IN THE SUPREME COURT OF GUAM

DR. HUGH SULE,
Petitioner-Appellant,

v.

GUAM BOARD OF DENTAL EXAMINERS,
Respondent-Appellee.

Supreme Court Case No.: CVA07-012
Superior Court Case No.: SP0192-02

OPINION

Cite as: 2008 Guam 20

Appeal from the Superior Court of Guam
Argued and submitted on February 20, 2008
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; MIGUEL S. DEMAPAN, Justice *Pro Tempore*.

CARBULLIDO, J.:

[1] This appeal arises out of an administrative adjudication hearing resulting in Respondent-Appellee Guam Board of Dental Examiners (the "Board") imposing discipline upon Petitioner-Appellant Dr. Hugh Sule. Dr. Sule sought relief from the lower court through a petition for writ of administrative mandate on grounds that his due process rights were violated, that the Board's findings were not supported by substantial evidence, and that the discipline imposed was excessive or unauthorized by law. The lower court denied Dr. Sule's petition, upholding the Board's order. Dr. Sule thereafter filed a motion for reconsideration, which the lower court similarly denied. Dr. Sule appeals from this denial of the writ petition and the reconsideration. For the reasons discussed herein, we hold that the imposition of attorney's fees was unauthorized, and therefore vacate the part of the judgment imposing attorney's fees. We affirm the judgment in all other respects.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Dr. Hugh Sule is a dentist who was licensed to practice dentistry in Guam and a principal of Gentle Dental Care Clinic ("Gentle Care"). After being interviewed by Gentle Care's office administrator, Robert Loeb, Sarah Swank was hired by Dr. Sule to work at Gentle Care. Swank had previously worked as a dental assistant in Florida and Georgia, but at the time she was hired by Dr. Sule, she had not obtained a Guam license to work as a dental assistant. Record on Appeal ("RA") at 11-12 (Submission of Hearing Transcripts ("Hr'g Tr."), Jan. 31, 2003). There is some dispute as to what position Swank was actually hired as, initially. According to Dr. Sule, Swank was hired as a sterilization technician ("steritech") because he knew she was not licensed as a

dental assistant. No special training or licensure is required for steritechs, and steritechs do not interact with patients. *See* Appellant's Excerpts of Record ("ER") at 91 (Excerpts of Tr., Jan. 31, 2003). Swank, on the other hand, understood that she was hired as a dental assistant, and claims that Dr. Sule never discussed with her what her responsibilities were or that she had to obtain a license from the Board in order to work as a dental assistant. RA, Hr'g Tr. at 15, 22. Swank testified that she would never have taken a job as a steritech. RA, Hr'g Tr. at 23. She was paid a wage of $10.50 per hour, which she understood to be the prevailing starting pay for a dental assistant in Guam. RA, Hr'g Tr. at 42. Moreover, Dr. Sule himself testified that Swank was given the pay of a dental assistant, which is higher than that of a steritech, because he expected that she would soon become licensed as a dental assistant. RA, Hr'g Tr. at 86-87. Swank's employment with Gentle Care lasted only eleven days.

[3] During the short time she worked for Gentle Care, Swank performed several dental procedures that a licensed dental assistant would perform, such as prophylaxis,[1] gross debridement,[2] x-rays, and impressions. Swank also assisted Dr. Sule with fillings, extractions, and a root canal. Further, Swank operated certain dental equipment on clinic patients, specifically a cavitron, which Dr. Sule instructed that Swank be trained to use.

[4] Some time after Swank left the employ of Dr. Sule, Dr. Sule was served an accusation and statement of charges, alleging that he violated certain provisions of the Dental Practice Act and Board regulations. Before the commencement of the formal hearing, Dr. Sule requested that three Board members -- Dr. Andrew Eusebio, Dr. Jeffrey Johnson, and Dr. Rayner Terlaje -- be

[1] Prophylaxis is a "basic . . . above the gum-line cleaning." ER at 76 (Excerpts of Tr., Jan. 31, 2003).

[2] Gross debridement is an oral cleaning procedure that is more in depth than prophylaxis, and involves the removal of heavy tartar and calculus, and the use of a dental instrument called a cavitron. ER at 77 (Excerpts of Tr., Jan. 31, 2003).

disqualified from participating in his case due to concerns of bias. These three Board members were also members of Pacific Dental Partners ("PDP"), a competing group of dentists allegedly hostile toward Dr. Sule. Dr. Sule's concerns of bias had to do with this competitive hostility, as well as the purported pecuniary interest that these members had in the outcome of the disciplinary proceedings. Dr. Eusebio voluntarily recused himself, but the other two remained on his case. Dr. Sule also sought the disqualification of the administrative hearing officer, attorney Arthur Barcinas,[3] on claims of appearance of partiality, as a patient of Dr. Jeffrey Johnson. This motion was also denied, and the hearing commenced on February 13, 2002.

[5] After the hearing, the hearing officer made his findings, which were adopted by the Board. The Board found that Dr. Sule had committed the following violations: that he employed an unlicensed ancillary, that he failed to report this person's unauthorized practice of dentistry, that he aided/assisted this person in the unauthorized practice of dentistry, and that he improperly delegated his professional responsibilities to an unlicensed dental ancillary person. The Board imposed discipline as follows: (1) that Dr. Sule be immediately and indefinitely suspended from the practice of dentistry; (2) that he shall pay a $1000.00 fine for each violation; (3) that he shall pay a $50.00 fine for each working day that the violations occurred. Dr. Sule was given the option of suspending this discipline, provided he comply with the following conditions: (1) that he take and pass a written jurisprudence exam within ninety days of the order; (2) that he pay attorney's fees of the Board counsel and costs incurred by the Board as a result of these proceedings. In addition to these, the Board ordered that Dr. Sule be publicly reprimanded within ninety days of the order.

[3] At the time of these proceedings, attorney Arthur Barcinas was not yet a Superior Court judge.

[6] Dr. Sule filed a Petition for Writ of Administrative Mandate with the Superior Court, seeking an order of the court commanding the Board to set aside its findings of fact and conclusions of law and its order of discipline. The lower court denied the petition on September 19, 2005. Dr. Sule thereafter filed a Motion for Reconsideration, which the lower court also denied on February 20, 2007. Final judgment was entered on July 23, 2007, and Dr. Sule timely filed a notice of appeal.

II. JURISDICTION

[7] This court has jurisdiction over an appeal from a final judgment of the Superior Court pursuant to 48 U.S.C. § 1424-1(a)(2) (Westlaw through Pub. L. 110-207 (2008)); 7 GCA §§ 3107 (b) and 3108 (a) (2005).

