STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF CLINICAL SOCIAL WORK, MARRIAGE AND FAMILY THERAPY, AND MENTAL HEALTH COUNSELING,	)	
Petitioner,	)	
vs.	)	Case No. 97-5193
MARTIN LUDWIG,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on May 19, 2000, by video teleconference at sites in Fort Lauderdale and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John O. Williams, Esquire
Maureen L. Holz, Esquire
Williams & Holz, P.A.
211 East Virginia Street
Tallahassee, Florida 32301

For Respondent: Michael I. Schwartz, Esquire
410 North Gadsden Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint, as amended, and, if so, what penalties should be imposed.

PRELIMINARY STATEMENT

On April 13, 1995, Petitioner's predecessor, the Agency for Health Care Administration (AHCA), filed an Administrative Complaint against Respondent, a Florida-licensed clinical social worker, alleging that Respondent engaged in the following conduct:

> 3. From on or about August, 1992, through sometime shortly after April 27, 1993, the Respondent was the therapist of record for Patient S. G.
>
> 4. On or about April 27, 1993, and/or on other dates unknown to the Petitioner, but occurring during the course of therapy, the Respondent engaged, attempted to engage, or offered to engage Patient S. G. in sexual behavior which includes, but is not limited to, kissing, sexual intercourse, touching by either the Respondent or Patient S. G. of the other's breast or genital area.
>
> 5. On or about April 27, 1993, and/or on other dates unknown to the Petitioner, but occurring during the course of therapy, the Respondent engaged Patient S. G. in verbal or physical behavior which was sexually arousing or demeaning. Specifically, in an attempt to engage Patient S. G. in phone sex, the Respondent called Patient S. G. and communicated obscenities to her. . . .
>
> 11. At some time prior to Respondent's treatment of S. G., he had accepted S. G.'s husband (A. G.) as a client.

> 12. During Respondent's treatment of A. G., Respondent discussed sexual intimacy issues occurring between S. G. and A. G.
>
> 13. Respondent discussed the same or similar issues with S. G. during therapy and often questioned S. G. about her sexual fulfillment and her personal sexual preferences.
>
> 14. Further, Respondent discussed his own sexual needs with S. G. as well as other personal information.

According to the Administrative Complaint, in engaging in such conduct, Respondent violated Section 491.009(2)(k), Florida Statutes, "by committing any act upon a patient or client which would constitute sexual misconduct" (Count One); Section 491.009(2)(q), Florida Statutes, "through a violation of Rule 61F4-10.002(1), Florida Administrative Code, 1/ by engaging a patient in sexual behavior" (Count Two); Section 491.009(2)(q), Florida Statutes, "through a violation of Rule 61F4-10.002(1), Florida Administrative Code, by engaging Patient S. G. in verbal or physical behavior which was sexually arousing or demeaning" (Count Three); and Section 491.009(2)(s), Florida Statutes, "by failing to meet the minimum standards of performance in professional activities" (Count Four).

Respondent "dispute[d] the allegations of fact contained in the Administrative Complaint and request[ed] . . . a formal hearing pursuant to Section 120.57(1), Florida Statutes . . . ." AHCA, on November 5, 1997, referred the matter to the Division of Administrative Hearings (Division) for the assignment of a

Division Administrative Law Judge to conduct the hearing Respondent had requested.

The final hearing was originally scheduled to commence on January 21, 1998, but was continued and rescheduled five times (once at Petitioner's request, twice at Respondent's request, and twice at the request of both Petitioner and Respondent).

On January 3, 2000, Petitioner filed a Motion to Amend Administrative Complaint (Motion) in the instant case, which read as follows:

> Petitioner moves to amend . . . the Administrative Complaint, and as grounds therefor states:
>
> Subsequent to the filing of the Administrative Complaint, the criminal charges against the Respondent based upon the same events underlying the Administrative Complaint were resolved. The outcome supports an additional count in the Administrative Complaint.
>
> Wherefore, Petitioner respectfully request[s] leave to amend the Administrative Complaint. The notice of mutually convenient dates will take into consideration the schedule of the probable cause panel, which must review the amendment.

