

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
DENTISTRY,

Petitioner,

vs.

Case No. 13-3286PL

PASQUALE ALMERICCO, JR., D.D.S.,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Administrative Law Judge Edward T. Bauer held a final hearing in this case by video teleconference between sites in Miami and Tallahassee, Florida, on November 8, 2013, and in Tallahassee, Florida, on April 9, 2014.

APPEARANCES

For Petitioner: Gail Scott Hill, Esquire  
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For Respondent: Max R. Price, Esquire  
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the allegations contained in the Amended Administrative Complaint and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On May 28, 2013, Petitioner, Department of Health, Board of Dentistry, filed an Amended Administrative Complaint ("Amended Complaint") against Respondent, Dr. Pasquale Almerico. The Amended Complaint, which comprises one count, alleges that Respondent violated section 466.028(1)(x), Florida Statutes (2009), in that his treatment of patient P.D. fell below the appropriate standard of care in one or both of the following ways: by failing to remove existing carries (i.e., decay) on tooth number 20 before seating a bridge at teeth numbers 19, 20, and 21; and/or by failing, subsequent to the seating of the bridge, to take x-rays or otherwise rule out endodontic involvement in response to repeated complaints of dental pain.

Respondent timely requested a formal hearing to contest the allegations and, on August 29, 2013, the matter was referred to the Division of Administrative Hearings ("DOAH") and assigned to Administrative Law Judge John G. Van Laningham. On November 7, 2013, Judge Van Laningham transferred this cause to the undersigned for further proceedings.

As noted above, the final hearing in this matter was held on November 8, 2013, and April 9, 2014, during which Petitioner presented the testimony of Dr. Solomon Brotman and introduced eight exhibits, numbered 1 through 8.<sup>1/</sup> Respondent testified on

his own behalf, presented the testimony of Dr. Robert Fish, and introduced ten exhibits, numbered 3 through 5, and 7 through 13.

The final hearing Transcript of the April 9, 2014, proceedings was filed with DOAH on April 30, 2014. (The Transcript of the first day of final hearing was filed on November 27, 2013.) Thereafter, at Respondent's request, the undersigned extended the deadline for the submission of proposed recommended orders to June 2, 2014. Both parties submitted proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### A. The Parties

1. Petitioner Department of Health has regulatory jurisdiction over licensed dentists such as Respondent. In particular, Petitioner is authorized to file and prosecute an administrative complaint, as it has done in this instance, when a panel of the Board of Dentistry has found probable cause exists to suspect that the licensee has committed one or more disciplinable offenses.

2. Respondent Pasquale Almerico, Jr., a graduate of the University of Pennsylvania School of Dental Medicine, has been licensed to practice dentistry in the State of Florida since 1984. Respondent's address of record is 704 North Alexander Street, Plant City, Florida.

B. The Events

3. On February 16, 2010, patient P.D., a 60-year-old female, presented to Respondent's dental office to discuss the replacement of a partial, removable denture that was causing discomfort. The partial denture, which another dentist installed some 15 years earlier to fill the gaps created by lost teeth in the lower-left portion of P.D.'s mouth—specifically, teeth numbers 18 and 19—was secured by a metal “C-clasp” attached to tooth number 20.

4. Noticing immediately that the partial denture was ill fitting, Respondent recommended its replacement with a three-unit cantilever bridge at teeth numbers 19, 20, and 21. As explained during the final hearing, a cantilever is a type of fixed bridge that attaches to adjacent teeth on one end only. Thus, in this instance, abutment crowns on teeth numbers 20 and 21 would connect to a pontic (an artificial tooth) extending into the gap formerly occupied by tooth number 19.

5. P.D. consented to the suggested treatment during the February 16 office visit, at which point Respondent removed the existing crown on tooth number 20, took a radiograph of the relevant area, and performed a thorough clinical examination of teeth numbers 20 and 21. Although Respondent observed some abrasion<sup>2/</sup> on the distal surface of tooth number 20 where the C-clasp of the partial denture had been attached, the teeth

otherwise appeared healthy—i.e., neither Respondent's direct visualization of the teeth nor his review of the radiograph suggested the presence of decay.

