

SOAH DOCKET NO. 578-11-7257

TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
v.	§	OF
	§	
KODY KOTHMAN, D.V.M., Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Board of Veterinary Medical Examiners (Staff/Board) sought to formally reprimand Kody Kothman, D.V.M. (Respondent) on the basis that he violated various Board rules. Staff also sought to require him to take eight hours of continuing education in small animal surgery, and impose a \$1,500.00 administrative penalty. This Proposal recommends Respondent receive an informal reprimand.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no contested issues of notice, jurisdiction, or venue in this proceeding. These matters are addressed in the findings of fact and conclusions of law without further discussion.

The hearing convened November 1-2, 2011, before Administrative Law Judge (ALJ) Steven M. Rivas in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by Tyler Vance, Assistant General Counsel. Respondent was represented by Keith Thompson, attorney. The record closed on November 2, 2011.

II. DISCUSSION

A. Background

Respondent is a licensed doctor of veterinary medicine who operates a veterinary clinic, Caprock Veterinary Clinic, at 9202 Avenue P, Lubbock, Texas. On April 22, 2009, Adam DeLong and Ashley Sellers (the owners)¹ took their cat Brie to Respondent's clinic to be spayed after Mr. DeLong noticed the cat was in heat. Following the procedure, the owners took the cat home and later observed the cat was in discomfort. On April 27, 2009, the owners took the cat back to Respondent's clinic where Respondent briefly examined the cat and prepared to treat the cat. However, the owners left the clinic with the cat before Respondent could perform any work on the cat. After taking the cat to other veterinary clinics, the owners filed a complaint against Respondent, resulting in this action.

B. Legal Standard and Staff's Allegations

TEX. OCC. CODE Ann. (Code) ch. 801 is the Veterinary Licensing Act (the Act) that regulates veterinarians. Under the Code § 801.002(6), veterinarians are persons "licensed by the board under this chapter to practice veterinary medicine." Code § 801.402(6) provides that a person is subject to disciplinary action if the person "engages in practices or conduct that violates the board's rules of professional conduct."

Staff's first allegation is that Respondent did not comply with the appropriate standard of care because he did not use the same humane care, skill, and diligence as other veterinarians in the community in the manner he prepared the cat for surgery and the method he utilized in spaying the cat. 22 TEX. ADMIN. CODE (TAC) § 573.22.

¹ Ms. Sellers briefly attended the hearing but did not offer any testimony.

Staff's second allegation is that Respondent was not honest with the cat's owners about the procedure he performed and thus failed to uphold his duties of honesty, integrity, and fair dealing. 22 TAC § 573.26.

Staff's third allegation is that Respondent attempted to directly influence the sound professional judgment of another veterinarian while this matter was being investigated. 22 TAC § 573.2.

Staff's final allegation was that Respondent failed to keep proper patient records for the cat. 22 TAC § 573.52.

C. Evidence

Staff offered 11 exhibits which were all admitted as evidence and provided the testimony of 5 witnesses: Adam DeLong, the complainant; Don Hegi, D.V.M.; Jeanette Lubenau, D.V.M., Russell Ueckert, D.V.M., and Dennis Barker, an investigator for the Board. Respondent testified on his own behalf and offered 17 exhibits, of which 14 were admitted as evidence.

1. Adam DeLong's Testimony

Mr. DeLong testified that when he picked up the cat on April 22, 2009, nothing appeared wrong with the cat other than she was still unconscious after the procedure. Two days later, he grew concerned about the cat's condition because she appeared lethargic and, in his opinion, was not recovering well.² Mr. DeLong testified that the cat's incision site was stitched when he first picked up the cat from the clinic, but in the days that followed, the stitches around the wound appeared "ragged" and began to unravel and become loose. Mr. DeLong also noticed swelling and pus near the incision site.

² Respondent and other veterinarians have spayed several other cats belonging to the owners.

Mr. DeLong testified that by the early morning hours of April 27, 2009, the cat's condition deteriorated to the point that he believed it was a "dire emergency" that the cat be examined by a veterinarian. Mr. DeLong testified that he first attempted to take the cat to an emergency animal care facility, but was unable to locate one that was open. Next, Mr. DeLong arranged to take the cat to Respondent's clinic so that he could examine her. At approximately 1:30 a.m., Mr. DeLong met Respondent at his clinic, and Respondent immediately grabbed the cat and sedated her as soon as they arrived.

After Respondent examined the cat, Mr. DeLong testified Respondent told him that it was not "as big of a deal" as Mr. DeLong thought it was, and quoted a charge for the visit. Mr. DeLong testified he felt uncomfortable with the situation because Respondent had not explained there would be a charge for this visit.³ Mr. DeLong then took the cat home and began calling other veterinarians the following morning.