III. STANDARD OF REVIEW

[8] The denial of a writ is reviewed for abuse of discretion. *Dep't of Agric. v. Civil Serv. Comm'n*, 2007 Guam 21, ¶ 8. The denial of a motion for reconsideration is reviewed for abuse of discretion. *Ward v. Reyes*, 1998 Guam 1 ¶ 10. This petition was brought before the lower court seeking administrative mandate, pursuant to 5 GCA § 9241, rather than as a writ for ordinary mandate. In a majority of appellate courts, the standard of review on appeal from the denial of a writ of mandate as to an administrative adjudication is the same as the scope of review that the trial court applied to the agency's findings. *See Norton v. San Bernadino City Unified Sch. Dist.*, 69 Cal. Rptr. 3d 917, 927 (2008). In the case of *Fagan v. Dell'Isola*, 2006 Guam 11, which was an appeal of a review of an administrative decision, this court stated that "[t]he trial court was required to review *de novo* the Commission's conclusions of law. The trial court was also required to affirm the Commission's findings of fact, and any conclusions resulting therefrom, if supported by substantial evidence." *Id.* at ¶ 11. This court then went on to

state that "[o]ur inquiry in effect mirrors the review which should be conducted by the trial court." *Id.* at ¶ 12. S*ee also Anserv Ins. Servs., Inc. v. Kelso*, 99 Cal. Rptr. 2d 357, 362 (Ct. App. 2000) (Generally, the standard of review on appeal of the trial court's determination is the substantial evidence test. However, pure questions of law that were determined by the trial court based on undisputed facts are reviewed *de novo*).

[9] When the decision of an agency substantially affects a fundamental vested right of the petitioner, then some courts have held that the lower court should apply an independent judgment standard, which requires the lower court to weigh the evidence and make its own independent determination as to whether the administrative decision should be upheld. *See Clare v. State Bd. of Accountancy*, 10 Cal. App. 4th 294, 300 (1992). California authority holds that, in its exercise of independent judgment, lower courts must determine whether the agency's decision is supported by the weight of the evidence (a standard greater than substantial evidence). *See Anton v. San Antonio Cmty. Hosp.*, 567 P.2d 1162, 1172 (Cal. 1977).

[10] However, the less deferential standard of "independent judgment" and weight of the evidence that California courts have said should apply when trial courts review an administrative determination substantially affecting a vested right comes from California's pertinent statutes, and thus is a rule created by that state's legislature. Cal. Code of Civ. Proc. § 1094.5(c) (West 2007); *See generally Bixby v. Pierno*, 481 P.2d 242, 246-47 (Cal. 1971). Guam's pertinent statute, on the other hand, provides that an agency's determination shall be conclusive if it is in accordance with the law and supported by *substantial evidence*. 5 GCA § 9239 (Administrative Adjudication Law). Moreover, our Administrative Adjudication Law also states, regarding judicial review of an agency's decisions, that a decision not in accordance with the law or supported by *substantial evidence* shall be subject to an order of the court directing the agency to

take proper action. 5 GCA § 9240. Thus, the substantial evidence test as put forth by Guam law is the proper test when the lower court reviews the actions of an administrative board.

[11] Hence, the lower court's legal conclusion that Dr. Sule's due process rights were not violated by an unfair administrative hearing is reviewed *de novo*. *Fagan,* 2006 Guam 11 at ¶ 11; *Guam Election Comm'n v. Responsible Choices for Adults Coal.*, 2007 Guam 20 ¶ 86 ("Whether a constitutional right has been violated is reviewed *de novo*."). However, the factual findings underlying this determination are reviewed for whether they are supported by substantial evidence. *Fagan*, 2006 Guam 11 at ¶ 11. Moreover, the standard of review at the appellate level remains the substantial evidence test, regardless of the nature of the right affected. *Nightlife Partners v. City of Beverly Hills*, 133 Cal. Rptr. 2d 234, 240 (Ct. App. 2003).

IV. DISCUSSION

A. Due Process Rights in Administrative Proceedings

[12] Dr. Sule argues that his due process rights were violated because the Board suspended his license to practice dentistry without affording him a fair hearing.[4] Dr. Sule raises the following bases for this argument: (1) that two of the Board members were biased against him and had adverse pecuniary interest in the outcome of the proceedings, and that a recused Board member improperly participated in the proceedings; (2) that the administrative hearing officer was biased against him because he was a patient of one of the challenged Board members; and (3) that there was improper ex parte communications between counsel for the Board and the administrative hearing officer. The lower court found that none of these bases merited the issuance of the writ.

[4] Counsel for Dr. Sule informed the court at oral argument that Dr. Sule's license to practice dentistry remains active until disposition of this appeal.

[13] Whether Dr. Sule was denied a fair hearing, and thus denied his due process rights, is a question of law reviewed *de novo*. *Responsible Choices For Adults Coal.*, 2007 Guam 20 ¶ 86; *Anserv,* 99 Cal. Rptr. 2d at 362; *Clark v. City of Hermosa Beach*, 56 Cal Rptr. 2d 223, 233 (Ct. App. 1996) (review of administrative procedural issues in mandamus proceedings is *de novo*). Guam law is not clear on what the standard is to disqualify administrative adjudicators, although our Administrative Adjudication Law seems to suggest an actual bias standard. S*ee* 9 GCA § 9222 (2005) ("A hearing officer or agency member shall voluntarily disqualify himself and withdraw from any case *in which he cannot accord a fair and impartial hearing or consideration.*") (emphasis added). We do know that the disqualification of judges is based on an appearance of impropriety standard. Guam's judicial disqualification statutes call for the disqualification of a judge or justice in any proceeding in which his or her impartiality might reasonably be questioned. 7 GCA § 6105(a) (2005); *see also Ada v. Gutierrez*, 2000 Guam 22 ¶ 12; *Dizon v. Super. Ct. (People)*, 1998 Guam 3 ¶ 8. A judge or justice may also be disqualified if he or she has a personal bias toward a party. 7 GCA § 6105(b)(1).