6. At the conclusion of the February 16 visit, Respondent prepared teeth numbers 20 and 21 (a process that involves the use of a drill to remove enough enamel from the teeth so that the bridge will fit properly), took a final impression, and provided P.D. with a temporary bridge.

7. P.D. returned to Respondent's office on March 3, 2010, at which time Respondent removed the temporary bridge and performed a "try-in" with the metal framework of the new bridge. During this process, Respondent directly visualized tooth number 20 and, as was the case during the previous visits, observed no signs of decay.<sup>3/</sup> However, Respondent noticed that the metal framework would not seat correctly, which prompted him to take a new impression.

8. Thereafter, on March 10, 2010, Respondent removed P.D.'s temporary bridge and conducted a try-in with the new metal framework—affording him a third opportunity to visualize tooth number 20. Once again, Respondent observed no indications of decay or any other issues. Of the opinion that the second impression had yielded a satisfactory framework, Respondent scheduled P.D. to return at a later date for the seating of her new bridge.

9. Upon P.D.'s return on March 24, 2010, Respondent removed the temporary bridge and directly visualized tooth number 20 for a fourth time; no decay was observed. Respondent then proceeded to seat the cantilever bridge, which fit well and caused the patient no discomfort. At that point, it was anticipated that P.D. would follow up with Respondent in six months for routine cleaning and maintenance.

10. As it happens, though, P.D. returned to Respondent's office a mere five days later, on March 29, 2010. During the visit, P.D. reported that her new bridge was "hurting" and that she was feeling "pressure constantly." Notably, however, P.D. denied that the pain was of such intensity that it kept her awake at nighttime, which militated against a conclusion that the patient was suffering from an abscess.<sup>4/</sup>

11. In response to P.D.'s complaints, Respondent adjusted and flossed the bridge. That an adjustment was made so soon after the bridge's seating, although less than optimal, was by no means unusual; indeed, Petitioner's expert witness concedes that neither the timing of the March 29 visit nor P.D.'s report of pressure necessitated a clinical examination or the taking of an x-ray on that date.<sup>5/</sup>

12. Nine days later, on April 7, 2014, P.D. appeared at Respondent's office once again, this time with the complaint that she was biting her cheek. During the clinical examination

that ensued, Respondent surmised that the cheek biting, if any, had been caused by a different, aging bridge located in the upper left of P.D.'s mouth (at teeth numbers 11 through 14).<sup>6/</sup> Respondent did, however, notice that the new bridge was hitting high, which prompted him to make a minimal adjustment using a rubber wheel.

13. Although Petitioner contends that Respondent should have taken an x-ray during the April 7 visit to rule out an abscess, the evidence demonstrates that P.D. exhibited none of the clinical symptoms sometimes attendant to such a condition. Save for her report of "cheek biting," P.D. presented with no complaint of severe—or, for that matter, any—pain,<sup>7/</sup> nor did she exhibit any discomfort during the adjustment. Moreover, P.D. did not react adversely when Respondent used the end of his examination mirror to perform percussion on the bridge. Finally, Respondent detected no inflammation below the gum line.

14. Subsequently, on April 13, 2010, P.D. returned to Respondent's office and reported that the new bridge was "catching her lip." P.D. complained of no other pain relating to the new bridge, and Respondent's clinical examination yielded no indications (e.g., thermal sensitivity or sensitivity to percussion) that the patient was suffering from an abscess.<sup>8/</sup> Owing to the dearth of symptoms suggestive of endodontic involvement, Respondent determined that an x-ray was

unnecessary. However, Respondent made a minimal adjustment to the new bridge and sent P.D. on her way, with the expectation that the patient would return in six months for a follow-up visit.

15. Although P.D. would return a mere six days later, on April 19, 2010, her complaints at that time related only to the aging bridgework at teeth numbers 11 through 14 (seated years earlier by another dentist), which Respondent discovered was "hitting hard." Significantly, P.D. raised no issues concerning her new bridge at teeth numbers 19 through 21, and Respondent's examination revealed, yet again, no signs of endodontic involvement.<sup>9/</sup> As such, Respondent did nothing more than make a slight adjustment to the bridge at teeth numbers 11 through 14.<sup>10/</sup>

16. Soon thereafter, P.D. scheduled another appointment and returned to Respondent's office on April 27. On this occasion, as with the previous visit, P.D. voiced no complaints concerning her new bridge, and Respondent observed no signs of inflammation, cheek biting, or any problems. This time, however, P.D. accused Respondent of "breaking" the bridgework at teeth numbers 11 through 14 and suggested that he provide a replacement free of charge.

