

**STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
PUBLIC HEALTH HEARING OFFICE**

In Re: Ryan Mastej, R.D.H.

Petition No. 980413-013-001

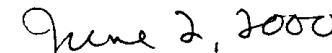
FINAL MEMORANDUM OF DECISION

On November 29, 1999, a Proposed Memorandum of Decision was issued in this matter pursuant to §4-179 of the Connecticut General Statutes. On January 5, 2000, Ryan Mastej ("respondent") requested oral argument on the Proposed Decision and submitted "Respondent's Exceptions to the Proposed Memorandum of Decision" and a "Brief in Opposition to the Proposed Memorandum of Decision." On January 12, 2000, the Commissioner of the Department of Public Health designated the undersigned to hear oral argument, to determine findings of fact and conclusions of law, and to issue a final decision in this matter. The Department did not file a brief in reply to respondent's brief. On March 2, 2000 oral argument was heard.

After full consideration of the oral arguments, the written briefs, and the complete record, and in accordance with Connecticut General Statutes §4-180, the undersigned hereby adopts the Proposed Memorandum of Decision issued by Hearing Officer Borrino as the Final Memorandum of Decision in this matter. A true copy of the Proposed Memorandum of Decision is attached hereto and hereby incorporated herein by reference as the Final Memorandum of Decision in this matter.



Donna Brewer, Esq.
Hearing Officer



Date



STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC HEALTH PUBLIC HEALTH HEARING OFFICE

December 22, 1999

Ryan Mastej
191 Shingle Hill Road
West Haven CT 06516

CM RRR #Z319986222

Stanley K. Peck, Director
Department of Public Health
410 Capitol Avenue, MS#12LEG
P.O. Box 340308
Hartford, Connecticut 06134-0308

Interdepartmental

RE: Proposed Revocation of Ryan Mastej, RDH – License No. 005497

Dear Mr. Mastej and Attorney Peck:

Enclosed please find a copy of the Proposed Memorandum of Decision rendered by Hearing Officer Elisabeth Borrino in the above referenced case which was previously referenced as a final decision in error.

Pursuant to the Connecticut General Statutes Section 4-179, you have the opportunity to file briefs and exceptions and present oral argument to the Commissioner of Public Health. If no such request is received by the Commissioner **by January 5, 2000**, the Commissioner shall consider these rights to be waived and shall render a final decision in this matter. .

Respectfully,

Janice E. Wojick, Hearings Liaison
Public Health Hearing Office, MS#13PHO
Tel. (860) 509-7648
FAX (860) 509-7553

c: Joxel Garcia, M.D., Commissioner
Richard J. Lynch, Assistant Attorney General
Kay Zarrella, Director, HSR
Debra Tomassone, Public Health Services Manager, Licensure
Elisabeth Borrino, Hearing Officer
Lawrence C. Sgrignari, Esq. – CMRRR#Z319986223



Phone:
Telephone Device for the Deaf (860) 509-7191
410 Capitol Avenue - MS # _____
P.O. Box 340308 Hartford, CT 06134
An Equal Opportunity Employer

**PUBLIC HEALTH HEARING OFFICE
STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH**

Ryan Mastej, R.D.H.

Petition No. 980413-013-001

PROPOSED MEMORANDUM OF DECISION

Procedural Background

On May 24, 1999, the Department of Public Health ("the Department") issued a Statement of Charges to Ryan Mastej ("respondent") due to his alleged violations of the Connecticut General Statutes and the Regulations of Connecticut State Agencies ("the Regulations"). H.O. Exh. 1. On October 12, 1999, the Department submitted an Amended Statement of Charges ("the Charges"). H.O. Exh. 10.

On June 15, 1999, notice of the hearing on the Charges was provided to respondent. In the Notice of Hearing, Elisabeth Borrino was appointed by the Commissioner of the Department to be the Hearing Officer and to rule on all motions, and to recommend findings of fact and conclusions of law. H.O. Exh. 2.