[14] "Guam's rule on judicial disqualification is based upon the federal law." *Ada v. Gutierrez*, 2000 Guam 22 ¶ 12, n.2 (citing 28 U.S.C. § 455(a) (1986)).[5] As applied to matters of judicial disqualification, Guam applies a reasonable person standard. *Dizon*, 1998 Guam 3 ¶ 8; *Ada v. Gutierrez,* 2000 Guam 22 ¶ 12; *see also People v. Johnny*, 2006 Guam 10 ¶ 20; *United States v. Cherry*, 330 F.3d 658, 665 (4th Cir. 2003) (finding that the relevant inquiry is whether a reasonable person would have a reasonable basis for questioning the judge's impartiality, not

[5] Title 7 GCA § 6105, which sets forth the grounds for judicial disqualification, is patterned after 28 U.S.C. § 455, but does not contain subsection (e) of the federal statute, which calls for automatic disqualification in certain specified circumstances. While the *grounds* for disqualification are based on the federal statute, *Van Dox v. Super. Ct.,* 2008 Guam 7 ¶ 31, the procedure for disqualification found in 7 GCA § 6107 is derived from California law. *Van Dox (Alcorn)*, 2008 Guam 7 ¶ 25 n.11.

whether the judge is impartial); *United States v. Antar*, 53 F.3d 568, 576 (3d Cir. 1995) (finding that in determining whether a judge had a duty to disqualify, the focus of the recusal court "must be on the reaction of the reasonable observer"), *abrogated on other grounds by Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001). Hence, in matters of judicial disqualification "[t]he judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so." *Liteky v. United States*, 510 U.S. 540, 553 n.2 (1994) (emphasis in original).

[15] However, in the instant case, the call for disqualification does not have to do with a judge or justice, but rather with administrative adjudicators. Guam's pertinent statutes and rules do not set forth guidelines for disqualifying administrative hearing adjudicators the way we have for jurists. Because Guam's substantive judicial disqualification statutes are based on federal law, a review of how the disqualification of administrative hearing officers is treated by federal courts would be instructive.

[16] Citing a string of Tenth Circuit cases, one court has stated:

> [A] substantial showing of personal bias is required to disqualify a hearing officer or tribunal in order to obtain a ruling that the hearing is unfair." *Roberts v. Morton,* 549 F.2d 158, 164 (10th Cir.1976), cert. denied, 434 U.S. 834, 98 S. Ct. 121, 54 L.Ed. 2d 95 (1977). Tribunals enjoy a presumption that they are not biased unless it is substantially demonstrated that they are actually biased with respect to factual issues being adjudicated. *See, e.g., Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir.1986)*; see also Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir.1998).

L.C. and K.C. v. Utah State Bd. of Educ., 188 F. Supp. 2d 1330, 1338 (D. Utah 2002).

[17] The Ninth Circuit joined other federal circuits which have held that the "appearance of impropriety" standard set forth in 28 USC § 455, upon which Guam's substantive judicial disqualification statute is based, is inapplicable in administrative hearing settings. *See Bunnell v. Barnhart*, 336 F.3d 1112, 1114 (9th Cir. 2003). Echoing the rationale pronounced by the Second

Circuit and Tenth Circuit, the court here stated that because administrative adjudicators are generally affiliated with the agency whose actions they review, it would be impractical to allow disqualification on the appearance of impropriety standard of 28 U.S.C. § 455(a). *Id.* The court further stated that:

> Our holding finds further support in the federal regulation concerning the recusal of an administrative law judge. 20 C.F.R. § 404.940. The regulation provides that an administrative law judge "shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision." This regulation mentions only actual prejudice; nothing in this regulation mandates recusal for the mere appearance of impropriety. On this basis, this court holds that actual bias must be shown to disqualify an administrative law judge.

Id. at 1115.

[18] The Seventh Circuit has similarly stated: "[W]e begin with the presumption that the hearing officer is unbiased. . . . It is only after a petitioner has demonstrated that the decisionmaker 'displayed deep-seated and unequivocal antagonism that would render fair judgment impossible' that the presumption is rebutted. . . ." *Keith v. Barnhart*, 473 F.3d 782, 788 (7th Cir. 2007) (quoting *Likety v. United States*, 510 U.S. 540, 556 (1994)).

[19] We agree that the standard that should apply in determining whether the Board members and hearing officer in this case had a disqualifying bias is the higher standard of actual bias. In adopting this standard for administrative adjudicators, we also espouse the rationale pronounced in the *Bunnell* opinion – that it is impractical to apply an appearance of impropriety standard to a proceeding in which members of the same profession in a small local area are called upon to judge another member of their profession.

[20] Hence, in order to prove that an adjudicator is biased, there must be a concrete showing that bias actually exists. *Andrews v. Agric. Labor Relations Bd.*, 623 P.2d 151, 158 (1981);

Breakzone Billiards v. City of Torrance, 97 Cal. Rptr. 2d 467, 493 (Ct. App. 2000). "Indeed, a party's unilateral perceptions of an appearance of bias cannot be a ground for disqualification. . . ." *Andrews,* 623 P.2d at 157. As one court has stated:

> Every person is entitled to an impartial hearing in an administrative setting. A[n] [adjudicator] shall be disqualified where bias has been shown; however, the appearance of impropriety shall not constitute bias and shall not be grounds for disqualification. [Adjudicators] are presumed to be free from bias. Moreover, mere allegations of impartiality are insufficient to set aside an administrative determination. There must be a factual demonstration supporting the allegation and proof that the outcome flowed from it.

Goldsmith v. De Buono, 665 N.Y.S.2d 727, 731 (N.Y. App. Div. 1997) (internal quotation marks and citations omitted); *see also Pavlik v. Chinle Unified Sch. Dist. No. 24*, 985 P.2d 633, 637 (Ariz. Ct. App. 1999) (mere speculation regarding bias will not suffice to disqualify an adjudicator).[6]

[21] Having adopted the standard for disqualification of administrative adjudicators, we now apply a *de novo* review of Dr. Sule's claims that the administrative hearing was procedurally unfair because (1) two of the Board members were biased against him and had adverse pecuniary interests in the outcome of the proceedings, and that a recused Board member improperly participated in the proceedings; (2) the administrative hearing officer was biased against him because he was a patient of one of the challenged Board members; and (3) there was improper ex parte communications between counsel for the Board and the administrative hearing officer.

[6] *Compare United States v. Inman*, 20 M.J. 773, 775 (ACMR 1985) ("'Actual' bias may be shown by express admission or by proof of specific facts which point so sharply to bias in a member that his own denials . . . must be discounted."). This case involves the bias of a hearing officer sitting on a court martial. Although the proceedings are not directly analogous to the case currently before this court, the reasoning may be instructive.

1. Alleged Bias and Improper Participation of Board Members

[22] Dr. Sule first alleges that two of the Board members – namely Dr. Johnson and Dr. Terlaje – should have been disqualified from participating in his hearing because up until a few days before the hearing, they were both members of PDP, a competing dental group to which Dr. Kaneshiro, one of the prosecuting witnesses, belonged. Dr. Sule argues the business relationship that Dr. Johnson and Dr. Terlaje shared with Dr. Kaneshiro would lead them to assign more credibility to Dr. Kaneshiro's testimony, which conflicted with the testimony of Dr. Sule. This, Dr. Sule asserts, prevented the two challenged Board members from making a fair and impartial determination of Dr. Kaneshiro's credibility. *See* Appellant's Br. at 8.

