



1997 ASSEMBLY BILL 549

October 9, 1997 - Introduced by Representatives URBAN, GREEN, DUFF, ROBSON, PORTER, GUNDERSON, GOETSCH, MUSSER, SYKORA, HAHN and OLSEN, cosponsored by Senators WELCH, C. POTTER, HUELSMAN, ROSENZWEIG, ROESSLER and DRZEWIECKI. Referred to Committee on Judiciary.

1 **AN ACT to amend** 227.54; and **to create** 448.02 (8), 448.02 (9), 448.09 (1m),
2 448.14 and 448.40 (2) (f) of the statutes; **relating to:** issuance of administrative
3 warnings by the medical examining board, disciplinary actions against
4 physicians, granting rule-making authority and providing a penalty.

Analysis by the Legislative Reference Bureau

Under current law, the medical examining board (board) investigates allegations of unprofessional conduct and negligence in treatment by persons holding credentials issued by the board (credential holders), including physicians. In addition, the department of regulation and licensing (DORL) may investigate such allegations. The board must hold a disciplinary hearing if it finds, after an investigation by the board or DORL, that there is probable cause to believe that a credential holder is guilty of unprofessional conduct or negligence in treatment. Under certain circumstances, the board may also decide to suspend a credential prior to the hearing (pre-hearing suspension). After a hearing, the board may impose any of the following if it finds that the credential holder is guilty of unprofessional conduct or negligence in treatment: a warning, reprimand or limitation, suspension or revocation of a credential (disciplinary sanction). A credential holder is entitled to judicial review of a pre-hearing suspension or a disciplinary sanction. During the review, the court may prevent the board from imposing the pre-hearing suspension or disciplinary sanction.

This bill allows the board to issue a private and confidential administrative warning to a credential holder after an investigation by the board or DORL if the

ASSEMBLY BILL 549

board determines that there is substantial evidence of misconduct by the credential holder. The board must promulgate rules that define "substantial evidence of misconduct". The board is required to review an administrative warning that it has issued if the credential holder makes a personal appearance before the board.

The bill also provides that an administrative warning may not be used as evidence that a credential holder is guilty of misconduct, unless the board holds a disciplinary hearing on a subsequent allegation of misconduct by the credential holder. At such a hearing, the administrative warning may be used as evidence that the credential holder had actual knowledge that the misconduct that was the basis for the administrative warning was contrary to law. In lieu of holding a disciplinary hearing on a subsequent allegation of misconduct, the board may reopen the matter that resulted in the administrative warning.

In addition, under the bill, a court may assess a forfeiture of up to \$25,000 against a physician if it finds that the physician committed gross negligence in practicing medicine or if, after a disciplinary hearing, the board makes such a finding.

The bill also provides that if a physician seeks judicial review of a pre-hearing suspension or a disciplinary sanction, a court may not prevent the board from imposing the pre-hearing suspension or disciplinary sanction unless all of the following apply:

1. The board has received notice of the physician's application for review and the court has notified the board in advance about the date of the court hearing on the application.

2. There is a substantial likelihood that the physician will prevail in the proceeding for review.

3. The physician will suffer irreparable harm if the board is not prevented from imposing the pre-hearing suspension or disciplinary sanction.

4. There is no substantial likelihood of harm to patients of the physician if the board is prevented from imposing the pre-hearing suspension or disciplinary sanction.

Finally, the bill requires the board to submit an annual report to the legislature that identifies the average length of time to process a disciplinary case involving a physician and the number of such cases that are pending before the board.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 227.54 of the statutes is amended to read:

2 **227.54 Stay of proceedings.** The institution of the proceeding for review

3 shall not stay enforcement of the agency decision. The reviewing court may order a

ASSEMBLY BILL 549

1 stay upon such terms as it deems proper, except as otherwise provided in ss. 196.43,
2 448.02 (9) and 551.62.

3 **SECTION 2.** 448.02 (8) of the statutes is created to read:

4 448.02 (8) ADMINISTRATIVE WARNING. (a) After an investigation by the board
5 under sub. (3) (a) or by the department under s. 440.03 (3m) or (5), the board may
6 issue a private and confidential administrative warning to a holder of a license,
7 certificate or limited permit if the board determines that there is substantial
8 evidence of misconduct by him or her. The board shall review the determination if
9 the holder of the license, certificate or limited permit makes a personal appearance
10 before the board. Following the review, the board may affirm, rescind or modify the
11 administrative warning. A holder of a license, certificate or limited permit may seek
12 review judicial review under ch. 227 of an affirmation or modification of an
13 administrative warning by the board.

