STATE OF VERMONT

BOARD OF DENTAL EXAMINERS

In Re: William D. McDonald, D. M. D. License No. 016-689	) Docket No. 2013-603 (DE)) Appeal of an Order of the) Board of Dental Examiners

Decision on Appeal

I. Background

The Board of Dental Examiners (Board) held the merits hearing in this matter on January 14, 2015. Petitioner, State of Vermont (State), was represented by Atty. Annika Green. Dr. William McDonald, D.D. S. represented himself.

The State called three witnesses: the Patient, an 18-year-old girl (Patient) who was a minor at the time of Dr. McDonald's alleged unprofessional conduct; the Patient's mother (Mother) and Cassandra Coakley, D. D. S. It also introduced Exhibits 1-9.

Dr. McDonald testified on his own behalf and introduced Exhibits A-E. He also called three of his employees as witnesses.

II. Board Decision

The Board issued its decision on January 27, 2015. It found:

> In this case Dr. McDonald extracted Patient's tooth without parental consent. The essential standards of acceptable and prevailing practicing required parental consent. Dr. McDonald also failed to take a proper pre-extraction radiograph. The essential standards of acceptable and prevailing practice required one.
>
> **Re: Alleged Violations of 3 V.S.A. § 129 a (b) (1) and (2):** The Prosecution has proven by a preponderance of the evidence that Dr. McDonald failed to practice competently. We find that Dr. McDonald's conduct, as found above constitutes, performance of unacceptable patient care. 3 VSA § 129 a (b) (1) and a failure to conform to the essential standards of acceptable and prevailing practice. 3 VSA § 129 a (b) (2). This is unprofessional conduct.
> Board Decision (Decision) p. 6

The Board then made a "Determination of Sanctions" and ordered suspension of Dr. McDonald's license for 6 months, effective the date of its decision. It also ordered him to successfully complete a course in "risk management"

Two Specific Findings of Unprofessional Conduct

A. "In this case Dr. McDonald extracted Patient's tooth without parental consent. The essential standards of acceptable and prevailing dental practice required parental consent."

The Board found that the State had proven by a preponderance of the evidence that Dr. McDonald engaged in unprofessional conduct when he "extracted Patient's tooth without parental consent." Board Decision (Decision) p.6

There is no dispute Patient was a minor (16 years-old) on September 4, 2013 when Dr. McDonald extracted her tooth (#17). Patient's mother was present at Dr. McDonald's office, sitting in the waiting room unaware that her daughter's tooth was being extracted. She did not give parental consent for the extraction. Transcript of January 14, 2015 merits hearing page (Tr.) 15

Dr. McDonald acknowledges that under normal circumstances, accepted and prevailing dental practice would require a dentist to obtain parental consent before removing the tooth of a minor. McDonald pp.8-9

He claims, however, that these were not normal circumstances. Dr. McDonald testified that Patient was suffering from a dental emergency when she came to his office that day. He says that it was this emergency that excused his failure to obtain parental consent. McDonald 7-9

The Board found that there was no emergency. Patient testified that she was not told there was an emergency. Tr. 104 In addition, the Board noted that none of Dr. McDonald's staff members "remembered Patient's visit that day or anything out of the ordinary about it." The Board also concluded after reviewing Dr. McDonald's treatment notes that these notes (McDonald Exhibit E) "do not reflect his dire picture of Patient's condition or a need for immediate action." Decision, p. 3.

Ultimately, the Board concluded that while removal of tooth #17 was "inevitable," the evidence did not support Dr. McDonald's claim that the circumstances constituted a potentially life threatening dental emergency that excused his failure to obtain parental consent:

> ". . . we are not convinced that an immediate extraction on September 4, 2013 was urgently necessary as Dr. McDonald would have us believe, we do agree that the tooth would eventually need to be removed. *Other treatment options were available that could have allowed for relief of pain and control of the infection for the patient, as well as allow time for proper consent by Patient's mother."*
> Decision p. 4 (emphasis added)

B. "Dr. McDonald also failed to take a proper pre-extraction radiograph. The essential standards of acceptable and prevailing dental practice required one."

The Board found the State had proven by a preponderance of the evidence that Dr. McDonald's failure to take a proper x-ray before extracting tooth #17 constituted unprofessional conduct. It explained its conclusions as follows:

> "*Dr. McDonald did not take an x-ray on September 4, 2013.* He relied on his 2012 x-rays and his observation of Patient's condition. Dr. McDonald testified that taking a new x-ray was unnecessary, that he did not want to submit Patient to unnecessary radiation. Dr. McDonald felt that an updated x-ray was not needed to help him with his treatment of Patient. Dr. McDonald thought that the x-ray

showing impacted tooth #17 as it was in April 2012 was sufficient. *A film that is 17 months old does not provide the most current information regarding root configuration and development, bone level, proximity to peripheral nerves or any other aberrations and/ or anomalies that should be known prior to extraction.*

A recent or contemporaneous x-ray would have shown the condition of #18 and #19 and the current information needed for Patient's treatment plan. A recent or contemporaneous x-ray should be part of pre-extraction preparation. The essential standards of acceptable and prevailing dental practice require it."
Decision p.4 (emphasis added)

III. Appeal

Dr. McDonald, who is represented on appeal by Attorney William C. Dagger, filed a timely notice of appeal pursuant to Rule 4.1 of the Administrative Rules of the Office of Professional Regulation (Rules).[1]

I heard oral arguments in Dr. McDonald's appeal on August 14, 2015.