Mr. DeLong testified that later the next morning, he took the cat to Dr. Hegi, who offered to perform some work on the cat or euthanize it. After Dr. Hegi quoted a \$700.00 charge for his services, Mr. DeLong took the cat to Dr. Lubenau for a second opinion. Dr. Lubenau offered to perform the same services that Dr. Hegi had offered for a fee of \$450.00. Mr. DeLong agreed to have Dr. Lubenau treat the cat. After Mr. DeLong picked up the cat from Dr. Lubenau's clinic, it recovered and continues to live normally, according to Mr. DeLong.

2. Dr. Hegi's Testimony

Dr. Hegi testified he has been practicing veterinary medicine in Lubbock for 33 years and has spayed approximately 15,000 cats in his career.⁴ Although Dr. Hegi did not perform any work on the cat, he did examine her on April 27, 2009, and testified the incision site "was a mess." According to Dr. Hegi, there was pus and debris coming from the incision site as a result

³ Mr. DeLong stated "we looked at it as kind of picking up the mess," which infers his belief that Respondent should have taken care of the cat for no charge.

⁴ Dr. Hegi is a member of the American Veterinarian Association, the Texas Veterinarian Medical Association, and the South Plains Veterinarian Medical Association, where he serves as secretary treasurer. Dr. Hegi and Respondent both graduated from Texas A&M in 1978.

of the cat's hair not being clipped short enough or wide enough. Dr. Hegi testified the skin around the incision site appeared to be infected and that the cat's intestines were starting to "poke" through the sutures. Dr. Hegi recommended stabilizing the cat before performing surgery, but the owners sought a second opinion with Dr. Lubenau.

a. Preparing the Surgical Site

Dr. Hegi testified the first step in performing surgery on an animal is to anesthetize the animal and then shave the surgery area. According to Dr. Hegi, a cat undergoing a spay procedure should be broadly shaved vertically from its rib cage to its pubis and horizontally from just outside the cat's mammary chain on the left to just outside the cat's mammary chain on the right. Dr. Hegi explained in further detail:

So you clip -- when you clip the area -- and the cat's on its back, you clip the whole area that you can see. You don't need to go up the sides. But if you're looking down on it from above, you clip from the costochondral junction here where the ribs come together. You follow the line of the ribs. You follow the line of the edge of the abdomen, then you come down to -- to where the pubis is on the side. The mammary chain, or the nipples of the mammary chain kind of run about right here. And you don't just go to the mammary chain, of course, you go broadly.⁵

According to Dr. Hegi, the reason for broadly shaving the surgery area is to reduce the chance of infection from bacteria and other contaminants that reside on cat hair. Dr. Hegi testified that when he observed the cat, its hair was matted into the incision site, which, to him, indicated the surgical area was not prepared correctly. Had the surgery area been broadly shaved in the manner explained above, the cat's hair would not have been able to reach the incision site, according to Dr. Hegi. The cat's hair was not sufficiently clipped above or below the incision site, nor was it clipped wide enough in Dr. Hegi's opinion. As such, Dr. Hegi asserted the manner in which Respondent prepared the cat for surgery did not meet the standard of care in Lubbock or similar communities because the area did not provide a proper sterile surgical field.

⁵ Dr. Hegi (and other witnesses) utilized a large drawing pad to illustrate their testimony at the hearing but the parties did not offer any of the illustrations as evidence.

b. The Surgical Procedure

As for the surgical procedure itself, Dr. Hegi testified Respondent performed an ovariectomy (OE) and not an ovariohysterectomy (OHE) on the cat. According to Dr. Hegi, an OE is where the ovaries are removed, the uterine horns are clamped, and the entire uterine body remains in the cat. Conversely, Dr. Hegi testified, an OHE procedure is where the entire uterine body is removed from the cat including the ovaries, and both uterine horns. Dr. Hegi testified he does not perform OE procedures, nor does he know of any other veterinarian in Texas that performs OE procedures—presumably, other than Respondent.

Dr. Hegi contended the standard of care in Lubbock is to perform an OHE procedure and because Respondent performed an OE procedure on the cat, Respondent was not within the appropriate standard of care for Lubbock. Dr. Hegi does not consider a cat properly spayed unless it has undergone an OHE procedure.

Moreover, Dr. Hegi testified complications that may arise from an OE procedure include: uterine infection, internal bleeding, and bladder strangulation. On cross-examination, Dr. Hegi testified that common complications from an OHE procedure include: bleeding at the incision site, infection, and intestines coming through the incision. Dr. Hegi recalled that the cat presented these same symptoms when he examined her. He also testified that these symptoms are “always possible” in any routine spay.

