

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

**ORIGINAL**

**COMMISSIONERS:**      **Jon Leibowitz, Chairman**  
                                 **William E. Kovacic**  
                                 **Edith Ramirez**  
                                 **J. Thomas Rosch**  
                                 **Julie Brill (recused)**



In the Matter of	)	<b>PUBLIC</b>
	)	
THE NORTH CAROLINA [STATE] BOARD	)	<b>DOCKET NO. 9343</b>
OF DENTAL EXAMINERS,	)	
	)	<b>EXPEDITED</b>
Respondent.	)	<b>TREATMENT</b>
	)	<b>REQUESTED</b>

**RESPONDENT'S MOTION FOR RECONSIDERATION OF THE ORDER  
DENYING EXPEDITED MOTION FOR A LATER HEARING DATE**

Respondent, the North Carolina State Board of Dental Examiners ("State Board") respectfully moves the Commission, pursuant to 16 C.F.R. §§ 3.22 and 3.41(b), to reconsider and modify its Order Denying Expedited Motion for Later Hearing Date, to reflect a finding that good cause exists to postpone the commencement of the evidentiary hearing in the above-captioned matter.

State Board's Counsel has conferred with Complaint Counsel in a good-faith effort to resolve by agreement the issues raised by this motion and has been unable to reach such agreement. Further, Complaint Counsel has indicated their intention to oppose this motion.

Due to the impending deadlines in the current Scheduling Order and the fact that the hearing date in this matter is scheduled for a little over three weeks from the filing date of this Motion for Reconsideration, the State Board respectfully requests expedited consideration of this motion.

This the 24th day of January, 2011.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2011, I electronically filed the foregoing with the Federal Trade Commission using the Federal Trade Commission E-file system, which will send notification of such filing to the following:

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I hereby certify that the undersigned has this date served copies of the foregoing upon the Secretary and all parties to this cause by electronic mail as follows:

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I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

The Honorable D. Michael Chappell  
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This the 24th day of January, 2011.

/s/ Alfred P. Carlton, Jr.

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Alfred P. Carlton, Jr.

#### **CERTIFICATION FOR ELECTRONIC FILING**

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.

/s/ Alfred P. Carlton, Jr.

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Alfred P. Carlton, Jr.

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**       **Jon Leibowitz, Chairman**  
                              **William E. Kovacic**  
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In the Matter of	)	)	)	)
THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS.	)	)	)	)

**PUBLIC**  
**DOCKET NO. 9343**

**PROPOSED ORDER GRANTING MOTION FOR RECONSIDERATION AND  
POSTPONING HEARING DATE**

The Scheduling Order entered in this case on July 15, 2010, set February 17, 2011 as the date on which the evidentiary hearing is to commence. On January 18, 2011, Respondent submitted an Expedited Motion for a Later Hearing Date ("Motion for Later Hearing Date"). In that Motion for Later Hearing Date, Respondent sought a hearing date of May 18, 2011.

On January 20, 2011, the Commission entered an Order Denying Expedited Motion for a Later Hearing Date ("Order"). On January 24, 2011, Respondent submitted a Motion for Reconsideration of the Order ("Motion for Reconsideration"), and moved the Commission to modify its Order to reflect a finding of good cause to postpone the commencement date of the evidentiary hearing in the above-captioned matter.

Under Rule 3.41(b) of the Commission's Rules of Practice, the Commission may, upon a showing of good cause, order a later date for the evidentiary hearing to commence. In reconsidering the grounds asserted by the Respondent in its Motion for Later Hearing Date and Motion for Reconsideration, good cause is found to grant Respondent's motion for a later hearing date.

Accordingly, Respondent's motion is GRANTED.

The new date for the commencement of the evidentiary hearing shall be May 18, 2011.

