

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD)
OF PSYCHOLOGY,)
)
Petitioner,)
)
vs.) Case No. 97-3644
)
DAVID FAUSTINO GRABAU,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held in this case in Tallahassee, Florida, on January 13, 2000, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Maureen L. Holz, Esquire
Williams and Holz, P.A.
211 Virginia Street
Tallahassee, Florida 32301

For Respondent: O. C. Allen
Qualified Representative
314 West Jefferson Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue for consideration in this hearing is whether Respondent's license as a psychologist in Florida should be disciplined because of the matters alleged in the Administrative Complaint filed herein.

PRELIMINARY MATTERS

By a three-count Administrative Complaint filed in this case on July 1, 1997, the Agency for Health Care Administration, at the time the state agency in Florida responsible for the licensing and regulation of the profession of psychology in this state, sought to discipline the license of the Respondent herein, David Faustino Grabau, alleging misconduct in the practice of psychology in this state. Specifically, the Agency charged Respondent with having entered into a psychologist/client relationship with K.R., engaging in an inappropriate sexual misconduct with her, committing sexual battery on her, and, by virtue of these actions, failing to meet the minimum standards of performance in professional activities of his profession. This misconduct, if proven, would constitute a violation of Section 490.009(2), Florida Statutes. Respondent, through counsel, subsequently filed an election of rights form in which he disputed the allegations of fact contained in the Administrative Complaint and requested formal hearing on the allegations.

The matter was initially scheduled for hearing but was then continued and ultimately placed in abeyance on October 6, 1997. In January 1998, the matter was again scheduled for hearing in April 1998. An extensive motion practice followed which culminated in another motion to abate, based on the parties

reaching a verbal settlement of the issues, and filed by Petitioner on April 13, 1998. This motion was granted by the undersigned, to whom the matter had been transferred in the interim, on April 15, 1998. This abeyance was extended several times, the last being on June 1, 1999, when the undersigned extended the abeyance to July 15, 1999, with a requirement for notice of need for further hearing to be filed by that time. No such notice was forthcoming, and on September 13, 1999, the undersigned closed the Division's file.

On September 15, 1999 counsel for Petitioner moved to reopen the case, and based on matters represented by counsel at the time, the file was reopened by order dated October 13, 1999, and the matter set for hearing in Tampa, Florida, on January 13, 2000. At the request of the parties, the venue of the hearing was changed to Tallahassee, Florida, where the hearing was held on January 13, 2000.

At the hearing, Petitioner presented the deposition testimony of K.R., the subject of Respondent's alleged misconduct, and the deposition testimony of Dr. George J. Rockwell, Jr., a psychologist and expert in the area of the practice of psychology. He has spent most of his career in school-related psychology. The depositions were introduced as Petitioner's Exhibits 1 and 3. Petitioner also introduced the clinical records of K.R., as Petitioner's Exhibit 2. At his

request Respondent's qualified representative was granted an opportunity to conduct further cross-examination of Dr. Rockwell by February 12, 2000, and the transcript of that additional examination was to be filed by February 25, 2000.

Respondent did not appear at the hearing. The undersigned delayed the commencement of the hearing for twenty minutes after the scheduled starting time to allow for unforeseen delay. A qualified representative represented Respondent at the hearing who indicated his willingness to proceed without the Respondent being present. No evidence was presented on behalf of the Respondent. Both counsel for Petitioner and Respondent's qualified representative argued in support of their clients' positions.

A Transcript of the proceedings was furnished. Counsel for Petitioner and qualified representative for Respondent both submitted matters in writing which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein the Board of Psychology was the state agency in Florida responsible for the licensing and professional discipline of psychologists in Florida. Respondent is and has been licensed as a psychologist in Florida and is subject to the jurisdiction of the Board of Psychology.

2. During the period April 11, 1995, through August 7, 1995, Respondent was employed as a psychologist at the University of South Florida Counseling Center for Human Development. In that capacity, Respondent saw the Complainant, K.R., on several occasions and established a psychologist-client relationship with her.

3. At the initial visit of K.R. to his office, Respondent conducted an initial intake evaluation of her and, in his client notes, defined the goal of his continued treatment of her as being to assist Ms. K.R. in stabilizing her depression; and to clarify her needs and patterns with regard to her career and relationships. Upon completing the intake evaluation of K.R., Respondent referred her to himself as treating therapist, and between the initial meeting and the end of August 1995, met with her approximately thirteen times.

4. Review of Respondent's notes regarding his sessions with K.R. reveals that they discussed her relationship with her parents; her relationships with men; her ability to deal with her emotions, her anxiety, and depression.

