

STATE OF FLORIDA  
BOARD OF DENTISTRY

GREGORY K. BARFIELD,

Petitioner,

vs.

DOAH CASE NO.: 99-4052

DEPARTMENT OF HEALTH, BOARD  
OF DENTISTRY,

Respondent.  
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FINAL ORDER

THIS MATTER was heard by the Board of Dentistry pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on March 3, 2000, in Jacksonville, Florida, for consideration of the Recommended Order entered by Linda M. Rigot, Administrative Law Judge, dated January 26, 2000 (a copy of which is attached as Exhibit A). At the hearing, Petitioner was present. Respondent was represented by Joy Myrick, Senior Attorney. Upon consideration of the Administrative Law Judge's Recommended Order, after review of the entire record and having been otherwise fully advised in its premises, the Board makes the following findings and conclusions.

RULINGS ON EXCEPTIONS FILED BY RESPONDENT

1. Respondent filed exceptions to the Administrative Law Judge's Findings of Fact and Conclusions of Law. A copy of said exceptions is attached as Exhibit B, and by reference incorporated herein. Respondent takes exception to those portions in Findings of Fact 5 and 7 that allude to a monitor motioning to Petitioner to place a note at the monitor's station and to the existence of a monitor note generated by Petitioner. The Board accepts the exceptions, finding that there is no competent substantial evidence to demonstrate that a monitor note existed. There is no record of a monitor's note in Petitioner's file. The transcript of the hearing (T-106) and the deposition of Marsha Carnes, at page 17, support this. Furthermore, Petitioner's testimony as to the monitor's nonverbal conduct was hearsay, since such nonverbal conduct was intended as an assertion.

2. Respondent further takes exception to the Findings of Fact at paragraphs 6, 7, and 10 concerning the existence of "dead tracts" in the patient on whom Petitioner performed the amalgam cavity preparation procedure. As found by the Administrative Law Judge, a dead tract is a rare dental defect. Petitioner testified that the only "dead tract" he ever saw previously was in dental school. Two of the three examiners, all of which must be Florida licensed dentists with a minimum of 5 years in practice, commented "caries" on their grade sheets. The Clinic monitor, also a Florida licensed dentist, indicated his agreement with the examiners that caries remained. The only evidence that the patient had "dead tracts" is the obviously interested testimony of Petitioner. Even assuming, arguendo, that caries did not remain, there is competent substantial evidence of serious deficiencies in Petitioner's performance of the amalgam cavity preparation procedure. (Respondent's Exhibits 9 and 10). Therefore, a finding that Petitioner properly performed the amalgam cavity preparation and that he should receive full points is not supported by competent substantial evidence, and the Board accepts the exceptions.

3. Respondent further takes exception to portions of Findings of Fact in paragraphs 8, 9, and 10. There was competent substantial evidence to conclude that Petitioner perforated the tooth during the endodontic procedure. One examiner clearly noted that a perforation in the pulp chamber was found. Respondent's expert witness examined the actual tooth at issue and saw the perforation himself (T101-103). Petitioner's testimony standing alone cannot constitute a preponderance of the evidence on this issue. Even assuming that finding that a perforation did not occur is appropriate, the comments of two of the three examiners indicate that there were problems with "access preparation." The finding that Petitioner properly performed the procedure and should receive full points for it is therefore not supported by competent substantial evidence, and the Board accepts the exceptions.

4. Respondent objects to the Conclusions of Law contained in paragraphs 15 and 16 that the Department presented no competent substantial evidence as to the work performed during the clinical portion of the examination and that the grade documentation sheets and grade sheets admitted into evidence without objection are hearsay and cannot form the basis for a finding of fact as to what happened during the examination.

5. Such a conclusion is clearly erroneous as a matter of law since these records are admissible as public records and reports under 90.803(8), F.S. It is the Board's opinion that these grade documentation sheets and grade sheets constitute "reports . . . of matters observed pursuant to duty imposed by

law as to matters which there was a duty to report. . . ." since the examiners reduced their statements to writing while observing the Petitioner taking an examination, pursuant to §455.574 and 466.006, F.S., and rule 64B5-2.013 and 2.020, F.A.C.

6. The Board further opines that these documents are also admissible as a record of regularly conducted business activity under §90.803(6), F.S. Public records may be admissible under the business records exception. Adams v. State, 521 So.2d 337 (Fla. 4th DCA 1988). The Administrative Law Judge acknowledges in paragraph 16 that the Department presented the testimony of two witnesses that "testified as to how graders are selected and trained, how the examination is administered in general, and as to the contents of grade sheets and other grade documentation forms." This testimony provided the necessary foundation to demonstrate that the records were made "at or near the time by a person with knowledge" and that said records are kept in the course of the Department's regularly conducted activities. In order to lay a foundation for the admission of a business record, it is necessary to call a witness who can show that each of the foundational requirements in the statute is present, but it is not necessary to call the person who actually prepared the document. Forester v. Norman, Roger. Jewell & Brooks 610 So.2d 1369 (Fla 1st DCA 1992). There is no finding by the Administrative Law Judge of any circumstances that would show lack of trustworthiness in the records. It is the Board's opinion that these records would have been admissible over objection in a civil action.

