

**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. 09-32-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 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 Michael Tornow, D.M.D. on April 23, 2009. The complaint was also signed by New Mexico-licensed dentists Aaron Rasmussen, D.D.S., Cody Coleman, D.D.S., Christian Anderson, D.D.S., Todd Wahlin, D.D.S., and Kendell Buxton, D.D.S.

5. The complaint alleges that the Respondent is engaging in gross incompetence and unprofessional conduct in the practice of dentistry. [Ex. 3]. Dr. Kottke sent the Board his patient records on March 24, 2009. [Id.].

6. On or about April 18, 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].

7. 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 June 1, 2011 Board staff notified Respondent that no hearing would be held. [Ex. 1]. The letter dated June 1, 2011 is included as Administrative Record Attachment 3, but was not introduced or admitted as an exhibit.

8. On June 27, 2011, Respondent requested the Board to reopen his case and allow a hearing. Although not required by law, the Board granted the request to reopen and set a hearing date for September 23, 2011. The letter dated June 27, 2011 is included as Administrative Record Attachment 4, but was not introduced or admitted as an exhibit. Notice of the September 23, 2011 hearing is included as Administrative Record Attachment 5, but was not introduced or admitted as an exhibit.

9. The September 23, 2011 hearing was reset at the request of Respondent to November 5, 2011. [Ex. 12].

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

11. 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.

12. 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.

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

14. Michael Tornow, D.M.D., License No. DD2287, is currently licensed to practice general dentistry in the State of New Mexico. He has held this license since August 7, 2002. He is in private practice in Farmington, New Mexico.

15. Aaron Rasmussen, D.D.S., License No. DD3016, is currently licensed to practice general dentistry in the State of New Mexico. He has held this license since July 28, 2008. He is in private practice in Farmington, New Mexico.

16. Cody Coleman, D.D.S., License No. DD2872, is currently licensed to practice general dentistry in the State of New Mexico. He has held this license since May 4, 2007. He is in private practice in Farmington, New Mexico.

17. Christian Anderson, D.D.S., License No. DD2981, is currently licensed to practice general dentistry in the State of New Mexico. He has held this license since April 29, 2008. He is in private practice in Farmington, New Mexico.

18. Todd Wahlin, D.D.S., License No. DD2459, is currently licensed to practice general dentistry in the State of New Mexico. He has held this license since January 16, 2004. He is in private practice in Farmington, New Mexico.

19. Kendell Buxton, D.D.S., License No. DD3013, is currently licensed to practice general dentistry in the State of New Mexico. He has held this license since July 11, 2008. He is in private practice in Farmington, New Mexico.

Patient MN

20. Patient MN became a patient of Respondent in 2006. Patient MN was seen at least 11 times by Respondent between 2006 and 2008.

21. Respondent did not complete a comprehensive examination on Patient MN and no treatment was completed on patient MN chart prior to fabrication of an upper complete denture.

22. Respondent fabricated a new upper complete denture for Patient MN in 2007.

23. Respondent did an examination and panoramic radiograph on patient MN in 2008.

24. There is no treatment plan in the dental chart for Patient MN following this examination. There are no notes indicating decay in any of the remaining lower teeth and no notes indicating the presence of calculus on any remaining teeth. Calculus is hard calcium-like deposits that form on teeth due to inadequate plaque control. It is also called tartar. Calculus must be mechanically removed by a dental professional during scaling.

25. Respondent fabricated a new lower partial denture for Patient MN in 2008 without performing any dental cleaning or restorations. Restoration is the replacement of a portion of damaged tooth.

26. On February 2009, Patient MN presented to Country Club Dental for an examination and radiographs. Country Club Dental diagnosed multiple areas of decay on the

remaining lower teeth and calculus remaining on the lower remaining teeth that the removable partial denture had been constructed over.

27. Country Club Dental also found the dentures for Patient MN to be “ill-fitting.”

28. Radiographs from Respondent show caries and calculus present prior to fabrication of the lower partial denture for Patient MN.

29. Respondent testified that Patient MN “wanted teeth quickly to chew” that is why he did not perform any other procedures prior to fabricating the dentures.

Patient TJ

30. Patient TJ has been a patient of Dr. Kottke’s since June 2005. Patient TJ was seen at least 13 times by Respondent between 2005 and 2008.