3. Dr. Lubenau’s Testimony

Dr. Lubenau has been practicing veterinary medicine for 17 years and has performed thousands of cat spays. The type of spay Dr. Lubenau performs is the OHE because it renders a cat sterile and decreases the chances of mammary cancer by 90% and uterine cancer by 100%, according to Dr. Lubenau.⁶ Dr. Lubenau testified that she has always performed the OHE

⁶ On cross-examination, Dr. Lubenau admitted that because Respondent removed the cat’s ovaries, he created the same effect of decreasing mammary cancer by 90% as if he had performed an OHE. Additionally, Dr. Lubenau testified that of the 250 cats she sees each year, only one or two “intact” or non-spayed cats have uterine cancer.

procedure on cats and does not know of any veterinarian that performs the OE procedure, other than Respondent.

a. Dr. Lubenau's Treatment of the Cat

Dr. Lubenau testified that when she first saw the cat, it was lethargic, depressed and had an oozing incision site. Dr. Lubenau's testimony regarding the incision site was similar to Dr. Hegi's in that the area where Respondent made the incision was not shaved broadly, which resulted in the cat's hair being matted around the incision site. Dr. Lubenau agreed with Dr. Hegi's opinion that the manner in which Respondent prepared the cat's surgical area did not meet the Board's standard of care because the area was not properly shaved.

When Dr. Lubenau opened the cat, she found the uterine horns were not separately clamped, but instead were tied together with one suture. Leaving the uterine horns in this state could cause uterine infections like endometriosis and pyometra, as well as strangulation, according to Dr. Lubenau.

Dr. Lubenau asserted she was not taught to perform an OE procedure on a cat that required spaying. While she believes that administering an OE on the cat was not in the "best nature for this animal," she observed no infection inside of the cat resulting from the OE procedure. Moreover, Dr. Lubenau testified that nothing Respondent did inside of the cat was the cause of anything (oozing and swelling) on the outside of the cat. The symptoms the cat presented were caused by the manner in which Respondent prepared the surgical site, according to Dr. Lubenau.

b. Dr. Lubenau's Involvement in the Investigation and her Alleged Statements

Dr. Lubenau testified about a letter Respondent hand-delivered to her office on February 2, 2009, after Mr. DeLong initiated a complaint against Respondent.⁷ Dr. Lubenau testified Respondent presented the letter "rather rudely" to her receptionist and that he "threw the

⁷ VME's Exhibit No. 10.

papers” to her staff and told them to make sure “Dr. J receives this letter, and see you in court.” The letter addressed the Board’s investigation of this matter and referred to comments Dr. Lubenau allegedly made to the Board:

I am [e]nclosing information I have been sent that includes your opinions on the situation that the [B]oard is using against me. As you read the complaint letter, the allegation letter, and the findings of facts, pay close attention to those inflammatory statements that either came from you, was implied by you, or came from a third party using your name.

* * *

If Ashley [Sellers] lied to the Board about what you said, they need to know about it. If the Board has misrepresented you, then I need to know about it.

Dr. Lubenau admitted on cross-examination that certain allegations against Respondent were incorrectly accredited to her. Respondent’s hand-delivered letter of February 2, 2009, and the Board’s Report of Investigation dated November 5, 2009, contains the following:

Ms. Sellers stated Dr. Lubenau told her that [Respondent’s] spay surgery was performed incorrectly, which led to the infection. Ms. Sellers stated Dr. Lubenau told her that she had to correct the spay surgery.⁸

Dr. Lubenau asserted that Ms. Sellers misquoted her in the statement above that was made to the Board’s investigator. Dr. Lubenau also admitted that she signed letters to the Board that contained incorrect statements, although none of those letters were offered as evidence at the hearing. Dr. Lubenau apologized for not bringing this discrepancy to the Board’s attention until August 24, 2011—the day before her deposition in this matter—and testified that she understands how these misstatements made to the Board would upset Respondent.

At the hearing, Dr. Lubenau asserted that by personally delivering the letter, she believes Respondent sought to prevent her from working with the Board’s investigation of this matter and that he was trying to influence her opinion. However, Dr. Lubenau could not identify which opinion Respondent tried to change or influence.

⁸ Respondent’s Exhibit No. 4.