Claims on Appeal

The lawful bases for appeal of the Board decision are set out in 3 VSA § 130 a (b):

"The appellate officer shall not substitute his or her judgment for that of the board as to the weight of the evidence on questions of fact. The appellate officer may affirm the decision, or may reverse and remand the matter with recommendations if substantial rights of the appellant have been prejudiced because the board's finding, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the board; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the evidence on the record as a whole; (6) arbitrary or capricious; or (7) characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Unprofessional Conduct

On appeal, Dr. McDonald's argues that the Board's decision that he engaged in unprofessional conduct must be "reversed, vacated and dismissed." He maintains the Board's findings and conclusions were clearly erroneous, arbitrary and capricious and characterized by an abuse of discretion. He also contends that the hearing procedure that led to the Board's findings of unprofessional conduct violated his due process rights. McDonald Brief (McDonald) pp.6-12, 20

Sanctions

Dr. McDonald argues further that the sanctions the Board imposed for his unprofessional conduct - six month license suspension and a class on risk management- must be vacated and dismissed because

[1] Dr. McDonald's Motion to Stay the Board's Order pending this appeal was denied on March 17, 2015. His six-month license suspension had run its course by the time of the August 14, 2015 argument on his appeal.

(1) they do "not follow from the findings and conclusions" and (2) they are not "commensurate with the nature and quality of the conduct alleged." Dr. McDonald pp. 17-20

A. Unprofessional Conduct

1. "Clearly Erroneous"

Dr. McDonald claims that the Board's conclusions that he (1) engaged in unprofessional conduct in failing to obtain parental consent before removing the 16-year-old patient's tooth and (2) by failing to take a pre-extraction x-ray were each "clearly erroneous in view of the evidence as a whole." McDonald pp. 7-15 However, the record does not support his claims.

Findings of an administrative body are not "clearly erroneous" if "there is any credible evidence which fairly and reasonably supports them. *Seaway Shopping.*"[2] In re Grievance of Ruth Muzzy, 141 Vt. 463, 470 (1982) (reversed on other grounds) Additional deference is given to findings where, as here, the findings "arose out of an administrative proceeding in which a professional's conduct was evaluated by a group of his peers." *Braun v. Board of Dental Examiners*, 167 Vt. 110, 114 (1997)

Lack of parental consent - Since there was no dispute that under normal circumstances the essential standards of acceptable and prevailing practice required Dr. McDonald to obtain parental consent before extracting a tooth, the issue here is whether there was credible evidence that "fairly and reasonably" supported the Board's determination that there was no emergency that excused Dr. McDonald's failure to obtain parental consent. There was such credible evidence.

As noted above, the Board found Dr. McDonald's treatment notes did not support his testimony that Patient was in such dire straits that the need for immediate action excused his failure to obtain parental consent. Again, as noted above, the Patient testified that she was not told there was an emergency before Dr. McDonald extracted tooth #17. In addition, the Board credited the testimony of Dr. McDonald's employees – none of whom remembered anything "out of the ordinary" about Patient's visit. This evidence fairly and reasonably supports the Board's conclusion that there was no emergency that excused the failure to obtain parental consent. Its findings and conclusion on "lack of parental consent" were not "clearly erroneous.

Failure to take pre-extraction x-ray – Dr. McDonald argues that there was no evidence in the record to dispute his testimony that a pre-extraction x-ray was not necessary and that, in fact, American Dental Association (ADA) Guidelines supported his decision not to take an x-ray. McDonald p. 16-17 He contends that the Board's finding to the contrary was clearly erroneous. McDonald pp. 7-9

The evidence, and the Board's analysis of it, showed otherwise.

First, it was not only undisputed that Dr. McDonald had failed to take a pre-extraction x-ray; but, it was also undisputed that that the most recent x-ray available for review on September 4, 2013 was 17-months-old. The Board was lawfully authorized to draw on its own knowledge and experience to

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[2] *Seaway Shopping v. Grand Union*, 132 Vt. 111, 116 (1974): "The prescribed law of this state is that findings must stand if there is any credible evidence which fairly and reasonably supports them, and this Court must construe them so as to support the judgment, if possible, and further, that the weight of the evidence, the credibility of the witnesses and the persuasive effect of the testimony is for the sole determination of the trier of fact."

evaluate this undisputed evidence: "As a body composed primarily of dental professionals, the Board *has the power to apply its own expertise in evaluating the evidence.*" *Braun v. Board of Dental Examiners*, 167 Vt. 110, 116 (1997) (emphasis added) The Board did just that in explaining its finding of unprofessional conduct for failure to take a pre-extraction x-ray:

> ". . . A film that is 17 months old does not provide the most current information regarding root configuration and development, bone level, proximity to peripheral nerves or any other aberrations and/ or anomalies that should be known prior to extraction.
>
> A recent or contemporaneous x-ray would have shown the condition of #18 and #19 and the current information needed for Patient's treatment plan. A recent or contemporaneous x-ray should be part of pre-extraction preparation. The essential standards of acceptable and prevailing dental practice require it." Decision p.4

The Board's analysis of the evidence fairly and reasonably supports its conclusion that Dr. McDonald's decision not to take a pre-extraction x-ray breached essential standards of acceptable and prevailing dental practice. The Board's findings and conclusions on this count were not "clearly erroneous."