On January 4, 2000, Respondent filed a Response in Opposition to Petitioner's Motion to Amend Administrative Complaint. The undersigned, on January 7, 2000, issued an Order, in which he ruled as follows on the Motion:

> Petitioner's Motion is premature inasmuch as no probable cause determination has been made pursuant to Section 455.621, Florida Statutes, concerning the "additional count" that Petitioner seeks to add to the

> Administrative Complaint. Accordingly, the Motion is hereby DENIED, without prejudice to Petitioner renewing its Motion if and when such probable cause determination is made by the probable cause panel.

On May 4, 2000, Petitioner filed a second Motion for Leave to Amend Administrative Complaint (Second Motion) seeking to add a fifth count to the Administrative Complaint reading as follows:

> 16. Petitioner realleges and incorporates by reference the allegations contained in paragraphs 1 through 5 as if fully stated herein.
>
> 17. Based upon Respondent's actions alleged in paragraphs 1 through 5, Respondent was charged criminally. Respondent ple[]d to a misdemeanor battery and was placed on probation for two years.
>
> 18. Based upon the foregoing, Respondent has violated Section[] 491.009(2)(c), Florida Statutes, by being convicted or found guilty, regardless of adjudication, or having entered a plea of nolo contendre to a crime in any jurisdiction which directly relates to the practice of his or her profession or the ability to practice his or her profession.

On May 12, 2000, Respondent filed a response in opposition to Petitioner's Second Motion. The undersigned heard oral argument on the matter by telephone conference call on May 16, 2000.

As noted above, the final hearing in this case was held on May 19, 2000. At the outset of the proceeding, after hearing additional argument from the parties on Petitioner's Second Motion, the undersigned announced that he was granting the motion. 2/ The evidentiary portion of the final hearing thereupon commenced.

Two witnesses testified on behalf of Petitioner: S. G., the patient identified in the Administrative Complaint; and Debra Frank, Ph.D., who gave expert testimony. In addition to the testimony of these two witnesses, Petitioner offered three exhibits (Petitioner's Exhibits 1, 2, and 3) into evidence. All three of these exhibits were admitted, the latter two over Respondent's objection.

Respondent did not present any evidence at the final hearing; however, he requested that the evidentiary record be left open in order to allow him the opportunity to present the testimony of three "alibi" witnesses: Alva Ludwig, his wife; Annabelle Moonshine, Ms. Ludwig's first cousin; and Monte Holzman, a speech therapist with whom Respondent had previously shared office space. The request was granted and the record was left open for the purpose of receiving into evidence the transcripts of the depositions of Ms. Ludwig, Ms. Moonshine, and Mr. Holzman (in lieu of their "live" testimony). It was agreed that the depositions would be taken on June 6, 2000.

Before the final hearing concluded on May 19, 2000, the undersigned, on the record, advised the parties that proposed recommended orders had to be filed with the Division no later than July 10, 2000.

A transcript of the May 19, 2000, final hearing held in this case (consisting of one volume) was filed with the Division on June 12, 2000. On July 10, 2000, Respondent filed the

transcripts of the depositions of Ms. Ludwig, Ms. Moonshine, and Mr. Holzman, along with his Proposed Recommended Order. To date, Petitioner has not filed any post-hearing submittal.

The transcripts of the depositions of Ms. Ludwig, Ms. Moonshine, and Mr. Holzman are hereby received into evidence in lieu of the deponents' live testimony. These transcripts have been carefully considered by the undersigned, as has Respondent's Proposed Recommended Order.

FINDINGS OF FACT

Based upon the evidence adduced at the final hearing and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been since June 5, 1986, a Florida-licensed clinical social worker, holding license number SW1666.

2. S. G. became a patient of Respondent's in the fall of 1992, when she was experiencing marital difficulties.

3. Her then husband, from whom she was separated, was already a patient of Respondent's.

4. Pursuant to Respondent's suggestion, S. G. saw Respondent as a patient once a week.

5. S. G. and her husband met with Respondent both as a couple and separately.

6. At first, during his sessions with S. G., when they were alone, Respondent's demeanor was "pretty professional"; however, as time passed, "boundaries were crossed." Respondent began to

talk to S. G. about his personal life. For example, he told her about the extramarital affairs he had had, claiming that these instances of infidelity had occurred "when he was highly stressed." After making this claim, he added that he "had been very, very stressed lately."

