

**BEFORE THE STATE OF NEW MEXICO
BOARD OF DENTAL HEALTH CARE**

IN THE MATTER OF:

WILLIAM C. KOTTKE, D.D.S.
License No. DD-1571

Case No. 09-19-COM

Respondent.

DECISION AND ORDER

This matter was heard on November 5, 2011, by the full New Mexico Board of Dental Health Care, and on November 18, 2011 by Board members Jessica Brewster, D.D.S. and Robert Gherardi, DMD. The hearing was conducted on day one at the New Mexico Regulation and Licensing Department, 2550 Cerrillos Road, Santa Fe, New Mexico, and on day two at the New Mexico Dental Association, 9201 Montgomery Blvd NE # 601, Albuquerque, New Mexico. Gloria I. Lucero, Assistant Attorney General, appeared as administrative prosecutor. Respondent William C. Kottke, D.D.S. appeared (on day two) and was represented by attorney James R. Wood of Miller Stratvert PA.

On January 27, 2012, a quorum of the Board met to consider and deliberate upon the administrative record established at the hearing, including the transcript of the hearing and exhibits. After considering and evaluating all of the testimony, exhibits and argument, and by a majority of its members voting, the Board hereby renders this Decision and Order pursuant to the Uniform Licensing Act, NMSA 1978, §§ 61-1-1 through 61-1-31.

Findings of Fact

1. The hearings in this matter were conducted in accordance with the rules and regulations governing the New Mexico Board of Dental Health Care (“Board”).
2. All parties to these proceedings were properly and timely noticed and all interested parties were present at the hearing. [Administrative Record]
3. Respondent William C. Kottke, D.D.S. (“Respondent” or “Dr. Kottke”), is currently licensed to practice dentistry in the State of New Mexico under license number DD1571, and is subject to the jurisdiction and licensure authority of the Board. He has held this license since January 29, 1986. He is in private practice in Farmington, New Mexico.
4. This case is before the Board because of a complaint filed against Respondent by his patient Kelly B. on March 4, 2009. Patient Kelly B.’s complaint stated that Respondent had failed to diagnose and treat dental caries (tooth decay or cavities) on herself, her husband and her child. [Exs. 3]. Dr. Kottke responded to the complaint on March 24, 2009. [Id.].

5. On or about March 4, 2011, the Board issued a Notice of Contemplated Action (“NCA”) to Respondent alleging that he had violated the Dental Health Care Act [NMSA 1978, § 61-5A-21] and the Board’s rules, including 16.5.16.10 NMAC. The NCA stated that the Board had sufficient evidence to act upon Respondent’s license to practice dentistry in New Mexico given its information regarding Respondent’s patient diagnosis, and standard of care in treating patients. [Ex. 1].

6. Respondent did not timely request a formal hearing within the 20 day time limit stated both in the Uniform Licensing Act, NMSA 1978, Section 61-1-4(D) and in the NCA. As a result, on May 6, 2011 the Board voted to issue a Default Order to revoke Respondent’s license. [Ex. 1; May 6, 2011 Board meeting minutes].

7. Although not required by law, on July 29, 2011 the Board voted to withdraw their motion from the May 6, 2011 Board meeting and set the matter for hearing for September 23, 2011. [July 29, 2011 Board meeting minutes].

8. On September 2, 2011 Respondent filed a motion to continue the September 23, 2011 hearing. [Administrative Record Attachments 8 and 13]. The September 23, 2011 hearing was reset to November 5, 2011.

9. On November 4, 2011, less than 24 hours before the scheduled hearing, Dr. Kottke e-mailed the Dental Board office stating he would be unable to attend the November 5, 2011 hearing due to a family emergency.

10. The full eight member Board, six witnesses, the administrative prosecutor, the Board’s assistant attorney general, a court reporter, and three Board staff had made arrangements to be in Santa Fe for the hearing, so the Board proceeded with the hearing and heard witness testimony on November 5, 2011.