[23] In addition to this, Dr. Sule also raises an allegation of bias against these same challenged Board members because of their affiliation with PDP, a group in direct competition with Dr. Sule's practice, asserting that these Board members had pecuniary interests adverse to his. Dr. Sule also alleges that Dr. Johnson and Dr. Terlaje had each, on separate occasions, made threatening or disparaging remarks to Dr. Sule, Dr. Sule's employees, and others about Dr. Sule's practice. *See* Appellant's Br. at 9. The only evidence before this court to this effect came by way of Dr. Sule's own declaration. ER at 49-50 (Aff. of Dr. Hugh Sule). A review of the evidence presented reveals that Dr. Johnson and Dr. Terlaje did belong to a group of dentists to which Dr. Sule did not belong. In that sense, it may be said that they were competitors. However, as the lower court aptly noted, "[i]n order for the adjudicators involved to have had a pecuniary interest, the financial impact must have been direct and significant, and not remote, contingent, or uncertain." ER at 123 (Dec. & Order, Sept. 19, 2005); *see S.Cal. Underground Contractors, Inc. v. City of San Diego*, 133 Cal. Rptr. 2d 547, 549 (Ct. App. 2003); *cf. Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (where an adjudicator has a pecuniary interest in the outcome

of the proceedings, then the probability of actual bias is too high to be constitutionally tolerable); *Tumey v. Ohio,* 273 U.S. 510, 523 (1927).

[24] The mere fact that these two challenged Board members, formerly members of PDP, may in a general sense have been competitors of Dr. Sule supports only a tenuous claim of bias, at best. A review of the excerpted pages of the 2004 Guam Phone Book contains over eight pages of listings for dentists apart from PDP. ER at 107-115 (App. 2 to Reply Mem., Mar. 26, 2004). It can hardly be said that competition *specifically* from one group of dentists to which roughly one dozen dentists belong (ER at 105 (App. 1 to Reply Mem., Mar. 26, 2004)) would create such a direct and significant financial impact to conclude that Dr. Johnson and Dr. Terlaje had adverse pecuniary interests and were thus biased adjudicators. "[M]ere theoretical competition alone has never been a sufficient predicate for an inductive conclusion of probable economic bias." *Rite Aid Corp. v. Bd. of Pharmacy of State of N.J.*, 421 F. Supp. 1161, 1169 (D.C.N.J. 1976).

[25] As further evidence of their bias against him, Dr. Sule asserts that Dr. Johnson and Dr. Terlaje had each made threatening or disparaging comments about Dr. Sule and his practice. The evidence presented regarding this argument comes from Dr. Sule's declaration, wherein he states that "Dr. Terlaje has told employees of mine that 'you shouldn't be messing with us' referring to business competition between my clinic and the PDP." ER at 49 (Aff. of Dr. Sule). Other remarks that Dr. Sule attributes to Dr. Terlaje is a statement that "I feel Hugh Sule's hand in my pocket everyday." *Id.* In addition, Dr. Sule declares that Dr. Johnson has referred to him as a "loose cannon" and told Dr. Sule that he should stop trying to compete with the PDP because PDP dentists "run things" in Guam. *Id.* These, however, fall short of the evidence of

actual bias necessary to disqualify these Board members as adjudicators.[7] *See DeFries v. Town of Washington, Okl.*, 875 F. Supp. 756, 766 n.5 (W.D. Okla. 1995) ("There is a presumption of honesty and integrity in those serving as adjudicators that must be overcome by evidence of actual bias.").

[26] Dr. Sule also contends that Dr. Eusebio, who voluntarily recused himself from the proceedings, improperly participated in the proceedings by being present, sitting at the table with other Board members, and passing notes to Board members during the testimony of one defense witness. ER at 60-61 (Decl. of Robert Loeb). However, others who were present testified that they did not see this conferring taking place. The trial court weighed the conflicting evidence and was not persuaded by the evidence presented by Dr. Sule. Under a substantial evidence standard of review, this is the province of the trial court. An appellate court must not do its own weighing of the evidence or substitute its factual determinations for that of the lower court. *See Goldsmith*, 665 N.Y.S.2d at 730-31 (reviewing courts should not weigh conflicting testimony, as these matters are within the province of the fact finder).

[7] Actual bias may arise where the adjudicator has a pecuniary interest in the outcome of the proceedings or where the adjudicator has been the target of personal abuse by the party appearing before him. *See Withrow*, 421 U.S. at 47. An example of facts that tip the scale toward a finding of actual bias can be found in *Esso Standard Oil Co. v. Mujica Cotto*, 327 F. Supp. 2d 110 (D.P.R. 2004). Although not decided on these grounds, the court found that the evidence of actual bias in that case to be overwhelming such that the adjudicators could not be impartial. *Id.* at 130. In that case, the oil company was issued an order to show cause (OSC) why it should not be fined nearly $76,000.00 for soil and water contamination. *Id.* at 119. The hearing officer assigned to hear the OSC was an attorney contracted and paid by the agency, and whose contract with the agency contained a clause stating that she owed complete loyalty to the agency. *Id.* Further, her contract stated that she may be terminated without cause. *Id.*. By the terms of the board's enabling act, all the monies from the $76,000.00 fine would go directly into a special account administered by the agency, and this account would be at the disposal of the agency. *Id.* at 115. The hearing officer, therefore, was presiding over a hearing to determine whether the oil company would have to pay a large fine, which the agency would get to spend afterwards. *Id.* The amount of the proposed fine was more than double the agency's yearly budget. *Id.* The court stated that "[e]xamples are pecuniary interest on the part of the agency, . . .biased hearing examiners and general unfairness throughout the proceeding" as well as the amount of the fine itself point to the board's inability to be an unbiased adjudicator. *Id.* at 130. For another example of a case where the facts rise to the level of actual bias, see *Riter v. Woonsocket Sch. Dist. No. 55-4*, 504 N.W.2d 572 (S.D. 1993).

2. Alleged Bias of the Administrative Hearing Officer

[27] Similar to Dr. Sule's contention that Dr. Johnson and Dr. Terlaje were biased, Dr. Sule argues that the administrative hearing officer was biased because he was a dental patient of Dr. Johnson. The court finds that this claim also does not rise to the level of a concrete demonstration of bias such that Dr. Sule was denied a fair hearing and his due process rights were violated. Essentially, Dr. Sule contends that because he attacked Dr. Johnson's credibility during the proceedings, and the hearing officer was a patient of Dr. Johnson, then this affected the hearing officer's ability to be fair and impartial. This allegation does not amount to a concrete showing of bias on the part of the hearing officer. *See Andrews*, 623 P.2d at 157; *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997) ("[B]ias by an adjudicator is not lightly established.").