7. In or about late April of 1993, when S. G. was still a patient of his, Respondent telephoned S. G.'s residence and asked S. G.'s son, who had answered the telephone, if he could speak with S. G. S. G.'s son thereupon handed S. G. the telephone and S. G. began conversing with Respondent. During their conversation, Respondent told S. G. that he "wanted to engage in phone sex." When S. G. declined to participate in such activity, Respondent asked her to visit him that evening at his office, which she agreed to do.

8. As promised, that evening, after dark, S. G. went to Respondent's office. When she arrived, at around 8:00 or 9:00 p.m., Respondent was in his office seeing another patient.

9. S. G. remained in the waiting area outside Respondent's office until the other patient left and Respondent came out and invited her to return with him to his office.

10. Upon entering the office, S. G. sat down in a chair. Respondent thereupon took off his tie and asked S. G. if she trusted him, to which S. G. replied, "Yes." Respondent then tied S. G.'s hands behind her back with his tie. The two wound up on the floor together, where they engaged in sexual intercourse.

11. They were interrupted by the ringing of the telephone in the waiting area. Respondent left the office to answer the telephone. He joked that it was probably his wife "wondering where he was."

12. When he returned to the office, Respondent tossed S. G. a few tissues to use to clean herself off. He then asked S. G. (whose car was parked in front of the building in which Respondent's office was located) to drive him to his car (that was parked behind the building), which she did. They both then went their separate ways.

13. S. G. was "very upset" following this encounter.

14. Respondent telephoned her the following morning and told her he needed to see her. He met her later that day at a delicatessen. When S. G. ordered only a cup of coffee, Respondent told her that she was a "cheap date." During their conversation in the delicatessen, Respondent told S. G. that what had happened the night before "had to remain between the two of [them] and no one else could know."

15. On a subsequent occasion, approximately a month or so later, in or about early June of 1993, when she was still a patient of Respondent's, S. G. had another encounter with Respondent in which the two of them engaged in sexual activity.

16. This meeting took place in the evening, at approximately 9:00 or 10:00 p.m., in S. G.'s vehicle, which was parked near a "video store" from which Respondent had rented

"some videos" that he needed to return. After returning the "videos," Respondent joined S. G. in her vehicle. Upon entering the vehicle, he commented "about how [S. G.] looked." The two then engaged in oral sex, after which Respondent stated that "somebody's wife wasn't going to get any that night."

17. Following this second instance of sexual activity between Respondent and S. G., S. G. began to feel that she was "being taken advantage of, manipulated, and betrayed" by Respondent. She therefore stopped seeing him. In addition, she filed a civil action against Respondent and gave a statement to the police concerning her relationship and activities with Respondent.

18. At the time of the final hearing in this case, S. G.'s civil action against Respondent had been settled and S. G. had received from Respondent the money he had agreed (as part of the settlement) to pay her.

19. S. G.'s statement to the police led to criminal charges being filed against Respondent in Broward County Circuit Court Case No. 94-17857CF. Respondent was initially charged with three counts of sexual conduct by a psychotherapist, in violation of Section 491.0112, Florida Statutes, 3/ to which he pled not guilty.

20. Pursuant to a "plea bargain," the charges were reduced to three counts of simple (misdemeanor) battery, to which Respondent pled guilty "in [his] best interest." 4/

21. Respondent was adjudicated guilty and, as to each count, placed on consecutive one-year terms of probation.

22. The following is an excerpt from the transcript of the proceeding at which Respondent entered his guilty plea to these reduced charges:

> THE COURT: Is there a stipulation to the factual basis of the plea?
>
> MR. DUTKO [Defense Counsel]: Yes[] sir[,] as to the offense of battery.
>
> THE COURT: Okay. What facts would the State bring forth if the case went to trial?
>
> MR. SHANE [Prosecutor): The State would allege that on or about the 27th day of April, 1993, on two separate occasions, at two separate times and locations, the defendant did unlawfully touch or strike [S. G.] without her permission.
>
> With respect to Count III, as amended in the information, on or about the 1st day of June, 1993, the defendant did touch or strike [S. G.] without [her] permission or consent.
>
> THE COURT: Court finds that the defendant received advice of competent counsel with whom he is satisfied[;] [t]hat he knowingly, voluntarily, and intelligently waived the constitutional rights contained in the plea form[;] and [that] he freely entered into this plea agreement.
>
> The Court finds the defendant competent. There's a factual basis and the Court hereby accepts [the change] of plea and makes the agreement to enter the plea and waiver of rights an exhibit for the purpose of the court file. Any reason why sentence should not be imposed?
>
> MR. DUTKO: No, sir.

> THE COURT: As to case 94-17857 as far as amended Court adjudicates the defendant guilty of Count I, II and III, which has been amended to Misdemeanor Battery.
>
> The defendant is placed on one year probation on each count. All counts are to run consecutive[ly], rather than concurrent[ly], with the following special conditions[:] $143.00 court cost[s], and that's to be paid at minimum equal monthly increments over the period of probation; [r]andom urinalysis to determine the presence of a controlled substance[;] [t]wo hundred hours of community service, and that may be performed at any nonprofit entity at a minimum and equal monthly increments over the period of his three years of probation[;] [n]o contact directly or indirectly with [S. G.], her family or her place of business[;] [t]hat the defendant may travel for business purposes within Dade, Broward and Palm Beach[;] [t]he defendant is permitted to go to Orlando, during the periods that have been set forth[;] [a]nd the Court has no objection to the defendant, at some future date, . . . com[ing] in and request[ing] further travel once the Department has been given an opportunity to be heard. Is that [the] sum and substance of the agreement?
>
> MR. DUTKO: It is Your Honor.

CONCLUSIONS OF LAW

23. The Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling (Board) is statutorily empowered to take disciplinary action against the holder of a Florida license to practice as a clinical social worker based upon any of the grounds enumerated in Section 491.009(2), Florida Statutes. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension for a period of time not to exceed five years; imposition of an

administrative fine not to exceed $1,000 for each count or separate offense; issuance of a public reprimand; placement on probation for a period of time and subject to such conditions as the Board may specify, including, but not limited to, requiring the licensee to submit to treatment, to attend continuing education courses, to submit to reexamination, or to work under the supervision of a designated licensee; and restriction of practice.

24. Section 491.009(2)(k), Florida Statutes, authorizes the Board to take disciplinary action against a licensed clinical social worker for "[c]ommitting any act upon a patient or client which would constitute sexual battery or which would constitute sexual misconduct as defined pursuant to s. 491.0111." Section 491.0111, Florida Statutes, provides as follows:

> Sexual misconduct by any person licensed or certified under this chapter, in the practice of her or his profession, is prohibited. Sexual misconduct shall be defined by rule.

"Sexual misconduct," as that term is used in Section 491.0111, Florida Statutes, is defined in Rule 64B4-10.002, Florida Administrative Code, which provides, in pertinent part, as follows:

> (1) It is sexual misconduct for a psychotherapist to engage, attempt to engage, or offer to engage a client in sexual behavior, or any behavior, whether verbal or physical, which is intended to be sexually arousing, including kissing; sexual intercourse, either genital or anal; cunnilingus; fellatio; or the touching by either the psychotherapist or the client of

> the other's breasts, genital areas, buttocks, or thighs, whether clothed or unclothed. . .

25. Section 491.009(2)(q), Florida Statutes, authorizes the Board to take disciplinary action against a licensed clinical social worker for "[v]iolating provisions of . . . [C]hapter [491, Florida Statutes], or of part II of chapter 455, or any rules adopted pursuant thereto" (including Rule 64B4-10.002, Florida Administrative Code).

26. Section 491.009(2)(s), Florida Statutes, authorizes the Board to take disciplinary action against a licensed clinical social worker for "[f]ailing to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance, including the undertaking of activities for which the licensee . . . is not qualified by training or experience."