17. Respondent was understandably dismayed by P.D.'s demand, for he had never caused any damage to the 11 through 14



bridge; moreover, the bridge in question, although in poor condition, was by no means "broken." At that point, Respondent terminated his relationship with P.D.

C. Expert Testimony

18. As noted previously, Petitioner advances two unrelated theories in support of its charge that Respondent violated the minimum standard of care. First, Petitioner contends that, prior to the seating of the new bridge on March 24, 2010, Respondent failed to treat decay supposedly present on the distal surface (i.e., the part of the tooth that faces the back of the mouth) of tooth number 20. In light of Respondent's concession that the standard of care requires the removal of existing decay prior to the seating of a bridge, Petitioner's first theory boils down to a factual dispute over whether decay was present on tooth number 20 on March 24, 2010.

19. In an attempt to establish the presence of decay, Petitioner adduced testimony from Dr. Solomon Brotman, an eminently qualified dentist with more than 30 years of practical experience. Although Dr. Brotman concedes that he never clinically examined P.D., he nevertheless maintains that the presence of "substantial" decay on tooth number 20 is demonstrated by x-rays in Respondent's possession when the bridge was seated.<sup>11/</sup> Dr. Brotman further opines that the x-rays of tooth number 20 are not reasonably susceptible to any other

interpretation (e.g., abrasion or erosion), and that Respondent may have missed the decay because it is "sometimes" tooth colored. Finally, Dr. Brotman asseverates that, in cases involving interproximal decay, it is appropriate to make a diagnosis based solely on an x-ray.

20. Respondent counters with testimony from Dr. Robert Fish, an expert with an equally impressive background, who credibly asserts that the x-rays in question are not suggestive of decay but, rather, abrasion<sup>12/</sup> that likely resulted from the ill-fitting "C-clasp" of the removable partial denture—an opinion that jibes with Respondent's persuasive testimony that he observed abrasion on the distal surface of tooth number 20. Dr. Fish further contends that, had decay been present, it is highly unlikely that Respondent would have missed it given the number of times he directly visualized tooth number 20 prior to the seating.<sup>13/</sup>

21. The short of it is that decay quite possibly existed on the distal surface of tooth number 20 at the time Respondent seated the bridge. However, Respondent's persuasive account of his clinical observations of the tooth, buttressed by the credible testimony of Dr. Fish, leaves the undersigned with substantial doubt on this point. As such, Petitioner has failed to sustain its burden of proof.

22. The undersigned now turns to Petitioner's alternative theory, namely, that "continuing, localized dental pain" required Respondent to rule out the possibility of an abscess at the root of tooth number 20. In relevant part, the Amended Complaint alleges:

23. Continuing, localized dental pain is a symptom of endodontic involvement.

24. Minimum standards of diagnosis and treatment in the practice of dentistry require that when a patient complains of continued dental pain, a dentist take radiographic images of the symptomatic area to determine whether there is endodontic involvement. . . .

26. Patient appointed with Respondent for relief of pain five times [after the bridge was seated] . . . .

27. Respondent Dr. Almerico did not take radiographs of that area or otherwise rule out endodontic involvement during those visits.

28. By failing to take radiographic images to determine possible endodontic involvement at bridge #19-21, Respondent failed to meet minimum standards of dental diagnosis and treatment when measured against generally prevailing peer performance.

(emphasis added).

23. Fairly read, the Amended Complaint alleges the standard of care as follows: when a patient reports continuing, localized dental pain, a practitioner must take an x-ray of the symptomatic area or otherwise rule out endodontic involvement.

