

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. 00-4526PL
)
ISMAEL LOPEZ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in the above-style case by Stephen F. Dean, Administrative Law Judge of the Division of Administrative Hearings, on February 2, 2001, in Daytona Beach, Florida.

APPEARANCES

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

For Respondent: Ismael Lopez, pro se
13691 Gavina Avenue, No. 447
Sylmar, California 91342

STATEMENT OF THE ISSUE

Whether Respondent violated Sections 491.009(2)(k), and 491.009(2)(s), Florida Statutes, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On June 28, 1999, the Department of Health, Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling filed an Administrative Complaint against Respondent, Ismael Lopez, alleging that Respondent violated the above sections of the practice Act.

Petitioner requested a formal hearing, and the case was transferred to the Division of Administrative Hearings. It was noticed for formal hearing and heard as noticed.

Petitioner's witnesses were Ismael Lopez, T.J., Diane Mongelli, Janet Miller, and expert witness Dr. Stephen Wright. Petitioner placed Exhibits 1 through 7 into evidence.

Respondent testified in his own behalf, and placed Exhibits 1 through 5 into evidence.

A Transcript was ordered and filed on March 1, 2001. Subsequently, Respondent requested a copy of the transcript from the Division of Administrative Hearings, and delays occurred in providing him with a copy which were not the fault of Respondent. His Proposed Recommended Order containing his suggested findings and a discussion of the law were filed late,

and objected to by Petitioner. Because the delay grew out of circumstances over which Respondent had no control and because it does not prejudice Petitioner, Respondent's Proposed Recommended Order was read and considered.

Petitioner filed a Proposed Recommended Order which was also read and considered.

FINDINGS OF FACT

1. At all times material, Respondent held a license as a Mental Health Counselor in the State of Florida.

2. Petitioner, through the Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling, is the state agency that licenses and has regulatory jurisdiction of Clinical Social Workers.

3. Respondent was employed as a counselor by the ACT Corporation (ACT) at the time of the incident that is the basis for this case. ACT operates a residential psychiatric treatment facility at which Respondent was employed.

4. T.J. was a patient in the ACT facility from December 26, 1996 until mid-February, 1997. While at ACT, T.J. was diagnosed with bipolar disorder.

5. T.J. had both group sessions and private sessions with Respondent while she was an in-patient at ACT. The private sessions took place in Respondent's office. Respondent and T.J.

talked on the telephone, and he brought her small items, like lip-gloss and gum, that she was not allowed to have.

6. T.J. alleges that the sessions became sexual on or about the second private therapy session. She alleges sexual contact during the in-patient sessions involved kissing and touching, that was consensual. T.J. states that she trusted Respondent and was in love with him. T.J. alleges this sexual relationship with Respondent continued after T.J. left ACT in February.

7. There was never a therapeutic relationship between Respondent and T.J. after T.J. left the hospital. There was never any discussion of a fee arrangement, and no fees were ever paid for counseling sessions.

8. Two days after T.J. left ACT, Respondent picked her up from her home and took her to Sapporo's for dinner and drinks. Following dinner, they went to a bar called the Barracks.

9. T.J. alleges that when Respondent brought T.J. home that night they engaged in oral sex and intercourse.

10. A few days later, T.J. and Respondent met for dinner at the Olive Garden. At the Olive Garden they had dinner and drinks.

11. T.J. alleges that following dinner, Respondent walked T.J. to the van she was driving, they kissed and then had sexual intercourse in the van.

12. On Valentine's Day Respondent came to T.J.'s house for dinner. T.J. lived with her parents. He brought her flowers and a bottle of wine for her parents. A card accompanied the flowers that said: "Sorry! No candy. Hope this will do instead." The envelope said "Traci." Following dinner, they went out to the Flagler Tavern.

13. T.J. alleges that when they returned to T.J.'s house Respondent stayed until early morning and they had oral sex and intercourse.

14. Respondent denies any sexual intimacy with T.J., and asserts that their relationship was one of patient-therapist even after she left ACT.