27. Section 491.009(2)(c), Florida Statutes, authorizes the Board to take disciplinary action against a licensed clinical social worker for "[b]eing convicted or found guilty of, regardless of adjudication, or having entered a plea of nolo contendere to, a crime in any jurisdiction which directly relates to the practice of his or her profession or the ability to practice his or her profession. However, in the case of a plea of nolo contendere, the board [must] allow the [licensee] to present evidence in mitigation relevant to the underlying charges and circumstances surrounding the plea."

28. "No revocation [or] suspension . . . of any [clinical social worker's] license is lawful unless, prior to the entry of a final order, [Petitioner] has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57." Section 120.60(5), Florida Statutes.

29. The licensee must be afforded an evidentiary hearing if, upon receiving such written notice, the licensee disputes the alleged facts set forth in the administrative complaint. Sections 120.569(1) and 120.57, Florida. Statutes.

30. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the administrative complaint. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure

disciplinary proceedings or except as otherwise provided by statute . . . .").

31. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.'" In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

32. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific factual allegations made in the administrative complaint. Due process prohibits an agency from taking disciplinary action against a licensee based upon conduct not specifically alleged in the agency's administrative complaint or other charging instrument. See Hamilton v. Department of Business and Professional Regulation, 25 Fla. L. Weekly D1689b (Fla. 1st DCA July 14, 2000); Lusskin v. Agency for Health Care

Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); and Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

33. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

34. The first three counts of the Amended Administrative Complaint issued in the instant case allege that Respondent engaged in "sexual misconduct" with S. G. during the period that S. G. was his patient and receiving therapy from him, in violation of Section 491.009(2)(k), Florida Statutes (Count One); and Rule 64B4-10.002, Florida Administrative Code, 5/ and, therefore, also Section 491.009(2)(q), Florida Statutes (Counts Two and Three).

35. In support of these allegations, Petitioner presented the "live" testimony of S. G. S. G. testified that, during the time that she had been Respondent's patient, Respondent, on one occasion, telephoned her and told her that he "wanted to engage in phone sex" with her; later that evening, Respondent had sexual intercourse with her in his office; and, on a subsequent occasion, Respondent had oral sex with her in her vehicle. Respondent chose to remain silent (as was his right under State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973)) and did not take the stand to attempt to refute S. G.'s testimony. Instead, he presented the testimony of three "alibi" witnesses.

36. Having carefully considered the evidentiary record in this case in its entirety, the undersigned accepts as accurate and truthful the testimony S. G. gave at the final hearing describing Respondent's "sexual misconduct." Her testimony was not inherently unreasonable or implausible, and she had no apparent reason, at the time of the final hearing, to testify falsely against Respondent. While she had difficulty pinpointing the exact dates and times that the events she described had taken place, the undersigned is convinced that these events indeed did occur and were not a product of S. G.'s imagination and that they occurred at times other than when Respondent's "alibi" witnesses established Respondent was not in the company of S. G.

37. S. G.'s testimony, although uncorroborated, constitutes clear and convincing evidence that Respondent committed the violations alleged in the first three counts of the Amended Administrative Complaint. See Section 120.81(4)(a), Florida Statutes ("Notwithstanding s. 120.569(2)(g), in a proceeding against a licensed professional or in a proceeding for licensure of an applicant for professional licensure which involves allegations of sexual misconduct: The testimony of the victim of the sexual misconduct need not be corroborated.").

38. To the extent that Count Four of the Amended Administrative Complaint alleges that Respondent "fail[ed] to meet the minimum standards of performance in professional activities," in violation of Section 491.009(2)(s), Florida Statutes, by engaging in sexual activity with S. G., it too is supported by clear and convincing record evidence; however, to the extent this count of the Amended Administrative Complaint alleges that Respondent violated Section 491.009(2)(s), Florida Statutes, by engaging in the (verbal) conduct described in numbered paragraphs 12, 13, and 14 of the complaint, the record evidence is insufficient to support a finding of guilt inasmuch as it does not clearly and convincingly establish that Respondent committed the acts alleged in numbered paragraphs 12 and 13 and, although there is proof demonstrating that Respondent shared personal information about himself with S. G., as alleged in numbered paragraph 14, the record fails to clearly and

convincingly establish that, in so doing, he "fail[ed] to meet minimum standards of performance in professional activities when measured against generally prevailing peer performance." See McDonald v. Department of Professional Regulation, Board of Pilot Commissioners, 582 So. 2d 660, 668 (Fla. 1st DCA 1991)("Whether McDonald's conduct deviated from the standards of care required of a licensed pilot under the cited statutory provision can be proved only through expert testimony establishing the requisite professional standards he is said to have violated; yet, no expert testimony was presented to establish these standards.").

