

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,	)	
BOARD OF DENTISTRY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 97-5692
	)	
MERLE N. JACOBS,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

A final hearing was conducted in this case on March 25, 1998, in West Palm Beach, Florida, before Michael M. Parrish, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas E. Wright, Esquire  
Agency for Health Care Administration  
Post Office Box 14229  
Tallahassee, Florida 32317-4229

For Respondent: Dr. Merle N. Jacobs, pro se  
614 Northwest 8th Avenue  
Delray Beach, Florida 33444

STATEMENT OF THE ISSUE

This is a license discipline case in which the Respondent has been charged in a Corrected Administrative Complaint with a violation of Section 466.028(1)(m), Florida Statutes.

PRELIMINARY STATEMENT

At the final hearing in this case, the Petitioner presented the testimony of one expert witness, Dr. John Jordan, and offered the testimony of the patient by means of a deposition transcript. In addition to the testimony, the Petitioner

offered four exhibits, all of which were received in evidence. The Petitioner testified on his own behalf and also presented the testimony of his wife. The Petitioner also offered one exhibit, which was received in evidence.

At the conclusion of the hearing the parties were allowed ten days from the filing of the transcript within which to file their respective proposed recommended orders. The transcript was filed with the Division of Administrative Hearings on April 20, 1998. On April 29, 1998, the Petitioner filed a timely proposed recommended order. The Respondent requested an extension of time until May 8, 1998. The request was granted. Thereafter, on May 20, 1998, the Respondent filed two letters, one undated and the other dated May 18, 1998,<sup>1</sup> in which he summarizes his view of the case. The post-hearing submissions of all parties have been carefully considered during the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At all times material to this proceeding, the Respondent, Dr. Merle N. Jacobs, has been licensed to practice dentistry in the State of Florida. He currently holds license number DN 0005940.

2. During the period from January 22, 1993, through March 27, 1995, T. C. was a patient of the Respondent. During that period of time, the Respondent performed various dental services for T. C., including the making and fitting of a partial denture.

3. The Respondent prepared and kept dental records and medical history records of his care of patient T. C. The Respondent's records of such care are sufficient to comply with all relevant statutory requirements.

4. The Respondent's records of such care do not include any notations specifically identified or captioned as a treatment plan. The records do, however, include marginal notes of the course of treatment the Respondent intended to follow in his care of patient T. C. Those marginal notes describe the treatment the Respondent planned to provide to patient T. C.

#### CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to these consolidated cases. Section 120.57(1), Florida Statutes.

6. The Petitioner is the state agency charged by statute with regulating the practice of dentistry in the State of Florida.

7. In cases of this nature, proof greater than a mere preponderance of the evidence must be submitted. Clear and convincing evidence is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); McKinney v. Castor, 667 So. 2d 387, 388 (Fla. 1st DCA 1995); Tenbroeck v. Castor, 640 So. 2d 164, 167 (Fla. 1st DCA 1994); Nair v. Department of Business and Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995); Pic N' Save v. Department of Business Regulation, 601 So. 2d 245 (Fla. 1st DCA 1992); Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992); Newberry v. Florida Department of Law Enforcement, 585 So. 2d 500 (Fla. 3d DCA 1991); Pascale v. Department of Insurance, 525 So. 2d 922 (Fla. 3d DCA 1988); Section 120.57(1)(h), Florida Statutes. ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.")

8. "[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

9. The disciplinary action taken against the licensee may be based only upon those offenses specifically alleged in the administrative complaint. See Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Department of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

10. In determining whether Section 466.028(1)(m), Florida Statutes, has been violated in the manner charged in the administrative complaint, one "must bear in mind that it is, in effect, a penal statute. . . . This being true the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

11. The conduct for which disciplinary action may be taken against a licensed dentist includes the following at Section 466.028(1)(m), Florida Statutes:

(m) Failing to keep written dental records and medical history records justifying the course of treatment of the patient including, but not limited to, patient histories, examination results, test results, and X rays, if taken.

12. The Corrected Administrative Complaint issued in the instant case, after allegations identifying the parties, alleges the following:

3. Between January 22, 1993, and March 27, 1995, patient T. C. presented to Respondent for dental care.

4. On or about June 8, 1994, Respondent took impressions for a partial to be anchored to Patient T. C's tooth #12. The partial did not fit properly.

5. On or about September 11, 1994, Respondent took impressions for a partial to replace patient T. C's pre-existing partial.

6. Respondent failed to take radiographs prior to making the aforementioned impressions.

7. Based on the foregoing, Respondent has violated Section 466.028(1)(m), Florida Statutes, by failing to keep written dental records and medical history records

justifying the course of treatment of the patient including, but not limited to, patient histories, examination results, test results, and x-rays, if taken.

13. Notably absent from the above-quoted allegations is any mention of a "treatment plan." Also absent is any mention of Rule 21G-17.002,<sup>2</sup> Florida Administrative Code, which, among other things, requires that dental treatment records contain a "treatment plan proposed by the dentist."

14. In the opinion of the Petitioner's expert, the Respondent's records complied with all requirements, except the rule requirement that the records contain a treatment plan. Such being the case, the evidence is insufficient to prove the statutory violation charged in the Corrected Administrative Complaint.

15. In the opinion of the Petitioner's expert, the Respondent's records failed to comply with the requirements of the above-mentioned rule, because, in his opinion, the records failed to include a treatment plan. Even if proved by the required quality of evidence,<sup>3</sup> such a conclusion could not be a proper basis for disciplinary action against the Respondent, because the Corrected Administrative Complaint does not contain a factual allegation that the records lack a treatment plan, nor does it contain an allegation that the Respondent violated Rule 21G-17.002, Florida Administrative Code. It is a well-established rule of law that disciplinary action cannot be meted out on the basis of violations that are not charged in the administrative complaint. (See the cases cited in paragraph 9, above.) Such being the case, the Corrected Administrative Complaint in this case must be dismissed.

#### RECOMMENDATION

On the basis of all of the foregoing it is RECOMMENDED that a Final Order be issued in this case dismissing all charges against the Respondent.

DONE AND ENTERED this 29th day of May, 1998, in Tallahassee, Leon County, Florida.

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MICHAEL M. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of May, 1998.

#### ENDNOTES

1/ The letter dated May 18, 1998, explains that the undated letter was timely mailed. For unknown reasons, the original of the undated letter was never received by the Division of Administrative Hearings. The Respondent's post-hearing submissions have been treated as timely-filed.

2/ Rule 21G-17.002, Florida Administrative Code, has since been renumbered as Rule 64B5-17.002.

3/ In any event, the greater weight of the evidence in this case is to the effect that the Respondent's marginal notations are sufficient to comply with the "treatment plan" requirement of Rule 21G-17.002. In this regard, I have found the Respondent's testimony to be more persuasive than the testimony of the Petitioner's expert. Although the Petitioner's expert expressed the unexplained opinion that the subject records did not contain a treatment plan, he did not explain the basis for that opinion, and he was not recalled to express any opinion on the Respondent's assertion that the marginal notes were sufficient to comply with the "treatment plan" requirement of Rule 21G-17.002.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.