4. Dr. Ueckert's Testimony

Dr. Ueckert has been practicing veterinary medicine for 19 years and has a mixed practice in Abilene, Texas. He is familiar with the practice of veterinary medicine in Lubbock, and believes it is very similar to Abilene based on its size and similar socioeconomics. In addition, Dr. Ueckert testified he has spayed "several thousand" cats in his career.

a. Preparing the Surgical Site

In preparing a cat for surgery, Dr. Ueckert testified, he first anesthetizes the cat and then shaves the surgical area using a clipper blade size 40, which cuts to .25 millimeters. Dr. Ueckert testified that he shaves the cat in essentially the same manner described by Drs. Hegi and Lubenau.

Dr. Ueckert observed photographs of the cat taken on April 27, 2009, and described the cat as having a "dehiscd" wound, or a wound where a surgical incision comes undone and does not heal properly due to improper suturing, infection, or trauma.⁹ The dehiscence depicted in the photograph shows the cat had an infection due to an "inadequate job of surgical prep," according to Dr. Ueckert. He added the cat's hair should have been clipped further away and should not have been around the incision site.

b. The Procedure

Dr. Ueckert testified that a cat in heat affects a spay procedure "only slightly" because the uterine tissue will be edematous or slightly larger. When a cat is in heat, Dr. Ueckert testified, the surgical incision must be slightly longer than usual to get to the uterine tissue during a spay procedure. Dr. Ueckert acknowledged that making a longer incision may be more invasive, but it is not necessarily detrimental to the animal in his opinion.

⁹ VME Exhibit Nos. 7-8.

The only spay procedure Dr. Ueckert was taught to perform was the OHE; and he is not aware of any other veterinarian that performs an OE. Although an OE procedure may be less invasive and may render less trauma on a cat, Dr. Uecker chooses to perform a complete OHE on a cat that requires a spay procedure. In addition, Dr. Ueckert's concerns regarding possible complications that may result from an OE procedure were similar to Drs. Hegi and Lubenau: bleeding, pyometra, and strangulation.

Through research, Dr. Ueckert has discovered that veterinarians in Europe have started spaying cats by OE using laparoscopic instruments. Dr. Ueckert testified that although he has laparoscopic equipment, he would not use it to perform a spay procedure because it is difficult to set up and is time-consuming to perform.

c. The Standard of Care

Dr. Ueckert testified the standard of care progresses over time. Dr. Ueckert explained that the standard of care changes after research and peer-reviewed findings and journal articles filter down to students attending colleges of veterinary medicine and to veterinarians attending continuing education seminars. Regarding the manner in which new methods are recognized and accepted as the standard of care, Dr. Ueckert testified, "We veterinarians love to get together and talk about new and exciting stuff and how [we] are doing new procedures. [That's how] veterinary medicine advances. We talk about ideas, but we don't go out unilaterally and begin changing them on our own." Dr. Ueckert added, "If there is not good science" that supports new methods, "we wait for the good science to come along."

5. Mr. Barker's Testimony

Mr. Barker has worked as an investigator 18 years, both at the state and federal level, and has been with the Board for 11 years. He testified that in this case he reviewed the complaint, obtained relevant business and medical records, and obtained statements from everyone involved. Next, he prepared a report for the Board outlining the evidence he gathered.

a. Statements Attributed to Dr. Lubenau

Mr. Barker admitted he did not verify whether or not Dr. Lubenau made the statements (noted above) to Ms. Sellers before he included the statements in his report. According to Mr. Barker, before he submits his report to the Board, he usually talks to the complainant (Ms. Sellers) but “not necessarily” to any other witnesses (Dr. Lubenau) that are quoted by the complainant in the complaint. Mr. Barker acknowledged that Dr. Lubenau did not make the statements attributed to her by Ms. Sellers in the complaint, and added, “I can’t tell you why I didn’t ask [Dr. Lubenau] anything about that.” Mr. Barker further stated that although he has a duty to investigate complaints, he does not adhere to a standard of care.¹⁰

b. Respondent’s Medical Records

Mr. Barker also testified that Respondent’s medical record for the cat that he provided to Mr. DeLong on April 22, 2009, did not comply with the Board’s rule at § 573.52 because it did not contain several items of information like the client’s name, address and phone number; and the name, age, species, sex, weight, temperature, and breed of the animal. Additionally, Mr. Barker testified the rule requires information regarding the date of visit, diagnosis, examinations performed, immunizations administered, and medications dispensed or prescribed. The record Respondent gave to Mr. DeLong contained the client’s name, address and phone number as well as the animal’s name, sex, and breed in addition to an indication that a spay procedure was performed for \$67.15.¹¹ Mr. Barker testified the record did not contain the cat’s age, weight, temperature, or information regarding medications prescribed or administered.

