DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

BOARD OF DENTAL EXAMINERS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the License to Practice Dentistry of	)	DEN 2001-15-L
	)	DEN 2001-16-L
	)	DEN 2001-17-L
	)	DEN 2001-29-L
BENJAMIN S. RODRIGUEZ, D.D.S.	)	
	)	BOARD'S FINAL ORDER
Petitioner.	)	
	)	

BOARD'S FINAL ORDER

On September 20, 2004, the Hearings Officer in the above-referenced matter filed his Findings of Fact, Conclusions of Law, and Recommended Order ("Recommended Order"). Copies of the Recommended Order were transmitted to the Board of Dental Examiners ("Board") and the parties involved. Neither Respondent Rodriguez nor the Regulated Industries Complaints Office ("RICO") filed any post-hearing pleadings. Neither party requested oral argument.

On November 8, 2004, the Board considered the Recommended Order in the above-captioned matter. Neither of the parties were present. After careful review and consideration of the record of

these proceedings, the Board voted to accept and adopt all of the Hearings Officer's Findings of Fact and Conclusions of Law, and proposed an amended Final Order. The Board's Proposed Final Order was issued on January 10, 2005, and copies were transmitted to the parties. Neither party filed Exceptions to or Statements in Support of the Proposed Final Order. Neither party requested oral argument.

ACCORDINGLY, the Board hereby adopts its Proposed Final Order and orders that for the violations found, Respondent's license, DT 1770, is revoked; provided that this revocation is stayed so long as Respondent:

1. Has ongoing, regular follow-up treatment with psychiatrist Douglas Smith, M.D., or Respondent's treating psychiatrist, until the psychiatrist deems treatment no longer necessary;

2. Arranges for and ensures that Dr. Smith, or Respondent's treating psychiatrist, submits quarterly reports to the Board and RICO showing that Respondent is mentally stable, able to safely treat patients, and fit to practice dentistry;

3. Receives and fully participates in any medical, psychological, or psychiatric treatment deemed necessary by his treating psychiatrist;

4. Practices as a dentist, including prescribing, only under the direct supervision, as defined in § 16-79-2(1), Hawaii Administrative Rules ("HAR"), of another licensed dentist who is working with Respondent in the same office or facility; and

5. Arranges for and ensures that the licensed supervising dentist submits to the Board a letter confirming that the licensed supervising dentist understands and agrees to serve as Respondent's supervising dentist.

This direct supervision relationship shall continue for at least five years, subject to further extension by the Board. If Respondent seeks to have any conditions of this Order lifted or amended, he shall petition the Board and obtain Board approval prior to the cessation of compliance with this Order's conditions.

If Respondent is found to be in violation of any of the above-stated conditions, or violates any other statute or rule pertaining to the practice of dentistry, including but not

limited to chapters 448 and 436B, Hawaii Revised Statutes, and HAR chapter 16-79, the stay of revocation of Respondent's license shall be lifted and Respondent's license shall be revoked upon a finding that Respondent has committed such a violation.

DATED: Honolulu, Hawaii, February 14, 2005.

STANWOOD KANNA, D.D.S
Chairperson

GERALD ADACHI, D.M.D
Vice-Chairperson

DAVID BREESE, D.D.S
Dental Member

GAYLE CHANG, R.D.H.
Dental Hygienist Member

ARMOND CHONG
Dental Member

RANDALL CISLO, D.M.D.
Dental Member

DENNIS ISHIMOTO, D.D.S
Dental Member

STUART LAU
Public member

DEBORAH LICHOTA, R.D.H
Dental Hygienist Member

JEFFREY MIYAZAWA, D.D.S.
Dental Member

ANN TERANISHI
Public Member

RONALD YOUNG, D.M.D
Dental Member

In the Matter of the
License to Practice Dentistry
of BENJAMIN S. RODRIGUEZ, D.D.S.;
Board's Final Order;
DEN 2001-15-L, DEN 2001-16-L,
DEN 2001-17-L, DEN 2001-29-L