11. Although not required by law, the Board continued the hearing until November 18, 2011 so that Dr. Kottke could testify. The continued hearing was conducted by Board members Robert Gherardi, D.M.D. and Jessica M. Brewster, D.D.S.

12. Dr. Kottke has taken the required number of continuing education hours each year to maintain his license.

13. Jared Lusk, D.D.S., License No. DD1834, is currently licensed to practice general dentistry in the state of New Mexico. He has held this license since June 26, 1995. He is in private practice in Farmington, New Mexico.

14. Dr. Lusk testified that he had examined Respondent’s Patients Kelly B., CB and KB, and that he reached his conclusions regarding Patients Kelly B., CB and KB after completing a comprehensive examination with x-rays. Dr. Lusk also treated Patients Kelly B., CB and KB after performing the exams.

Patient KB

15. On July 3, 2008, Patient KB presented to Respondent for a dental examination, x-rays, and a prophylaxis. Prophylaxis means a simple dental cleaning.

16. Respondent's chart notes for Patient KB only indicate dental work needed to be done on teeth #k and #t.

17. Patient KB has been a patient of Dr. Kottke's since 2002. Patient KB was seen at least 18 times for routine examinations, cleanings and treatment between 2002 and 2008.

18. On July 31, 2008, Patient KB presented to Respondent for a one surface amalgam restoration on tooth #t and a stainless steel crown on tooth #k. Amalgam is a common filling material used to repair cavities.

19. On August 7, 2008, Patient KB presented to Dr. Lusk with pain on tooth #t.

20. Dr. Lusk found Patient KB's tooth #t filled into the pulp chamber with no pulpotomy done. Pulp is the living part of the tooth and contains the nerve tissue. Pulpotomy is the partial removal of the pulp tissue.

21. Dr. Lusk performed a pulpotomy on Patient KB's tooth #t and diagnosed decay on teeth #a, b, j and s.

Patient Kelly B.

22. On July 31, 2008, Patient Kelly B. presented to Respondent for a periodic evaluation, bitewing x-rays and a prophylaxis.

23. Respondent's July 31, 2008 chart notes for Patient Kelly B. do not indicate the need for any dental treatment.

24. Patient Kelly B. has been a patient of Dr. Kottke's since 1996. Patient Kelly B. was seen at least 25 times for routine examinations, cleanings and treatment between 1996 and 2007.

25. On February 2, 2009, Patient Kelly B. presented to Dr. Lusk for a comprehensive examination, bitewing x-rays and a prophylaxis.

26. Dr. Lusk diagnosed decay on Patient Kelly B. on teeth #18 O, #12 O, and #31 MO, recurrent decay under both lower bridges, an open margin on crown #19 and an open margin with decay on the mesial of crown #30. Mesial is the anterior surface of the tooth. An open margin means there is a gap between the tooth and crown that should not be there.

27. Dr. Lusk testified to the recurrent caries under both lower bridges and decay in teeth #18 and #31 on Patient Kelly B.

28. Dr. Kottke's bitewing x-rays taken July 31, 2008 clearly show caries in teeth #31 MO and #18 O on Patient Kelly B.

29. Dr. Lusk's x-rays taken February 2, 2009 clearly show caries #31 MO and #18 O on Patient Kelly B. Recurrent caries under the bridges are not visible on x-rays.

30. Dr. Kottke placed bridge #19-21 on October 9, 1999, and bridge #28-30 on December 6, 1999 on Patient Kelly B.

Patient CB

31. On July 3, 2008, Patient CB presented to Respondent for a dental examination, x-rays and prophylaxis.

32. Respondent's chart notes for Patient CB on July 3, 2008 do not indicate the need for any dental treatment.

33. Patient CB has been a patient of Dr. Kottke's since 2002. Patient CB had been seen at least 11 times for routine examinations, cleanings and treatment between 2002 and 2008.