5. K.R. relates that during many of their sessions, Respondent told her she had nice legs and was very sexy. He also told her of his personal life, including his dissatisfaction with his marriage, and it appears that he met with her outside his professional office on a purely social

basis. K.R. claims Respondent told her not to tell anyone about their friendship outside the clinic. The relationship between Respondent and K.R. culminated in their engaging in sexual intercourse which resulted in her becoming pregnant. The pregnancy was subsequently aborted.

6. As a result of their relationship, K.R. filed a complaint against Respondent with the Board of Psychology relating the sexual nature of their relationship.

7. Subsequent to the filing of K.R.'s complaint against Respondent, and the Agency For Health Care Administration's (Agency) filing of an Administrative Complaint against him, the Agency deposed Dr. George J. Rockwell, Jr., a retired psychologist with a specialty in school psychology. Dr. Rockwell did not meet with Respondent or speak with him in any capacity. He examined the file collected in this case regarding the allegations against Respondent, and from his review of all the material, concluded that Respondent had established a psychologist/patient relationship with K.R. This relationship involves trust and the generation in the patient of a basic belief that the psychologist has the skills and knowledge that would assist the patient in dealing with whatever problems he or she has. The patient develops the ability to talk to a non-critical, non-judgmental person in an effort to help him or her deal with their problems or concerns.

8. The psychologist has the responsibility to create an emotionally safe environment for the patient. In this process the patient is often made vulnerable. The patient must be open with the psychologist and feel comfortable in sharing emotions and incidents which he or she would most likely not be able to share with others. It is without question a special relationship, and in Dr. Rockwell's opinion, it is unlikely that a patient will work with a psychologist and not form that special relationship.

9. This special relationship places upon the psychologist special responsibilities toward the patient. These include abiding by the laws and rules relating to the practice of psychology; having respect for the patient; and keeping all matters confided by the patient confidential. In addition, the psychologist has the responsibility to comport himself or herself in a manner so as to maintain a professional relationship and distance with the patient.

10. Specifically, sexual relationships between a psychologist and his or her patient are normally prohibited as being beyond boundaries that should not be crossed. It is the psychologist's responsibility to set the limits on behavior so as to prevent an inappropriate relationship from developing. This applies even if the patient initiates sexual advances.

These advances would not excuse the psychologist from professional responsibility toward the patient.

11. In the event the psychologist detects what appear to be inappropriate sexual advances from the patient, the psychologist had a duty to discuss this with the patient; talk about the nature of the psychologist/patient relationship; and explain that such a relationship would not be appropriate.

12. The constrictors on the professional are even more specific in the event the psychologist finds himself or herself sexually attracted to the patient. Under no circumstances should the professional act on those feelings, but should evaluate the situation to ensure that those feelings are in no way interfering with the therapeutic relationship. There is absolutely no situation which Dr. Rockwell can think of in which it would be appropriate for a therapist to engage in sexual relations with a patient, either during or after termination of a therapy session.

13. Inappropriate sexual contact between a therapist and a patient can have severe and deleterious effects on a patient. These might include feelings of guilt and depression, based on the patient's belief that the inappropriate behavior was his or her fault. The patient might also feel embarrassment and be reluctant to undergo further treatment. Further, the patient

would most likely lose trust in the involved therapist and potential other therapists.

14. Dr. Rockwell concluded that notwithstanding Respondent's contention that he saw K.R. solely for the purpose of career counseling, and at no time entered a psychologist/patient relationship with her, Respondent's clinical notes regarding K.R. clearly indicate a professional psychologist/patient relationship was formed. An independent review of the records supports that conclusion, and it is so found. Even were the counseling limited solely to career counseling, it would still constitute counseling, the conduct of which is covered by the standards of the profession. Here, however, Dr. Rockwell is convinced that Respondent's conduct toward K.R., as alleged, constituted sexual misconduct in the practice of psychological counseling which fell below the minimum standards of performance and professional activities when measured against generally prevailing peer performance. It is so found.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

16. The Agency for Health Care Administration, on behalf of the Board of Psychology, has filed an Administrative

Complaint in this matter in which it alleged Respondent violated provisions of Chapter 490 and 455, Florida Statutes, and rules of the agency; engaged in sexual misconduct with a patient to whom he was providing psychological counseling and with whom he had established a psychologist/patient relationship, in violation of Sections 490.0111 and 490.009(2)(k); and performed in a manner below minimum standards, in violation of Section 490.009(1)(s), Florida Statutes.

17. The burden of proof in this matter rests with the Petitioner, which must establish Respondent's guilt of the matters alleged by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern & Cp., 670 So. 2d 932 (Fla. 1996).