DEPT. OF COMMERCE
AFFAIRS
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BOARD OF DENTAL EXAMINERS
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the License to Practice Dentistry of BENJAMIN S. RODRIGUEZ, D.D.S., Respondent.	)))))))))	DEN 2001-15-L DEN 2001-16-L DEN 2001-17-L DEN 2001-29-L HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

I. INTRODUCTION

On May 14, 2003, the Regulated Industries Complaints Office ("Rico" or "Petitioner") filed a petition for disciplinary action against the license to practice dentistry of Benjamin S. Rodriguez, D.D.S. ("Respondent"). The matter was set for hearing pursuant to Hawaii Revised Statutes ("HRS") Chapters 91, 92, 436B and 448.

On September 22, 2003, Respondent filed a demand for bill of particulars. Petitioner filed a memorandum in opposition, and on November 12, 2003, oral argument on this motion was heard. On November 14, 2003, the undersigned Hearings Officer issued an Order Denying Respondent's Demand for Bill of Particulars, finding that Respondent had fair notice of the charges against him and the factual grounds for the allegations in the Petition.

On November 20, 2003, the hearing was commenced at the Office of Administrative Hearings by the undersigned Hearings Officer. Petitioner was represented by John T. Hassler, Esq. Respondent was present, along with his wife, and was represented by Sidney M. Quintal, Esq. The hearing was reconvened on May 18, 2004 and the evidentiary portion of the hearing was completed on June 29, 2004. It is

noted that the hearing was postponed twice due to Respondent's and his counsel's illness. The parties were requested to file written closing arguments.

During the course of the proceedings, Petitioner orally moved to amend the allegation in the Petition from HRS §436-19(7) to read HRS §436B-19(7). The motion was granted. The section cited appears to be a typographical error, which although careless, did not cause Respondent actual prejudice. The alleged violation is spelled out in the Violations section of the Petition, listing the allegation as "professional misconduct, incompetence, gross negligence or manifest incapacity in the practice of the licensed profession or vocation." This tracks the language of HRS §436B-19(7). Additionally, the first page of the Petition lists HRS Chapter 436B, not 436, as one of the chapters violated. Finally, the actual HRS Chapter 436 concerns Abstract Makers and had been previously repealed.

The Hearings Officer, having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of this proceeding, renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT

1. Respondent was originally licensed to practice dentistry in the State of Hawaii on March 17, 1993, License No. DT 1770.

2. Regarding Count I, Larry Sizemore's complaint, the Petition alleges that some of the dental work performed by Respondent was substandard as Mr. Sizemore's caps fell off when he ate. The Petition also alleges that Respondent charged Mr. Sizemore twice for some of the work. The Petition fails to state that any bridge work performed by Respondent was deficient in any way.

3. Mr. Sizemore did not testify in person or by telephone. To prove the allegations in the Petition, Petitioner relied upon the testimony of its experts, dental advisory committee members Drs. Kevin Ching, D.D.S. and Kenneth Chinn, D.D.S. Both Drs. Ching and Chinn were qualified as experts in the field of general dentistry. Both experts conducted a records review, but did not interview any of the complainants or Respondent.

4. Dr. Chinn reviewed all documents regarding Respondent's treatment of Mr. Sizemore and concluded that if the bridge work falls out, then it is not up to the standards of the profession. Mr. Sizemore's bridge work fell out at least twice. Dr. Chinn noted that a gross lack of basic crown and bridge knowledge or gross negligence caused Mr. Sizemore's work to fail. Further, Dr. Chinn opined that he would not have charged a patient twice for a procedure that had to be redone a few months later. In Mr. Sizemore's situation, crown #10 was originally done on May 19, 1998, and was redone on January 8, 1999 with an additional charge.