Moreover, contrary to Dr. McDonald's claims[3], the ADA Guidelines Prescribing Dental Radiographs (Hearing Exhibit 5) do not support his decision not to take a pre-extraction x-ray. He claims that his decision to rely on a 17-month-old x-ray, rather than take a pre-extraction x-ray could not have violated "essential standards of acceptable and prevailing practice" because the ADA Guidelines recommend only that x-rays be taken at 18 to 36 month intervals. In other words, he claims he had at least another month before he would have to take an x-ray under ADA Guidelines. McDonald p. 9

This is not so – at least in this case. Patient was a "recall patient" with "multiple caries." (emphasis added) McDonald p. 8. Dr. McDonald had treated her twice in 2012. He took x-rays on April 3, 2012. A little over a week later, on April 12, 2012, he "treated 12 of patient's teeth." Decision p.6

The next time Dr. McDonald saw the Patient was 17-months-later on September 4, 2013. The ADA guidelines recommend that where, as in Patient's case, there is an adolescent "recall patient with clinical caries or increased risk for caries"[4] the dentist ought to take x-rays at "6 to 12 month intervals." Exhibit 5 p. 1 (emphasis added). The 18 to 36 month interval Dr. McDonald relied on is only applicable in cases where there is an adolescent recall patient "with no clinical caries and not at increased risk of caries." Exhibit 5 p. 1

The Board's findings and conclusions on this count were based on credible evidence and analysis which fairly and reasonably supported the Board's decision. They were not "clearly erroneous."

2. "Arbitrary and Capricious" and "Abuse of Discretion"

Dr. McDonald also argues that both findings of unprofessional conduct – i.e. failure to obtain parental consent and failure to take a pre-extraction radiograph – were "arbitrary and capricious and therefore an abuse of discretion." McDonald p. 14. In making these arguments, he relies for the most part on the same allegations he relied on for his claim that the Board's findings and conclusions were "clearly erroneous" (III, A-above). McDonald pp. 6-14.

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[3] Dr. McDonald alleged: " The Board ignored the fact that (the 17 month-old-x-ray) was within the timeframe prescribed by the Guidelines (ADA Guidelines Exhibit 5) for requirement of an additional x-ray." McDonald p. 16

[4] For adult patients with caries or increased risk of caries, the ADA recommends x-rays at "6 to 18 month intervals," Exhibit 5, p. 1

A decision of an administrative body is not "arbitrary and capricious" unless it is evident after reviewing the record that there has been a "clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 US 360, 378 (1989) The Board's findings and reasoning (II A,B and III A- above) demonstrate that its determination that Dr. McDonald engaged in unprofessional conduct by failing to obtain parental consent was not "arbitrary and capricious." The same is true of its determination that Dr. McDonald engaged in unprofessional conduct by failing to take a pre-extraction x-ray. In each case there was no "clear error of judgment." The Board evaluated relevant information, applied the proper standard of proof and came to a reasonable decision based on that information. 490 US 385 There was no "clear error of judgment."

There was likewise no "abuse of discretion." To establish abuse of discretion, the record must show that the Board "withheld its discretion entirely or that it was exercised for clearly untenable reasons or to a clearly untenable extent." *In Re Chittenden Recycling Services and Chittenden Solid Waste District*, 162 Vt. 84, 88 (1994). There is no such showing in the record. Again, as set out in Parts II A, B and III, A, 1, the Board's findings and conclusions on the unprofessional conduct counts constituted a reasonable exercise of Board discretion in that they were supported by credible evidence and reasonable analysis of that evidence.

3. "Due Process

Dr. McDonald also claims the hearing process that led to the two findings of unprofessional conduct against him was a process in which his "due process rights were flagrantly violated." McDonald p. 13

Dr. McDonald makes three basic arguments to support this claim. First, he argues that the State was improperly allowed to introduce irrelevant, highly prejudicial evidence of his "disciplinary history" at the beginning of the hearing on on the unprofessional conduct charges. Second, he says the Board improperly considered evidence of what the Board characterized as his "attitude of self-righteousness and an unwillingness to take responsibility for this failure to obtain parental consent before treating Patient." Third, he says the Board improperly deprived him of the opportunity to cross-examine Dr. Jeffrey Crandall and improperly limited his cross-examination of Dr. Cassandra Coakley. McDonald pp. 12-14

"Disciplinary History" - At the beginning of the hearing, the State was allowed, over Dr. McDonald's objection, to identify by date and title of the document (e.g. "Stipulation and Consent Order") seven exhibits[5] of what the prosecutor described as "prior disciplinary action by this Board" against Dr. McDonald. Tr. 9-11, Exhibits 1-7. This evidence was not admissible to prove the unprofessional conduct charges. However, it was admissible on the issue of what sanction(s[6]) should be imposed if the State proved unprofessional conduct. *Devers Scott v. Office of Professional Regulation*, 2007 Vt. 4

[5] State's exhibits 1-7 consist of findings, conclusions and orders resulting from merits hearings (3) and stipulations and consent orders (4).

[6] The "prior disciplinary history" documents were relevant to the determination of a proper sanction for the unprofessional conduct. The Board could have taken official notice of its own records under 3 VSA § 810 (4). Or, the State could have introduced into evidence before the Board under the Public Records exception to the hearsay rule. Vermont Rules of Evidence (VRE) 803 (8).

Before the State was allowed to identify these exhibits, the hearing officer gave a cautionary instruction to the Board in which he warned the exhibits would only be relevant, and eligible for consideration by the Board[7], if the Board found that Dr. McDonald was liable on any of the charges of unprofessional that the Board was about to consider:

> "I don't think it's appropriate for the board to make inferences of character based on the prior cases. This case should be decided on its own merits, but should the board find unprofessional conduct, these would be certainly appropriately regarded and considered in determining whether or what sanction might be imposed. So we'll admit these." Tr. 10-11

Once the prosecutor identified the exhibits, the hearing officer cautioned the Board again that board members could only consider the exhibits if there was a finding of unprofessional conduct in the case the State was about to consider:

> "Let me just caution the board at this time. These decisions really should be looked at after you've decided the merits of the case, and if you found unprofessional conduct, then you may regard them in determining what, if any, sanction is appropriate, but at this time we should just wait for the evidence in this case." Tr. 11-12 (emphasis added)

Dr. McDonald argues, in effect, that the Board ignored the hearing officer's instructions.

