

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF PSYCHOLOGY,)
)
Petitioner,)
)
vs.) Case No. 00-2112
)
DIANE P. BLANK,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 3, 2000, at Tallahassee, Florida, before Susan B. Kirkland, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary Denise O'Brien, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Tallahassee, Florida 32308

For Respondent: James B. Meyer, Esquire
111 West Bloxham Street
Tallahassee, Florida 32301-2308

STATEMENT OF THE ISSUES

Whether Respondent violated Subsection 490.009(2)(v), Florida Statutes, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On October 21, 1999, Petitioner, Department of Health, Board of Psychology (Department), filed an Administrative Complaint

against Respondent, Diane P. Blank (Blank), alleging that she violated Subsection 490.009(2)(v), Florida Statutes, by failing to maintain in confidence a communication made by a patient or client made in the context of psychological services. Blank requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on May 22, 2000, for assignment to an Administrative Law Judge.

The final hearing was held on October 3, 2000. At the final hearing, Petitioner called Stephen Wright as its witness. Petitioner's Exhibits 1 and 2 were admitted in evidence. Respondent testified in her own behalf and called James Fischer and Anne V. Alper as her witnesses. Respondent's Exhibits 1-3 were admitted in evidence.

Official recognition was taken of Rule Chapter 64B-19, Florida Administrative Code, Chapters 490 and 60, Florida Statutes, and a certified copy of an Order dated October 19, 1998, in In re: The Marriage of Susan J. Whittaker and James W. Fischer, Case No. 97-010390 FMCE 40, in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

The parties agreed to file their proposed recommended orders within 15 days of the filing of the transcript, which was filed on October 19, 2000. The parties have filed their proposed recommended orders, which have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. Blank is a psychologist, licensed by the Department.

2. In 1998, Susan Whittaker (Whittaker) and James Fischer (Fischer) were parties to a dissolution proceeding. The divorce was very acrimonious. Anne Alper (Alper) was appointed as a guardian ad litem to protect the interests of the couple's children during the divorce. Because of the animosity between Whittaker and Fischer and the difficulty they were having with their children, the presiding judge, Judge Ziedwig, requested that Alper determine what was in the best interests of the children.

3. Alper effectuated an agreement between the couple, which included the following provision:

The mother agrees to participate independently in counseling using the same counselor as James for the purpose of maximizing the parents' effectiveness in communication and parenting under the shared parental responsibility agreement.

The agreement was signed by Whittaker, Fischer, and their attorneys.

4. The agreement was presented to Judge Ziedwig, who indicated that he did not want to see the couple again until they had participated in the parent effectiveness training.

5. Blank had experience in conducting parent effectiveness training. For a couple of years, she held classes in which more than one couple attended. She used a manual and tapes which had been developed by two psychologists. The attendees in the

classes had no expectation that the classes would be confidential. As the number of class participants dwindled, Blank found it more cost effective to present the parent effectiveness training to individual couples.

6. Alper called Blank to see if she would be willing to provide parent effectiveness training for Whittaker and Fischer. Alper agreed to do so.

7. Whitakker understood that her attendance for the sessions with Blank was not voluntary and that she had been ordered by the judge in her dissolution proceeding to attend. The initial session was held on August 20, 1998, at Blank's office. Whittaker and Fischer attended. The purpose of the session was to teach Whittaker and Fischer how to parent their children effectively, not to provide psychotherapy for either Whittaker or Fischer. At the beginning of the session, Blank informed the couple that it was her understanding that the couple were involved in the parent effectiveness training by order of the court. Additionally, Blank advised them that the sessions were not confidential and that she would be reporting to the guardian ad litem, the court, and the attorneys for the parties. After being informed that the sessions were not confidential, Whittaker and Fischer continued with the training session.

8. At the end of the session, Whittaker informed Blank that she would not be returning to another session. Whittaker was not satisfied with the training and felt that Blank should be dealing

more with Fischer's past history of domestic violence. Blank advised Whittaker that because the divorce case was on hold until the parents received parent training, she would have to notify the court, the guardian ad litem, and the attorneys on the case that the sessions were not progressing. Blank told Whittaker that she would give Whittaker some time to think about whether she wanted to return for more training.

9. Fischer continued to see Blank for training sessions, but Whittaker never returned.

10. Whittaker called Blank and asked her what was the procedure to release information, and Blank told her to write a letter stating specifically to whom Whittaker wanted the information released. Whittaker hand delivered a letter to Blank, stating that she wanted Blank to release information to her attorneys, Elise Lucas and Robert Merlin. After Blank received the letter, she spoke with Ms. Lucas by telephone and informed her about the training session.

