

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARION J. GWIZDALA,

Petitioner,

vs.

Case No. 13-4668

DEPARTMENT OF HEALTH, BOARD OF
CLINICAL SOCIAL WORK, MARRIAGE
AND FAMILY THERAPY AND MENTAL
HEALTH COUNSELING,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH) heard this case by video teleconference on February 11, 2014, at sites in Tampa, Gainesville, and Tallahassee, Florida.

APPEARANCES

For Petitioner: Marion Joseph Gwizdala, pro se
1003 Papaya Drive
Tampa, Florida 33619-4629

For Respondent: Robert Antonie Milne, Esquire
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STATEMENT OF THE ISSUE

Is Petitioner, Marion J. Gwizdala, entitled to issuance of a license as a registered mental health counselor intern under section 491.0045, Florida Statutes (2013).^{1/}

PRELIMINARY STATEMENT

On October 24, 2013, the Department of Health, Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling (Board), denied Mr. Gwizdala's application for licensure as a registered mental health counselor intern. Mr. Gwizdala timely petitioned for an administrative hearing under section 120.57(1), Florida Statutes. On December 3, 2013, the Board referred the matter to DOAH to conduct an evidentiary hearing and to issue a recommended order.

The final hearing was conducted by video teleconference at sites in Tallahassee, Tampa, and Gainesville. From Tampa, Mr. Gwizdala testified on his own behalf and presented the testimony of Daryl Dowding, Ted Hull, Robin McKenzie, Sherrill O'Brien, and Virginia Walsh. Mr. Gwizdala's Exhibits 1 through 6, 10A through 10E, 12, 14, and 15 were admitted into evidence.

The Board presented the testimony of Dr. Peter A.D. Sherrard from the Gainesville site. The Board's Exhibits 1 through 4 were admitted into evidence.

The hearing Transcript was filed with DOAH on February 25, 2014. The parties requested and received additional time to submit their proposed recommended orders (PROs). The undersigned considered the parties' PROs in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented at the final hearing and on the entire record of this proceeding, the following Findings of Fact are made:

1. Mr. Gwizdala seeks licensure as a registered mental health counselor. Throughout the licensure process and in this proceeding, Mr. Gwizdala has acknowledged that he has two criminal convictions which may be grounds for denying his licensure application. Throughout the process and this proceeding, because of the convictions, Mr. Gwizdala has only sought a license that limits him to serving only adults.

2. On August 27, 2013, the Board issued a Notice of Intent to Deny Mr. Gwizdala's application for licensure as a registered mental health counselor intern because of the two criminal convictions. The Board found that Mr. Gwizdala's crimes directly relate to the practice of, or the ability to practice, mental health counseling, grounds for denial of a license under section 491.009(1)(c).^{2/}

3. The first crime resulted in a 1976 judgment against Mr. Gwizdala based on his plea of guilty to attempted lewd assault on his neighbor, an 11-year-old boy. Mr. Gwizdala completed five years of probation for this offense.

4. The second crime resulted in a 1985 judgment against Mr. Gwizdala based on his plea of guilty to two counts of lewd

assault on two boys under the age of 14. Mr. Gwizdala fondled, masturbated in front of, and provided alcohol and pornography to the two boys. He served six months of a one-year prison sentence for that offense and spent another ten years on probation.

5. Mr. Gwizdala has not been convicted of any crime since 1985.

6. As part of his sentence for the 1985 conviction, Mr. Gwizdala completed three years of mandatory treatment at the Florida Mental Health Institute's Center for the Prevention of Child Molestation. He voluntarily underwent additional treatment at the Sexual Abuse Treatment Center for approximately one and one-half years. Mr. Gwizdala has not undergone any treatment since. However, his later training in counseling involved self-reflection similar to treatment.

7. In 1993, the Florida Department of Education, Division of Blind Services (DBS), required Mr. Gwizdala to undergo a mental health evaluation to determine whether DBS should fund his education in counseling. Dr. Leo P. Cotter conducted the mental health evaluation. The evaluation consisted of approximately five hours of clinical interviews with Mr. Gwizdala and a review of collateral materials. The materials included a letter of recommendation from Sharon M. McElvoy, Sexual Abuse Treatment Services; results of a Minnesota Multiphasic Personality Inventory Test administered to Mr. Gwizdala; and Mr. Gwizdala's

Department of Corrections file. At the time, Mr. Gwizdala was under community supervision by the Department.

8. Dr. Cotter compiled a report of his findings. He noted Mr. Gwizdala's "long history of sexually abusing children," but found that Mr. Gwizdala "appears now to have the coping skills to deal with his personal problems in legal, healthy ways."

Dr. Cotter concluded that Mr. Gwizdala's goal of becoming a mental health counselor was "realistic," provided that Mr. Gwizdala limited his practice to adults and not treat children under any circumstances. DBS provided Mr. Gwizdala's funding for his counseling education.

9. Mr. Gwizdala obtained his bachelor's degree in psychology from the University of South Florida in 1993 and his master's degree in counseling from Nova Southeastern University in 1997.

10. Mr. Gwizdala has practiced as a hypnotherapist since approximately 1994. He restricts his practice to adults because he knows it would be inappropriate for him to treat children.

11. Mr. Gwizdala has been active in community service for many years. He founded and has worked extensively with the Tampa chapter of the National Federation of the Blind. He has also volunteered with the National Association of Guide Dog Users.