34. On July 3, 2008, Respondent prescribed Anaprox DS for Patient CB. Dr. Kottke testified this prescription was for a "sore tooth."

35. On February 10, 2009, Patient CB presented to Dr. Lusk for a comprehensive examination, bitewing x-rays and prophylaxis. Dr. Lusk diagnosed decay on teeth #18 MOB and #20 DO.

36. Radiographs from the Respondent are questionable as to whether these teeth had caries at the time that the Respondent saw Patient CB.

Conclusions of Law

The Board determines that the administrative record and Findings of Fact in this matter support its adoption of the following Conclusions of Law.

1. The Board has jurisdiction over the parties and subject matter in this proceeding pursuant to the Dental Health Care Act. NMSA 1978, §§ 61-5A-10(F) (2003), 61-5A-21(A) (2003).

2. The Board investigates complaints and determines whether a licensed dentist has violated the Dental Health Care Act or the Board's rules, and has exclusive power to discipline a licensed dentist who, following an administrative hearing, is found in violation. NMSA 1978, §§ 61-5A-10, 61-5A-21.

3. All notices in this matter, including the Notice of Contemplated Action, were served on Respondent in accordance with the Uniform Licensing Act, NMSA 1978, §§ 61-1-1 through 61-1-31 (2003).

4. The Board has the power to discipline Respondent for any cause stated in the Dental Health Care Act. NMSA 1978, § 61-5A-10(F); 16.5.16.9(A) NMAC.

5. The Board applied its technical knowledge, experience and expertise in the practice of dentistry in making a judgment as to Respondent's adherence to professional standards of conduct for dentists licensed in New Mexico, and in evaluating the testimony and documentary evidence in the record and making its findings of fact, reaching its conclusions of law, and rendering a decision based on those findings and conclusions. NMSA 1978, § 61-1-11(C); Weiss v. N.M. Bd. of Dentistry, 110 N.M. 574 (1990).

6. The Board found adequate and persuasive the documentary evidence, including dental radiographs and clinical treatment notes, and relied on both all of this evidence and the testimony in evaluating the entire administrative record and reaching its conclusions as to both Respondent's diagnosis, care and treatment of his patients.

7. Generally, the standard of proof in administrative hearings is by a preponderance of the evidence. Foster v. Board of Dentistry, 103 N.M. 776, 777-778 (1986); NMSA 1978, § 61-1-13 (1993).

8. "Gross incompetence" or "gross negligence" means a significant departure from the prevailing standard of care in treating patients. 16.5.16.10(A) NMAC.

9. Respondent has violated the Dental Health Care Act, NMSA 1978, § **61-5A-21(A)(3)**, and is guilty of gross negligence and gross incompetence as defined by the Board's rules, **16.5.16.10(A) NMAC**. As shown in the patient chart notes, radiographs and testimony, and as specifically described in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patient KB in that he failed to diagnose decay on teeth a, b, j and s.

10. Respondent has violated the Dental Health Care Act, NMSA 1978, § **61-5A-21(A)(3)**, and is guilty of gross negligence and gross incompetence as defined by the Board's rules, **16.5.16.10(A) NMAC**. As shown in the patient chart notes, radiographs and testimony, and as specifically described in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patient KB in that he performed an amalgam restoration on tooth #t without performing a pulpotomy when the tooth was filled into the pulp chamber.

11. Respondent has violated the Dental Health Care Act, NMSA 1978, § **61-5A-21(A)(3)**, and is guilty of gross negligence and gross incompetence as defined by the Board's rules, **16.5.16.10(A) NMAC**. As shown in the patient chart notes, radiographs and testimony, and as specifically described in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patient Kelly B. by taking bitewing x-rays on July 31,

2008 which showed caries in teeth #31 MO and #18 O and failing to note it, record it or recommend treatment.