39. The record contains clear and convincing evidence that Respondent violated Section 491.009(2)(c), Florida Statutes, as alleged in Count Five of the Amended Administrative Complaint. As Respondent concedes (in his Proposed Recommended Order), he was found guilty and convicted of three counts of simple (misdemeanor) battery in Broward County Circuit Court Case No. 94-17857CF. Although Respondent acknowledges his battery convictions, he nonetheless contends that the record evidence is insufficient to establish a violation of Section 491.009(2)(c), Florida Statutes, because it does not establish that the crimes of which he was convicted have "any direct relationship to the practice of [his] profession or to his ability to practice his profession." An examination of the evidentiary record, however, reveals otherwise inasmuch as it clearly and convincingly shows that S. G. was the victim of the batteries of which Respondent

was convicted and that these batteries were committed at a time when S. G. was a patient of Respondent's.

40. In view of the foregoing, the Board is authorized to take disciplinary action against Respondent pursuant to Section 491.009(2)(c), (k), (q), and (s), Florida Statutes.

41. In determining what disciplinary action the Board should take, it is necessary to consult the Board's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Board's disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); cf. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."); and Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

42. The Board's "disciplinary guidelines" are found in Rule 64B4-5.001, Florida Administrative Code, which provides, in pertinent part, as follows:

(1) When the Board finds an applicant, licensee, registered intern, provisional licensee, or certificate holder whom it regulates under Chapter 491, Florida Statutes, has committed any of the acts set forth in Chapter 491.009(2), Florida Statutes, it shall issue a final order imposing appropriate penalties as recommended in the following disciplinary guidelines. . .

(c) Being convicted or found guilty, regardless of adjudication, or having entered a plea of nolo contendere to, a crime in any jurisdiction which directly relates to the practice of the licensee's profession or the licensee's ability to practice that profession. Generally the usual recommended penalty shall be suspension of license until such time as the licensee can, to the Board's satisfaction, demonstrate rehabilitation and an administrative fine of $1,000. . . .

(k) Committing any act upon a patient or client, which would constitute sexual battery or which would constitute sexual misconduct as defined in Section 491.0111, Florida Statutes. The usual recommended penalty shall be an administrative fine of $1,000 and suspension followed by probation on terms and conditions set by the Board or revocation. .

(q) Violating provisions of Chapter 491, Florida Statutes, or of Chapter 455, Part II, Florida Statutes, or any rule adopted pursuant thereto. The usual recommended penalty shall range from a public reprimand to revocation depending on the nature of the statutory or rule provision violated and an administrative fine of $1,000.

(s) Failing to meet the minimum standards of performance in professional activities when measured against generally prevailing peer performance, including the undertaking of activities for which the licensee is not qualified by training or experience. The usual recommended penalty shall be an administrative fine of $1,000 and suspension until such time as the licensee demonstrates to the Board's satisfaction competence in the

performance of the licensee's profession, then a probation from one to four years with such terms and conditions as set by the Board

(2) Based upon consideration of the following factors, the Board may impose disciplinary action other than the penalties recommended above:

(a) the severity of the offense;

(b) the danger to the public;

(c) the number of repetitions of offenses;

(d) the length of time since the date of the violation(s);

(e) prior discipline imposed upon the licensee;

(f) the length of time the licensee has practiced;

(g) the actual damage, physical or otherwise, to the patient;

(h) the deterrent effect of the penalty imposed;

(i) the effect of the penalty upon the licensee's livelihood;

(j) any efforts for rehabilitation;

(k) the actual knowledge of the licensee pertaining to the violation;

(l) attempts by the licensee to correct or stop violations or failure of the licensee to correct or stop violations;

(m) related violations against the licensee in another state, including findings of guilt or innocence, penalties imposed and penalties served;

(n) any other mitigating or aggravating circumstances.

