

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD)
OF PSYCHOLOGY,)
)
Petitioner,)
)
vs.) Case No. 01-4192PL
)
FRANK BROWN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided and a formal hearing was held on January 16, 2002, in Pensacola, Florida, and conducted by Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary Denise O'Brien, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 39
Tallahassee, Florida 32308

For Respondent: Paul Watson Lambert, Esquire
1203 Governor's Square Boulevard
Magnolia Centre, Suite 102
Tallahassee, Florida 32311-2960

STATEMENT OF THE ISSUE

Whether Respondent violated Section 490.009(2)(c), Florida Statutes (2000).

PRELIMINARY STATEMENT

On August 17, 2001, the Department of Health, Board of Psychology (Department), filed an Administrative Complaint notifying Frank Brown, Ph.D. (Respondent), that it intended to impose one or more penalties upon Petitioner's license. Respondent requested an administrative hearing in a petition served on October 3, 2001. In a letter filed with the Division of Administrative Hearings on October 25, 2001, the Department forwarded the matter to the Division of Administrative Hearings for action.

The case was set for formal hearing on January 16, 2002, and was heard as scheduled.

The Department presented the testimony of three witnesses and offered three exhibits on behalf of Petitioner. The Department offered five joint exhibits on behalf of the parties. All of the exhibits were admitted into evidence. Respondent presented the testimony of eight witnesses and offered two exhibits for admission into evidence. Both exhibits were admitted into evidence. A scholarly article entitled "Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings," by Robert J. McGrath, which was published in the International Journal of Offender Therapy and Comparative Criminology in 1991 (the McGrath article), was marked as Respondent's Exhibit 3 for identification. This

article was the subject of testimony elicited by both parties. It was not offered into evidence.

At the conclusion of the hearing the parties requested 14 days from the filing of the transcript to file proposed recommended orders.

A Transcript was filed with the Division of Administrative Hearings on January 30, 2002. Subsequently, Respondent requested that proposed recommended orders be due February 20, 2002. Petitioner did not object. By order dated February 11, 2002, the motion was granted. Both parties timely filed Proposed Recommended Orders which were considered in the preparation of this Recommended Order.

References are to Florida Statutes (2000) unless otherwise noted.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating the practice of psychology pursuant to Section 20.43, Florida Statutes, and Chapters 456 and 490, Florida Statutes.

2. Respondent, during all times material to these proceedings, was a licensed psychologist in the State of Florida. He continues to be licensed in the State of Florida. His license identification is PY 2079. He practices psychology in Pensacola, Florida.

3. Respondent went to the Bahama Bay Club, a condominium located in Gulf Breeze, Florida, on July 19, 2000. In the vicinity of the swimming pool located on the condominium premises, he removed his penis from his trousers and began shaking it in the presence of two women who were in or near the pool. Respondent whistled at the two women who then observed him.

4. One of the women was Beth Rico, who is an airline pilot. The other woman was Ms. Rico's 19-year-old niece who is a student at Louisiana Tech University.

5. Ms. Rico yelled at Respondent who thereafter placed his penis in his trousers and retreated. Ms. Rico told Respondent to get off the property and subsequently pursued Respondent.

6. By chance, Sergeant Stephen Neff of the Gulf Breeze, Florida, Police Department, was in the immediate area of Ms. Rico and Respondent. Ms. Rico told Sergeant Neff that Respondent had exposed himself to her niece and to herself.

7. Sergeant Neff pursued Respondent off the premises of the Bahama Bay Club. Respondent dove into some azalea bushes. Sergeant Neff attempted to apprehend Respondent by grabbing him. Respondent attempted to extricate himself. The two eventually exited the azalea bushes into the parking lot of a shopping plaza. There was a continuing struggle which ended only after

officers arrived from the Gulf Breeze Police Department subsequent to calls for help made by citizen bystanders.

8. It is apparent that Respondent's motivation was to escape rather than harm Sergeant Neff. However, as a result of Respondent's efforts to resist arrest, Sergeant Neff received abrasions and cuts to his hands, knees, elbows, and feet.