During the investigation of this matter, Mr. Barker testified that Respondent submitted an amended medical record to the Board, which was also dated April 22, 2009.¹² Although the

¹⁰ Mr. Barker additionally commented that he does not “care for anybody.” However, the ALJ can reasonably infer Mr. Barker meant to say he does not provide medical care for anybody.

¹¹ VME Exhibit No. 1.

¹² VME Exhibit No. 11. Mr. Barker did not know when Respondent submitted the amended record to the Board.

amended record was very similar to the original record Respondent gave to Mr. DeLong on April 22, 2009, it contained new information regarding the type of anesthesia Respondent used on the cat.¹³ The new information was not identified as an amendment, according to Mr. Barker, which is also a record violation of the same rule § 573.52.

6. Respondent's Testimony

Respondent is a graduate of Texas A&M and has been practicing veterinary medicine for 33 years. He has spayed or neutered approximately 7,000 animals, and has never been reprimanded by the Board. According to Respondent's research, people who have been formally reprimanded from the Board have all treated animals that experienced an undesirable outcome. Despite the speculative testimony about the possible complications that may have afflicted the cat, Respondent argued that cat is alive today and is unable to reproduce. Respondent testified that receiving a formal reprimand from the Board bothers him more than taking continuing education hours and paying a \$1,500 administrative penalty because, to him, "a name means something."

a. The OE Procedure

Respondent does not specifically recall his training at Texas A&M regarding how to properly shave a cat for a spay procedure. However, he testified that, in practice, he shaves a cat approximately half-an-inch outside the mammary chain.

Respondent testified that he performed an OE procedure because he felt he could not exteriorize the cat's uterus "without causing some kind of trauma, or making a major incision." According to Respondent, because he could not expose the cat's cervix, he was unable to exteriorize the cat's uterus, which prevented him from removing the uterus in this case. Respondent testified that the reason he could not expose the cat's cervix was because the cat was

¹³ The notation ".02 xyl .04 Ket IM" on the amended record indicates Respondent gave the cat xylazine and ketamine on April 22, 2009, according to Mr. Barker.

in heat at the time it was spayed and, as such, its cervix and uterus were cramped and thickened, which made them difficult to expose.

Respondent asserted it was within his discretion to perform an OE on the cat as opposed to an OHE because he believed an OE would be less invasive, less painful, and less time consuming. According to Respondent, because he could not expose the cat's cervix, he would have needed to make a longer incision and possibly "traumatize" the cat in an attempt to perform a complete OHE.

b. The Follow-up Visit

Respondent testified that when Mr. DeLong and Ms. Sellers brought the cat back to the clinic, he tranquilized the cat because it was in its carrier and would not come out. Respondent testified that he then "scruffed" the cat by grabbing it on the back of its neck and taking it out of the carrier. Holding a cat in this manner simulates how a cat's mother carries the cat and "paralyzes their fight capability" to a certain extent, according to Respondent. Respondent asserted that he believed he had consent to examine and treat the cat based on the owner's request that Respondent meet them at the clinic at 1:30 a.m.

Respondent testified that he expected to see the cat's insides coming out of the cat, which he did not. After examining the cat, Respondent told the owners it was not the emergency they described on the phone and that it could have waited until later that morning. Respondent testified that he then told the owners he would treat the cat but there would be a charge for the visit. Respondent testified that as he was preparing to take photographs and operate on the cat, the owners took the cat without letting him take any pictures of the cat. Respondent further testified that he was honest in his dealings with the owners throughout his interactions with them.

c. Communications with Dr. Lubenau

Respondent testified he first called Dr. Lubenau on June 29, 2009, after he received the Board's initial complaint against him.¹⁴ On that date, Respondent testified, that he read the complaint to Dr. Lubenau and asked her if she made a statement reflecting that Respondent "had [spayed the cat] entirely wrong and that was causing the problems on the outside of the cat." Respondent recalls Dr. Lubenau told him that she did not make that statement.

When Respondent hand-delivered the letter to Dr. Lubenau on February 2, 2011, this matter had been under investigation for a year and a half. Respondent asserted that while this matter was under investigation, he believed the Board had taken into consideration the statements Ms. Sellers had incorrectly attributed to Dr. Lubenau. Respondent asserted his objective in delivering the letter was to inform Dr. Lubenau that the Board was using her statements (or misstatements) against him. In addition, Respondent testified he wanted to clear up what statements or opinions Dr. Lubenau had expressed to the Board because he considered the statements (or misstatements) to be slanderous. Respondent contended it was not his goal to change or influence Dr. Lubenau's opinion, but rather he wanted to know if there was any truth behind the statements made by Ms. Sellers.

d. Respondent's Recordkeeping Practices

Respondent testified that after the Board initiated its investigation in this matter, he revised his records to include a place where the animal's weight could be recorded.¹⁵ Respondent testified that although he has asked the Board for assistance in complying with the rules on record-keeping, he has received none.