(3) Penalties imposed by the Board pursuant to 64B4-5.001(1), Florida Administrative Code, may be imposed in combination or individually but may not exceed the limitations enumerated below:

(a) denial of an application for licensure, either temporarily or permanently;

(b) revocation of an application for licensure, either temporarily or permanently;

(c) suspension of a license for a period of up to five years 6/ or revocation of a license, after hearing;

(d) immediate suspension of license pursuant to Section 120.60(6), Florida Statutes;

(e) imposition of an administrative fine not to exceed one thousand ($1,000) dollars for each count or separate offense;

(f) issuance of a public reprimand;

(g) placement of an applicant or licensee on probation for a period of time and subject to such conditions as the Board may specify;

(h) restriction of practice.

(4) The provisions of Sections (1) through (4) above shall not be constructed so as to prohibit civil action or criminal prosecution as provided in Section 491.012 or Section 455.624, Florida Statutes, and the provisions of Sections (1) through (4) above shall not be construed so as to limit the ability of the Board to enter into binding stipulations with accused parties as per Section 120.57(4), Florida Statutes.

43. Having carefully considered the facts of the instant case in light of the provisions of Rule 64B4-5.001, Florida Administrative Code, set forth above, the undersigned concludes that, for having committed the violations of Section

491.009(2)(c), (k), (q), and (s), Florida Statutes, described above, Respondent should be fined $2,000.00 and his license should be suspended for a period of six months, after which he should be placed on probation for a period of one year.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Board enter a final order finding Respondent guilty of the violations of Section 491.009(2)(c), (k), (q), and (s), Florida Statutes, described above and disciplining him for having committed these violations by fining him $2,000.00, suspending his license for a period of six months, and placing him on probation for a period of one year commencing immediately following the conclusion of the period of his suspension.

DONE AND ENTERED this 27th day of July, 2000, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of July, 2000.

ENDNOTES

1/ Rule 61F4-10.002, Florida Administrative Code, was subsequently renumbered 64B4-10.002, Florida Administrative Code.

2/ See Optiplan, Inc. v. School Board of Broward County, 710 So. 2d 569, 572 (Fla. 4th DCA 1998); and Key Biscayne Council v. Department of Natural Resources, 579 So. 2d 293, 295 (Fla. 3d DCA 1991).

3/ Section 491.0112, Florida Statutes, provides as follows:

> (1) Any psychotherapist who commits sexual misconduct with a client, or former client when the professional relationship was terminated primarily for the purpose of engaging in sexual contact, commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083; however, a second or subsequent offense is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (2) Any psychotherapist who violates subsection (1) by means of therapeutic deception commits a felony of the second degree punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (3) The giving of consent by the client to any such act shall not be a defense to these offenses.
>
> (4) For the purposes of this section:
>
> (a) The term "psychotherapist" means any person licensed pursuant to chapter 458, chapter 459, chapter 464, chapter 490, or chapter 491, or any other person who provides or purports to provide treatment, diagnosis, assessment, evaluation, or counseling of mental or emotional illness, symptom, or condition.
>
> (b) "Therapeutic deception" means a representation to the client that sexual contact by the psychotherapist is consistent with or part of the treatment of the client.
>
> (c) "Sexual misconduct" means the oral, anal, or vaginal penetration of another by,

> or contact with, the sexual organ of another or the anal or vaginal penetration of another by any object.
>
> (d) "Client" means a person to whom the services of a psychotherapist are provided.

4/ Pursuant to Rule 3.172(d), Florida Rules of Criminal Procedure, the guilty plea of a criminal defendant may be accepted in the absence of an acknowledgment of guilt if the defendant "acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence."

5/ Unlike the original Administrative Complaint, the Amended Administrative Complaint makes reference to Rule 64B4-10.002, Florida Administrative Code, which is currently in effect, instead of Rule 61F4-10.002, Florida Administrative Code, which is the current rule's predecessor.

6/ The Board is without authority to impose an indefinite suspension that may last longer than five years. See Haas v. Department of Business and Professional Regulation, 699 So. 2d 863 (Fla. 5th DCA 1997).

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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.