9. On December 20, 2000, during an appearance before the Circuit Court of Santa Rosa County, Respondent was placed on probation for a period of one year subsequent to pleading guilty to the misdemeanor of battery and resisting a law enforcement officer without violence and after pleading nolo contendere to the misdemeanor of indecent exposure in a public place. Adjudication was withheld for the offense of battery and resisting a law enforcement officer without violence. He was adjudicated guilty of indecent exposure in a public place.

Expert testimony

10. Carolyn Stimel, Ph.D., is a psychologist in Tallahassee, Florida. She is board-certified in forensic psychology. She is an expert in the field of psychology and is an expert in treating sexual predators.

11. Prior to testifying, she reviewed the Administrative Complaint, the response to the investigative complaint, and a copy of a psychological evaluation on Respondent prepared by Dr. Larry Neidigh completed on June 11, 2001. She also reviewed

the investigative report prepared by the Agency for Health Care Administration (AHCA). She did not personally examine Respondent.

12. Dr. Stimel noted that Dr. Neidigh diagnosed Respondent as being afflicted with exhibitionism. Exhibitionism is a subset of paraphilia and describes someone who derives sexual excitement or satisfaction from displaying their genitals to unsuspecting or unwilling observers.

13. Dr. Stimel opined that exhibitionism may be treated but recidivism is high. There are some people who do not respond at all to treatment. About 40 percent of persons with one paraphilia, such as exhibitionism, are likely to have another, but different paraphilia. However, Dr. Stimel stated that there was no evidence of this in the case of Respondent.

14. It is Dr. Stimel's opinion that a psychologist needs integrity, good judgment, and emotional stability in order to properly perform the duties of a psychologist. It is Dr. Stimel's opinion that Respondent is not mentally fit to practice psychology at this time. Dr. Stimel believes that someone having psychological, emotional, or sexual problems which affect their ability to work effectively with patients is not mentally fit to properly practice psychology.

15. It is Dr. Stimel's opinion that there is a nexus between the practice of psychology and a conviction of indecent exposure and a diagnosis of paraphilia.

16. The expert testimony of Dr. Stimel, taken as a whole, is credible.

17. Larry Neidigh, Ph.D., of Orange Park, Florida, conducted a psychological evaluation of Respondent on June 6, 2001, and made a report dated June 11, 2001. Dr. Neidigh reviewed documents pertinent to the matter and administered a five-hour battery of psychological tests to Respondent.

18. Dr. Neidigh's diagnostic impression was exhibitionism. He opined that there were no indications of any mental abnormality or psychopathology which would indicate that he is not competent to perform his duties as a psychologist. It is Dr. Neidigh's opinion that the conviction does not directly relate to the practice of his profession or his ability to practice his profession.

19. The report of Dr. Neidigh is succinct. It is also helpful, but Dr. Neidigh did not appear at the hearing and all of the factual underpinnings which caused him to formulate his conclusions were not available. Additionally, there is a substantial question as to whether certain of the tests administered by Dr. Neidigh were helpful in understanding Respondent's situation. Accordingly, the information supplied

by Dr. Neidigh is considered less persuasive than that provided by Dr. Stimel.

20. James Burt Meyer, Ph.D., is a psychologist who also has a law degree. He has done post-doctorate work in two different areas of psychology. He practices forensic psychology, and he is a professor at Florida State University. He frequently conducts training workshops addressing ethical issues in psychology, and has worked in the area of assessing and treating juvenile sex offenders. He is an expert in psychology.

21. Dr. Meyer did an extensive document review in the case of Respondent and conducted interviews of both the Respondent and his wife. He engaged in a very careful review of the Florida Psychological Services Act with specific reference to Section 490.009(2)(p), Florida Statutes, which addresses the issue of a psychologist's fitness to practice the profession.

22. Dr. Meyer believes there are three areas which should be considered in Respondent's case.

23. The first area addresses whether the offender admitted that he had committed a sexual offense and whether he accepted responsibility for that act. Dr. Meyer believes that acknowledging that one has a problem is an indication that rehabilitation is probable. He noted that Respondent acknowledged that he had exposed himself.