¹⁴ The initial complaint was not offered as evidence.

¹⁵ Respondent's Exhibit No. 11. No other changes appear to have been made.

D. Analysis and Recommendation**1. Standard of Care Allegation**

The manner in which Respondent prepared the surgical site on the outside of the cat was below the standard of care because it caused the cat to suffer an infection. The site appears to have been inadequately prepared based on several photographs of the cat taken five days after the procedure. It is clear that the cat's hair was not shaved horizontally across from the left and right mammary glands. Nor was it shaved vertically from the cat's rib cage to its pubis. The photographs reflect Respondent shaved no more than right over the cat's incision site. Due to the amount of hair in the vicinity of the incision site, it seems reasonable that contaminants within the cat's hair caused the cat to suffer from an infection that required subsequent medical attention.

There is no question that the cat's hair was matted around the incision site. Respondent did not dispute the testimony that a cat's surgical area should be shaved broadly in preparation for surgery. Although Respondent testified that he normally shaves animals very broadly for surgery, the ALJ cannot reasonably interpret from the photographs that the cat was shaved broadly or adequately before Respondent performed the spay procedure on April 22, 2009. For these reasons, Respondent should receive an informal reprimand for inadequately preparing the cat's surgical site. The ALJ does not believe a formal reprimand is an appropriate sanction on the basis that, although the cat suffered from an infection caused by inadequate shaving, the infection was treated several days later and the cat recovered completely with no lingering effects from Respondent's treatment.

The OE procedure itself did not violate the standard of care for several reasons. First, Respondent is a licensed veterinarian with 33 years experience and has sound discretion in performing an appropriate procedure. Respondent testified that because the cat was in heat, its tissues were thickened, which made it difficult to perform a complete OHE. As such, Respondent made the decision to essentially perform an OE in order to save the cat from a longer incision as well as discomfort if he had to forcibly remove the cat's uterus.

Next, the procedure accomplished the goal for which it was sought—to prevent the cat from reproducing. And third, the infection that presented itself at the cat’s incision site was not caused by anything Respondent did inside the cat. The fact that Respondent performed an OE as opposed to an OHE did not cause the cat to suffer an infection. Instead, it was the manner in which Respondent prepared the site that caused the infection.

Although there was testimony about the possible complications associated with performing an OE, the evidence does not suggest that the cat had a significantly higher risk of complications after undergoing an OE rather than an OHE. The record reflects that cats are susceptible to complications after undergoing a spay procedure, be it an OE or OHE. In this case, the fact of the matter is that Dr. Lubenau observed no complications (cancer, bleeding, or strangulation) as a result of Respondent’s performing an OE rather than an OHE on the cat. As such, Respondent was within the Board’s standard of care as it relates to his decision to perform an OE on the cat.

2. Allegation Regarding Respondent’s Honesty, Integrity and Fair Dealing

There was no evidence that Respondent was dishonest in his dealings with the cat’s owners. The rule at 22 TAC § 573.26 provides that licensed veterinarians shall conduct their practice with honesty, integrity, and fair dealing to clients in time and services rendered, and in the amount charged for service. There is no evidence that Respondent deceived the owners or engaged in fraudulent acts. This matter is about Respondent’s decision to perform a procedure under a specific set of circumstances, which does not draw into question his honesty or integrity.

Additionally, there is no evidence that Respondent sought an unreasonable fee from the owners who took the cat to Respondent’s clinic at 1:30 a.m. Conversely, the owners denied Respondent an opportunity to photograph the cat, and they left the clinic paying no gratitude or reasonable fee to Respondent for meeting them at his clinic after hours to examine the cat.

3. Allegation Regarding Respondent's Attempt to Influence Dr. Lubenau's Judgment or Opinion

Staff attempted to use the Board's rule at § 573.2 to prove that Respondent tried to influence Dr. Lubenau's judgment in this case by contacting her by phone, in person, and in writing regarding statements she allegedly made to the Board. The rule makes it a violation for any veterinarian to make any effort, direct or indirect, which in any manner is calculated to influence the sound professional judgment of another veterinarian. Dr. Lubenau failed repeatedly to state one example where Respondent attempted to change her professional judgment or opinion.