> ". . . it is obvious the Board's decision was strongly influenced by, indeed almost exclusively relying upon facts inadmissibly entered on the record, including prior disciplinary history, and an undocumented assertion of some ill-conceived notion that Dr. McDonald has an improper "attitude." McDonald, p.12 (emphasis added)

The law and the record do not support his claim.

First, juries are "presumed to follow" jury instructions. *Weeks v. Angelone*, 528 US 225, 234 (2000). Board members sat as jurors –judges of the facts in this case. There is no reason to believe this presumption should not also apply to a jury of professionals such as the Board, when as here, the hearing officer has instructed them twice that evidence of Dr. McDonald's "prior disciplinary history" could only be considered if the Board found unprofessional conduct.

Second, the evidence does not support Dr. McDonald's allegation that it is "obvious" the Board's decision on the unprofessional conduct issues was "strongly influenced" by references to prior discipline.

The State called Dr. Cassandra Coakley to prove that Dr. McDonald's extraction of tooth #17 had caused unnecessary pain and other eventual "harm" including several "head, ear, facial and jaw complaints." Tr. 32-35, Decision p 5. If the State's references to prior discipline had the effect of prejudicing the Board's findings in favor the State, then the Board would have been expected to find for the State on the allegations that Dr. McDonald's unprofessional conduct caused harm to the Patient. But, it didn't. The Board decision does not support the State's claim that Dr. McDonald caused patient:

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[7] The prosecutor later informed the Board that "there are more exhibits, but they are coming in through witnesses." Tr. 12 Exhibits 8 and 9, treatment records were relevant to the unprofessional conduct charges. They were eventually admitted through Dr. Cassandra Coakley. Tr. 33-34

"On the evidence presented we cannot conclude that Patient's November, 2014 complaints resulted from improper extraction of # 17." Decision, p. 5.

The record simply does not support Dr. McDonald's claim that the Board ignored the hearing officer's instructions and allowed references to Dr. McDonald's disciplinary history to influence its decision(s) on whether the State had proven its unprofessional conduct allegations.

"Attitude" - The Board did criticize Dr. McDonald's attitude:

> "In his letter to Patient's mother and in his hearing testimony Dr. McDonald revealed an attitude of self-righteousness and an unwillingness or inability to take responsibility for his failure to obtain parental consent before treating Patient. His letter to Patient's mother blamed her." Decision, p. 6

The Board was referring to a letter from Dr. McDonald to Patient's mother that Dr. McDonald had offered into evidence himself as Exhibit A. The Board then noted that Dr. McDonald had "displayed a similar attitude" in messages that he had left for the OPR Director and in statements that he had made to the prosecutor in this case. Decision, p. 6

Evidence that a professional has refused to accept responsibility for his errors and has, instead, tried to blame others for these errors is relevant on the issue of what sanctions should be imposed for unprofessional conduct. *Devers-Scott v. Office of Professional Regulation*, 2007 Vt. 4 ¶ 56 The Board used this evidence as one consideration in determining sanctions this case[8]. There is no evidence that the Board used it for any other purpose. Decision, pp. 6-7

There is no reasonable basis for concluding that the Board's use of this "attitude" evidence violated Dr. McDonald's due process rights[9].

Cross-examination

On several occasions in his brief Dr. McDonald complains that he was denied his due process rights because he was unable to fully cross-examine Dr. Coakley and because he was not able to cross – examine Dr. Jeffrey Crandall at all. McDonald pp. 13- 18

The record shows that Dr. McDonald did have an opportunity to cross examine Dr. Coakley and that his cross-examination was cut off after the hearing officer sustained the State's objection that his questioning was argumentative. Tr. 35-36. The record also shows that although Dr. Crandall did not testify, his notes relating to his treatment of Patient[10]were admitted without objection from Dr. McDonald. Tr.p.34.

However, even if it is assumed for the sake of argument only, that the Board somehow acted improperly by limiting cross-examination of Dr. Coakley and in admitting Dr. Crandall's notes, there

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[8] "Dr. McDonald's history of blaming others for his errors has been noted in prior decisions. It is one factor in determining the appropriate sanction." Decision, p. 6

[9] The Vermont Supreme Court has also held that failure to notify a professional that his/her "demeanor" will be considered in determining the sanction to be imposed does not violate the professional's due process rights 2007 Vt. 4, ¶ 59

[10] Dr. Crandall's notes indicated that Patient's continuing pain may have been caused by extraction of tooth #17 (done by Dr. McDonald). They were admitted into evidence through Dr. Coakley. Dr. McDonald told the hearing officer that he did not object to their admission. Tr. P.34

would still be no basis for finding that Dr. McDonald suffered prejudice requiring reversal because of the Board's alleged error. This is because the evidence from Dr. Coakley and Dr. Crandall was introduced by the State in an effort to prove that Patient suffered "harm" as a result of Dr. McDonald's extraction of tooth #17. As noted earlier, the Board ultimately found against the State on this issue and concluded that extraction of tooth #17 had not caused "patient harm."

B. Sanctions

Dr. McDonald argues that the sanction the Board imposed should be "reversed" because (1) the "sanction does not follow from the findings and conclusions" and (2) the sanction is "excessive and out of proportion." McDonald, pp.17, 19

The Board carefully explained the basis for its decision to suspend Dr. McDonald's license for six months and to require him to successfully complete a risk management course.