An administrative hearing has been held on August 24, September 10, and 13, and October 12, 13, 14, and 22, 1999, in accordance with Connecticut General Statutes Chapter 54 and Regulations §§19a-9-1 *et seq.* On each hearing date, respondent appeared and was represented by Attorney Lawrence Sgrignari, Esq.; Attorney Leslie Scoville, Esq. represented the Department.

On October 12, 1999, respondent moved to Dismiss Counts One through Five, inclusive, of the Charges on the grounds that the Department failed to meet its burden of proof. On November 28, 1999, the Hearing Officer issued a proposed ruling granting that Motion.¹ Accordingly, on Count Six remains at issue at this time.

¹ Respondent's Motion to Dismiss Counts One through Five, inclusive, is a dispositive motion. Since, "[p]roposed rulings on dispositive motions shall be reviewed at the same time and in the same manner as proposed final decisions," (section 19a-9-25 of the Regulations) the proposed ruling granting respondent's Motion, attached hereto as "Attachment A," is incorporated herein by this reference, to be considered as part of this Proposed Memorandum of Decision.

This Proposed Memorandum of Decision is based entirely on the record and sets forth this Hearing Officer's proposed findings of fact, conclusions of law, and order. To the extent that the findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *SAS Inst., Inc. v. S & H. Computer Systems, Inc.*, 605 F.Supp. 816 (M.D. Tenn 1985).

Allegations

1. Paragraphs 1 through 20, inclusive, concern Counts one through five (see, Att. A.)
2. In paragraph 21 of the Charges, the Department alleges that respondent is, and has been at all times referenced therein, the holder of Connecticut dental hygienist license number 005497.
3. In paragraph 22 of the Charges, the Department alleges that in or about October 1994, respondent treated J.R., a female child.
4. In paragraph 23 of the Charges, the Department alleges that in providing such treatment, respondent engaged in negligent and/or incompetent conduct and/or treatment beyond the parameters of his license, by diagnosing dental treatment, and extracting six teeth without anesthetic.
5. In paragraph 24 of the Charges, the Department alleges that these facts constitute grounds for disciplinary action pursuant to Sections 20-126; 20-126o(2); 20-126o(3); 20-126o(5); and/or 20-126w of the Connecticut General Statutes.

Findings of Fact

1. Respondent is, and has been at all times referenced in the Charges, the holder of Connecticut dental hygienist license number 005497. H.O. Exh. 3.
2. At all relevant times, respondent was employed as a dental hygienist by Bruce Friedman, DDS. Tr. 10/14/99, 9.
3. At all relevant times, Dr. Friedman's staff were assigned code numbers to identify on dental records the staff member providing treatment. Dr. Friedman was assigned code no. 1, dental hygienist Wendy Kudej was assigned code no. 10, respondent was assigned code no. 11, Mary Sidawi was assigned code no. 12, dental hygienist Adrianna (unknown last name) was assigned code no. 14, dental hygienist Thao Do was assigned code no. 15. Tr. 8/24/99, 110, 120-121.

4. On October 17, 1994, respondent and Dr. Friedman were the only male staff members. Tr. 9/10/99, 138; Tr. 10/14/99, 31.
5. On October 17, 1994, J.R., an eleven year old female child, received dental treatment at Dr. Friedman's office. J.R. and her siblings had received dental treatments at Dr. Friedman's office on numerous occasions prior to October 1994. Tr. 8/24/99, 31; Tr. 9/10/99, 86-88, 95, 97-99, 101, 167; Rt. Exhs. F, G, M, R.
6. On October 17, 1994, respondent extracted six of J.R.'s teeth without administering an anesthetic. Tr. 8/24/99, 22-27, 31, 34, 36, 45-46, 80, Tr. 9/10/99, 92-94, 101, 129-130, 133, 135-138, Rt. Exh. F, G, M.
7. Respondent extracted the teeth of numerous unnamed children during his employ at Dr. Friedman's office. Tr. 8/24/99, 99, 126, 151, 153-154, 176, 178-179.
8. At all relevant times, patients frequently referred to respondent as "Dr. Ryan." Respondent rarely corrected the patients when this occurred. Tr. 8/24/99, 109, 157-158.
9. J.R. was a credible witness.
10. Dr. Bruce Friedman was not a credible witness.
11. Respondent was not a credible witness when he denied extracting J.R.'s teeth.