24. The second area is whether Respondent expressed a desire to stop his behavior. Respondent expressed remorse for his behavior and said that he wished to make amends. He informed Dr. Meyer that he had written letters to the two women and the police officer expressing his regret.

25. The third area is whether the offender expressed a desire for treatment. Dr. Meyer did not discuss what, if any, treatment Respondent sought nor is there any evidence in the record which indicated that Respondent sought treatment.

26. In an effort to formulate an opinion as to whether the act in which Respondent engaged on July 19, 2000, was directly related to the practice of psychology, he also consulted the McGrath article, consulted his own library of psychology law and ethics, and reviewed the definition of serious crimes in the National Registry of Health Service Providers (National Registry).

27. Upon a review of all of the foregoing material and after considering all of the other information available to him, Dr. Meyer concluded that Respondent's behavior did not rise to a level where a chronic abuse of power between patient and therapist might occur. He opined that there was no direct relation between Respondent's exhibitionism and his practice of psychology.

28. Dr. Meyer further noted that indecent exposure was a misdemeanor and was not the type of crime that would cause a psychologist to be removed from the National Registry. While he opined that Respondent's behavior suggested a great lapse in moral consciousness, it did not extend to exhibiting a depraved mind.

29. Dr. Meyer agreed with Dr. Stimel when she stated that the recidivism rate for exhibitionism ranges from zero to 70 percent. Dr. Meyer also opined that a person could compartmentalize his behaviors and stated that Respondent could compartmentalize his professional life and his personal life so that aberrant behavior in his personal life might not affect his performance in his professional life.

30. Dr. Meyer further noted that exhibitionism is a crime usually committed by young men, that men over 40 rarely practiced exhibitionism, and that since Dr. Meyer is about 55 years of age, he is less likely to engage in that kind of behavior than are younger men.

31. In discussing the McGrath article, it was pointed out that about 35 percent of incarcerated rapists and child molesters engaged in hands-off aberrant sexual behavior, like exhibitionism, prior to moving into hands-on offenses such as rape. Dr. Meyer stated that he did not believe that would be the case with Respondent.

32. Dr. Meyer's testimony was informative; however, he stated that a key indicator of rehabilitation was seeking treatment, but there was no evidence that Respondent sought treatment subsequent to the events of July 19, 2000. Moreover, Dr. Meyer could not adequately address the propensity of certain exhibitionists to move on to more heinous sexual activities. As a result, Dr. Meyer's opinion that there is no direct relation between Respondent's exhibition and his practice of psychology, is rejected.

Character witnesses

33. Dr. Henry E. Roberts is Respondent's pastor at United Methodist Church. He knows Respondent and his wife. He stated that Respondent is an active church member, a man of integrity, and is respected in the community.

34. Flurett Fontaine is Respondent's office manager and has been for six years. She has been in a position to observe him closely. She stated that Respondent is a Christian, an ethical, and moral man. She chose Respondent to counsel her son when her son was arrested. She would not work for anyone she could not trust.

35. Robin Steed is a sign language interpreter for the deaf or hard of hearing for the Department of Education, Vocational Rehabilitation, and has known Respondent for 15 years. She works with him when he evaluates and counsels deaf

or hard of hearing persons. She believes Respondent to be sincere, generous, and trustworthy.

36. George Custred was a patient of Respondent before Respondent's arrest and continues to be a patient of Respondent. Mr. Custred stated that he had experienced serious emotional problems and that he would not be alive absent the professional help he received from Respondent.

37. Bradford Guy is a vocational rehabilitation counselor and has been for 25 years. Mr. Guy said that Respondent was a dedicated and thorough psychologist.

38. Kenneth Donnalley is a vocational rehabilitation counselor who has known Respondent for nine years both personally and professionally. Mr. Donnalley said that Respondent is an honest, caring person to whom he refers his more clinically fragile clients because of Respondent's understanding and because of the thoroughness of his evaluations. He referred his 19-year-old daughter to Respondent and would do so again, if necessary, despite his knowledge that Respondent had been arrested.