24. As Respondent correctly argues, however, the testimony of Petitioner's expert departs substantially from the theory pleaded in the charging document. First, contrary to paragraph 27 of the Amended Complaint, which alleges a failure to take x-rays "or otherwise rule out" an abscess, Dr. Brotman's formulation of the standard of care absolutely requires the taking of an x-ray to eliminate the possibility of endodontic involvement. To muddy the waters further, Dr. Brotman's articulation of the prevailing standard at times focused not on P.D.'s supposed reports of continued pain but, rather, the fact that Respondent made more than one adjustment to the new bridge subsequent to its seating:

A Sure. I think we fell below the minimum standards on 4/7, 4/13 and 4/19 of 2010, because each of those visits, because the patient came back with the bite having shifted, which for that reason Dr. Almerico continued to adjust the bite on each visit.

\* \* \*

BY MR. PRICE:

Q Doctor, you just gave an opinion that is the standard of care that a patient with more than one adjustment, they automatically get an X-ray. You just gave that as a standard-of-care opinion, didn't you?

A Yes, sir.

(emphasis added).<sup>14/</sup>

25. In light of the significant degree to which Dr. Brotman's testimony deviates from the theory charged in the Amended Complaint, it is concluded that Petitioner has failed to convincingly articulate the minimum standard of performance against which the undersigned, as fact-finder, can independently evaluate Respondent's conduct.

26. Even assuming that Petitioner had established the standard of care (as pleaded), there is a dearth of credible evidence that P.D. presented with continuing, localized pain relating to the new bridge. As detailed previously, P.D.'s report on April 7 that she was "biting her cheek" involved the older bridge at teeth numbers 11 through 14; on her next visit, she complained only that her new bridge was "catching her lip"; on April 19, P.D. merely informed Respondent that the older bridge was "hitting hard"; and, on her final visit, P.D. complained of nothing at all (save for her dubious request for a free replacement of the older bridge).<sup>15/</sup> Such hardly constitutes a pattern of ongoing, localized pain.

27. In any event, the persuasive evidence demonstrates that Respondent "otherwise ruled out" endodontic involvement through his clinical observations. Indeed, as Dr. Fish persuasively explained during his testimony, P.D. presented with none of the symptoms<sup>16/</sup> sometimes associated with the presence of an abscess—e.g., sensitivity to temperature, exquisite pain,

sensitivity to percussion, a fistula, or inflammation—during the office visits of April 7, 13, 19, and 27, 2010, thereby obviating the need for an x-ray.

D. Ultimate Factual Determinations

28. It is determined, as a matter of ultimate fact, that Respondent is not guilty of violating section 466.028(1)(x).

CONCLUSIONS OF LAW

A. Jurisdiction

29. DOAH has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes (2013).

B. The Burden and Standard of Proof

30. This is a disciplinary proceeding in which Petitioner seeks to discipline Respondent's license to practice dentistry. Accordingly, Petitioner must prove the allegations contained in the Amended Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

31. Clear and convincing evidence:

[R]equires 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. Statutory Construction/Notice

32. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee.").

33. Due process prohibits an agency from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument. § 120.60(5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action . . . ."); Trevisani v. Dep't of Health, 908

So. 2d 1108, 1109 (Fla. 1st DCA 2005) ("A physician may not be disciplined for an offense not charged in the complaint"); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992) ("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated"); Dep't of Fin. Servs. v. Calvo, Case No. 07-5648PL, 2008 Fla. Div. Adm. Hear. LEXIS 820, \*24 (Fla. DOAH July 24, 2008) ("Such a theory, however, cannot support a finding of guilt in the instant case inasmuch as it was not advanced in the Administrative Complaint"); Dep't of Ins. & Treasurer v. Gottlieb, Case No. 92-1902, 1993 Fla. Div. Adm. Hear. LEXIS 5893, \*6 (Fla. DOAH July 26, 1993) ("Agencies cannot take disciplinary action against a licensee on the basis of . . . legal theories not asserted in the Administrative Complaint.").

D. The Charge Against Respondent

34. With the foregoing principles in mind, the undersigned turns to Count I of the Amended Complaint, which charges Respondent with violating section 466.028(1)(x), a provision that subjects a licensee to discipline for:

Being guilty of incompetence or negligence by failing to meet the minimum standards of performance in diagnosis and treatment when measured against generally prevailing peer performance, including . . . dental malpractice.