Discussion and Conclusions of Law

Sections 20-126o *et seq* and 20-126w of the Connecticut General Statutes provide that the Department of Public Health may take any of the actions set forth in section 19a-17 of the Connecticut General Statutes when a dental hygienist engages in illegal, negligent, incompetent, or wrongful conduct in professional activities; and/or practices beyond the parameters of the general supervision of a licensed dentist.

The Department bears the burden of proof by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 101 S. Ct. 999, *reh'g den.*, 451 U.S. 933 (1981); *Swiller v. Comm'r of Public Health*, CV-950705601, Superior Court, J.D. Hartford/New Britain at Hartford, October 10, 1995.

The Department alleges that in or about October 1994, respondent treated J.R. by extracting six teeth without anesthetic. Respondent denies that he extracted J.R.'s teeth

but concurs with the Department that such conduct by a dental hygienist would be wrongful and beyond the parameters of his/her license.

The evidence establishes that on October 17, 1994, six of J.R.'s teeth were extracted without an anesthetic by a male staff member of Dr. Friedman's office. Although J.R.'s dental record indicates that this treatment was performed by the person assigned to code number "12," the Hearing Officer finds that the listing of code numbers generally provides little assistance in determining which staff member treated a patient at any given time. Indeed, assuming that respondent extracted these teeth and/or performed treatments beyond the parameters of his license, both he and Dr. Friedman were sophisticated enough to avoid any record of this wrongdoing.

Sixteen year old J.R. credibly testified that respondent extracted six of her teeth, without anesthetic, when she was eleven years old on October 17, 1994. Respondent correctly argues the many inconsistencies and inaccuracies of J.R.'s testimony and that of her mother, especially when contrasted with their signed 1997 witness statements.² Although J.R.'s memory is unreliable in many respects, when questioned regarding the identity of the individual who extracted her six teeth the testimony was unequivocal when she identified respondent. Further, J.R.'s 1997 witness statement attests that a male staff member of Dr. Friedman's office extracted her teeth. The uncontroverted evidence also establishes that, on October 17, 1994, the only male staff members in Dr. Friedman's office were respondent and Dr. Friedman. Both J.R. and her mother were adamant, consistent, and credible that Dr. Friedman did not extract J.R.'s teeth. No contrary evidence was proffered.

Assessing credibility in this instance required that the Hearing Officer intensely scrutinize the demeanor of the witnesses and review the entirety of the record when comparing and contrasting the testimony and evidence. After doing so, the inescapable conclusion is that, despite various inconsistencies and inaccuracies, there is substantial

² There is insufficient evidence in the record as to (1) who prepared the statements; and/or (2) the purpose for which the statements were intended. Respondent concedes that the statements were prepared at a time when the focus of the investigation was on Dr. Friedman and Mary Sidawi, rather than respondent, which may explain the careless manner in which the statements appear to have been drafted. Accordingly, the value of these statements for purposes of impeachment of J.R. and her mother, is minimal.

evidence in the record to establish that six of J.R.'s teeth were extracted by a male staff member other than Dr. Friedman, on October 17, 1994 and that the only other male staff member was respondent. Moreover, when J.R. and her mother testified they did so as if "re-living" the experience. While the Hearing Officer notes the inaccuracies and inconsistencies touted by respondent, none of these were sufficient to negate or compromise the overwhelmingly credible testimony that respondent extracted J.R.'s teeth, as alleged in the Charges.

Based on the foregoing Findings of Fact, a preponderance of the evidence establishes that in or about October 1994, respondent treated J.R., a female child, and that in providing such treatment, respondent engaged in negligent and/or incompetent conduct and/or treatment beyond the parameters of his license, by extracting six teeth without anesthetic. The evidence further establishes that respondent did so with knowledge of the wrongfulness of his conduct.

