

Opinion No. 71-121

December 13, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Honorable Arthur L. Dow State Representative 3718 Candelaria N.E. Albuquerque, New Mexico

QUESTIONS

QUESTIONS

1. Do the words "supervised" and "under supervision" as used in Sections 67-4-2, and 67-4-17, respectively, NMSA, 1953 Comp. (1971 P.S.), require that a licensed dentist be physically and immediately present in his office or building if those services he is to supervise are being performed?
2. Does Section 67-4-19(C) allow the Dental Board the administrative discretion to determine which dental examination and the time of such examination is "appropriate" in each individual circumstance?

CONCLUSIONS

1. Yes.
2. Yes.

OPINION

{*186} ANALYSIS

Section 67-4-2, NMSA, 1953 Comp. (1971 P.S.) states:

As used in the Dental Act [67-4-1 to 67-4-21]:

...

D. 'dental hygienist' means a person licensed as a dental hygienist under the Dental Act to perform dental hygiene, to take roentgenograms and perform such supervised activities and functions as provided for under the Dental Act and the rules and regulations of the board;

E. 'dental hygiene' means the treatment of human teeth by removing from the surface thereof calcarious deposits and stains, by removing accumulated accretions and by

polishing the surface of the teeth and performing such other supervised dental functions as permitted by the rules and regulations of the board.

...

Section 67-4-17, **supra**, states:

A. A dental hygienist shall practice **only under the supervision of a licensed dentist** in accordance with the rules and regulations of the board. (Emphasis added.)

...

Reading these sections together, it seems evident to us that a dental hygienist is not to perform any act constituting dental hygiene unless "supervised" by, or "under the supervision" of, a licensed dentist.

Consequently, we must define "supervise." Webster's Third International Dictionary defines it as "to coordinate, direct, and inspect continuously and at first hand the accomplishment [of another]: oversee with the powers of direction and decision the implementation of one's own or another's intention." Similarly, "supervision" is defined as "the act, process or occupation of supervising; direction, inspection and critical evaluation."

Although we find no New Mexico cases defining these terms, numerous other jurisdictions have accepted the above quoted definitions. See **Saxton v. St. Louis Stair Co.**, Mo. App., 410 S.W.2d 369; **Holland-American Line v. Vassallo**, Tex. Civ. App., 365 S.W.2d 650; **Lowe v. Chicago Lumber Co. of Omaha**, 283 N.W. 841 (Neb.); **Swartley v. Harris**, 40 A. 2d 409 (Pa.)

Further, it should also be noted that the Rules and Regulations of the Dental Board on file with the State Records Center and the State Library allow auxiliary personnel to perform only the very limited services of sterilization, organization and arrangement of instruments and other minor house keeping {**187*} chores when the licensed dentist is away from his office, see Rules and Regulations of the New Mexico Board of Dental Examiners (dated Sept. 21, 1970), Section 10-110, unless the services are performed in circumstances not appropriate to this opinion.

While it is noted that the above Rules and Regulations were filed pursuant to the Dental Act which was repealed by Laws 1971, Chapter 125, it is our opinion that these Rules and Regulations are still in effect insofar as they do not conflict with the new Dental Act enacted by Laws 1971, Chapter 125.

As there is no conflict between the above quoted language and the new Dental Act, it is our opinion that no services which constitute dental hygiene can be performed unless a licensed dentist is physically and immediately present in the office or building where the

work is being performed in order that he can meet his statutory duty to supervise the services of a dental hygienist.

Section 67-4-19, NMSA, 1953 Comp. (1971 P.S.), states in applicable part:

Nothing in the Dental Act [67-4-21] shall be construed to prohibit:

...

C. any dentist who has been lawfully licensed to practice in another state and who submits proof that he has received, in writing, a notification by the board of dentistry that he possesses the necessary character and professional qualifications from entering into a contract, to serve exclusively as a member of their medical staff, with any state hospital or state institution, any institution or dental program maintained by the health and social services department or the hospitals and institutions department or other similar charitable state institutions for the care of the aged, indigent, or feeble-minded, Provided, that the contracting dentist must take and pass the next appropriate dental examination or the contract shall be automatically terminated;

...

As indicated in your question, the word which must be defined to answer your question is the word "appropriate." Turning again to Webster's Third International Dictionary we find appropriate defined as "specially suitable", a definition which connotes a discretionary function on those who are to determine what is appropriate.

Such a definition was adopted by the Federal Courts in construing Rule 57 of the Federal Rules of Civil Procedure which allows the Court to issue a declaratory judgment "in cases where it is appropriate." In **Yellow Cab Co. v. City of Chicago**, 186 F.2d 946, the Court interpreted the above quoted language to accord "wide discretion in deciding whether or not to grant declaratory relief."

It is our opinion that such an interpretation is sound and the language of Section 67-4-19, NMSA, **supra**, allows the Dental Board to specify what the "next appropriate dental examination" is to be for those serving as dentists in state hospitals and institutions. If the Legislature had intended conclusively that contracting dentists must take and pass the "next dental examination," it would have used only those words omitting the word "appropriate."

In specifying what the next appropriate dental examination is, it is our opinion that the Dental Board may use its discretion. Further, it is our opinion that no contract is "automatically terminated" until the Board has specified the appropriate examination and the contracting dentist has failed to take and pass it.

By: James B. Mulcock, Jr.

Assistant Attorney General