7. The Board is aware that pursuant to §1 20.57(1)(1), F.S., it may reject or modify only those conclusions of law over which it has substantive jurisdiction. The Board acknowledges that it does not have substantive jurisdiction over the Florida Evidence Code. Nevertheless, under the particular facts of this case, the Board concludes that the proceedings under which the Administrative Law Judge made the challenged findings of fact and conclusions of law did not comply with essential requirements of law. Specifically, the Board finds that the Administrative Law Judge received evidence without any objection by Petitioner as to its admissibility, and that the Administrative Law Judge gave absolutely no indication of concern as to its admissibility or as to any problem with the lack of foundation for its use. Several weeks later, in the Recommended Order, the Administrative Law Judge rejected this evidence as hearsay. This procedure prejudiced the Department:

"In an evidentiary proceeding, it is unfair to a party who offers evidence to have it received by the fact finder without objection from the adversary or without any limitation

by the fact finder only to discover later that its evidence- was secretly rejected. This could all be avoided simply by requiring the hearing officer to determine these issues before the evidence is closed." BAPCO v. Unemployment Appeals Commission, 654 So.2d 292, at 297, (Fla 5th DCA 1995)

8. The Board further finds that the Administrative Law Judge assigned an improper burden of proof to the Department. When an applicant challenges the grades he received on a professional licensing examination he must show by a preponderance of evidence that the grades in issue were arbitrarily or capriciously given by the examining agency. State ex rel Glasser v. Pepper, 155 So.2d 383 (Fla. 1st DCA 1963). See also In re Altchiler, 4 FALR 724A Fla. Bd of Dentistry, Final Order dated 1/16/82); In re Chokhawala, (Fla. Bd of Dentistry, Final Order dated 11/15/82). Absent some showing that the examining agency failed to follow standard procedures for conducting and/or grading the examination, or that the candidate was treated differently from other examination candidates, test results will not be disturbed. In re Corda, (Fla. Bd. of Architecture, Final Order dated 9/28/82). See generally Balino v. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla 1st DCA 1977). In the present case, Petitioner did not carry his burden of proof. The Administrative Law Judge instead implicitly imposed on the Department the burden of disproving Petitioner's allegations by bringing in the actual examiners who examined Petitioner! No reported case has ever assigned such a burden of proof. For example, in Gage v Department of Health, Board of Dentistry, DOAH Case No. 97-2518, the exact same two expert witnesses who testified in this case testified as experts in that case. Dr. Thomas Shields examined the procedures, documents and x-rays involved, and testified as to the candidate's deficiencies in the examination. It is clear from the Order in Gage that the same grade documentation sheets and grade sheets this Administrative Law Judge finds to be "hearsay" were admitted and relied upon by that Administrative Law Judge to render a ruling.

9. The Board acknowledges that a rejection or modification of a conclusion of law may not form the basis of for rejection or modification of a finding of fact. However, under the particular facts of this case, the failure to comply with essential requirements of law by ignoring competent substantial evidence after the fact under the guise of a conclusion of law permeates both the findings of fact and conclusions of law.

#### FINDINGS OF FACT

10. The Administrative Law Judge's Findings of Fact in paragraphs 1, 2, 3, and 4 are approved and adopted and are incorporated herein by reference.

11. The Board adopts Respondent's Exceptions To Findings Of Fact and the Rulings on Exceptions in paragraphs 1- 3 above as the remaining Findings of Fact. There is competent, substantial evidence to support the Board's findings.

#### CONCLUSIONS OF LAW

12. The Board has jurisdiction of the parties and subject matter of this case pursuant to Sections 120.569 and 120.57, Florida Statutes, and Chapter 466, Florida Statutes.

13. The Administrative Law Judge's Conclusions of Law in paragraphs 11 and 12, as well as the first sentence in paragraphs 13 and 14 are approved and adopted and are incorporated herein by reference.

14. The Board adopts Respondent's Exceptions To Conclusions of Law and the Rulings on Exceptions in paragraphs 4- 8 above as the remaining Conclusions of Law. There is competent, substantial evidence to support the Board's conclusions.

15. The Board rejects the Administrative Law Judge's recommendation.

WHEREFORE, it is ORDERED AND ADJUDGED that the Petitioner did not achieve a passing score on the June 1999 dental licensure examination.

This Final Order becomes effective upon its filing with the Clerk for the Department of Health.

The parties are hereby notified that they may appeal this Final Order by filing one copy of a Notice of Appeal with the Clerk of the Department of Health and by filing a filing fee and one copy of a Notice of Appeal with the District Court of Appeal within thirty (30) days of the date this Final Order is filed.

DONE AND ORDERED this 27th day of March, 2000.

BOARD OF DENTISTRY

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SOLOMON G. BROTMAN, D.D.S.  
CHAIRMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been forwarded by United States Mail this 31st day of March, 2000, to Gregory K. Barfield, 2555 Collins Road, Penthouse 114, Miami Beach, FL 33140, and hand delivered to Joy Myrick, Staff Attorney, Department of Health, 2020 Capital Circle SE, Bin A02, Tallahassee, Florida 32308, and by interoffice mail to Linda M. Rigot, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060.

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CONNIE SINGLETARY