18. Section 490.0111, Florida Statutes, states that sexual misconduct by any person licensed under Chapter 490 in the practice of her or his profession is prohibited. Sexual misconduct is defined in Rule 59AA-16.003(2), Florida Administrative Code, and defines sexual misconduct by a psychologist involved in a psychologist-client relationship as:

Engage[ing], or offer[ing] to engage that client in sexual intercourse or other sexual behavior. Sexual behavior includes, but is not limited to, kissing, or touching by either the psychologist or the client of the other's breasts or genitals.

19. No evidence was presented to diminish the credibility of K.R.'s testimony given by deposition in this matter. She clearly established that she and Respondent had engaged in sexual intercourse as a result of which she became pregnant. The evidence of record is also clear this misconduct took place while K.R. was a client of Respondent who had established a psychologist/client relationship. As such, his participation in this sexual activity, even with the consent of the client, constitutes sexual misconduct in the practice of psychology. The psychologist/client relationship, once established, is deemed to continue in perpetuity for the purposes of determining the existence of sexual misconduct.

20. Section 490.009(2)(k), Florida Statutes, makes it a ground for discipline of the license of a psychologist to commit any act upon a patient or client which would constitute sexual battery or which would constitute sexual misconduct as defined in Section 490.0111, Florida Statutes. The evidence presented by Petitioner, found to constitute clear and convincing evidence of sexual misconduct, also supports finding a violation of this statutory provision as well.

21. Section 490.009(2)(s), Florida Statutes, also cites as grounds for discipline the failure to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance. Dr. Rockwell, identified

as an expert in the field of psychology, unequivocally opined that Respondent's actions with regard to K.R. fell well below a minimum standard of performance. His testimony was not controverted by any credible evidence to the contrary. Consequently, the evidence presented at hearing is clear and convincing that Respondent failed to meet acceptable minimum standards of practice.

22. Respondent's representative contends that because K.R. did not appear at the hearing, Respondent has been prevented from confronting his accuser concerning the allegations of the Administrative Complaint and prevented from showing her confusion and lack of precision regarding her recollection of the salient events. It should be noted in that regard that Respondent took the deposition of K.R. earlier in the proceedings. Review of that deposition reveals he was in no way precluded from inquiring into any facet of her testimony or from testing her ability to remember the fundamentals of the situation. It should also be noted that Respondent did not appear at the instant hearing and even had his accuser been present, he would not have confronted her. His failure to appear at this hearing is in no way considered against him in the evaluation of the evidence presented by both parties.

23. Respondent also claims that the evidence presented at the administrative hearing does not constitute clear and

convincing evidence of Respondent's guilt of the offenses alleged. To the contrary, it does. K.R.'s deposition clearly defines the nature of the relationship that was established between her and Respondent. It is corroborated by Respondent's clinical notes which establish the nature and particulars of the relationship.

24. Further, Respondent cannot successfully seek exoneration of his misconduct by alleging that K.R.'s actions toward him were flirtatious or suggestive. Rule 59AA-16.003(1), Florida Administrative Code, establishes a presumption that a client is incapable of giving valid, informed, free consent to sexual activity involving the psychologist, and the assertion of consent by the client shall not constitute a defense against charges of sexual misconduct.

25. Having established that the evidence of record clearly establishes the Respondent's guilt of the matters alleged in the Administrative Complaint, one must then turn to the issue of an appropriate penalty. Rule 64B19-17.002(1), Florida Administrative Code, authorizes, inter alia, an administrative fine of \$1,000 for each of the three offenses established herein. The rule also authorizes revocation of the professional license for each of the offenses alleging sexual misconduct or sexual battery, and suspension of the license for an established

showing of performance below minimum standards when measured against prevailing peer performance.

26. The Agency recommends, therefore, that Respondent's license to practice psychology in this state be revoked, and that he be assessed an administrative fine of \$3,000. The evidence in this case is clear that Respondent abused the position of trust placed in him by his patient, a troubled and depressed female who came to him for counseling. It matters not whether the counseling he administered was for her career or for her depression. The evidence is clear that in the course of the counseling regimen, Respondent explored matters with her which went to the bases of her vulnerability, and he improperly took advantage of that vulnerability. His misconduct is egregious and reprehensible, and he should be removed from the counseling profession. A major administrative fine would serve little purpose.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Board of Psychology enter a final order in this matter finding Respondent guilty of all Counts in the Administrative Complaint, and revoking his license to practice psychology in the State of Florida.

DONE AND ENTERED this 3rd day of March, 2000, in
Tallahassee, Leon County, Florida.

ARNOLD H. POLLOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 3rd day of March, 2000.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any Exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.