First it reviewed the multiple findings of unprofessional conduct against Dr. McDonald beginning in 1987. The Board said that Dr. McDonald had "a history for blaming others for his errors" which had been noted in earlier disciplinary decisions. It went on to say that its review of Dr. McDonald's disciplinary history required it to "consider whether Dr. McDonald will be able to learn from any sanction imposed in this case." It explained further:

> As the Board has done in prior cases, we consider the gravity of the unprofessional conduct in this case, Dr. McDonald's disciplinary history, and what it will take to promote adherence to professional standards. We consider it our paramount to protect the public. We consider also how the sanction in this case may deter Dr. McDonald from further unprofessional conduct while at the same time promoting confidence in the legitimacy and integrity of the disciplinary system."

Finally, the Board pointed out that Dr. McDonald had been sanctioned for failure to take pre-treatment x-rays in the past and that his license had been suspended for two weeks in 2005 and that a 90 day suspension in 2007 had been held in abeyance and not imposed. Decision, pp. 6-7

1. "The sanction does not follow from the findings and conclusions"

Dr. McDonald's arguments here regarding sanctions (McDonald pp. 17-18) merely repeat the arguments he made in contesting the Board's findings of unprofessional conduct that are discussed above (III, A, 1).

He says there is no basis for sanctions because there was no unprofessional conduct to sanction. He contends there was no unprofessional conduct for failing to obtain parental consent because there was no time to obtain parental consent in the midst of what he says was a dental emergency. And, he says there was nothing "unprofessional" about his decision not to take a pre-extraction x-ray because his decision to rely on a 17-month x-ray was consistent with ADA Guidelines. As set out in parts II, A and B (above), the Board gave a detailed explanation of why he is wrong on both counts.

The bases for appellate review of the Board's decision are set out in 3 VSA § 130 a (p. 2 above). They do not include this claim ("sanction does not follow from the findings and conclusions"). But, in effect, Dr. McDonald is arguing that there is no basis for sanctions because the Board's findings of unprofessional conduct which prompted the sanctions were, themselves, "clearly erroneous." This is not so – for the reasons discussed in Part III, A, 1 pp. 4-5). The Board's findings on unprofessional

conduct were not "clearly erroneous" because they were fairly and reasonably supported by a reasonable analysis of credible evidence.

Dr. McDonald also argues against the sanctions in this case because he claims he is the "only dentist in the area" who will treat Medicaid patients. McDonald p. 17-18. This too is not a basis for overturning a Board decision under 3 VSA § 130 a. Beyond this, it is not clear what "area" he is referring to and his observation that the "patients in every other discipline case" he was involved in (Exhibits 1-7) "were also Medicaid patients" (McDonald, p.18) certainly does not support his claim that he should not be sanctioned in this case – another case involving a Medicaid patient.

2. "Excessive and out of proportion"

The essence of his claim for lesser sanctions here (McDonald, pp. 19-20) is that the six-month license suspension and mandatory "risk management" class are "excessive and out of proportion" to the unprofessional conduct the Board found he had engaged in. Dr. McDonald argues that his conduct was not "egregious in nature" and that it did not threaten public health and safety. McDonald, p.19

I have not found any Vermont cases that dealt with claims such as this one - the claim that sanctions imposed by administrative bodies were out of proportion to the conduct that was sanctioned. The Court of Appeals of New York has held that where the issue is whether the punishment imposed by an administrative body will be "set aside", the punishment will be "set aside only if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness. . ." *Pell v. Board of Education et al.*, 313 NE2d 321, 326 (1974)

The process the Board used to decide on and impose, Dr. McDonald's sanction was not "arbitrary and capricious" or an abuse of its discretion. The Board reasonably considered not only the fact Dr. McDonald had been found to have engaged in unprofessional conduct seven times since 1987 and that he had been sanctioned for failure to take a pre-extraction x-ray in the past; it also considered the fact that his license had been suspended on two other occasions before he engaged in the unprofessional conduct sanctioned here - failing to obtain parental consent and failing to take a pre-extraction x-rays before removing the tooth of a sixteen-year-old Medicaid patient.

The Board could have reasonably determined that imposing a longer suspension than it had imposed in the past would deter Dr. McDonald from engaging in further unprofessional conduct and that this, in turn, would protect the public. In light of the circumstances, suspending Dr. McDonald's license to practice for six months and requiring him to take the risk management course would not be shocking to a reasonable person's sense of fairness.

The findings and conclusions that led to the Board's determination that Dr. McDonald had engaged in unprofessional conduct were not "clearly erroneous," "arbitrary and capricious" or characterized by an "abuse of discretion." The process involved in reaching these findings and conclusions did not violate Dr. McDonald's due process rights.

The sanctions imposed by the Board for Dr. McDonald's unprofessional conduct were likewise not "clearly erroneous" – nor were they excessive or disproportionate.

Accordingly, the Findings, Conclusion and Order entered in Dr. McDonald's case on January 30, 2015 are AFFIRMED.

Dated at Burlington, Vermont this 21st day of August, 2015.

Robert V. Simpson, Jr.
Appellate Officer

Date Entered: 8/24/15

APPEAL RIGHTS

This is a final administrative determination by the Appellate Officer of the Office of Professional Regulation.

A party aggrieved by a final decision of the Appellate Officer may appeal the decision to the Superior Court in Washington County by filing a written Notice of Appeal with the Docket Clerk of the Office of Professional Regulation, Vermont Secretary of State, 89 Main Street, 3rd Floor, Montpelier, Vermont 05620-3402 within 30 days of the entry of the order. A filing fee of $295.00, payable to Washington County Superior Court, must accompany the notice of appeal.

For more information about the procedure for filing an appeal, please see the Administrative Rules for the Office of Professional Regulation, which you can find at: http://www.vtprofessionals.org/opr1/opr/admnrule.pdf, and the Rules are also available at the Office of Professional Regulation.