5. Dr. Ching was unable to make specific comments regarding Respondent's work on Mr. Sizemore, as he did not examine Respondent's work.

6. Regarding Count II, Jiesi Chen's complaint, Petitioner submitted the affidavit of Ms. Chen to support the allegations in the Petition. Ms. Chen's affidavit almost mirrors the allegations in the Petition, stating that Respondent was rude and unprofessional in his dealings with her, swearing at her mother, and being late for appointments. Again, the complaining witness, Ms. Chen, did not testify.

7. Dr. Ching testified that assuming that the contents of Ms. Chen's affidavit were true, Respondent's conduct was improper and unprofessional.

8. Dr. Chinn opined that Respondent's conduct toward Ms. Chen was improper.

9. Regarding Count III, Ms. Darcy Ilae testified that she sought the services of Respondent as she was experiencing pain in her lower jaw. Another dentist had performed a partial root canal upon Ms. Ilae six or seven months earlier.

10. Ms. Ilae telephoned Respondent's office on the Saturday of the President's Day weekend in February 2001 and told Barbara Cochran, Respondent's administrator, that the root canal needed to be finished. However, Ms. Ilae decided not to go to Respondent's office. At about 10:30 p.m., the pain became so intense that Ms. Ilae sought treatment at Straub Hospital's emergency room.

11. The next day, Ms. Ilae went to Respondent's office with a friend, and complained of horrible pain. Respondent's assistant took x-rays of Ms. Ilae's mouth, but struggled when using the equipment. Respondent was physically close to Ms. Ilae as he examined her. During the examination, Respondent held Ms. Ilae's hand and stroked her

hair. In her Rico complaint, Ms. Ilae complained of being kidnapped and sexually assaulted. However, Ms. Ilae's testimony at hearing did not support these complaints.

12. Respondent gave Ms. Ilae three injections. When Ms. Ilae indicated she may have difficulty paying for Respondent's services, Respondent got close to her face, spoke harshly to Ms. Ilae, ordering her to look at him. Respondent stated that he was not a charity, and that Ms. Ilae could go elsewhere. Ms. Ilae felt uncomfortable, concerned, and afraid as Respondent's attitude was angry and dominant.

13. Respondent and Ms. Cochran yelled at each other while Ms. Ilae was at the office. Ms. Ilae paid $217.70 cash for her treatment and a prescription from Respondent and quickly left the office.

14. Respondent refunded Ms. Ilae the money she had paid him, after Ms. Ilae filed her Rico complaint.

15. Dr. Ching opined that Respondent's conduct toward Ms. Ilae was unprofessional and improper.

16. Dr. Chinn opined that Respondent exhibited inappropriate and unprofessional conduct when allowing his untrained assistant to take x-rays of Ms. Ilae; and that scaring a patient and yelling in the office was improper and unprofessional.

17. Regarding Count IV, Ms. Tracy Romias testified that on March 9, 2001 she sought dental treatment for a cracked tooth. Since Ms. Romias' regular dentist at Hawaii Family Dental was not available to treat her for a week, Ms. Romias contacted Respondent after searching through the phone book for a dentist who provided emergency care.

18. Ms. Romias telephoned Respondent's office and told Ms. Cochran that she wanted an extraction. According to Ms. Romias, Ms. Cochran said that the extraction could be done at her home in Waikiki. However, Respondent testified that an extraction could not be done at a patient's home, and he did not tell Ms. Romias that he would extract her tooth at home.

19. On the afternoon of March 9, 2001, Respondent and Ms. Cochran went to Ms. Romias' home. Respondent numbed Ms. Romias' mouth and told her to come to his office the next day to do the extraction. Respondent left empty vials of Marcaine and Lidocaine, and a used syringe at Ms. Romias' apartment. These items were recovered by

Ms. Romias and submitted into evidence. Ms. Romias was disappointed that Respondent did not perform an extraction at her home.

20. Just prior to the time Respondent and Ms. Cochran went to Ms. Romias' apartment, Ms. Romias had been smoking marijuana. Ms. Romias admitted that she had smoked the marijuana to relieve her pain.

21. Respondent gave Ms. Romias a prescription for Percodan for her pain. However, the pharmacy would not fill this prescription because there was only one copy of the prescription. At Ms. Romias' request, Respondent and Ms. Cochran met Ms. Romias at a shopping center and wrote another prescription. However, Ms. Romias did not take the Percodan as she did not like its effects.

22. Ms. Romias further testified that she paid Respondent $325.00 cash at the shopping center and also gave Respondent marijuana.

23. For the next two days, Saturday and Sunday, March 10th and 11th, Ms. Romias tried to contact Respondent, but could not reach him. On March 12, 2001, Ms. Romias was told to go to Respondent's Kahala office. Ms. Romias observed that the office had few furnishings, and Respondent stated that he was in the process of moving. The extraction could not be done as there was no dental chair. Ms. Romias, angry and in pain, requested her money back. Respondent recommended that Ms. Romias have the extraction performed by Dr. Kim Lawler, D.D.S. Ms. Romias went to Dr. Lawler, but declined treatment as her insurance would not cover the extraction.

24. Later, Ms. Romias went to Hawaii Dental Clinic and extracted three teeth.

25. Respondent fully refunded Ms. Romias the $325.00 she had paid him, but only after Ms. Romias had complained to the police and Rico. Ms. Romias signed an affidavit indicating she was withdrawing her complaint.

26. Dr. Ching concluded that Respondent's conduct toward Ms. Romias was improper, unprofessional, and dishonorable. Ms. Romias was promised an appointment, but did not get treatment that day.

27. Regarding Ms. Romias' complaint, Dr. Chinn opined that if a home visit is made, the dentist should take all equipment, including used syringes and carpules with him. Further, Respondent failed to properly dispose of the used syringe and carpules. Additionally, Respondent failed to keep accurate and complete clinical records of his

home visit with Ms. Romias. Ms. Romias collected one carpule of Marcaine, and one carpule of Lidocaine. Respondent's treatment notes incorrectly showed that two carpules of Marcaine were administered to Ms. Romias.

28. Respondent testified about his mental state while he had been treating the complainants in Counts I through IV. In December 2000, Respondent was suicidal and had been involuntarily admitted to Queen's Hospital. Respondent was treated for depression.

29. Respondent testified that in December 2000, he was diagnosed with a bipolar disorder, with manic episodes causing him to exhibit mood swings. Because he lacked health insurance, Respondent did not seek psychiatric treatment.

30. Respondent's witness, psychiatrist Douglas Smith, M.D., testified that he first saw Respondent on July 6, 2001. Respondent had suffered from pulmonary arrest and had died and been resuscitated. Respondent has a chronic mood disorder and had been treated for depression in December 2000, when he had his first manic episode with associated bizarre behavior. Respondent exhibited bipolar mood swings between mania and depression, causing him to be out of touch with reality.

31. Dr. Smith treated Respondent with various medications, and Respondent became medically stable, although he is still capable of high/low episodes.

32. According to Dr. Smith, Respondent is currently stable, is responding well to treatment, and is able to function. Respondent should be monitored as he has a higher than normal probability of having a high/low episode. Currently, Dr. Smith sees Respondent every two weeks. For the next five years, Dr. Smith recommends Respondent continue with his psychotherapy at least once every three months, or more, if under acute stress. Respondent continues to benefit from his medication and therapy.

33. In a November 24, 2001 letter, Dr. Chinn concluded that if Respondent continues to practice, he should only be allowed to work where another dentist can take professional and financial responsibility for all the dental work that he accomplishes.

34. At the hearing, Dr. Chinn stated that Respondent should not practice dentistry unless he is mentally stable and is receiving continued mental health treatment. Further, Dr. Chinn recommended that Respondent work under another dentist's license, and that he only be allowed to write prescriptions under supervision. Dr. Chinn also

testified that having Respondent take his boards again (the clinical portion of the dental examination) may be a good idea. Dr. Chinn opined that if Respondent exhibits further unprofessional conduct his license should be terminated without further hearing.

35. Respondent testified that he is currently practicing dentistry in Hilo as an associate with Dr. Terry Lawrence, D.D.S.

III. CONCLUSIONS OF LAW

Petitioner has charged Respondent with violating HRS § 448-17(12), as to Counts I through IV, and HRS § 436B-19(7), as to Count I.

HRS § 448-17(12), in pertinent part, reads as follows:

> In addition to any other actions authorized by law, the board may suspend or revoke any license issued under this chapter and may fine the licensee for any cause authorized by law, including but not limited to the following:
>
> > (12) Any other improper, unprofessional, or dishonorable conduct in the practice of dentistry.

HRS § 436B-19(7), states:

> In addition to any other acts or conditions provided by law, the licensing authority may refuse to renew, reinstate or restore, or may deny, revoke, suspend, or condition in any manner, any license for any one or more of the following acts or conditions on the part of the licensee or applicant thereof:
>
> > (7) Professional misconduct, incompetence, gross negligence, or manifest incapacity in the practice of the licensed profession or vocation.

Regarding Count I, the Hearings Officer concludes that the evidence Petitioner submitted to show unprofessional conduct in Respondent's dental care of Mr. Sizemore, was sufficient to sustain the violations, but only as to Respondent's multiple billings for crown #10. Initially, it is noted that Mr. Sizemore did not testify. Although Petitioner's expert conducted a records review and testified that the bridge work Respondent performed was below the standard of the profession, the Petition does not allege substandard bridge work, and Respondent was not put on notice that Mr. Sizemore's bridge work was an issue. Having earlier denied Respondent's Motion for Bill of Particulars, the Hearings Officer will not expand the scope of violations to other than

those specified in the Petition. However, Petitioner's expert found that the January 8, 1999 billing for the redo of crown #10 was an additional charge for work Respondent had performed and billed for just months earlier; and the additional charge for the remedial work should not have been billed.

Regarding Count II of the Petition, Petitioner submitted the affidavit of Ms. Chen to establish the allegations in the Petition. Again, the complaining witness did not testify. In his closing brief, Respondent admits that his "conduct toward Ms. Chen was inappropriate and unfortunate and should not be allowed to occur again." Respondent admits that he should have informed Ms. Chen of changes to Respondent's telephone number and office location, and that he should have adequate dental equipment and furnishings to perform dental treatment at a scheduled appointment. Based upon Ms. Chen's affidavit, the experts opinions, and no evidence to the contrary, the Hearings Officer finds that Respondent violated the provisions of HRS §448-17(12) in his dealings with Ms. Chen.

Respondent argues that the other violations alleged in the Petition were not proven to be improper, unprofessional or dishonorable. However, the Hearings Officer concludes that Respondent's conduct in Counts III and IV, in his dealings with Ms. Ilae and Ms. Romias, was also unprofessional and in violation of HRS §448-17(12).

In regards to Count III, dental advisory committee members, Drs. Ching and Chinn testified that Respondent's conduct toward Ms. Ilae was unprofessional. Dr. Ching opined that Respondent's conduct toward Ms. Ilae was unprofessional and improper. Dr. Chinn opined that Respondent exhibited inappropriate and unprofessional conduct when allowing his untrained assistant to take x-rays of Ms. Ilae; and that yelling in the office and scaring the patient was unprofessional.

