 573.74, DUTY TO COOPERATE WITH BOARD, of the Board's Rules of Professional Conduct, which requires a veterinarian to cooperate fully with any Board investigation and to respond within 21 days to requests for information concerning complaints.

7. Based on Findings of Fact 4 through 12 and Conclusions of Law 1 through 6, Respondent has violated Section 801.402 (6) of the Veterinary Licensing Act, Texas Occupations Code, and is subject to disciplinary action by the Board: 801.402. GENERAL GROUNDS FOR LICENSE DENIAL OR DISCIPLINARY ACTION. A person is subject to denial of a license or to disciplinary action under Section 801.401 if the person:
   (6) engages in practices or conduct that violates the board's rules of professional conduct;
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8. Based on Conclusions of Law 1 through 7, Respondent is subject to disciplinary action under Section 801.401 of the Veterinary Licensng Act, Texas Occupations Code: 801.401. DISCIPLINARY POWERS OF BOARD. (a) If an applicant or license holder is subject to denial of a license or to disciplinary action under Section 801.402, the Board may:

(1) refuse to examine an applicant or to issue or renew a license;
(2) revoke or suspend a license;
(3) place on probation a license holder or person whose license has been suspended;
(4) reprimand a license holder; or
(5) impose a civil penalty.

NOW, THEREFORE, THE BOARD AND RESPONDENT AGREE AS FOLLOWS:

The Board ORDERS that Gary Smrstick, D.V.M., be officially REPRIMANDED.

The Board further ORDERS that Respondent pay a CIVIL PENALTY of Three Thousand Five Hundred Dollars ($3500.00) within forty-five (45) days of the Board’s approval of this Order.

The Board further ORDERS that Respondent take and pass the Board’s JURISPRUDENCE EXAMINATION within thirty (30) days of the Board’s approval of this Order.

The Board further ORDERS that Respondent’s license to practice veterinary medicine in the state of Texas be SUSPENDED for thirty (30) days of the date of the Board’s approval of this Order. If Respondent takes and passes the JURISPRUDENCE EXAMINATION within thirty (30) days of the Board’s approval of this Order, the SUSPENSION will be lifted at the end of the 30-day period. If Respondent does not take and pass the JURISPRUDENCE EXAMINATION within 30 days of the Board’s approval of this Order, the SUSPENSION will continue for successive 30-day periods until Respondent takes and passes the JURISPRUDENCE EXAMINATION. Respondent may take the JURISPRUDENCE EXAMINATION once every 30 days.

Each 30-day suspension remains in effect for the full 30 days regardless of when during the 30-day period the JURISPRUDENCE EXAMINATION is taken and passed. For example, if the Board adopts this Order on February 13, 2003, the first 30-day suspension period will begin on February 13 and remain in effect until March 15, 2003. If Respondent takes and passes the JURISPRUDENCE EXAMINATION on February 24, 2003, the suspension will still remain in effect until March 15, 2003.

The Board further ORDERS that during the period(s) of suspension, Respondent shall not engage in any activities constituting the practice of veterinary medicine. If Respondent does engage in
the practice of veterinary medicine during a period of suspension, the Board will prosecute Respondent to the fullest extent of the law.

The Board further ORDERS that:

1. Respondent shall abide by the Rules of Professional Conduct, the Texas Veterinary Licensing Act, and the laws of the State of Texas and the United States.

2. Respondent shall cooperate with the Board’s attorneys, investigators, compliance officers and other employees and agents investigating Respondent’s compliance with this Order.

3. Failure by Respondent to comply with the terms of this Agreed Order or with any other provisions of the Licensing Act or the Board Rules, may result in further disciplinary action.

Respondent, by signing this Agreed Order, acknowledges his understanding of the Agreed Order, the notice, Findings of Fact and Conclusions of Law herein set forth, and agrees that he will satisfactorily comply with the mandates of the Agreed Order in a timely manner or be subject to appropriate disciplinary action by the Board.

Respondent, by signing this Agreed Order, waives his right to a formal hearing and any right to seek judicial review of this Agreed Order. Respondent acknowledges that he had the right to be represented by legal counsel in this matter.

RESPONDENT WAIVES ANY FURTHER HEARINGS OR APPEALS TO THE BOARD OR TO ANY COURT IN REGARD TO ALL TERMS AND CONDITIONS OF THIS AGREED ORDER. NOTHING IN THIS ORDER SHALL BE DEEMED A WAIVER OF RESPONDENT’S RIGHTS UNDER STATUTE OR UNDER THE UNITED STATES OR TEXAS CONSTITUTIONS TO APPEAL AN ORDER OR ACTION OF THE BOARD SUBSEQUENT TO THIS AGREED ORDER EXCEPT AS RESPONDENT MAY HAVE OTHERWISE AGREED TO HEREIN. RESPONDENT AGREES THAT THIS IS A FINAL ORDER.

The effective date of this Agreed Order shall be the date it is adopted by the Board.

I, GARY SMRSTICK, D.V.M., HAVE READ AND UNDERSTAND THE FOREGOING AGREED ORDER. I UNDERSTAND BY SIGNING IT, I WAIVE CERTAIN RIGHTS. I SIGN IT VOLUNTARILY. I UNDERSTAND THAT THIS ORDER CONTAINS THE ENTIRE AGREEMENT AND THERE IS NO OTHER AGREEMENT OF ANY KIND, VERBAL, WRITTEN OR OTHERWISE.
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1-30-2003
Date

STATE OF TEXAS
COUNTY OF

BEFORE ME, on this day, personally appeared Gary Smrstick, D.V.M., known to me as the person whose name is subscribed to the foregoing document, and acknowledged to me that he executed the same for the purposes stated therein.

Given under the hand and seal of office this 30 day of January, 2003.

MICHAEL J. MILLER
Notary Public, State of Texas
My Commission Expires
July 31, 2005

Notary Public

SIGNED AND ENTERED by the TEXAS STATE BOARD OF VETERINARY MEDICAL EXAMINERS on this the day of 2003.

J. Lynn Lawhon, D.V.M., President