STATE OF VERMONT
BOARD OF DENTAL EXAMINERS

In re: William McDonald, D.D.S.	}	
License No. 016-689	}	Docket No. 2013-603(DE)
	}	

Decision on
Unprofessional Conduct Charge

Board Members Participating:
Jennie Kendall, R.D.H., Chair
Edward P. Pantzar, D.D.S.
Katherine Silloway, D.D.S.
Dixie Vallie, C.D.A.
Gerald Theberge, D.D.S.
Mimi Kevan, Public Member
David Baasch, D.D.S., Vice Chair

Appearances:
Petitioner, State of Vermont: Annika Green
Respondent: Pro se

Presiding Officer: Larry S. Novins

Findings of Fact, Conclusions of Law, and Order

The Board of Dental Examiners held a hearing in the above matter on January 14, 2015 at the Office of Professional Regulation conference room at the City Center in Montpelier, Vermont.

Background

Dr. McDonald is a licensed dentist and is therefore subject to the regulatory authority of this Board. 3 V.S.A. §§ 129, 129a, 26 V.S.A. §§ 584, the Administrative Rules of the Board of Dental Examiners, and the Administrative Rules of the Office of Professional Regulation. The prosecution alleges in an Amended Specification of Charges that on September 4, 2013 Dr. McDonald extracted a tooth from a minor patient without parental consent, relied on a seventeen month old x-ray and failed to take a new one, and that the extraction was improperly performed.

The Hearing

The prosecution's case consisted of the testimony of a now 18 year old girl (Patient), her mother (Mother), and Casandra Coakley, D.D.S. Dr. McDonald testified on his own behalf. He called three of his employees to testify. Also admitted into evidence were:

State's Exhibits:

Exhibits 1-7, copies of Board of Dental Examiners Decisions and approved Stipulations and Consent Orders covering unprofessional conduct by Dr. McDonald between 1987 and 2013;
Exhibit #8, Casandra Coakley, D.D.S. treatment records of Patient from September 11, 2013 through June 6, 2014;
Exhibit #9, report of Jeffrey A. Crandall, D.D.S. regarding examination of Patient on November 10, 2014.

Dr. McDonald's Exhibits:

Exhibit A, copy of October 29, 2013 letter written to Patient's Mother;
Exhibit B, photocopy of X-ray of Patient taken by Dr. McDonald on April 3, 2012;
Exhibit C, photocopy of x-ray of Patent taken September 11, 2013, which because it is unlabeled, we assume is from Dr. Coakley's records;
Exhibit D, Gifford Medical Center Emergency Room Report, September 10, 2013, and Saturday Clinic Report of August 31, 2013; and
Exhibit E, Dr. McDonald's treatment records of Patient from April 3, 2012 through September 9, 2013.

The State did not make an opening statement. Dr. McDonald read a letter he wrote to his patient's mother which, he said, summarized his case.

Findings of Fact

Less than three years ago, on April 3, 2012, Dr. McDonald treated a then 16 year old girl (hereafter "Patient") in his Rutland office. His treatment notes clearly show Patient's date of birth in 1996. The treatment notes form clearly indicates the name of Patient's mother. A sticker on the note indicates "Medical Alert: see health history." X-rays taken that day show that tooth #17 was impacted. On April 12, 2012, Dr. McDonald saw Patient again and treated 12 of patient's teeth. Dr. McDonald's notes show only three other appointments. One appointment scheduled for August 20, 2013 was canceled because patient's car broke down. Patient did not see Dr. McDonald again until September 4, 2013.

On August 31, 2013 Patient went to the Gifford Medical Center where she saw APRN Emily Levan at the Center's Saturday Clinic. The "Chief Complaint" was listed as Dental pain/swollen lymph node." She reported that she had had a toothache on the "*back right molar*" for about the last couple of months or so. It is unclear whether APRN Levan's description is inaccurate, or whether Patient reported to her a complaint different from the one she expressed to Dr. McDonald on September 4. Patient's medications on August 31 included Effexor 225 mg.

daily. Patient told APRN Levan that she was supposed to have seen a dentist but was unable to make the appointment. She reported that the gum around the molar "has been swollen." The report noted that Patient noticed a lymph node in the submental area that was tender and inflamed. The APRN's report noted her, "attention is focused to the right lower jaw." "There is some tenderness and on percussion of the back molar. There is no sign of gingival hyperplasia or erythema noted." Her assessment, "Dental pain with swollen lymph node, possibly reactive node."

On September 4, 2013 Patient arrived at Dr. McDonald's office two days before her 17th birthday. Both she and her mother ("Mother") testified that both came to Dr. McDonald's office that day. Patient was given an adult patient medical history form which she filled out. A copy of the form was not introduced by either party at the hearing. It is unknown whether it showed Patient's date of birth.

Patient's complaint that day was that she had a tooth ache on the lower left side. Patient was taken into the treatment room. Rather than accompany her daughter to the treatment room and not wanting to be a "smother mother," Mother waited in the reception area. According to mother, Patient was in the treatment room for a "long time."

Dr. McDonald looked at Patient's teeth. He testified and we find that Patient had a parulis (gum boil), a subperiosteal abscess of the gum at tooth #17, and that it was very infected. It was purulent and inflamed. Dr. McDonald described it as the size of a half dollar. Dr. McDonald tapped on all the back teeth on that side. Dr. McDonald testified that he feared for Patient's immediate well-being and that waiting to treat her condition until another time could be life threatening to her. None of his staff remembered Patient's visit that day or anything out of the ordinary about it. In his testimony Dr. McDonald painted himself as being heroic in responding to her plight. His treatment notes do not reflect his testimony's dire picture of Patient's condition or a need for immediate action.