The only remaining issue is what, if any discipline is appropriate.

The record is replete with credible evidence that more than one staff member confronted respondent and chastised his treating patients beyond the parameters of his license. The record is also replete with evidence of respondent's cavalier attitude regarding these treatments. Respondent was not alone in this attitude. There is disturbing evidence that Dr. Friedman and his staff lacked compassion and empathy for their young patients. Respondent presented as an intelligent young man who fully understood the limits of his dental hygienist license but relished being mistaken for a dentist by patients and their parents. Although there is no evidence that respondent had a prior discipline record with the Department, he displayed no remorse or regret for his conduct which put young children at risk.

Accordingly, the Hearing Officer recommends to the Commissioner that he revoke respondent's dental hygienist license no. 005497

Order

Based on the record in this case, the above findings of fact and conclusions of law, this Hearing Officer respectfully recommends to the Commissioner that respondent's Registered Dental Hygienist License No. 005497 be revoked.

Respectfully Submitted,


Elisabeth Borrino
Hearing Officer
Department of Public Health

December 22, 1999
Date

**PUBLIC HEALTH HEARING OFFICE
STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH**

Ryan Mastej, R.D.H.

Petition No. 980413-013-001

**NOTICE OF RULING AND RULING ON
RESPONDENT'S MOTION TO DISMISS**

On May 24, 1999, the Department of Public Health ("the Department") issued a Statement of Charges to Ryan Mastej ("respondent") due to his alleged violations of the Connecticut General Statutes and the Regulations of Connecticut State Agencies ("the Regulations"). H.O. Exh. 1. On October 12, 1999, the Department submitted an Amended Statement of Charges ("the Charges"). H.O. Exh. 10.

On June 15, 1999, notice of the hearing on the Charges was provided to respondent. In the Notice of Hearing, Elisabeth Borrino was appointed by the Commissioner of the Department to be the Hearing Officer and to rule on all motions, and to recommend findings of fact and conclusions of law. H.O. Exh. 2.

An administrative hearing has been held on August 24, September 10, and 13, and October 12, 13, 14, and 22, 1999, and is scheduled to resume on December 1, 1999, in accordance with Connecticut General Statutes Chapter 54 and Regulations §§19a-9-1 *et seq.* On each hearing date, respondent appeared and was represented by Attorney Lawrence Sgrignari, Esq.; Attorney Leslie Scoville, Esq. represented the Department.

On October 12, 1999, respondent moved to Dismiss Counts One through Five, inclusive, of the Charges on the grounds that the Department failed to meet its burden of proof. The Hearing Officer deferred ruling until both parties filed written briefs with citations to the record, and the Hearing Officer had an opportunity to review the entirety of the voluminous record.

As set forth below, respondent's motion is granted with respect to each of Counts One through Five.

1. Count One of the Statement of Charges.

In Count One of the Charges, the Department alleges that in or about March 1996, respondent treated M.E., a male child. The Department further alleges that in providing such treatment respondent engaged in negligent and/or incompetent conduct, and/or treatment beyond the parameters of his license, by diagnosing for dental procedures and/or performing dental treatments by filling and extracting teeth.

The Department's recitation of supporting evidence relies upon (1) the alleged reference to both code nos. 11 and 15 in M.E.'s record which the Department claims were codes used by respondent; (2) respondent's March 1996 notation on M.E.'s dental record which the Department argues constitutes a "dental diagnosis" as allegedly established by the Department's expert Dr. Goodman; (3) the sworn statement of M.E.'s mother identifying respondent and claiming that he diagnosed cavities; and (4) a general recitation to evidence that respondent diagnosed cavities and filled and extracted teeth during the relevant time period on unnamed children on unknown dates.