31. Patient TJ has had examinations, radiographs, cleanings, restorations, root canal treatment and crowns placed by Respondent.

32. Respondent placed a restoration on Patient TJ’s tooth #2 in 2005.

33. Patient TJ returned to Respondent complaining of pain in tooth #2. Notes from October 18, 2006 indicate a periapical (PA) x-ray was taken of tooth #2, but Respondent could not find the x-ray at the hearing. A periapical x-ray shows the root, tooth and surrounding bone. There are no chart notes in the Respondent’s record regarding decay in Patient TJ’s tooth #2 or treatment needed for this tooth.

34. On October 20, 2006, Patient TJ presented to Country Club Dental for a second opinion on tooth #2.

35. The radiograph from Country Club Dental taken on October 20, 2006 shows extensive decay into the pulp of tooth #2. Pulp is the living part of the tooth and contains the nerve tissue. Dr. Cody Coleman, D.D.S. testified that the decay was so extensive that tooth #2 had to be extracted. [Ex. 5].

36. Patient TJ returned to Respondent for treatment, and on May 2, 2008 Respondent placed a crown on tooth #19.

37. Patient TJ had temperature sensitivity on tooth #19 and returned to Respondent on September 11, 2008. Respondent prescribed Anaprox DS. There are no other chart notes regarding any further treatment for tooth #19

38. Patient TJ presented to Country Club Dental on September 30, 2008 regarding tooth #19. A radiograph taken at Country Club Dental revealed an open mesial margin on the crown on tooth #19. Mesial is the anterior surface of the tooth. The margin is where the crown

and tooth meet. An open margin means there is a gap between the tooth and crown that should not be there.

39. Respondent testified that he did not see an open margin on Patient TJ's tooth #19.

Patient TM

40. Patient TM has been a patient of Respondent's since 1994. Patient TM was seen more than 30 times for examinations, cleanings, radiographs and treatment from 1994 to 2003.

41. Respondent's chart notes indicate root canal treatment was completed on tooth #19 in 1996 by Dr. George Cathy, D.D.S, License No. DD1155. Respondent placed a crown on tooth #19 following the root canal treatment. Dr. Cathy is the dentist of record in Dr. Kottke's note dated 3/14/96. No further information about Dr. Cathy was provided by Dr. Kottke.

42. Respondent testified that Dr. Cathy sent Patient TM's post-treatment notes and radiographs to him after treatment, but Respondent could not locate the post-treatment notes for Patient TM at the hearing.

43. On January 6, 2004, Respondent placed a crown on tooth #20 for Patient TM.

44. On August 17, 2006, Patient TM presented to Country Club Dental for an examination and radiographs.

45. Radiographs from Country Club Dental show grossly incomplete and short margins on the crown on Patient TM's tooth #20.

46. Dr. Michael Tornow, D.M.D. also testified to the incomplete margins on Patient TM's crown #20 and to the fact that tooth #19 did not have a crown build-up and was filled with cotton pellets under the crown. [Ex. 8].

Patient JP

47. Patient JP has been a patient of Respondents since December 2, 1994.

48. Patient JP was seen more than 35 times for examinations, cleanings, radiographs, fillings, crowns and extractions from 1994 to 2009.

49. Respondent treated tooth #15 on Patient JP three times from 2006-2009. The last treatment was on April 9, 2009 when the Respondent placed restorations on teeth #15 and #29.

50. On April 13, 2009 Patient JP presented to Country Club Dental for an evaluation on teeth #15 and #29. Dr. Michael Tornow, D.M.D. testified that the patient was in pain for the whole weekend and unable to contact Dr. Kottke. [Ex. 11].

51. Radiographs taken at Country Club Dental show that the restoration on Patient JP's tooth #15 invaded the pulp chamber, that there was incomplete caries removal on tooth #29, and that tooth #30 had extensive recurrent caries. Caries is tooth decay or cavities.

52. Dr. Michael Tornow, D.M.D. testified that Patient JP was not told by Respondent about the pulp chamber invasion tooth #15 or the recurrent caries in tooth #30. [Ex. 10]. The pulp is the living part of the tooth and contains the nerve tissue. The pulp chamber is the center of the tooth containing the pulp.

53. The Respondent stated that Patient JP only showed up for isolated treatments, and that many examinations were for emergency treatment only; however, Respondent's records show that Patient JP was seen over a period of 16 years with many examinations, cleanings and radiographs, and extensive treatment noted in the records.