According to Patient, Dr. McDonald reviewed x-rays taken on April 3, 2012, 17 months earlier. The 2012 x-ray showed that tooth #17 was impacted. The film was very clear. Dr. McDonald determined that tooth #17, her third molar, needed to be extracted immediately. Dr. McDonald told Patient that he had to extract the tooth. He spoke only with Patient. He did not inquire if she was there with a parent or guardian. He obtained her verbal consent for the extraction. His contemporaneous notes say that she requested the extraction. He noted, "Requested EXT [extraction]. Informed consent received-discussed small possibility of paresthesia."

There was no written consent to the extraction. Dr. McDonald testified that he did not know that Patient's mother was present, and that he did not realize that Patient was still a minor; this despite her date of birth on his treatment notes. What other evidence of Patient's date of birth Dr. McDonald may have had is unknown. If other documents from Patient's file showed her date of birth, they were not placed in evidence at the hearing.

Dr. McDonald did not take an x-ray on September 4, 2013. He relied on his 2012 x-ray and his observation of Patient's condition. Dr. McDonald testified that taking a new x-ray was unnecessary, that he did not want to subject Patient to unnecessary radiation. Dr. McDonald felt that an updated x-ray was not needed to help him with his diagnosis or treatment of Patient. Dr. McDonald thought that the x-ray showing impacted tooth #17 as it was in April of 2012 was sufficient. A film that is 17 months old does not provide the most current information regarding root configuration and development, bone level, proximity to peripheral nerves or any other aberrations, and/or anomalies that should be made known prior to extraction.

A recent or contemporaneous x-ray would have shown the condition of teeth #18 and #19 and the current information needed for Patient's treatment plan. A recent or contemporaneous x-ray should be part of pre-extraction preparation. The essential standards of acceptable and prevailing dental practice require it.

Dr. McDonald administered a local anesthetic using a mandibular block technique, and began the extraction. Neither before or during the procedure did Patient call for her mother to come in to the treatment room. She did not ask Dr. McDonald to get her mother and bring her into the room. With a quick glance at his patient record, or a question to his patient, Dr. McDonald could easily verify Patient's age.

Patient described the procedure and said that as Dr. McDonald was drilling she saw bits of tooth flying from her mouth. Dr. McDonald did not explain to Patient what was happening. Patient tried to get Dr. McDonald's attention by tapping on his arm and pointing to the instrument he was using. Dr. McDonald stopped for a moment, then immediately continued. Dr. McDonald testified that he did not use a drill and that no pieces of tooth were "flying" from Patient's mouth. Before Patient left Dr. McDonald's office, he prescribed for her Penicillin for the infection he saw, Percocet for possible anticipated pain, and Dexamethasone to minimize the expected swelling that would follow.

We conclude that extracting tooth #17 was not inappropriate. Given Patient's symptoms that day and the location of the tooth as shown by the 2012 x-ray, removal of #17 was inevitable. While we are not convinced that an immediate extraction on September 4,2013 was urgently necessary as Dr. McDonald would lead us to believe, we do agree that this tooth would eventually need to be removed. Other treatment options were available that could have allowed for relief of pain and control of the infection for the patient, as well as allow time for proper consent by the Patient's Mother. From the evidence presented at the hearing, we cannot conclude that Dr. McDonald erred by removing #17 and not some other tooth. The x-ray taken on September 11, 2013 featuring adjacent teeth 18 and 19 does not indicate any anomalous conditions that would have changed Dr. McDonald's treatment of #17 had he taken that x-ray and viewed it on September 4.

The day after the extraction, September 5, 2013, Dr. McDonald's office called Patient to check on her. They left a voice mail. On September 9, Patient's mother called Dr. McDonald's

office saying patient's "tooth was feeling better, but over the weekend she had a lot of pain and still does."

On September 9, five days after the extraction, Patient came to Dr. McDonald's office for a follow up exam and to have sutures removed. The sutures were removed. Dr. McDonald quoted patient as saying, "It is hurting a lot." He prescribed Vicodin 5/325 every four to six hours.

The next day, September 10, 2013, patient went to the Gifford Medical Center emergency room complaining of dental pain. She apparently saw two doctors that day. She told the attending physician, Dr. Marc I. Keller, that she had had a wisdom tooth removed 7 days before. Patient reported that her dentist told her she should take Percocet which made her feel "spacy." She did not mention the Vicodin. Dr. Keller called another doctor, Dr. DiNicola, who recommended a shot of narcotic. Patient reported no fever or chills, any facial swelling or difficulty with breathing or swallowing. The doctor's examination of oropharynx and dentition revealed "a left lower wisdom tooth area that is vacant. "Tis [sic] no swelling and no discharge." Patient was given 1 mg. Dilaudid by the nurse.

According to the Gifford records another doctor, Pamela S. Udomprasert, M.D., saw Patient on September 10. She wrote also that Patient arrived complaining of tooth pain. Patient told of the problems she was having with Percocet. Patient did not mention the Vicodin prescription Dr. McDonald had given her the day before. The second doctor noted, "There is no redness or swelling of the gums where the wisdom tooth was removed. No discharge or bleeding."

On September 11, 2013 Patient saw Dr. Cassandra Coakley, D.D.S. in Montpelier. Dr. Coakley wrote in her notes, "I had to numb Pt before I could even look." "Patient has openings from distal to buccal of #18 where tissue is ulcerated. Flushing distal with periogard causes it to come out buccal & tissue to swell." She wrote also, that Patient was "visibly swollen on L angle of jaw." In Dr. Coakley's hearing testimony she said the opening where the tooth had been extracted was the largest site she had ever seen. X-rays taken on September 11 showing teeth #18 and #19 do not reveal any abnormalities. In her hearing testimony Dr. Coakley attributed many of Patient's on-going dental complaints to the extraction Dr. McDonald performed.