14 (b) An administrative warning issued under par. (a) does not constitute an
15 adjudication of guilt or the imposition of discipline and may not be used as evidence
16 that the holder of a license, certificate or limited permit is guilty of misconduct.

17 (c) Notwithstanding par. (b), if the board receives a subsequent allegation of
18 misconduct about a holder of a license, certificate or limited permit to whom the
19 board issued an administrative warning under par. (a), the board may reopen the
20 matter that resulted in the issuance of the administrative warning and commence
21 disciplinary proceedings on the matter, or use the administrative warning in any
22 subsequent disciplinary hearing under sub. (3) (b) as evidence that he or she had
23 actual knowledge that the misconduct that was the basis for the administrative
24 warning was contrary to law.

25 **SECTION 3.** 448.02 (9) of the statutes is created to read:

ASSEMBLY BILL 549**SECTION 3**

1 448.02 **(9)** JUDICIAL REVIEW. No injunction, temporary injunction, stay,
2 restraining order or other order may be issued by a court in any proceeding for review
3 that suspends or stays an order of the board to discipline a physician under sub. (3)
4 (c) or to suspend a physician's license under sub. (4), except upon application to the
5 court and a determination by the court that all of the following conditions are met:

6 (a) The board has received notice of the application and the court has provided
7 advance notice to the board of the date of the court hearing on the application.

8 (b) There is a substantial likelihood that the applicant will prevail in the
9 proceeding for review.

10 (c) The applicant will suffer irreparable harm if the order is not suspended or
11 stayed.

12 (d) There is no substantial likelihood of harm to patients of the applicant if the
13 board's order is suspended or stayed.

14 **SECTION 4.** 448.09 (1m) of the statutes is created to read:

15 448.09 **(1m)** FORFEITURE FOR CERTAIN CONDUCT. A court may require a physician
16 to forfeit not more than \$25,000 if the court finds that he or she committed gross
17 negligence in the practice of medicine and surgery or if the board makes such a
18 finding. A forfeiture may be imposed under this subsection in addition to any penalty
19 imposed under sub. (1).

20 **SECTION 5.** 448.14 of the statutes is created to read:

21 **448.14 Annual report.** Annually, no later than March 1, the board shall
22 submit to the chief clerk of each house of the legislature for distribution to the
23 appropriate standing committees under s. 13.172 (3) a report that identifies the
24 average length of time to process a disciplinary case against a physician during the

ASSEMBLY BILL 549

1 preceding year and the number of disciplinary cases involving physicians pending
2 before the board on December 31 of the preceding year.

3 **SECTION 6.** 448.40 (2) (f) of the statutes is created to read:

4 448.40 (2) (f) Establishing procedures for issuing and using administrative
5 warnings under s. 448.02 (8). The rules promulgated under this paragraph shall
6 define "substantial evidence of misconduct" for purposes of s. 448.02 (8) (a).

7 **SECTION 7. Nonstatutory provisions.**

8 (1) STAFF FOR MEDICAL EXAMINING BOARD. The authorized FTE positions for the
9 department of regulation and licensing are increased by 1.5 PR program assistant
10 positions and 1.5 PR legal assistant positions on July 1, 1998, to be funded from the
11 appropriation under section 20.165 (1) (g) of the statutes, for the purpose of providing
12 staff only to the medical examining board.

13 (2) USE OF AUTHORIZED POSITIONS. The department of regulation and licensing
14 may not use the positions authorized under subsection (1) to supplant positions in
15 the department that are being used immediately prior to the effective date of this
16 subsection to provide staff to the medical examining board.

17 **SECTION 8. Initial applicability.**

18 (1) The treatment of sections 227.54 and 448.02 (9) of the statutes first applies
19 to disciplinary actions taken by the medical examining board on the effective date
20 of this subsection.

21 (2) The treatment of section 448.09 (1m) of the statutes first applies to findings
22 that are based on misconduct that occurs on the effective date of this subsection.

23 (END)