[28] Upon a *de novo* review of these legal claims of bias, none of these amounts to a concrete demonstration of actual bias required for disqualification. As such, the lower court did not err in so finding.

3. Alleged Improper Ex Parte Communication

[29] Finally, with regard to Dr. Sule's claim that he was denied a fair hearing, Dr. Sule asserts that there was improper ex parte communication between the Board's counsel, Cesar Cabot, and the administrative hearing officer. This issue, however, was not raised before the Board, nor was it raised before the lower court in Dr. Sule's writ petition. It was not until Dr. Sule's motion for reconsideration that this allegation was made. Evidence of the improper ex parte communication, according to Dr. Sule, can be found in Mr. Cabot's billing records, which showed six instances of contact with the hearing officer during the relevant time. ER at 129-32 (Professional Services Invoice).

[30] However, as the lower court found in its review, these contacts listed in Mr. Cabot's invoice had been explained and clarified in such a way as to dispel the notion that these contacts were improper ex parte communications. *See* ER at 134-35 (Dec. & Order). The lower court made its findings of fact on this point based on information from Mr. Cabot's deposition that "such communication involved administrative matters, i.e. scheduling." ER at 134 (Dec. & Order). According to Mr. Cabot's deposition testimony, though he could not recall every specific instance, these communications likely dealt with administrative matters, as he "would not have discussed any merits of any particular pending motions or matters that were assigned to the hearing officer." RA, Ex. "B" to Decl. of Mitchell F. Thompson (Dep. of Cesar Cabot) at 14 (filed April 6, 2006). Mr. Cabot further testified that one of the entries was actually "an erroneous entry that should have read, 'letter to Attorney Mitch Thompson' with a CC to [the hearing officer]." RA, Dep. of Cesar Cabot at 18 (March 23, 2006). Based on the explanations proffered by the Board, through deposition of its counsel, the allegations of impropriety were reviewed and rejected by the trial court. There was no error in the lower court's finding that the facts do not support a claim of improper ex parte communication.

[31] Evaluating Dr. Sule's various claims, there is no evidence of actual bias required to establish that the hearing was procedurally unfair due to adjudicator bias. The evidence presented by Dr. Sule in support of his assertion that there was bias was insufficient to establish that the former business relationship that Dr. Johnson and Dr. Terlaje shared with prosecution witness Dr. Kaneshiro caused them to be biased against Dr. Sule during the proceeding, and that these members had an adverse pecuniary interest in the outcome of the proceeding. Both Dr. Johnson and Dr. Terlaje had stated that they could do their jobs as Board members fairly and impartially. Because of the mandate the Board members have through the Dental Practice Act and the Guam

Administrative Rules to regulate the conduct of those within their profession,[8] members should not be removed from hearing a matter absent a clear, demonstrable showing that an actual bias exists. *See Goldsmith,* 665 N.Y.S.2d at 731. Similarly, the findings and orders of the Board should not be disturbed absent such a showing of bias, and a demonstration that the adverse rulings flowed from the bias. *Id.*

[32] Likewise, the mere fact that the administrative hearing officer was a patient of one of the challenged Board members simply does not, without more, amount to evidence of actual bias. Looking at the course of the proceedings and the substantial evidence presented (discussed below), the actions of the hearing officer as well as the outcome of the proceedings cannot be said to have flowed from any claimed bias.

[33] With regard to Dr. Sule's claim of improper ex parte communication, while there is no Board decision to review, the lower court did make certain factual findings. The lower court found that there was a satisfactory, reasonable explanation for all of the entries noted in Mr. Cabot's invoice indicating contact between himself and the hearing officer: With the exception of one entry which was a clerical error, the entries pertained to either communications in which Dr. Sule's counsel was also involved or included, or they were contacts made merely for administrative/scheduling purposes and not regarding the merits of Dr. Sule's case. RA, Dep. of Cesar Cabot at 18, 20-23; ER at 137-138 (Dec. & Order). The lower court's factual determinations will not be disturbed on appeal so long as they are supported by substantial evidence. *Griffiths*, 117 Cal. Rptr. 2d at 452; *Anserv,* 99 Cal. Rptr. 2d at 362.

[8] Guam statutory law and administrative rules provide that a body of licensed dental practitioners operates as a regulatory agency for the dental community. 10 GCA §§ 12400-12480. *See also* 5 GCA § 9102 ("The word agency whenever used in this Chapter, shall include *any board,* commission, department, division, bureau, or officer of the territory of Guam *authorized by law to make rules or adjudicate contested cases.*") (emphasis added).

B. Substantial Evidence of Misconduct

[34] The Board found that Dr. Sule had committed four of the five charges that were brought against him. The findings included that Dr. Sule employed an unlicensed ancillary, he failed to report this person's unauthorized practice of dentistry, he aided/assisted this person in the unauthorized practice of dentistry, and he improperly delegated his professional responsibilities to an unlicensed dental ancillary person. In his writ petition filed with the lower court, Dr. Sule argued that there was no substantial evidence presented during the hearing to support the Board's findings of misconduct.

[35] When an appellate court reviews factual determinations made during an administrative board hearing, the standard of review is whether there was substantial evidence that the pertinent statutes or regulations were violated.[9] *See Bondoc v. Worker's Comp. Comm'n*, 2000 Guam 6 ¶ 6. This is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[36] The lower court's denial of Dr. Sule's petition for a writ of administrative mandate is reviewed for an abuse of discretion. *Id.; Dep't of Agric. v. Civil Serv. Comm'n*, 2007 Guam 21 ¶ 8. If there is substantial evidence in the record to support the factual findings of the lower court, these findings will not be disturbed on appeal. *Klajic*, 109 Cal. Rptr. 2d at 460. As stated previously, an appellate court must not do its own weighing of the evidence or substitute its factual determinations for that of the lower court. *See Goldsmith*, 665 N.Y.S.2d at 730-31 (explaining that reviewing courts should not weigh conflicting testimony, as these matters are

[9] Dr. Sule asserts that a clear and convincing evidence standard should apply for hearings to revoke a professional license. Appellant's Br. at 16-18 (Sept. 21, 2007). However, this court has established in *Bondoc* that the standard of appellate review of such findings of an administrative board is whether there was substantial evidence to support the findings. *Bondoc*, 2000 Guam 6.

within the province of the fact finder). This court must confine its review to whether the lower court's factual determinations were supported by substantial evidence in deciding whether the lower court abused its discretion in denying the petition for writ of administrative mandate. Applying this standard, we find that the lower court did not abuse its discretion when it found no merit in Dr. Sule's claim of insufficient evidence of misconduct. On the contrary, there appears in the record substantial evidence to support the lower court's findings of fact.