Patient was seen by Jeffrey Crandall, D.D.S. in November, 2014. At that time Patient had several head, ear, facial and jaw complaints. Dr. Crandall, who did not testify at the hearing, wrote that contributing factors, "may include -Trauma: onset following extraction of tooth #17; Craniofacial skeletal deformity; mandibular prognathism; dental occlusion; deep overbite; oral parafunctional factors: clenching; TMJ hypermobility." Dr. Crandall suggested that treatment for these problems will include: "Mandibular orthopedic repositioning appliance, physical therapy, behavioral modification." On the evidence presented we cannot conclude that Patient's November 2014 complaints resulted from improper extraction of #17.

Our decision in this case must include mention of Respondent's response to the allegations against him and the hearing process. In his letter to Patient's mother and in his hearing testimony Dr. McDonald revealed an attitude of self-righteousness and an unwillingness or inability to take responsibility for his failure to obtain parental consent before treating Patient. His letter to Patient's mother blamed her. "This incident can be attributed to your statement in the very first sentence of your statement: 'she went in to see the dentist on her own...' This is simply not the scenario for a minor." Dr. McDonald displayed a similar attitude in his telephone messages to the OPR Director and at the hearing when he launched into personal attacks on the prosecuting attorney rather than addressing the disputed issues of the hearing.

Conclusions of Law

In this case Dr. McDonald extracted Patient's tooth without parental consent. The essential standards of acceptable and prevailing dental practice required parental consent. Dr. McDonald also failed to take a proper pre-extraction radiograph. The essential standards of acceptable and prevailing dental practice required one.

Re: Alleged Violation of 3 V.S.A. § 129a(b)(1) and (2): The Prosecution has proved by a preponderance of the evidence that Dr. McDonald failed to practice competently. We find that Dr. McDonald's conduct, as found above constitutes, performance of unacceptable patient care. 3 V.S.A. § 129a(b)(1) and a failure to conform to the essential standards of acceptable and prevailing practice. 3 V.S.A. § 129a(b)(2). This is unprofessional conduct.

Determination of Sanction: Factors

Dr. McDonald has been sanctioned for unprofessional conduct several times. Prior unprofessional conduct has included: failure to abide by cleanliness standards (glove use) in 2013; being verbally abusive to patients in 2000; failure to comply with a Board Order from a prior disciplinary case in 2005; failure to properly document an office incident in 2002, fitting dentures that the patient complained did not fit properly, not adequately charting treatment, being verbally abusive to a patient in 2000; performing restorative work on a patient's tooth without taking, reviewing, or documenting pretreatment x-rays in 2000 (two occasions); performing a reconstruction on a patient's tooth without taking, reviewing, or documenting pre-treatment x-rays in 2001; failure to retain dental impressions in 2004; failure to keep appropriate documentation in 2005 and 2006 and having a client who was in pain sign a promissory note in 2005; and conviction of a crime arising from the practice of dentistry (welfare fraud) in 1987. Dr. McDonald has missed deadlines for completing Board ordered activities. Sanctions imposed have included warning and reprimanding his license, several $1,000 civil penalties, one short license suspension and more suspensions held in abeyance pending compliance with Board ordered conditions.

Dr. McDonald's history of blaming others for his errors has been noted in prior decisions. It is one factor in determining the appropriate sanction. Our review of Dr. McDonald's

disciplinary history requires us to consider whether Dr. McDonald will be able to learn from any sanction imposed in this case.

As the Board has done in prior cases, we consider the gravity of the unprofessional conduct in this case, Dr. McDonald's disciplinary history, and what it will take to promote adherence to professional standards. We consider our paramount duty to protect the public. We consider also how the sanction in this case may deter Dr. McDonald from further unprofessional conduct while at the same time promoting confidence in the legitimacy and integrity of the disciplinary system.

Before this case, Dr. McDonald has not, to our knowledge, failed to obtain parental consent prior to a dental procedure. His failure to take pre-treatment x-rays has been sanctioned before.

A practitioner who continues to fail to meet required standards of practice after multiple findings of unprofessional conduct may be considered to have "not learned his lesson." The last time Dr. McDonald's license was suspended was for two weeks in 2005. A 90 day suspension held in abeyance in 2007 was not imposed.

Order

For the violations above, to protect the public, health, safety and welfare, the following sanction is necessary.

Dr. McDonald's license is **suspended for 6 months (180 days)**, effective the date of this decision.

Before Dr. McDonald's license may be reinstated he must do the following:

1) Complete a course, pre-approved by the Board in "risk management." The purpose of this course is to assure that Dr. McDonald takes proper x-rays and that he has appropriate safeguards and processes in place to ensure that he obtains proper patient consent, including needed parental consent. When Dr. McDonald has shown satisfactory completion of the course, his license may be reinstated at the end of the suspension period.

APPEAL RIGHTS

This is a final administrative determination by the Vermont Board of Dental Examiners. A party aggrieved by a final decision of a board may appeal this decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, Office of Professional Regulation, 89 Main St. Fl. 3, Montpelier, Vermont 05620 3402 within 30 days of the entry of this Order.

If an appeal is filed, the Director of the Office of Professional Regulation shall assign the case to an appellate officer. The review shall be conducted on the basis of the record created before the board. In cases of alleged irregularities in procedure before the board, not shown in the record, proof on that issue may be taken by the appellate officer. 3 V.S.A. §§ 129(d) and 130a.

To request a stay of the Board's decision, please refer to the attached stay instructions.

Vermont Board of Dental Examiners

By: _____ Dated: January 27, 2015
Jennie Kendall, R.D.H., Chair

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 1/30/15