ORDERED:

\_\_\_\_\_  
Donald S. Clark, Secretary  
Federal Trade Commission

\_\_\_\_\_  
Date

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**      **Jon Leibowitz, Chairman**  
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Respondent.	)	

**RESPONDENT’S MEMORANDUM IN SUPPORT OF ITS MOTION FOR  
RECONSIDERATION OF THE ORDER DENYING EXPEDITED MOTION FOR  
A LATER HEARING DATE**

Pursuant to 16 C.F.R. §§ 3.22 and 3.41(b), Respondent, the North Carolina State Board of Dental Examiners (“State Board” or “Respondent”), submits this Memorandum in Support of its Motion for Reconsideration of the Order Denying Expedited Motion for a Later Hearing Date (“Memo in Support of Motion for Reconsideration”).

**I. Introduction**

In its January 21, 2011 Order Denying Expedited Motion for a Later Hearing Date (“Order”), the Commission ruled that the State Board, in its Expedited Motion for a Later Hearing Date (“Motion for Later Hearing Date”), had not made the requisite showing of good cause to support a postponement in the commencement of the evidentiary hearing. Because of the Commission’s manifest failure to consider material facts presented in the Motion for Later Hearing Date and in light of new material facts occurring after the issuance of the Order, the State Board seeks reconsideration of the Order.

## **II. Argument**

### **A. Material Facts Not Considered by the Commission, Which Were Set Forth in the Motion, Support a Finding of Good Cause to Set a Later Hearing Date.**

As an initial matter, the Commission has failed to consider the State Board's Expedited Motion to Amend the Scheduling Order, filed on January 18, 2011, which currently is pending before the Administrative Law Judge ("ALJ"). Good cause was shown in the State Board's Memorandum in Support of its Expedited Motions for a Later Hearing Date and To Amend the Scheduling Order ("Memo in Support of Later Hearing Date") to postpone all remaining deadlines set forth in the Scheduling Order, other than the date of the evidentiary hearing. As such, sufficient grounds exist for the Commission to reconsider and modify its Order, as the prehearing deadlines are subject to delay.

Second, as set forth in the State Board's Memo in Support of Later Hearing Date, the parties' witnesses—the vast majority of whom reside outside of the Washington, D.C. area—are in limbo with regard to their travel plans for the upcoming evidentiary hearing. Because of the uncertainty regarding where the hearing will be held, these witnesses currently are being forced to forego professional and personal opportunities that they otherwise might take if the evidentiary hearing were postponed. Furthermore, these witnesses likely will incur higher costs in travel and lodging as a result of their inability to finalize their travel plans until days or weeks prior to the hearing. There is no indication in the Commission's Order that the Commission considered the State Board's material facts with regard to its Motion to Change Hearing Location, which was filed on January 14, 2011 and currently is pending before the Administrative Law Judge. These

material facts are even more compelling now, given the continued passage of time since these concerns were first raised with the ALJ and the Commission.

Third, the Commission has failed to consider the impact that the outstanding dispositive motions have had on Respondent's ability to meet the outstanding deadlines in the Scheduling Order. When the Commission denied the Respondent's (unopposed) Motion to Stay the Proceedings on November 15, 2010, the possibility existed that the Commission would rule upon the dispositive motions in due time so that the parties would not be required to spend significant time and resources preparing for a hearing that may not take place. However, the State Board has spent—and continues to spend **significant** time and resources to comply with pre-hearing deadlines that ultimately may prove to be unnecessary. At this late date—a mere 18 business days before the evidentiary hearing—good cause exists for the Commission to reconsider the Motion, notwithstanding its earlier Order Denying Respondent's (unopposed) Motion for Stay of Proceedings, and to find good cause to delay the commencement of the administrative hearing.