15. T.J.'s testimony was presented by deposition. There was no opportunity to observe her. She was diagnosed contemporaneously with the events to which she testified with a condition that makes her credibility difficult to assess. Respondent testified at hearing denying the sexual relationship with T.J. I do not find the deposition testimony of T.J. credible regarding the allegations of sexual relations with Respondent. I find that there was a relationship between Respondent and T.J. because Respondent verifies the social contacts T.J. reported.

16. Respondent did not perform any counseling with T.J. on the various occasions when they went to the bars and

restaurants. This relationship was inconsistent with existing standards of professional conduct, as testified to by experts at hearing and exemplified in the code of ethics which ACT had.

17. T.J. continued therapy as an outpatient with another ACT therapist for a short time after she was released from the hospital. During one of these sessions, T.J. told the outpatient therapist about her social/personal relationship with Respondent. Shortly thereafter, ACT fired Respondent for violation of ACT's code of ethics. This code prohibited personal relationships between patients and employees of the facility.

18. Respondent had his Florida Teaching Certificate permanently revoked when he worked as a counselor at Deland Senior High School. He was charged with sexual misconduct with a student, and did not contest the charges formally.

19. Psychotherapy is dependent upon a personal relationship between the patient and the therapist. Patients often develop emotional relationships or attachments to counselors or therapists because of the creation of an environment of trust. It is important that therapist recognize that this relationship is an outgrowth of treatment, and not to take advantage of the patient.

20. Respondent had a relationship with T.J. that is contrary to the professional standards of practice,

notwithstanding the allegations of sexual misconduct. His professional relationship should have been confined to the clinical setting, and the social activities in which he engaged with T.J. were inappropriate.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.57, Florida Statutes.

22. Petitioner has the burden of proving by clear and convincing evidence that Respondent has violated the above statute. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1st DCA 1987). Petitioner has met that burden.

23. Section 491.009(2), Florida Statutes, states:

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

* * *

(k) Committing 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.

* * *

(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 or certificateholder is not qualified by training or experience.

Section 491.0111, Florida Statutes, states:

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

Rule 64B4-10.002, Florida Administrative Code, states:

(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.

24. Section 120.81(4), Florida Statutes, states:

(4) REGULATION OF PROFESSIONS - 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:

(a) The testimony of the victim of the sexual misconduct need not be corroborated.

25. While the testimony of the victim need not be corroborated, it must be credible. I do not find the testimony of the alleged victim credible regarding the allegations of sexual intimacy with Respondent. I do find that there was a

social relationship or contact outside the clinical setting which was inconsistent with professional standards.

26. There is undisputed evidence that shows that Respondent was disciplined for engaging in a sexual relationship with a student while a counselor in Deland Senior High School. This evidence is admissible because it is relevant to prove motive, opportunity, and pattern. See Williams v. State, 110 So. 2d 654 (Fla. 1959).

27. Although I find that he did not in the instant case engage in sexual relations with T.J., his conduct in the instant case is consistent with a history of having personal relationships that are professionally inappropriate with patients.

28. Respondent requested that testimony and depositions taken in the case of T.J. v. ACT Corporation, Case No. 98-30226-CI-CI (Fla. 7th Cir. Ct.) (case settled) be admitted as evidence in this case. Petitioner objected. The deposition in question was introduced to impeach the testimony of T.J. in the instant case. Such testimony is admissible pursuant to Section 90.801, Florida Statutes. See State v. Green, 667 So. 2d 756 (S. Ct. 1995), and Kaminshy v. Travelers Indem. Co., 474 So. 2d 287 (Fla. 3d DCA 1985).

29. Respondent had a social relationship with T.J. as evidenced by taking her to a bar or bringing her flowers and

gifts. Consent of the patient does not excuse or mitigate this conduct. Respondent's conduct violated the minimum standards of performance.

RECOMMENDATION

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

RECOMMENDED:

That the Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling, enter a final order adopting this order and revoking Respondent's license and assessing a fine of \$1,000 against him pursuant to Rule 64B4-10.002 formerly 59P-5.001, Florida Administrative Code, the Board's penalty guidelines.

DONE AND ENTERED this 17th day of May, 2001, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 2001.

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.