1. Dr. Sule employed an unlicensed dental ancillary.

[37] The first violation the Board found that Dr. Sule committed is that he employed an unlicensed dental ancillary, which is deemed "unprofessional conduct" by Guam's Dental Practice Act. 10 GCA § 12417. Guam's Professional and Vocational Regulations define dental ancillary personnel as any dental auxiliary, dental assistant, or dental laboratory technician. 25 Guam Admin. R. & Regs. § 8101(b) (2004).

[38] It is not disputed by the parties that Swank was not licensed in Guam as a dental assistant at the time she was hired by, and during the duration of her employment with, Dr. Sule. There is disagreement, however, as to whether Swank was actually hired as a dental assistant. Dr. Sule claims that because he knew Swank was not yet licensed in Guam, he hired her only as a steritech, which does not require any type of licensure. ER at 91 (Excerpts of Transcript, filed Jan. 31, 2003).According to Dr. Sule's testimony, steritech duties were generally limited to "knocking down rooms, cleaning them, cleaning instruments . . . help[ing] the assistants by bringing them tools, and performing general subs, but . . . not touch[ing] patients . . .." *Id.* at 97. Swank, on the other hand, understood she was being hired as a dental assistant. *Id.* at 75; RA, Hr'g Tr. at 15.

[39] Dr. Kaneshiro testified that Dr. Sule stated he hired Swank as an assistant. Dr. Kaneshiro recounted two phone conversations he had with Dr. Sule, during which Dr. Sule made it clear to Dr. Kaneshiro that Swank was an assistant, which he understood to mean dental assistant. RA, Hr'g Tr. at 57-61. The following exchange took place during the examination of Dr. Kaneshiro by Board counsel:

> Q. Did it appear to you in your discussion or conversation with Dr. Sule, could it have been construed that he was telling you that Sarah Swank was in fact a steritech?
>
> A. No, she was an assistant.
>
> Q. And he made that very clear to you?
>
> A. Correct.

RA, Hr'g Tr. at 61. Dr. Sule himself testified that he was "very careless" in hiring Swank. ER at 97 (Excerpts of Tr., Jan. 31, 2003).

[40] Swank testified that as far as she could recall Dr. Sule never discussed with her what her role and responsibilities were, nor did he discuss with her any licensing requirement. *Id.* at 74-75, 85. Dr. Sule's testimony refutes this, as he testified he advised Swank to get licensed. *Id.* at 97. Though there is some factual dispute as to what Swank was actually hired as, there is substantial evidence that Swank was in fact, for all practical purposes, hired as a dental assistant. For instance, Swank's starting pay of $10.50 per hour was commensurate with that of a dental assistant rather than a steritech.[10] In addition, Swank, in her testimony, frequently referred to herself as having "patients." *Id.* at 76-77, 82. Swank testified that she openly, and almost from the time she was first hired, began interacting with and performing procedures on these patients.

[10] Swank testified that $10.50 per hour was a "very good" starting salary for dental assistants in Guam. RA, Hr'g Tr. at 42. *See also* RA, Hr'g Tr. at 86-87 (Dr. Sule admits that Swank was given the pay of a dental assistant rather than that of a steritech). Additionally, Swank testified that she would not have taken a job as a steritech, which she equated to that of a maid. RA, Hr'g Tr. at 23.

[41] Reasonable minds considering all these facts could surely find the evidence that Swank was hired as a dental assistant to be more compelling than any evidence to the contrary. Moreover, even if the evidence might support two inconsistent conclusions, this does not prevent a finding of substantial evidence in support of the Board's decision. *Towbin v. Bd. of Examiners of Psychologists*, 801 A.2d 851, 859 (Conn. App. Ct. 2002). Indeed, the evidence in this case is such that reasonable minds would find that Swank was hired as a dental assistant, and that Dr. Sule knew she was not at the time of her hire licensed in Guam as such. Thus, there is substantial evidence in the record to support the charge that Dr. Sule employed an unlicensed dental ancillary.

2. Dr. Sule failed to report Swank's unauthorized practice of dentistry.

[42] A dentist has a duty to notify the Board when he knows or has reason to believe that a person is in violation of the Dental Practice Act or the rules and regulations of the Board. 25 GAR § 8103(o)(7) (1997). In this case, it would be a violation for Dr. Sule to fail to report Swank's unlicensed practice if he knew or had reason to believe she was engaged in such practice. Although Dr. Sule contends that he was not aware Swank was performing functions beyond those of a steritech, the evidence – particularly Swank openly interacting with and performing procedures on patients – would lead reasonable minds to conclude that Dr. Sule did know or have reason to believe that Swank was engaged in the unlicensed practice of dentistry. It is undisputed that Dr. Sule did not report Swank's actions to the Board. Thus, Swank's open interaction with and treatment of patients (oftentimes while Dr. Sule was present in the clinic), as well as Dr. Sule's failure to report this to the Board, constitutes substantial evidence that Dr. Sule is in violation of this regulation.

3. Dr. Sule aided/assisted Swank in the unauthorized practice of dentistry.

[43] The Professional and Vocational Regulations of the Guam Administrative Rules makes it a violation to aid, assist, procure, or advise any unlicensed person to practice dentistry contrary to the Dental Practice Act or the regulations of the Board. 10 GCA § 12417(b)(3); 25 GAR § 8103(o)(8). It is alleged that Swank operated as a dental assistant, for which she was not licensed in Guam. A dental assistant is defined in the rules as a person registered with the Board as a Dental Assistant who assists the dentist or provides dental care directly to the patient under the supervision and authorization of a dentist. 25 GAR § 8101(f) (1997). The evidence supports the contention that Swank performed functions of a dental assistant. Swank testified that on multiple occasions, she performed dental procedures such as prophylaxis, gross debridement, x-rays, and impressions. ER at 76-79, 82-83 (Excerpts of Tr., Jan. 31, 2003). Although in many of these instances, Swank testified that she is uncertain whether Dr. Sule was aware that she was treating those specific patients, she did testify that Dr. Sule instructed an auxiliary to train her in the use of certain dental instruments and that Dr. Sule had her assist him with other dental procedures, including a root canal.

[44] Dr. Sule argues that he was unaware that Swank was performing procedures on patients, and that the procedures she assisted him with were performed on their office administrator, who was a non-patient who volunteered to have her work on him. ER at 100 (Excerpts of Tr., Jan. 31, 2003). The job of this court is not to weigh the evidence anew and make its own determinations of credibility and reach its own conclusions, but to look at the evidence and determine whether reasonable minds would accept this evidence as adequate to support the conclusion that Dr. Sule aided or assisted Swank in the unauthorized practice of dentistry. *Cf. Bondoc*, 2000 Guam 6 ¶ 11

(finding that substantial evidence supported the commission's findings of fact because hearing officer heard and observed witnesses personally).