12. Respondent has violated the Dental Health Care Act, NMSA 1978, § **61-5A-21(A)(3)**, and is guilty of gross negligence and gross incompetence as defined by the Board's rules, **16.5.16.10(A) NMAC**. As shown in the patient chart notes, radiographs and testimony, and as specifically described in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patient Kelly B. by failing to note, record and recommend treatment for recurrent caries under both lower bridges.

13. Respondent has violated the Dental Health Care Act, NMSA 1978, § **61-5A-21(A)(3)**, and is guilty of gross negligence and gross incompetence as defined by the Board's rules, **16.5.16.10(A) NMAC**. As shown in the patient chart notes, radiographs and testimony, and as specifically described in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patient CB by failing to document CB's sore tooth and the reason for prescribing Anaprox to CB.

14. Respondent's gross negligence and gross incompetence constitute violations of the Dental Health Care Act, NMSA 1978, § **61-5A-21(A)(7)**.

15. The Board determines that, in addition to the evidence and administrative record in this Case No. 09-19 COM, Respondent has demonstrated a pattern and practice of gross negligence and gross incompetence in treating his patients, all as shown in the evidence and administrative hearing records in the four other cases heard by the Board since April 1, 2011: Case Nos. **08-93 COM** [June 27, 2011 Decision and Order], **08-104 COM** [June 27, 2011 Decision and Order], **09-28 COM** [February 10, 2012 Decision and Order], **09-32 COM** [February 10, 2012 Decision and Order].

16. The Board may impose a fine not to exceed one thousand dollars (\$1,000.00) for each violation of the Dental Health Care Act or the Board's rules. NMSA 1978, § 61-1-3(L) (1993).

17. A professional licensee who, following an administrative hearing, is found by the Board to have violated the Dental Health Care Act or the Board's rules, shall pay all costs of the Board's disciplinary proceedings. NMSA 1978, §§ 61-1-4(G) (2003); 61-5A-21(C).

ORDER

The New Mexico Board of Dental Care determines that Respondent **William C. Kottke, D.D.S.** violated the Dental Health Care Act and the Board's rules, as specifically described above in the Findings of Fact and Conclusions of Law.

IT IS THEREFORE ORDERED that Respondent **William C. Kottke, D.D.S.:**

A. shall have his license to practice dentistry in New Mexico **REVOKED** for a period of five (5) years, beginning sixty (60) days after his receipt of the Board's Decision and

Order. This sixty-day period will allow Respondent to take all steps necessary to avoid any patient abandonment. Simultaneously with the revocation of his license, Respondent shall surrender his current license to practice dentistry in New Mexico to Kathy Ortiz, Board Administrator, Regulation and Licensing Department, Toney Anaya Building, 2550 Cerrillos Road, 2nd Floor, Santa Fe, New Mexico 87505.

B. shall pay to the Board a fine in the amount of two thousand dollars (\$2,000.00) for his violations of the Dental Health Care Act and the Board's rules. Respondent shall pay this fine within thirty (30) days of his receipt of the Board's Decision and Order.

C. shall pay to the Board the costs of these administrative disciplinary proceedings in the amount of seven hundred ninety-two dollars and ninety-two cents (\$792.92) within thirty (30) days of his receipt of the Board's Decision and Order. Assessed costs include the transcript and witness fees, as permitted by New Mexico Board of Veterinary Medicine v. Riegger, 2007-NMSC-044, 142 N.M. 248.

D. At the end of his five-year period of revocation, Respondent **William C. Kottke, D.D.S.** shall be eligible to reapply for licensure as a dentist in New Mexico only after he has successfully completed either a CODA-approved two (2) year general practice dental residency or two (2) years at a CODA-accredited dental school, and, further, has successfully met all requirements for licensure as a dentist in New Mexico in place at the time of his re-application.

Respondent **William C. Kottke, D.D.S.** is hereby informed that, in accordance with the attached statement of rights, he may obtain judicial review of this Decision and Order.

NEW MEXICO BOARD OF DENTAL HEALTH CARE



Jessica Brewster, D.D.S.
Board Chair

Date Filed with Board Office: February 10, 2012