35. As discussed earlier, Petitioner advances two unrelated theories in support of the charge: that Respondent failed to remove decay from tooth number 20 prior to seating the new bridge at teeth 19 through 21; and/or that Respondent neglected to take an x-ray or otherwise rule out endodontic involvement in response to an alleged pattern of localized dental pain.

36. For the reasons elucidated previously, Petitioner's first theory fails as a matter of fact, as there is an absence of clear and convincing evidence that decay existed on tooth number 20 at the time the bridge was seated.

37. Petitioner's second theory fares no better, for, as explained above, the testimony of its expert concerning the minimum standard of care departed significantly from the theory advanced in the Amended Complaint. Further, even if the standard articulated in the charging document had been proven clearly and convincingly, the credible evidence establishes that, notwithstanding the lack of an x-ray, the possibility of endodontic involvement was "otherwise" ruled out by virtue of Respondent's clinical observations.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the

Board of Dentistry dismissing Count I of the Amended  
Administrative Complaint.

DONE AND ENTERED this 9th day of July, 2014, in  
Tallahassee, Leon County, Florida.



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EDWARD T. BAUER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of July, 2014.

ENDNOTES

<sup>1/</sup> The deposition transcript of Patient P.D. (identified as  
Petitioner's Exhibit 7) has been received in lieu of the  
witness' live testimony.

<sup>2/</sup> Nov. 8, 2013, Hr'g Tr. 131:12-133:3.

<sup>3/</sup> Nov. 8, 2013, Hr'g Tr. 142:24-143:12.

<sup>4/</sup> Nov. 8, 2013, Hr'g Tr. 149:7-13; Apr. 9, 2014, Hr'g Tr.  
51:14-52:3. P.D.'s testimony to the contrary is rejected in  
favor of Respondent's account.

<sup>5/</sup> Nov. 8, 2013, Hr'g Tr. 43:24-25.

<sup>6/</sup> Nov. 8, 2013, Hr'g Tr. 152:12-153:8.

<sup>7/</sup> Nov. 8, 2013, Hr'g Tr. 153:9-12.

<sup>8/</sup> Nov. 8, 2013, Hr'g Tr. 166:20-167-5.

<sup>9/</sup> Nov. 8, 2013, Hr'g Tr. 168:8-14; 169:15-170:3.

<sup>10/</sup> Within hours of her April 19 office visit, P.D. telephoned Respondent and advised that she was "biting the inside of her cheek"—a complaint she never mentioned during the appointment. To alleviate any discomfort to P.D.'s cheek, Respondent recommended Ibuprofen and salt water rinses.

<sup>11/</sup> To a lesser extent, Dr. Brotman's opinion is also based on notations of decay found in the records of three other dentists: Dr. Digamon, whose treatment of P.D. predated that of Respondent; and Drs. Crim and Kantwill, who saw P.D. (with the new bridge still cemented in place) more than four months after Respondent terminated his relationship with the patient. Notably, however, Dr. Brotman admits that he is without knowledge as to whether these practitioners clinically confirmed the existence of decay. Nov. 8, 2013, Hr'g Tr. 62:3-25; 95:2-4; 97:24-98:6. Thus, on this record, there is no evidence that anyone other than Respondent—a dentist with more than 25 years of practical experience—had occasion to directly visualize the distal surface of tooth number 20.

<sup>12/</sup> Apr. 9, 2014, Hr'g Tr. 19:14-17; 24:24-25:6.

<sup>13/</sup> Apr. 9, 2014, Hr'g Tr. 39:22-40:3.

<sup>14/</sup> Nov. 8, 2013, Hr'g Tr. 45:24-46:3; Apr. 9, 2014, Hr'g Tr. 191:11-16.

<sup>15/</sup> P.D.'s testimony that she repeatedly complained of extreme pain is rejected in favor of Respondent's recounting of the events, which the undersigned credits in its entirety.

<sup>16/</sup> Apr. 9, 2014, Hr'g Tr. 50:18-51:7; 52:19-25; 53:4-8.

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.