[45] Evidence of this violation found in the record includes the following: Swank testified that Dr. Sule was in the clinic when she was performing prophylaxis procedures, and although she cannot say for certain that Dr. Sule was aware she was performing them, she did believe he was. ER at 76-77 (Excerpts of Tr., Jan. 31, 2003). When asked whether Dr. Sule was aware that she was performing gross debridement, Swank stated: "I knew he was aware that I was being taught how to do them, not necessarily on that particular patient." *Id.* at 78. Swank testified that because the Gentle Care staff taught her how to do gross debridements, she assumed that is what they expected her to do. RA, Hr'g Tr. at 29-30. Regarding being trained to perform gross debridement, Swank stated that "[Dr. Sule] had instructed the auxiliary to teach me how to use the cavitron because I had never used one before because in the States it's illegal for me to do that." ER at 78 (Excerpts of Tr., Jan. 31, 2003). Swank also affirmed that she did use the cavitron and other instruments on patients, with the auxiliary popping in and out but not monitoring her performance. *Id.* at 79.

[46] Swank testified that, in addition to the procedures she performed on her own, she also assisted Dr. Sule with other procedures on patients. According to Swank's testimony before the Board, she assisted Dr. Sule with fillings on more than one occasion. *Id.* at 81. She also testified that she assisted Dr. Sule with a root canal and with an extraction, using instruments such as the suctioning device and the air/water syringe. *Id.* at 80, 87. Dr. Sule denied this, testifying that he would never have allowed Swank to work directly with a patient on an extraction because his "comfort level on extractions is extremely fragile." *Id.* at 94. In support of Dr. Sule's claim that he was not aware that Swank was performing unauthorized dental procedures, Elaine Cruz, who

was the office manager of Dr. Sule's clinic during the time Swank was there, submitted a declaration claiming that she never observed Swank working on any patients. ER at 62-63 (Decl. of Elaine Cruz). Loeb similarly testified that he never saw Swank perform any procedures on patients, and that although she performed or assisted Dr. Sule with procedures on Loeb, he was a volunteer rather than a patient. ER at 100 (Excerpts of Tr., Jan. 31, 2003).

[47] Although there was some evidence contradicting Swank's testimony, there is substantial evidence to support the factual basis for this charge, and thus the factual determinations of the lower court. The evidence that Dr. Sule instructed an auxiliary to train Swank in the use of the cavitron, that Swank actually did use this and other instruments on patients, that Dr. Sule was present in the office during the time she performed some of these procedures, that Swank assisted Dr. Sule with more than one filling, a root canal, and an extraction, is adequate to support the conclusion that Dr. Sule aided, assisted, procured, or advised an unlicensed person to practice dentistry.

4. Dr. Sule improperly delegated his professional responsibilities to an unlicensed dental ancillary person.

[48] It is an act of unprofessional conduct for a dentist to delegate his professional responsibilities to any person whom the dentist knows or has reason to know is not qualified by licensure to perform them. 25 GAR § 8103(o)(20). It is not disputed that Swank was, during the entire relevant time, not licensed in Guam as dental assistant. Based on the arguments and evidence discussed above, particularly the evidence that Dr. Sule allowed Swank to assist him with certain procedures and that he instructed an auxiliary to train Swank in the use of dental instruments she was not licensed to use, there is substantial evidence to support the conclusion that Dr. Sule violated this regulation. The lower court was not in error in so finding.

C. Discipline Imposed by the Board

[49] Whether the discipline imposed on Dr. Sule by the Board was unauthorized by law is a question of law, and consequently is subject to a *de novo* review by this court. *Bondoc*, 2000 Guam 6 ¶¶ 7, 9. Whether the penalty, though authorized by law, is excessive is reviewed for an abuse of discretion. *See Catricala v. State Pers. Bd.*, 118 Cal. Rptr. 89, 92 (Ct. App. 1974). Once the Board, through the proper procedural process, has found a dentist in violation, Guam law allows the Board to impose any of the following: (1) place the dentist on probation; (2) suspend the dentist's license to practice dentistry in Guam; (3) revoke the dentist's license to practice dentistry in Guam; (4) place limitations on the dentist's license to practice dentistry in Guam; (5) refuse to renew the dentist's license to practice dentistry in Guam; or (6) take such other disciplinary actions it finds in its discretion to be proper, including assessment of costs of the disciplinary proceedings. 10 GCA § 12417(e) (2005).

[50] The punishment actually imposed by the Board, and affirmed by the lower court, was as follows: (1) that Dr. Sule be immediately and indefinitely suspended from the practice of dentistry; (2) that he shall pay a $1000.00 fine for each violation; (3) that he shall pay a $50.00 fine for each working day that the violations occurred. Dr. Sule was given the option of suspending this, provided he comply with the following conditions: (1) that he take and pass a written jurisprudence exam within ninety days of the order; (2) that he pay attorney's fees of the Board counsel and costs incurred by the Board as a result of these proceedings. In addition to these, the Board ordered that Dr. Sule be publicly reprimanded within ninety days of the order.

[51] Because there was substantial evidence to support the lower court's implicit adoption of the Board's factual determinations that Dr. Sule had engaged in unprofessional conduct, it was within the authority of the Board to impose appropriate discipline on Dr. Sule for the four

violations he was found to have committed. 10 GCA § 12417(a)(3). Substantial evidence supports the finding that Dr. Sule had, in fact, employed an unlicensed ancillary, failed to report this person's unauthorized practice of dentistry, aided/assisted this person in the unauthorized practice of dentistry, and improperly delegated his professional responsibilities to an unlicensed dental ancillary person. Thus, Guam law authorizes the Board's imposition of discipline. The discipline actually imposed by the Board must be confined to the scope of penalties the Board was legally authorized to impose. *See* 10 GCA §12417(a)(3), (e); 25 GAR § 8103(p). However, even though the Dental Practice Act arguably gives the Board discretion in fashioning an appropriate order of discipline (10 GCA § 12417(e)(6)), such discipline must still conform to general legal principles.

1. Assessment of attorney's fees was unauthorized.

[52] Dr. Sule specifically contends that the Board was without authority to assess attorney's fees, as these fees do not qualify as "costs" within 10 GCA § 12417(e)(6). Dr. Sule posits that, under the "American Rule" governing the award of attorney's fees, the Board's assessment of such fees against him was improper because it is not specifically authorized by statute. The American Rule, as clarified by this court in the case of *Fleming v. Quigley*, 2003 Guam 4 ¶ 20, states that attorney's fees are improper unless authorized by statute, contract, or under equitable circumstances. "Under the American Rule, parties bear their own litigation expenses, including attorney's fees." *Id.* ¶ 7. Guam follows the American Rule. *Id.* ¶¶ 9-11.