First, the Department explains that "the procedure for noting treatment in dental records was for the person who performed dental treatment to write the treatment in each person's record. . . [F]urther, the office policy included code numbers for each employee." Dept. Mem. p. 2. The Department relies entirely upon its belated submission of a written statement and testimony of former dental assistant Lydia Savino¹ to establish that respondent used code no. 15 and, thereby, argues that all entries bearing this number necessarily reference treatment that respondent provided to the child identified in the dental record. The Department's reliance is wholly misplaced. In its case in chief,

¹ The Department only submitted Ms. Savino's January 10, 1997 written witness statement after it rested its case and during respondent's defense of the remaining allegations in the Charges and after respondent's Motion to Dismiss was submitted. Respondent objected to the consideration of any evidence that was not submitted during the Department's case. Although it is unclear why the Department did not submit this documentary evidence in a timely manner, the Hearing Officer is afforded wide discretion in the consideration of such matters to ensure a full and proper hearing on the merits. The objection is thereby overruled.

however, the Department had already proffered numerous other witnesses who testified that respondent was only assigned code no. 11. Respondent proffered the testimony of Thao Do who credibly testified that, at all relevant times, she was not only assigned code no. 15 but identified several entries bearing this number as being her handwriting and admitted that she provided the treatment referenced on each entry bearing no. 15.

The Department failed to explain why Ms. Savino's testimony is more reliable than the testimony of all other testifying witnesses, including the Department's witnesses, on this issue. Further, when questioned by this Hearing Officer, Ms. Savino testified, "I know, somewhere, that Ryan Mastej was 15." Tr. 10/13/99, p. 142. Yet, Ms. Savino could not recall who was No. 10. Tr. 10/13/99, p. 142. Moreover, Ms. Savino also testified that Dr. Friedman used both nos. 1 and 11, as also set forth in her statement. Tr. 10/13/99, 146; Dept. Exh. 16. There is no other evidence, nor does the Department claim that Dr. Friedman used both nos. 1 and 11. The many inconsistencies contained in Ms. Savino's statement as well as her testimony, compared with the testimony of all other witnesses, renders her attestation that respondent used no. 15 wholly unreliable.

Significantly, Carol Musco, former receptionist of the dental office not only testified that code no. 11 was assigned to respondent, but how the assignments were determined in the first place. Ms. Musco explained that Wendy Kudej was assigned no. 10 because she was in the first room, respondent was assigned no. 11 because "he had the next one, and we just gave him 11 and so on." Tr. 10/13/99, p. 158.

Further, the Hearing Officer observed the demeanor and testimony of Ms. Savino and finds that Ms. Savino was not nearly as clear or credible on the assignment of code numbers as compared to all other witnesses who testified.²

Secondly, with regard to the Department's claim that respondent diagnosed M.E., as reflected in a March 1996 notation, Dr. Goodman, the Department's expert witness, did not testify as claimed by the Department. Dept. Mem. p. 3. Instead, as respondent

²Wendy Kudej, former dental hygienist of the dental office testified that respondent used no. 11. Tr. 8/24/99, p. 110. Thao Do, former dental hygienist of the dental office, testified that respondent was assigned no. 11 and she was assigned no. 15. Tr. 10/13/99, p. 174. Notably, if the treatment by the person assigned no. 15 was inappropriate, then Ms. Do testified against her own interest thereby enhancing her credibility. The Department submitted no evidence upon which to find that these witnesses were either unreliable or fabricated their testimony.

correctly states, Dr. Goodman found nothing inappropriate about respondent's actions on that occasion. Rt. Mem. pp. 5-7. It is disconcerting that the Department misrepresents that Dr. Goodman testified that respondent's handling of the March 20, 1996 telephone call was "inappropriate." Dept. Rbtl. Mem. p. 2. In fact, Dr. Goodman testified unambiguously that "I don't feel that's inappropriate." Tr. 10/12/99, pp.72-73.

Third, the Department again misstates the evidence when it claims that M.E.'s mother identified respondent in a sworn statement as having diagnosed cavities for M.E. As respondent correctly cites, the statement only claims that in October 1995, M.E. was examined by a male dental hygienist and that the mother was advised that the son had many cavities. Rt. Mem. p. 4. This evidence falls far short of establishing the Department's claim and doesn't even concern the relevant time period.