11. In September 1998, Fischer asked Blank to send a letter to his attorney to update him on the progress of the training sessions. Blank told Fischer that she would need a letter from him to release the information. Blank felt that since she had a letter from Whittaker on the release of information that she should also have one from Fischer. Fischer provided the letter.

12. On October 1, 1998, Blank wrote a letter to Fischer's attorney, John Stedman, advising that Whittaker had refused to

attend further sessions after the initial meeting in August. Blank also described Whittaker's behavior during the session and recommended psychological evaluation for Whittaker and her son. Neither the court nor Whittaker's attorneys were copied with the letter. Blank thought that she had provided Alper with a copy of the letter, but she could not remember if she had.

13. On October 19, 1998, Fischer filed a motion to permit Blank to testify by telephone in the divorce proceeding. The court entered an order on the same date, stating:

ORDERED AND ADJUDGED that said Motion be, and the same is hereby denied. Based on representation of counsel for the Former-Wife that she met with Diane Blank in her capacity as a psychotherapist and the Former-Wife is invoking her psychotherapist-patient privilege, Diane Blank shall not testify in any way.

No sworn testimony was heard by the court in ruling on whether a psychotherapist relationship existed.

CONCLUSIONS OF LAW

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

15. The Department has the burden to establish by clear and convincing evidence the allegations in the Administrative Complaint. Department of Banking and Finance v. Osborne Stern, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The Department alleged that Blank violated

Subsection 490.009(2)(v), Florida Statutes, by violating Section 490.0147, Florida Statutes.

16. Subsection 490.009(2)(v), Florida Statutes, provides:

(2) The following acts of a licensee, provisional licensee, or applicant are grounds for which the disciplinary actions listed in subsection (1) may be taken:

* * *

(v) Failing to maintain in confidence a communication made by a patient or client in the context of such services, except as provided in s. 490.0147.

17. Section 490.0147, Florida Statutes, provides:

Any communication between any person licensed under this chapter and her or his patient or client shall be confidential. This privilege may be waived under the following circumstances:

(1) When the person licensed under this chapter is a party defendant to a civil, criminal, or disciplinary action arising from a complaint filed by the patient or client, in which case the waiver shall be limited to that action.

(2) When the patient or client agrees to the waiver, in writing, or when more than one person in a family is receiving therapy, when each family member agrees to the waiver, in writing.

(3) When there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society and the person licensed under this chapter communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.

18. It is clear that Blank understood that she was being hired to provide parent effectiveness training to Whittaker and Fischer and not to provide psychotherapy services to them. She had conducted such training before and viewed the sessions with

Whittaker and Fischer in same manner as she did with the participants in her other training classes. Blank explained to the couple why they were told to take the parenting classes and that the communications during the training classes were not confidential. Blank advised that she would report what went on in the sessions to the guardian ad litem, the court, and the attorneys for the couple.

19. It is clear that Fischer understood that he was attending parent effectiveness training classes and that he was not being provided psychotherapy by Blank.

20. Rule 64B19-19.002, Florida Administrative Code, defines a "client" or "patient" as follows:

[T]hat individual who, by virtue of private consultation with the psychologist, has reason to expect that the individual's communication with the psychologist during that private consultation will remain confidential, regardless of who pays for the services of the psychologist.

21. Whittaker should not have had an expectation that communications during the training sessions would have been confidential after Blank expressly told her that any communications would not be confidential and that she would report the sessions to the guardian ad litem, the court, and the parties' attorneys. Whittaker was neither a client nor a patient as those terms are defined in Rule 64B19-19.002, Florida Administrative Code, and are used in Subsection 490.009(2)(v),

Florida Statutes. Blank did not violate Subsection 490.009(2)(v), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered finding that Diane P. Blank did not violate Subsection 490.009(2)(v), Florida Statutes.

DONE AND ENTERED this 4th day of December, 2000, in Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of December, 2000.

COPIES FURNISHED:

Mary Denise O'Brien, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Tallahassee, Florida 32308

James B. Meyer, Esquire
111 West Bloxham Street
Tallahassee, Florida 32301-2308

Theodore M. Henderson, Agency Clerk
Department of Health
4052 Bald Cypress Way
Bin A02
Tallahassee, Florida 32399-1701

Dr. Kaye Howerton, Executive Director
Board of Psychology
Department of Health
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701

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.