[53] The term "costs" may or may not include attorney's fees depending on the underlying statute. *See Marek v. Chesny*, 473 U.S. 1 (1985); *see also Broadcast Music, Inc. v. Dano's Restaurant Sys., Inc.*, 902 F. Supp. 224, 227 (Fla. D. 1995) ("Therefore, if the underlying statute provides that attorney fees is included within the term 'costs,' then the final judgment includes

attorney fees."). In the instant case, the underlying statute – the Dental Practice Act – is silent as to whether "costs" as used in 10 GCA § 12417(e) contemplates attorney's fees. Following the American Rule, absent specific statutory or contractual language to the contrary, the term "costs" does not include attorney's fees. The Board conceded as much at oral argument.[11] Therefore, the imposition of attorney's fees against Dr. Sule was in error.

2. Remainder of discipline imposed by the Board was not excessive.

[54] Apart from his argument that the assessment of attorney's fees was unauthorized, Dr. Sule also argues that the discipline imposed was excessive under the circumstances. Whether the Board's penalty was excessively harsh is reviewed by this court for an abuse of discretion. "Although neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed, a penalty determination may be set aside if the licensee has demonstrated an agency abuse of discretion in that respect." *Anserv*, 99 Cal. Rptr. 2d at 362. Throughout Dr. Sule's pleadings, as well as in the record submitted, Dr. Sule makes much of the fact that Swank was only employed at his clinic for eleven days, presumably to demonstrate that these violations – due to the short duration in which they took place – were not so egregious as to warrant the punishment he received. Dr. Sule referenced remarks of Dr. Kaneshiro, that Dr. Sule would likely just get a slap on the wrist by the Board considering it was a first violation. Appellant's Br. at 27; ER at 88 (Excerpts of Tr., Jan. 31, 2003). However, just because the Board could have imposed a lesser penalty does not necessarily mean that the penalty actually imposed is excessive. *See Catricala* 118 Cal. Rptr. at 92 ("The fact that reasonable minds may differ as to the propriety of a penalty imposed will fortify the conclusion that the administrative body acted within the area of its discretion.").

[11] *See* Digital Recording at 10:32:00-10:33:10 (Oral Argument, February 20, 2008).

[55] Dr. Sule also proffered to the court that the licensing of a dental assistant requires merely that an applicant fill out a form and pay $25.00, and thus that Dr. Sule's failure to ensure Swank was licensed was a very minor procedural oversight compared to the harsh action taken by the Board. Contrary to this characterization made by counsel for Dr. Sule, the Board does in fact require more of a prospective dental assistant than merely filling out an application and paying a nominal fee. For one, the applicant for licensure as a dental assistant must state to the satisfaction of the Board that he or she is free of infectious diseases. 25 GAR § 8105(a)(1). Also, the Board may, upon a determination of reasonable professional need, require an examination of any dental ancillary personnel, which includes dental assistants. 25 GAR § 8105(c)(1) ("In the interest of upgrading professional requirements the [Board] will reserve authority to require such examination of applicants as needed.").

[56] Although specific further requirements for dental assistant licensure are "to be set at a future date" (25 GAR § 8105(c)(4)(B)), the requirements established for certification of dental auxiliaries[12] gives some indication that more is required to become a dental assistant than merely paying $25.00 to the Board. Dental auxiliaries, to compare, must show that they have completed a training program equivalent to or greater in scope than that offered by the University of Guam. Granted, the Board rules do not specify that this particular requirement exists for dental assistants (only that further requirements will be set at a future date). Nevertheless, it surely is not the case, as counsel for Dr. Sule has characterized, that anyone off the street can simply fill out the application, pay the $25.00 fee, and automatically become a dental assistant.

[12] The definitions of dental auxiliary and dental assistant are similar. Both types of dental ancillary personnel may, under the direct supervision or authorization of a dentist, provide dental care services directly to a patient. 25 GAR § 8101 (e), (f).

[57] The fact that dental assistants may provide dental care services – such as prophylaxis and gross debridement procedures performed by Swank – directly to patients, and the fact that an applicant for licensure as a dental assistant must have a health clearance and may be subject to further examination for certification at the discretion of the Board (25 GAR § 8105(a)(1), (c)(1)) underscores that there are public safety and public health concerns that the Board, as the regulatory body, seeks to protect in issuing licenses to practice as dental assistants. Therefore, we recognize the public importance – for safety, regulatory, and quality-control purposes – of requiring anyone who operates within this profession to be duly registered with the Board. The public importance of having these regulations in place, and the failure to comply with the regulations, is certainly more than a minor procedural oversight.

[58] Dr. Sule also asserts that the imposition of a $1000.00 fine for each violation on top of a $50.00 fine for each day Swank was employed at his clinic is excessive in light of 25 GAR § 8105, which states that "[a]ny dentist who employs a dental hygienist who is unlicensed by the [Board] shall be fined an amount not to exceed Fifty Dollars ($50) per working day." 25 GAR § 8105(b)(1). This argument is flawed. First, this rule, on its face, pertains specifically to dental hygienists. It is not alleged that Swank was an unlicensed dental hygienist, but that she was an unlicensed dental assistant. *Compare* 25 GAR §§ 8101(c), (d) *and* 25 GAR § 8101(f). Assuming that the use of the term "dental hygienist" is not an error in the rules, this part of the rules would thus be inapplicable to the situation at hand. In addition, Dr. Sule was found to have violated other regulations besides simply employing an unlicensed dental assistant, and hence the additional fines imposed are not necessarily excessive under the circumstances. Moreover, they do not exceed any laws or Board regulations.

V. CONCLUSION

[59] We hold that the lower court did not abuse its discretion in denying Dr. Sule's petition for writ of administrative mandate and motion for reconsideration. We further hold that the lower court properly found that Dr. Sule's due process rights were not violated during the administrative hearing, that substantial evidence supported the finding of misconduct against Dr. Sule, and that the discipline imposed was not excessive under the circumstances.

[60] The lower court did err in upholding the Board's assessment of attorney's fees against Dr. Sule as one of the conditions of avoiding suspension of his license and the payment of fines, because the underlying statute does not specifically authorize the assessment of attorney's fees or include these fees as part of costs. We therefore reverse and vacate that portion of the decision that upholds the award of attorney's fees.

[61] Accordingly, the decision of the lower court upholding the Board's Findings of Fact and Conclusions of Law and the Order of Discipline is hereby **AFFIRMED** in part and **REVERSED** in part. This matter is **REMANDED** for further proceedings consistent with this Opinion.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Miguel S. Demapan**
MIGUEL S. DEMAPAN
Justice *Pro Tempore*

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice