

BEFORE THE IOWA DENTAL BOARD

IN THE MATTER OF :)	
)	FINDINGS OF FACT,
TAMMY EASTMAN BERTCH ¹ , R.D.H.)	CONCLUSIONS OF LAW,
)	DECISION AND ORDER
RESPONDENT)	
)	

TO: TAMMY BERTCH BROUSSEAU

On January 10, 2008, the Iowa Dental Board (Board) filed a Notice of Hearing and Statement of Charges against Tammy Eastman Bertch, R.D.H. (Respondent) charging her with being convicted of a misdemeanor crime related to the practice of dental hygiene, in violation of Iowa Code section 153.34(10) and 650 Iowa Administrative Code (IAC) 30.4(4). A hearing was scheduled for April 22, 2008 at 3:30 p.m.

The hearing was held before the Board on April 22, 2008 at 3:30 p.m. in Board Conference Room, 400 SW 8th Street, Des Moines, Iowa. The following members of the Board presided at the hearing: Deena R. Kuempel, D.D.S., Chairperson; Lynn Curry, D.D.S.; Gary Roth, D.D.S.; Alan Hathaway, D.D.S.; Michael Rovner, D.D.S.; Debra Yossi, R.D.H.; Eileen Cacioppo, R.D.H.; Elizabeth Brennan and Suzan Stewart, Public Members. Respondent appeared by telephone and was self-represented. Assistant Attorney General Theresa O'Connell Weeg represented the state. Administrative Law Judge Margaret LaMarche assisted the Board in conducting the hearing. The hearing was recorded by a certified court reporter and was closed to the public at Respondent's request, pursuant to Iowa Code section 272C.6(1) and 650 IAC 51.20(13).

The Board, having heard the testimony and having examined the exhibits, and after convening in closed executive session pursuant to Iowa Code section 21.5(1)(f)(2007) to deliberate, directed the administrative law judge to prepare their Findings of Fact, Conclusions of Law, Decision and Order, in conformance with their deliberations.

¹ Respondent was married on August 31, 2007, and her name changed to Tammy Bertch Brousseau. (Testimony of Tammy Brousseau)

THE RECORD

The record includes Respondent's Continuance Request, the testimony of the witnesses, and State Exhibits 1-8 (See Exhibit Index for description).

RESPONDENT'S CONTINUANCE REQUEST

On April 21, 2008 at approximately 5:00 p.m., Respondent called the Board's Executive Director to request a continuance of the hearing. The Board's Executive Director informed Respondent that she would have to file a written request with the Board, and Respondent faxed a written continuance request at approximately 11:00 a.m. on April 22nd, which was the day of the hearing. The state resisted the continuance request as untimely. The Board heard the parties and considered the continuance request at the time scheduled for hearing.

The Board voted to deny the continuance request. 650 IAC 51.18(1)"a" provides that a written request for continuance shall be made at the earliest possible time and not less than five working days before the hearing except in unanticipated emergencies. Respondent filed her request the morning of the hearing. Respondent wanted more time to communicate with the attorney who had represented her on the criminal charges, apparently for the purpose of seeking to withdraw her guilty plea. Respondent had knowledge of these matters for some time and could have requested a continuance in a timely manner. This did not constitute an unanticipated emergency.

FINDINGS OF FACT

1. On September 18, 1996, Respondent was issued license number 2596 by the Board to engage in the practice of dental hygiene, subject to the laws of the state of Iowa and the rules of the Board. Respondent's license is current and will next expire on August 31, 2009. (State Exhibits 1, 2) At times relevant to this decision, Respondent was working part-time as a dental hygienist for two different dentists. One of the dentists has terminated her employment, and Respondent reports that she has since voluntarily left the other part-time position so that she could concentrate on looking for a full-time position. (Testimony of Respondent; State Exhibit 2)

2. On October 23, 2006, the Board's investigator received an anonymous call reporting that Respondent had recently been arrested for possession of a controlled substance and possession of needles that she took from an employing dentist's office. The caller further reported that DHS had founded allegations of denial of critical care against Respondent, in part due to her drug use. The caller subsequently sent the Board a copy of the DHS report, and the Board initiated an investigation. (Testimony of Phil McCollum; State Exhibits 2, 3)

3. The criminal charges and the DHS report, in part, were based on events that occurred on September 8-10, 2006. On Sunday, September 10, 2006, Respondent drove from Waterloo to the Correctional Facility in Mount Pleasant, Iowa to visit her son. Respondent had her two young daughters in the car with her, as well as her son's fiancé and their infant daughter. Along the way, the van's right front passenger tire blew out. Respondent stopped the van and examined the tire, but decided to continue driving on the rim because she did not have a spare and she was anxious to get to the prison before it closed at 6:00 p.m. When the tire blew out, Respondent spilled pop on her pants, and she decided to take her pants off to dry them. Respondent continued to drive while attempting to keep the flat tire on the gravel shoulder in order to maintain control of the car, which was a technique she learned from her father. Her son's fiancé apparently held Respondent's pants out the window in an attempt to dry them.

At approximately 3:00 p.m., Respondent's van was intercepted by Mount Pleasant, Iowa police officers just after she arrived at the correctional facility. The officers had received a complaint of reckless driving and observed that the van's tire was completely gone. Respondent granted permission for the officers to search the van, and they found and seized several vials of anesthetic medications, including Lidocaine, which were wrapped in paper towels in the driver's side door panel. Respondent admitted she did not have a prescription for the medications. According to the police report, Respondent told the officers that she worked for a dentist and that she was transferring the medications from one place to another.² The

² Respondent disputes the accuracy of this and other statements in the police report. Respondent claims that when the officers told her she was not allowed to have the medications, she simply told them that she worked for a dentist who allowed her to transport medications between dental offices. (Testimony of Respondent)

dentist later denied that he authorized Respondent to transport the anesthetic medications. Respondent was eventually charged with Reckless Driving, Possession of Controlled Substances, and Unlawful Possession of Prescription Medications. (Testimony of Phil McCollum; Respondent; State Exhibits 3; 9)

4. Respondent provided the following explanation for the anesthetic medications that she had in her possession when she was stopped in Mount Pleasant:

On Friday, September 8, 2006, Respondent was working at a dental office in Waverly and placed a number of items in her pockets with the intention of restocking the supply drawers in her work area. Respondent placed toothbrushes and floss in the pockets of her lab jacket and then put carpules of lidocaine and similar anesthetic medications, as well as needle tips in the pockets of her cargo pants. Respondent denies that she put any syringes in her pockets. Respondent was not certified to administer topical anesthetics, so when she treated patients requiring these medications, the dentist would have to administer them for her. At the end of the day, Respondent emptied the contents of her jacket pockets into the supply drawers but forgot that she also had items in her cargo pockets. When she was half way home to Waterloo, Respondent realized that she still had the medications and needle tips in her cargo pockets. She did not think that it was illegal to have them in her possession because her employer had allowed her to carry other medications, such as silver nitrate and Crest Whitening Strips-Professional Strength, between dental offices. She put the medications and needle tips in the driver's door panel of her van, where they remained wrapped in a paper towel and unopened until the police officers found them on Sunday, September 10, 2006.

(Testimony of Respondent; Phil McCollum; State Exhibits 2; 4)

5. On September 18, 2006, the Department of Human Services initiated a child protection investigation concerning Respondent's care of her children. When DHS interviewed her, Respondent denied using illegal drugs and agreed to drug testing. On September 20, 2006, Respondent reported to Allen

Lab for drug testing but was unable to provide enough urine for a specimen. She did provide a hair sample. Respondent returned to the lab the following day and provided a urine specimen. Respondent's hair specimen was positive for methamphetamine at 1.26 nanograms per milligram, but the urine specimen was negative. Respondent was asked to provide another urine sample. An employee of Allen Lab reported that the second urine specimen appeared to be diluted. The specimen was tested and came back as positive for methamphetamine (212 nanograms per milliliter) and amphetamine (66 nanograms per milliliter), with a creatinine level of 8.2. The lab personnel characterized the creatinine level as "suspicious for dilution" and the drug testing results as indicative of use, especially when Respondent's creatinine levels were so low. On October 16, 2006, the Department of Human Services founded the allegations against Respondent for denial of critical care/ failure to provide supervision to her children. Respondent agreed to wear a drug patch that would detect any drug use. (State Exhibits 2, 3; Testimony of Phil McCollum)

6. The Board's investigator interviewed Respondent on November 16, 2006 and prepared a report. Respondent denied using drugs but stated that she had married someone with a drug problem and had friends who were drug users. She attributed her positive drug tests to being around others who were using.³ Respondent was wearing the drug patch at the time of her interview, and agreed to provide the investigator a urine specimen. This urine specimen tested negative. (Testimony of Phil McCollum; State Exhibits 2, 4)

7. Following a review of the investigative information, the Board issued an evaluation order to Respondent on January 18, 2007. The evaluation order required Respondent to schedule a complete psychological, psychiatric, and substance abuse evaluation through Dr. Richard Hauser, M.D., within fourteen days. Dr. Hauser is a physician with specific experience in conducting evaluations for licensing boards. Respondent was further required to contact the Board seven (7) days prior to the date that the evaluation was scheduled to begin so that the

³ Respondent testified that she had a close friend who had a serious addiction to methamphetamine and that she spent a lot of time providing support to the friend in September 2006. The friend's child had tested positive for methamphetamine, presumably from second-hand exposure to the drug. (Testimony of Respondent)

Board could forward a complete copy of the investigative file to the evaluating facility.

The Board sent the evaluation order to Respondent by certified mail on February 12, 2007. The post office left notices for Respondent to pick up the certified mail on February 14 and again on February 19th. The evaluation order was returned to the Board as undeliverable on March 1, 2007. The Board's investigator attempted to contact Respondent by telephone, but her phone was disconnected. On March 5, 2007, the Board's investigator left a phone message at an alternative number for Respondent and urged her to return his call as soon as possible. Finally, on March 7, 2007 the Board investigator visited Respondent at her place of employment. Respondent admitted knowing that the Board had sent her a certified letter but stated that she wasn't able to pick it up. She also admitted receiving the investigator's phone message and told him that contacting him was "on her list of things to do" that day. Respondent stated that she had been very ill with mononucleosis and anemia. She reported that she continued to work with DHS to maintain custody of her children and continued to wear the drug patch. The investigator served Respondent with a copy of the Board's evaluation order. (Testimony of Phil McCollum; State Exhibits 2, 6)

8. On or about March 28, 2007, Respondent pled guilty to Possession of a Prescription Drug Without a Prescription, in violation of Iowa Code section 155A.21, and three other counts against her were dismissed. Respondent was granted a deferred judgment and was placed on unsupervised probation for one year, with conditions. She was also ordered to pay a civil penalty. (State Exhibit 9; Testimony of Phil McCollum)

9. Respondent scheduled an evaluation with Dr. Hauser for April 5, 2007, and the Board provided Dr. Hauser with a copy of the investigative file on March 29, 2007. However, the scheduled evaluation was cancelled because Respondent was receiving Title XIX, and Dr. Hauser is not able to provide services to Title XIX patients. (Testimony of Phil McCollum; State Exhibit 6)

10. The Board investigator told Respondent that she had to find another facility to perform the evaluation. Since Respondent had told the investigator that she was under psychiatric care for a panic disorder, he suggested that he contact her

psychiatrist for a referral. Respondent was evaluated by Jon F. Towley, LISW, in June 2007, and he submitted a written report to the Board on June 28, 2007. However, Respondent never notified the Board that she had scheduled this evaluation. Therefore, the Board never provided Mr. Towley with a copy of its investigative file.

Respondent's evaluation was based in part on her completion of the Substance Abuse Subtle Screening Inventory-3. The results showed that Respondent had a low probability of substance abuse disorder. Mr. Towley states that he has found this test to be an accurate predictor of substance dependence if it is present.

Mr. Towley also conducted three interviews with Respondent. According to his report, Respondent told Mr. Towley that she had been arrested on four counts of controlled substances possession and one count of child endangerment and that she was ultimately convicted of one count of possession of controlled substances. Respondent admitted to being in possession of Lidocaine, Mepevacaine, Septocaine, and one other Novocaine product and explained that she inadvertently took them home with her after putting them in her lab coat sometime during the day. Respondent also explained that her van was searched by police after it had a flat tire, and the drugs were discovered.

The evaluation report states that Respondent has a rather extensive substance abuse history during her teen years, including drinking to get drunk, extensive use of hashish and episodic uses of cocaine, LSD, PCP and amphetamines.⁴ The report also states that Respondent has been on the periphery of the drug and drinking culture for her whole life and that she periodically drinks too much.

Mr. Towley concluded that Respondent does not have a personal pattern of drug use, but does have a history of episodic alcohol abuse that has not impaired her personal or professional life and does have a low probability of substance abuse. He

⁴ Respondent testified that she filled out a questionnaire concerning her drug use history and asserts that the information in the evaluation report about her drug use is incorrect. Respondent denies that she ever used LSD or PCP, states that she used cocaine and amphetamine once during her teens, and denies extensive use of hashish in the past. The Board is uncertain whether the evaluation report was accurate and believes that one of the benefits of a new evaluation by Mr. Towley would be to verify what Respondent reported on the questionnaire and to clarify Respondent's past drug use. (Testimony of Respondent)

recommended a corrective plan to include re-education on the proper handling of medication in the workplace. He did not recommend drug treatment or drug use education. (Testimony of Phil McCollum; Respondent; State Exhibit 8)

11. The Board's investigator has 9½ years of investigative experience with the Board and 10 years of prior law enforcement experience. According to the Board's investigator, Lidocaine and similar drugs have significant value in the drug culture. Drug dealers have been known to cut cocaine with these types of anesthetic drugs so that a potential customer will feel an immediate numbness when they test the purity of the drug by touching it with their tongue. (Testimony of Phil McCollum)

CONCLUSIONS OF LAW

Applicable Statutes and Rules

Iowa Code section 153.34(10) provides, in relevant part:

153.34 Discipline

The board may issue an order to discipline a licensed dentist or dental hygienist, ... for any of the grounds set forth in this chapter, chapter 272C, or Title IV. Notwithstanding section 272C.3, licensee or registrant discipline may include a civil penalty not to exceed ten thousand dollars. Pursuant to this section, the board may discipline a licensee or registrant for any of the following reasons:

...

10. For a violation of a law of this state, another state, or the United States, without regard to its designation as either a felony or misdemeanor, which law relates to the practice of dentistry, dental hygiene, or dental assisting. A certified copy of the order or judgment of conviction or plea of guilty in this state or in another state constitutes conclusive evidence of conviction.

...

650 IAC 30.4(4) provides in relevant part:

650-30.4(153) Grounds for discipline. The following shall constitute grounds for the imposition by the board of one or more of the disciplinary sanctions set

forth in rule 650-30.2(153) specifically including the imposition of civil penalties not to exceed \$10,000.

...

4. Conviction of a felony crime or conviction of a misdemeanor crime if the misdemeanor conviction relates to the practice of the profession.

...

The preponderance of the evidence established that Respondent was convicted of a misdemeanor crime related to the practice of dental hygiene, in violation of Iowa Code section 153.34(10) and 650 IAC 30.4(4). The records from Iowa Courts Online indicate that Respondent, who was represented by counsel at the time, entered a plea of guilty to the misdemeanor crime of Possession of Prescription Drugs Without a Prescription.⁵ Although Respondent received a deferred judgment, Iowa Code section 153.34(1) specifies that the entry of a guilty plea constitutes a conviction for purposes of that statute.

The misdemeanor crime was clearly related to Respondent's practice as a dental hygienist because it involved her unauthorized removal of prescription drugs from the dental office where she was employed. Moreover, the circumstances surrounding Respondent's arrest and the subsequent investigations raised significant concerns about patient safety because they indicated that Respondent may have been using drugs or may have been under the influence of illegal drugs. While Respondent has since submitted a substance abuse evaluation report suggesting that she is not drug dependent or a drug abuser, the evaluator was not aware of Respondent's positive UAs and did not have the Board's investigative file available as a source of collateral information when he interviewed Respondent. The Board believes that this information is essential to a valid evaluation and that is why the original evaluation order required Respondent to notify the Board in advance of the evaluation.

⁵ In her Motion for Continuance and some of her testimony, Respondent suggests that she was improperly convicted of Possession of Controlled Substances because Lidocaine is not classified as a controlled substance, but the conviction record from Iowa Courts Online indicates that the controlled substances possession charges were dismissed.

DECISION AND ORDER

IT IS THEREFORE ORDERED that dental hygiene license no. 2596, issued to Respondent Tammy Eastman Bertch, R.D.H., is hereby placed on probation for an indefinite period, subject to the following conditions:

1. Within thirty (30) days of the date of this Order, Respondent shall complete a substance abuse evaluation by an evaluating facility/evaluator pre-approved by the Board. The evaluation shall be at Respondent's expense.
2. Respondent shall contact the Board office not less than seven (7) days prior to the date the above-referenced evaluation is to begin and advise the Board of the date and time of the evaluation. Upon receipt of this information, the Board will send the evaluating facility/evaluator a complete copy of the Board's investigative file and the Board's Final Order.
3. Respondent shall cause a complete written report of the evaluation to be promptly forwarded to the Board from the evaluating facility. Respondent shall sign any necessary releases to allow for a full exchange of information between the Board, the evaluator, and any subsequent treatment provider.
4. The Board shall review the report from the evaluating facility and this Decision and Order. Should the evaluating facility determine the need for continued monitoring of Respondent, the Board will issue an Order modifying the conditions of the probation. This Order shall include any specific treatment recommendations and incorporate the Board's standard monitoring protocols.
5. Respondent shall immediately and fully comply with any and all treatment recommendations made as a result of the substance abuse evaluation.
6. Respondent shall submit quarterly written reports to the Board detailing her compliance with this and subsequent Orders and the terms set forth for probation.

7. If treatment is recommended, Respondent shall include information verifying compliance with all treatment recommendations in her quarterly written reports to the Board.

8. Respondent shall upon reasonable notice appear before the Board at the time and place designated by the Board.

9. Respondent shall notify her current employer and any future employers of this and any subsequent Orders, and shall report back to the Board with signed statements from her employer acknowledging this disclosure within seven (7) days of employment.

10. Respondent shall fully and promptly comply with all Orders of the Board and all statutes and rules regulating the practice of dental hygiene in Iowa.

11. Any violation of the terms of this Order is grounds for further disciplinary action upon notice and opportunity for hearing for failure to comply with an Order of the Board, in accordance with Iowa Code section 272C.3(2)(a).

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6 and 650 IAC 51.35(2) that Respondent shall pay \$75.00 for fees associated with the disciplinary hearing and any costs calculated by the executive director and attached to this Order, within thirty (30) days of receipt of this decision.

Dated this 13th day of *May*, 2008.

Deena R. Kuempel, DDS

Deena Kuempel, D.D.S.
Chairperson
Iowa Dental Board

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Page 12

Judicial review of the board's decision may be sought in accordance with the terms of Iowa Code chapter 17A and Iowa Code section 153.33(5)(g) and (h).