Although Dr. Lubenau cooperated with the Board during this investigation, the Board's investigator, Mr. Barker, credited Dr. Lubenau with statements she did not make in his report to the Board. The statements in question were made by Ms. Sellers who indicated in the initial complaint that Dr. Lubenau told her Respondent had performed the procedure incorrectly and that she had to correct the surgery. Respondent considered these statements inflammatory and sought Dr. Lubenau's input on whether or not she made these statements to Ms. Sellers, which likely formed the basis of the formal complaint against Respondent. It was not until August 24, 2011, that Dr. Lubenau cleared up the misstatements with Staff.

The basis of Staff's allegation stems from Respondent's contact with Dr. Lubenau regarding the noted misstatements, but no evidence was presented that Respondent ever attempted to influence her sound professional judgment. His demeanor in contacting Dr. Lubenau may have been rude, but even Dr. Lubenau testified she understood why Respondent was upset knowing the Board had considered statements against him that Dr. Lubenau did not make.

Had Mr. Barker verified the hearsay statements Dr. Lubenau had allegedly made to Ms. Sellers, the statements would not have been included in the complaint because Dr. Lubenau never made those statements to Ms. Sellers. Without the inflammatory statements in the complaint, Respondent would have had no reason to contact Dr. Lubenau and the implication

that Respondent attempted to influence Dr. Lubenau's opinion would also be absent. Although Respondent was rude and perhaps gruff in his contact with Dr. Lubenau during the investigation of this matter, his intent was to determine if there was any truth behind Ms. Seller's statements. Respondent did not attempt to influence Dr. Lubenau's sound professional judgment, and no evidence suggests otherwise. As such, Staff failed to present sufficient evidence to support this allegation.

4. Patient Record-Keeping Allegation

The Board's rule at § 573.52 requires several items of information be entered on a medical record of a patient including the species, breed, age, sex, drugs administered, and treatment provided. Respondent admitted that his records in 2009 did not contain the information required by the rule. However, during the investigation of this matter, Respondent sought guidance from the Board in complying with the rule. Furthermore, Respondent revised his intake form to include an animal's weight. In addition, by asserting he did not intend to maintain incomplete records, Respondent admitted his records did not comply with the Board's rule.

The manner in which Respondent operated on the cat formed the basis of the initial complaint against him, and not his record-keeping practices. However, the ALJ questions the means by which Respondent submitted an amended record to the Board during the investigation of this matter. The amended record contained the original date of service, April 22, 2009, yet it included information regarding anesthesia given to the cat, which was not on the original record. However, the amended record was not labeled as such. Furthermore, there is nothing on the record to indicate the information regarding anesthesia was added to the record on a later date. This is a clear violation of the Board's rule § 573.52(a)(14), which states that any amendment or change in a patient record shall be noted by indicating time and date of the amendment. Respondent had no explanation for why he created the amended record and as such should be disciplined.

The ALJ believes an informal reprimand is the appropriate sanction for this violation because there is no evidence of Respondent's motive in amending the record. Although Mr. Barker testified the original and amended records were different, he did not provide any testimony regarding the circumstances under which Respondent would amend the record or if his intent was to provide the Board the amended record as if it was the original. Because Respondent created an amended record without indicating it had been amended, Respondent should be informally reprimanded. Had there been evidence suggesting that Respondent attempted to represent the amended record as the original record, the ALJ would have considered a formal reprimand.

III. RECOMMENDATION

Based on the record, it is recommended that Respondent receive an informal reprimand for inadequately preparing the cat's surgical site and for amending a medical record without indicating the record was amended.

IV. FINDINGS OF FACT

1. Kody Kothman, D.V.M. (Respondent), holds a veterinarian's license issued by the Texas Board of Veterinary Medical Examiners (Board/Staff).
2. On July 6, 2011, Staff issued a notice of hearing to Respondent advising him of the date, time, and place of the hearing.
3. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. The hearing on the merits was held November 1-2, 2011. All parties appeared and participated in the hearing. The record closed on the same date.
5. Respondent operates a veterinary clinic, Caprock Veterinary Clinic, in Lubbock, Texas.