Fourth, the fact that discovery is on-going was not considered by the Commission in its Order. The Commission makes much of the fact that the Scheduling Order has been set since July 15, 2010, and that the Respondent has been aware of that Scheduling Order for more than five months. However, the fact that the expert witness deposition of Dr. David L. Baumer was just taken on January 21, 2011, another expert witness deposition is outstanding, and the rebuttal/surrebuttal expert witness reports are not yet finalized, **despite the deadline of December 30, 2010** set forth in the Scheduling Order, belies the conclusion that the Motion should be denied. To the contrary, the flexibility

with which certain other deadlines in the Scheduling Order have been provided is grounds to support a good cause finding to postpone the commencement of the hearing date in this proceeding.

Fifth, the Commission has failed to consider the bearing on which the State Board's Motion for an Order Compelling Discovery ("Motion to Compel") has had on the ability of the State Board to prepare for the upcoming evidentiary hearing. The Commission indicates that it did not consider the Motion to Compel in issuing its Order, given that the Administrative Law Judge ("ALJ") had issued an order denying the Motion to Compel on January 20, 2011—**one day before the issuance of the Order**. The Commission's failure to consider the Motion to Compel is grounds for reconsideration of the Motion. As the State Board did not have the benefit of the ALJ's ruling on the Motion to Compel until January 20, any resolution of the parties' discovery disputes—to the extent that the ALJ's ruling did in fact provide such resolution—was delayed and interfered with the State Board's ability to prepare for the upcoming evidentiary hearing.

Sixth, the Commission has failed to consider the bearing on which the parties' discovery disputes are having on the ability of the State Board to prepare for the upcoming evidentiary hearing, notwithstanding the ALJ's January 20 Order Denying Respondent's Motion to Compel on an alleged (and arguably flawed) procedural technicality. The Commission's failure to consider the discovery disputes provides sufficient grounds, in and of itself, for the reconsideration of the Order. As set forth in the State Board's Memo in Support of Later Hearing Date, the State Board cannot reasonably comply with the remaining deadlines in the Scheduling Order without the full benefit of full and complete discovery. As such, the State Board is pursuing all remedies

available to obtain a full and fair resolution and/or adjudication of the discovery disputes. Allowing the evidentiary hearing to go forward on February 17, 2011 will deprive the State Board of its rights to pursue such remedies.

**B. New Material Facts Occurring After the Issuance of the Order Support a Finding of Good Cause to Set a Later Hearing Date.**

As set forth above, the State Board's Motion to Compel was denied by the ALJ on January 20, 2011 ("ALJ's Order"). On January 21, 2011, the State Board filed a Notice of Intent to File Application for Review of the Denial of its Motion to Compel Discovery. On January 24, 2011, the State Board filed an Application for Review of the ALJ's Order (which is incorporated herein by reference). As set forth in that application, subsequent review of this Order is necessary because: 1) the ALJ's Order involves a controlling question of law; 2) the ALJ's Order presents issues to which there is a substantial ground for difference of opinion; and 3) a subsequent review of the ALJ's Order will be an inadequate remedy.

The State Board intends to continue to pursue all remedies to which it may avail itself so that it will not be prejudiced by Complaint Counsel's inadequate discovery responses and by the ALJ's Order, which is arbitrary and capricious. As a matter of due process, the State Board has been denied, to date, its ability to have its motions regarding discovery fairly heard and considered. In light of the State Board's rights to reach a full and final adjudication of its Motion to Compel, which have ripened after the issuance of the Commission's Order, sufficient grounds exist for reconsideration of the State Board's Motion and for the Commission to enter a finding of good cause to postpone the commencement date of the evidentiary hearing.

### **III. Conclusion**

Based on the foregoing grounds, the State Board respectfully submits this Memorandum in Support of its Motion for Reconsideration of the Order Denying Expedited Motion for a Later Hearing Date, and moves the Commission to modify its Order to reflect a finding of good cause to postpone the commencement of the evidentiary hearing.

This the 24th day of January, 2011.

ALLEN AND PINNIX, P.A.

/s/ Alfred P. Carlton, Jr.

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Alfred P. Carlton, Jr.

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/s/ Alfred P. Carlton, Jr.

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