39. Dr. Bill Spain is a chiropractor who has known Respondent for about 20 years. They both attend the same church and are members of a Wednesday morning bible class. He said that Respondent is a fine Christian.

40. Bonnie Brown is Respondent's second wife. She is a middle school teacher and has known Respondent since 1985. She married him in 1991. She said they enjoyed an excellent marriage and stated that their relationship has grown stronger since Respondent's arrest.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Section 120.57(1), Florida Statutes. The party seeking to prove the affirmative of an issue has the burden of proof. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Therefore, the burden of proof is on Petitioner.

42. Because this case is penal in nature, the material allegations set forth in the Administrative Complaint must be proven by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

43. The Board of Psychology is empowered to revoke, suspend, or otherwise discipline the license of a psychologist for a violation of Section 490.009(2)(c), Florida Statutes.

44. Section 490.009(1)(c) and (2)(c), Florida Statutes, provides, in part, as follows:

(1) When the department or, in the case of psychologists, the board finds that an applicant, provisional licensee, or licensee whom it regulates under this chapter has committed any of the acts set forth in subsection (2), it may issue an order imposing one or more of the following penalties:

* * *

(c) Suspension for a period of up to 5 years or revocation of a license, after hearing.

* * *

(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:

* * *

(c) Being convicted or found guilty, regardless of adjudication, of 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. A plea of nolo contendere creates a rebuttable presumption of guilt of the underlying criminal charges. However, the board shall allow the person who is the subject of the disciplinary proceeding to present any evidence relevant to the underlying charges and circumstances surrounding the plea.

45. It is undisputed that Respondent was convicted of indecent exposure in a public place and that he also pled guilty to battery and resisting a law enforcement officer without

violence, offenses for which adjudication was withheld. The pertinent question which remains is whether or not the facts adduced demonstrate that he committed offenses which relate to the practice of his profession or the ability to practice his profession.

46. The offenses of battery and resisting a law enforcement officer without violence, in the context of this case, while unbecoming to a professional, nevertheless do not relate to the practice of his profession or his ability to practice his profession.

47. The offense of indecent exposure in a public place relates to the practice of his profession. Dr. Stimel pointed out that a psychologist needs to exhibit integrity, good judgment, and emotional stability in order to properly perform the duties of a psychologist. Engaging in the public exhibition of one's genitals does not demonstrate any of the foregoing characteristics, and interferes with, or relates to the practice of psychology.

48. Respondent's behavior on July 19, 2000, also relates to the ability to practice his profession. As pointed out by Dr. Stimel and Dr. Meyer, persons who engage in exhibitionism have a propensity to continue to engage in such behavior. Moreover, literature provided by Dr. Meyer, and discussed by Dr. Meyer, indicates that as many as 35 percent of sex offenders

who committed hands-on sex crimes, engaged in hands-off sexual activities prior to advancing to more serious offenses. A psychologist has a great deal of control over the patients he or she treats. This provides a fertile field for an exhibitionist who may be tempted to escalate his activities.

49. Rule 64B19-17.002, Florida Administrative Code, provides as follows:

(1) When the Board finds that an applicant or a licensee has committed any of the acts set forth in Section 490.009(2) or 456.072, F.S., it shall issue a final order imposing appropriate penalties as recommended in the following disciplinary guidelines.

* * *

(c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, 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. The penalty shall be suspension of license until such time as the licensee can, to the Board's satisfaction, demonstrate rehabilitation, and an administrative fine not to exceed \$10,000. In the case of an applicant, the penalty shall be from probation to permanent denial of license, and an administrative fine not to exceed \$10,000.

RECOMMENDATION

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

RECOMMENDED: That the Board of Psychology enter a final order finding that Respondent committed a violation of Section 490.009(2)(c), Florida Statutes, by being convicted or having been found guilty of a crime which directly relates to the practice of his profession or the ability to practice his profession, and that his license be suspended for one year, or a lesser period of time should he demonstrate to the Board of Psychology that he is rehabilitated.

DONE AND ENTERED this 27th day of February, 2002, in Tallahassee, Leon County, Florida.

HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of February, 2002.

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.