Further, Respondent's conduct toward Ms. Romias in Count IV was also found by Drs. Ching and Chinn to be unprofessional. Dr. Ching concluded that Respondent's conduct toward Ms. Romias was improper, unprofessional, and dishonorable. Ms. Romias was promised treatment, given an appointment, but not provided the service in a timely manner. Dr. Chinn opined that if a home visit is made, the dentist should take all equipment, including used syringes and carpules with him. Further, Respondent failed to properly dispose of the syringe and carpules. Additionally, Respondent failed to keep

accurate and complete clinical records of his home visit with Ms. Romias. Ms. Romias collected one carpule of Marcaine, and one carpule of Lidocaine. Respondent's treatment notes incorrectly showed that two carpules of Marcaine were administered to Ms. Romias.

In mitigation, Respondent asserts that his improperly treated medical disorder affected his behavior when dealing with the complainants listed in Counts I through IV. Respondent represented at the hearing, and through the testimony of his treating psychiatrist, Dr. Douglas Smith, M.D., that he has not had any valid Rico complaints since being treated by Dr. Smith. Dr. Smith notes that Respondent's condition has stabilized, but that Respondent still requires monitoring for his psychiatric condition.

Based upon the evidence presented, the Hearings Officer concludes that Respondent's conduct, as to Counts I, II, III and IV constituted improper, unprofessional or dishonorable conduct in violation of HRS §448-17(12). Further, Respondent engaged in professional misconduct in violation of HRS §436B-19(7) as to Count I.

IV. RECOMMENDED ORDER

Based upon the above, the Hearings Officer recommends that the Board of Dental Examiners ("Board") find and conclude that Respondent violated HRS §448-17(12) as to Counts I through IV, and HRS §436B-19(7) as to Count I.

In considering the appropriate sanction, the Hearings Officer gives substantial weight to the testimony and recommendations of Dental Advisory Committee member, Dr. Chinn. Dr. Chinn spent a considerable amount of time and effort in reviewing and summarizing the records, providing written reports, and testifying at hearing.

For the violations found, the Hearings Officer recommends that Respondent's license, DT 1770, be revoked; however, this revocation shall be stayed upon the following conditions:

1. That Respondent shall have ongoing, regular follow-up with psychiatrist Douglas Smith, M.D., or Respondent's treating psychiatrist, until the treating psychiatrist deems treatment no longer necessary;
2. That Dr. Smith, or Respondent's treating psychiatrist, submit quarterly reports to the Board and Rico showing that Respondent is

mentally stable, is able to safely treat patients, and is fit to practice dentistry;

3. That Respondent agrees to receive and fully participate in any medical, psychological, or psychiatric treatment deemed necessary by his treating psychiatrist;

4. That Respondent's work as a dentist be supervised by Dr. Lawrence or another dentist who is working with Respondent;

5. That while under the care of his treating psychiatrist, Respondent shall be subject to random drug screening. Upon proof at a hearing that Respondent's drug screening is positive for an unauthorized controlled substance, Respondent's dental license shall be revoked;

6. That Respondent agrees to have all psychotropic medication managed by his treating psychiatrist, and to abstain from taking medications not prescribed to him. Further, Respondent must agree not to prescribe any medications for himself; and

7. That Respondent pay a fine of THREE THOUSAND AND NO/HUNDRED DOLLARS ($3,000.00) by cashier's check or money order, payable to the "DCCA-Compliance Resolution Fund" within three months of the date of the Board's Final Order. Payment shall be sent to the Regulated Industries Complaints Office, attention, John Hassler, Esq., at 235 S. Beretania Street, Suite 900, Honolulu, Hawaii 96813.

If Respondent is found to be in violation of any of the above-stated conditions, or violates any other statute or regulation under HRS Chapters 448 or 436B, or the Hawaii Administrative Rules governing dentists during the 5-year period subsequent to the date of the Board's Final Order, Respondent's dental license shall be automatically revoked upon a finding that Respondent has committed such violation.

DATED: Honolulu, Hawaii, SEP 2 0 2004.

Richard A Young

RICHARD A. YOUNG
Administrative Hearings Officer
Dept. of Commerce & Consumer Affairs