Finally, the Department correctly references the testimony of Wendy Kudej as establishing that respondent diagnosed cavities and filled and extracted teeth during the relevant time period. Dept. Mem. p. 3. However, as respondent correctly asserts, "her testimony was clear that she had no knowledge that respondent ever performed any treatment on the minor child identified in Count One, namely M.E." Rt. Mem. p. 6.

Accordingly, the Department failed to meet its burden of proof as regards the allegations of Count One of the Charges.

2. *Count Two of the Statement of Charges.*

In Count Two of the Charges, the Department alleges that in or about April 1996, respondent treated patient G.T., a male child. The Department further alleges that in providing such treatment, respondent engaged in negligent and/or incompetent conduct, and/or treatment beyond the parameters of his license, by diagnosing for dental procedures and/or by filling and extracting teeth. H.O. Exh. 10.

The Department argues, "the procedure for noting treatment in dental records was for the person who performed dental treatment to write the treatment in each person's record. . . [F]urther, the office policy included code numbers for each employee." Dept. Mem. p. 2. The Department concedes that, as regards Count Two, "[a]lthough respondent's number does not appear in the dental record, the handwriting in the record is similar to respondent's handwriting in other records." *Id.*, p. 4. The Department asserts

that the handwriting in the dental record of E.S. of April 3, 1997 contains respondent's handwriting (Dept. Exh. 7), and that such handwriting is so similar to that contained in the record of April 1996, for G.T. (Dept. Exh. 3) and the treatment record for J.R. (Rt. Exh. M), that the necessary conclusion must be that respondent treated G.T. during April 1996.

The dental record of G.T. contains two separate entries for April 1996 with two separate code numbers listed.³ The Department fails to identify the entry to which it refers, but summarizes the treatment rendered. This summary includes both entries.

The Hearing Officer intensely examined the April 2 and 4, 1996 entries on G.T.'s dental records as well as that of April 3, 1997 in E.S.'s dental records. Although the Hearing Officer does not claim to be a handwriting expert, the handwriting in G.T.'s April 2, 1996 and April 4, 1996 dental records is obviously different. If the Department is merely claiming that respondent entered the chloralhydrate prescription noted on April 2, 1996, as opposed to the entire entry, the handwriting is too dissimilar from that of the April 4, 1996 entry as well as the April 3, 1997 entry on E.S.'s dental records to conclude that respondent wrote these entries, and certainly fails to establish that fact by a preponderance of the evidence. Further, even if the evidence established that respondent wrote these entries, it is doubtful that this, alone, would be sufficient to establish that respondent treated the referenced patients in the manner reflected on the records. However, the Hearing Officer need not reach that issue since the handwriting is too dissimilar to reach the conclusion sought by the Department.

The Department proffered no handwriting expert to support this assertion, despite the reliance on these handwriting exemplars to establish respondent's culpability for the allegations contained in Count Two of the Charges. The Hearing Officer spent a great deal of time comparing and contrasting the referenced dental record entries and cannot find by a preponderance of the evidence that the handwritings are so similar as to warrant totally disregarding respondent's denials and the clearly identified code numbers that

³ The code number for April 2, 1996 entry is no. 10, which the record establishes was assigned to Wendy Kudej. Dept. Exh. 3. The code number for April 4, 1996 entry is no. 1, which the record establishes was assigned to Dr. Friedman. Dept. Exh. 3. The code number for April 3, 1997 entry on Dept. Exh. 7 is no. 11, which the record establishes was assigned to respondent.

support respondent's denials. The Hearing Officer does note that the entry for M.E. (Dept. Exh. 2) of March 19, 1996 is strikingly similar to that of G.T. (Dept. Exh. 3) for April 4, 1996. Further, these two exemplars are also strikingly similar to the dental records of E.S. for October 6, 1993 (Dept. Exh. 7) as well as to the dental records of M.M. for October 6, 1993 and August 16, 1995 (Dept. Exh. 8). The Department did not claim that respondent treated M.E. on March 19, 1996, E.S. on October 6, 1993, or M.M. on October 6, 1993 and August 16, 1995 despite the strikingly similar handwriting exemplars. All of these entries were ostensibly made by Dr. Friedman who was assigned code no. 1. These entries are remarkably dissimilar to the March 20, 1996 entry on M.E.'s dental records, which respondent admits authoring, or to any other known entry by respondent.