6. On April 22, 2009, Adam DeLong and Ashley Sellers (the owners) took their cat Brie to Respondent's clinic to be spayed. The cat was in heat when it was taken to the clinic. Following the procedure, the owners brought the cat back home and later noticed it was not recovering very well.
7. On April 27, 2009, at approximately 1:30 a.m., the owners met Respondent at his clinic to examine the cat. Respondent sedated and examined the cat and quoted a charge for his services. While Respondent was preparing to treat the cat, the owners left the clinic with the cat and refused to allow Respondent an opportunity to photograph the cat.
8. Respondent was honest with the owners about the cat's condition and attempted to treat the cat on April 27, 2009.
9. The following morning, the owners took the cat to Don Hegi, D.V.M., a veterinarian in Lubbock, who examined the cat and observed the cat had an infection at its incision site. Dr. Hegi is a veterinarian with 33 years of experience.
10. The owners then took the cat to another veterinarian, Jeanette Lubenau, D.V.M., who examined and treated the cat. Dr. Lubenau is a veterinarian with 17 years of experience.
11. The cat recovered from Dr. Lubenau's work and currently lives normally.
12. The cat's hair around the incision site was matted into the incision site causing an infection.
13. Respondent did not shave the cat broadly enough to prevent an infection from occurring at the cat's incision site.
14. Because the cat was in heat, its tissues were thickened, and Respondent performed an ovariectomy (OE) on the cat to avoid making a longer incision and to avoid traumatizing the cat by forcibly removing the cat's uterus.
15. An OE procedure is where the ovaries are removed, the uterine horns are clamped, and the entire uterine body remains in a cat.
16. An ovariohysterectomy (OHE) is a procedure where the entire uterine body is removed from a cat including the ovaries and uterine horns.
17. Drs. Hegi and Lubenau only perform OHE procedures on cats that require spaying.
18. Although Respondent could have performed an OHE on the cat, he used his sound discretion and 33 years of experience in deciding to perform an OE on the cat because it was less invasive and less time consuming than an OHE.
19. Cats are susceptible to various complications after undergoing an OE or OHE spay procedure.

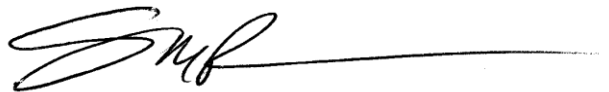
20. The cat suffered from no internal complications as a result of undergoing an OE on April 22, 2009.
21. Ms. Sellers reported to the Board's investigator, Dennis Barker, that Dr. Lubenau stated to Ms. Sellers that Respondent performed the spay procedure incorrectly and that she had to correct it.
22. Dr. Lubenau did not state to Ms. Sellers that Respondent performed the spay procedure incorrectly and that she had to correct it.
23. The initial complaint and the Board's Investigative Report contain statements by Dr. Lubenau that she did not make.
24. Mr. Barker did not verify whether or not Dr. Lubenau made the statements attributed to her by Ms. Sellers.
25. Respondent was upset over statements in the initial complaint and investigative report that were erroneously credited to Dr. Lubenau.
26. Respondent contacted Dr. Lubenau by phone, in person, and in writing to determine whether or not there was any truth behind Ms. Seller's statements.
27. Respondent did not attempt to change Dr. Lubenau's professional judgment or opinion.
28. Respondent created an amended medical record of the record he originally gave to the owners on April 22, 2009.
29. Although the amended record contained the original date of April 22, 2009, Respondent added information about the anesthesia he gave to the cat when it was spayed, without indicating the record had been amended.

V. CONCLUSIONS OF LAW

1. The Texas Board of Veterinary Medical Examiners (Board/Staff) has jurisdiction and authority to take disciplinary action against licensed veterinarians pursuant to TEX. OCC. CODE ANN. (Code) ch. 801.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the complaint and of the hearing on the merits was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. Staff had the burden of proving the case by a preponderance of the evidence.
5. A veterinarian shall exercise the same degree of humane care, skill and diligence as other veterinarians in the community pursuant to 22 TEX. ADMIN. CODE (TAC) § 573.22.
6. Based on Findings of Fact Nos. 12-13 Respondent failed to meet the standard of care in preparing the cat's surgical site in violation of 22 TAC § 573.22.
7. Based on Findings of Fact Nos. 14-20, Staff has failed to show that Respondent failed to meet the standard of care by choosing to perform an OE instead of an OHE on the cat.
8. Based on Findings of Fact Nos. 7-8, Staff has failed to show that Respondent failed to uphold his duties on honesty, integrity, and fair dealing with the cat's owners in violation of 22 TAC § 573.26.
9. Based upon Findings of Fact Nos. 21-27, Staff has failed to show that Respondent attempted to directly influence the sound professional judgment of another veterinarian while this matter was being investigated in violation of 22 TAC § 573.2.
10. Based on Findings of Fact Nos. 28-29, Respondent failed to properly indicate he had amended the medical record originally dated April 22, 2009.
11. Based on Findings of fact Nos. 12-13 and Conclusion of Law No. 6, Respondent should receive an informal reprimand from the Board.
12. Based on Findings of fact Nos. 28-29 and Conclusion of Law No. 10, Respondent should receive an informal reprimand from the Board.

SIGNED December 21, 2011.



**STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**