54. Respondent's chart notes indicate Patient JP was prescribed Lortab 7.5 on April 9, 2009. The line below the entry for Lortab says "Broken ribs," and Respondent testified this prescription was for Patient JP's broken ribs, and was written because Patient JP was an "old friend of mine and to save him time from going to the doctor".

Patient NM

55. Patient NM was a patient of Respondent's from 2003 until 2008.

56. Patient NM was seen on a regular basis for examinations, cleanings, fluoride treatment, x-rays, and sealants.

57. On May 28, 2007, Respondent placed a DOL amalgam in tooth "21d," also known as tooth L, on Patient NM. Amalgam is a common filling material used to repair cavities. DOL means three surfaces of the tooth, the distal, occlusal and lingual were filled.

58. On January 15, 2008, Respondent placed a MO amalgam in tooth "4d," also known as tooth A, on Patient NM.

59. On March 25, 2008, Patient NM was seen at Country Club Dental for an examination and x-rays. This examination revealed overhanging margins and incomplete caries removal in the restoration on tooth L.

60. Radiographs from Country Club Dental also show an overhanging margin on the restoration on Patient NM's tooth A.

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. "Unprofessional conduct" means, in relevant part, the failure to seek consultation whenever the welfare of the patient would be safeguarded or advanced by referral to individuals with special skills, knowledge, and experience. 16.5.16.10(B) (4) NMAC.
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 above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by failing to complete a comprehensive examination on Patient NM prior to fabrication of an upper complete denture.

11. Respondent has violated the Dental Health Care Act, NMSA 1978, § **61-51-21(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 above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by fabricating a new lower partial denture for Patient MN without performing any dental cleaning or restorations, or treating caries and calculus.

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 above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by fabricating ill-fitting dentures for Patient MN.

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 charts, radiographs and testimony, and as specifically described above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by failing to note, record or treat extensive decay in the pulp of Patient TJ's tooth #2.

14. 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 charts, radiographs and testimony, and as specifically described above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by failing to note, record and treat an open mesial margin on the crown on Patient TJ's tooth #19.

15. 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 charts, radiographs and testimony, and as specifically described above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by placing a crown on Patient TM's tooth #19 without a crown build-up and removal of the cotton pellets placed by the endodontist and by placing a crown on Patient TM's tooth #20 with incomplete margins.

16. 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 charts, radiographs and testimony, and as specifically described above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by placing a restoration on Patient JP's tooth #15 which invaded the pulp chamber.

17. 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 charts, radiographs and testimony, and as specifically described above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by placing a restoration on Patient JP's tooth #29 with incomplete caries removal.

18. 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 charts, radiographs and testimony, and as specifically described above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by failing to note, record or treat recurrent caries on Patient JP's tooth #30.

19. Respondent has violated the Dental Health Care Act, NMSA 1978, § **61-5A-21(A) (5)**, and is guilty of unprofessional conduct as defined by the Board's rules, **16.5.16.10(B)(10) NMAC**. As shown in Patient JP's chart notes and by Respondent's November 18, 2011 hearing testimony, and as specifically described above in the Findings of Fact, Respondent's prescribing Lortab, a controlled substance, to Patient JP for the patient's complaint of broken ribs, and not to treat any dental condition or issue, constitutes unprofessional conduct, specifically Respondent's prescribing, dispensing or administering drugs outside the scope of dental practice.

20. 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 charts, radiographs and testimony, and as specifically described above in the Findings of Fact, Respondent significantly departed from the prevailing standard of care in treating patients by placing a DOL amalgam in patient NM's tooth L with overhanging margins and incomplete caries removal prior to placing the restoration.

21. 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 charts, radiographs and testimony, and as specifically described above in the Findings of Fact, Respondent significantly departed from the Prevailing standard of care in treating patients by placing an MO amalgam in patient NM's tooth A with an overhanging margin on the restoration

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

23. The Board determines that, in addition to the evidence and administrative record in this Case No. 09-32 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], **09-19 COM** [February 10, 2012 Decision and Order], and **09-28 COM** [February 10, 2012 Decision and Order].

24. 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).

25. 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 one thousand forty-seven dollars and twelve cents (\$1,047.12) 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 DDS

Jessica Brewster, D.D.S.
Board Chair

Date Filed with Board Office: February 10, 2012