The Department claims that "even though respondent's number does not appear on G.T.'s dental record, if the handwriting is his, respondent most likely performed the treatments based on office policy." Dept. Mem. p. 5. However, office policy referenced hereinabove and upon which the Department relies as regards Count One and acknowledged as regards Count Two was to list one's code number at the end of the line for each treatment rendered to the patient. Although not specifically referenced by the Department, the testimony of the witnesses for both the Department and for respondent establishes that it was not uncommon for staff to write the entry for a different staff member, including noting the code number. Therefore, reliance upon handwriting exemplars may be useful but not necessarily dispositive in these instances. Simply because an entry bears a particular code number does not necessarily mean that the code number will match the handwriting of the person to whom that code number is assigned or that the treatment was rendered by the author of the notation.

Accordingly, the Department failed to meet its burden of proof as regards Count Two of the Charges.

3. *Count Three of the Statement of Charges.*

In Count Three of the Charges, the Department alleges that between August 1993 and November 1998, respondent treated patient E.S., a male child. The Department further alleges that in providing such treatment, respondent engaged in negligent and/or

incompetent conduct and/or treatment, beyond the parameters of his license, by diagnosing for dental procedures and/or filling teeth.

The two entries on E.S.'s dental records, upon which the Department relies, are August 1, 1995 and April 3, 1997. Dept. Exh. 7.

First, as regards the August 1, 1995 entry, the Department contends that "[b]oth of respondent's assigned code numbers were listed on the treatment record for that date" and relies upon the written statement and testimony of Lydia Savino to establish that respondent used no. 15. First, the entry does not bear two code numbers. Instead, during the hearing, the Hearing Officer merely reviewed the entry and pondered whether no. 11 was somehow altered to appear as no. 15. Nothing in the record establishes that an alteration of the original entry occurred. Moreover, as set forth above, the overwhelming evidence is that respondent only used code no. 11. This is clearly established by both the Department and respondent's witnesses, as correctly noted by respondent. Rt. Mem. fn. p. 10. Any claim by the Department that respondent used no. 15 is simply erroneous and unsupported by the reliable evidence for the reasons set forth hereinabove. No evidence was offered by the Department to prove that the entry bears code no. 11, or that respondent treated the child beyond the treatment described on the first line. Nonetheless, even if respondent's assigned number is correctly stated as code no. 11 at the end of the first line, and such treatment was rendered by respondent, nothing in the record establishes that it is inappropriate for a dental hygienist to provide this treatment. Dr. Friedman's number is listed as providing the treatments that follow -- which treatments the Department contends were inappropriately rendered to the subject child by respondent. There is no evidence that respondent performed that treatment.

Second, as regards the April 3, 1997 notation, the Department mischaracterizes the evidence. The Department contends that "working on an occlusal surface indicates that respondent performed an occlusal diagnosis and filling" (Dept. Mem. p. 6), and bases this contention on its misstatement of respondent's testimony contained in page 53 of the October 14, 1999 . Respondent correctly cites the actual testimony. Rt. Mem. p. 11. Nothing in that testimony can be remotely interpreted to support the Department's

contention. Moreover, nothing in the Dr. Goodman's testimony suggests that any "occlusal diagnosis or filling" was performed on that date on minor child E.S.

The only other evidence referenced by the Department is the testimony that respondent diagnosed and filled teeth of children during the referenced time period. Even if true, that evidence does not establish that respondent treated patient E.S, as alleged in Count Three of the Charges.

Accordingly, the Department failed to meet its burden of proof as regards the allegations contained in Count Three of the Charges.

4. *Count Four of the Statement of Charges.*

In Count Four of the Charges, the Department alleges that between August 1993 and November 1998, respondent treated patient M.M., a male child. The Department claims that on October 6, 1993 record, respondent filled five teeth and extracted one tooth for M.M. because respondent admitted that he wrote "RM" on the treatment record of that date. Dept. Mem. p. 7. Again, the Department relies upon its misstatement of the evidence. Instead, respondent testified that he recognized only the *top line* of the October 6, 1993, as correctly cited by respondent. Rt. Mem. p. 12. Further, Dr. Friedman testified that he provided the remaining treatment to M.M. and, thereby, his initials are noted at the end of that treatment notation.⁴

The remaining evidence cited by the Department requires the Hearing Officer to conclude that because respondent frequently performed inappropriate dental treatments during the relevant time period that it is reasonable to conclude that he provided the same inappropriate treatment to M.M. as stated in Count Four of the Charges. The Hearing Officer cannot so conclude based upon the evidence submitted.

Accordingly, the Department failed to meet its burden of proof as regards the allegations of Count Four of the Charges.

⁴ The uncontroverted evidence establishes that, at the conclusion of treatment, staff listed their assigned code numbers at the end of the last line which would be immediately to the right of the treatment entry if only one line was needed to describe the treatment, or underneath and to the right of the treatment entry if multiple lines were used to describe the treatment.

5. ***Count Five of the Statement of Charges.***

In Count Five of the Charges, the Department alleges that in or about July 1997, respondent treated patient G.M., a male child by diagnosing for dental procedures and/or performing dental treatments by filling teeth. Again, the Department erroneously relies upon the notation of no. 15 to establish that respondent inappropriately treated G.M. in July of 1997. As set forth above, the Department's reliance is erroneous.

Significantly, Thao Do credibly testified, potentially against her own interest, that not only is the subject notation her handwriting but that she provided the referenced treatment. Dr. Friedman corroborated this testimony and no contrary evidence was proffered by the Department.

Even if respondent treated G.M. on this date, the Department misrepresents that Dr. Goodman testified "that a dental hygienist is not allowed to perform the work listed in the dental record of child G.M." and cites to pages 44-46 of the October 12, 1999 hearing to support its representation. As respondent correctly cites, however, that reference is taken out of context and misleading. Dr. Goodman was responding to the notation regarding the work to be performed *at the next visit*. Thus, there is no evidence that either respondent or any other dental hygienist treated the child at that time.

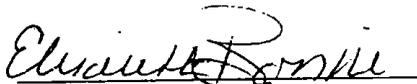
Notwithstanding the Department's mischaracterization of Dr. Goodman's testimony, even if cavities were improperly diagnosed and/or that chloral hydrate was prescribed by a dental hygienist on that date, there is no evidence that the treatment and/or diagnosis was provided by respondent. Instead, the evidence clearly establishes that Thao Do treated G.M. on July 21, 1997, as admitted to by Thao Do, potentially against her own interest and, thereby heightening her credibility.

Accordingly, the Department failed to meet its burden of proof by a preponderance of the evidence as regards the allegations contained in Count Five of the Charges.

The Hearing Officer exhaustively reviewed the entire record in this matter seeking a scintilla of evidence that would support the allegations contained in Counts One

through Five of the Charges. Despite copious disturbing and often shocking evidence that during the referenced time periods respondent provided dental treatments to unknown individuals on unknown dates that clearly exceeded the parameters of his license, the record is void of any evidence that respondent treated the subject five children on the dates referenced in the Charges. Respondent claims that the arguments advanced by the Department are based on speculation and conjecture, and are not reasonable inferences that can be drawn from the underlying facts. The Hearing Officer agrees.

Although the evidence that respondent frequently provided treatment that exceeded the parameters of his license permits certain inferences and assists in credibility determinations, there must be some scintilla of evidence that respondent treated the children identified in the Charges on or about the dates alleged therein. Absent such evidence, respondent's Motion to Dismiss Counts One, Two, Three, Four, and Five, inclusive, must be and is hereby granted.


Elisabeth Borrino
Hearing Officer
Department of Public Health

November 29, 1999
Date