12. At the National Federation of the Blind Florida State Convention in 2007, which he helped host, Mr. Gwizdala initiated

a "safety plan" to ensure that he was never on the same floor as any of the children attending the convention. That included locating the children's activities and day care on a different floor than the floor on which his activities occurred.

Mr. Gwizdala disclosed his past and arranged the "safety plan" on his own.

13. Mr. Gwizdala has served as the music director for his church since 2007. In August 2012, the church began to receive emails regarding Mr. Gwizdala's past. In response, he voluntarily suggested and, with the church, implemented a "safety plan" to ensure that he was never alone with children. In April 2013, Mr. Gwizdala and Reverend Virginia Walsh, his employer at the church, disclosed his criminal past to the entire congregation.

14. Reverend Walsh is not aware of any complaints about Mr. Gwizdala's behavior during his time at the church.

15. Mr. Gwizdala has been open and honest about his criminal history with friends, colleagues, employers, and his wife. Testimony and letters of reference from several people attest to his good character. The recommendations from Mr. Gwizdala's friends and associates are not superficial or inconsequential. He has known or worked closely with them for many years, in some cases as many as 20 years. The witnesses who testified on his behalf uniformly claimed that Mr. Gwizdala had

never acted inappropriately around them. The references are persuasive and credible.

16. In 2013, Mr. Gwizdala applied to the Board for licensure as a registered mental health counselor intern. On his application, Mr. Gwizdala disclosed his convictions.

17. Because of his disclosure, the Board required Mr. Gwizdala to submit documentation about his crimes and undergo a mental health evaluation. The Board forwarded his file to the Professional Resource Network (PRN), which referred Mr. Gwizdala to Dr. Barbara Stein for evaluation. On July 9, 2013, Dr. Stein interviewed Mr. Gwizdala for two and one-half hours, administered two psychiatric tests, and referred Mr. Gwizdala for a polygraph test and drug screening.

18. Dr. Stein compiled a report of her findings. She noted that Mr. Gwizdala understood the influential and powerful role of the therapist and knew it was wrong to have a sexual relationship with a patient. Dr. Stein also noted that he was a bit unclear on the "do's and don'ts" of non-sexual boundary crossing, like hugging. She concluded that Mr. Gwizdala "does not currently have any psychiatric impairment that prevents him from being able to safely become licensed as a mental health counselor intern treating adults only." Her report also suggested that Mr. Gwizdala engage in a course on professional boundaries and enter into a professional boundaries contract with PRN.

19. On August 27, 2013, the Board issued a Notice of Intent to Deny Mr. Gwizdala's application for licensure based on his criminal convictions. He appealed. On October 24, 2013, Mr. Gwizdala appeared before the Board and presented evidence, including the reports of Dr. Cotter and Dr. Stein. The Board voted and split 4-4, which upheld the Intent to Deny. Mr. Gwizdala moved for reconsideration of that decision, which the Board denied. This proceeding followed.

20. The Board does not maintain that Mr. Gwizdala is otherwise unqualified for a license under the requirements of section 491.0045.

21. Dr. Sherrard, the Board's expert and a former Board member, testified at the final hearing that he would not grant Mr. Gwizdala a license. He based his opinion on the reports described above and their underlying documentation. Dr. Sherrard was concerned about the possibility that Mr. Gwizdala might succumb to a desire to offend again with children.

22. As Dr. Sherrard testified and Mr. Gwizdala acknowledged, Mr. Gwizdala will always be vulnerable to the motivations that drove him to commit his crimes. Mr. Gwizdala's awareness of those motivations helps him stay vigilant against reoffending.

23. Dr. Sherrard fears that, if licensed, Mr. Gwizdala might put himself in a position to reoffend by treating children.

But, as Dr. Sherrard testified, Mr. Gwizdala is not a high risk to reoffend as recidivism rates for similarly-situated offenders are generally low.

24. Dr. Sherrard described his apprehension like this:

Well, it [the risk of recidivism] doesn't even have to be 18 percent. It could be 1 percent. I just would hope that he wouldn't put himself back in that position again, and my concern about granting the license is that we helped to put him back in that position again, partially because once you have a license it does not--inherently, the license does not restrict your practice.

25. Dr. Sherrard credibly testified that Mr. Gwizdala should have "additional insight as to what drives this behavior."

26. Mr. Gwizdala has practiced as a hypnotherapist for almost two decades without incident. He has limited his practice to adults because, in his words, "it would just be simply--to be candid, it would be inappropriate for me to treat a child."

27. Therapy is an intimate practice where patients are in vulnerable positions. In therapy, there is a presumption of safety. Maintaining trust and boundaries is paramount.

28. Mr. Gwizdala's crimes directly relate to the practice of mental health counseling because they were committed against vulnerable children and demonstrate repeated violations of trust and boundaries.

29. Similarly, the tendencies that spurred Mr. Gwizdala's criminal behavior undermine his ability to practice as a mental

health counselor intern without restrictions. Mr. Gwizdala is not immune from those tendencies and does not think that he is. If allowed to treat children, he represents a danger to the public safety and welfare.

30. On the other hand, the evidence proves that Mr. Gwizdala has conducted himself appropriately since his 1985 conviction. He has worked hard to turn his life around and has demonstrated a commitment to bettering himself and helping others. He is cognizant of his tendencies and the need to restrict his interactions to adults. He has initiated measures to avoid inappropriate situations and the appearance of impropriety.

31. The weight of the credible, persuasive, and consistent evidence establishes that Mr. Gwizdala does not present a threat to the public health and safety of adults.

32. The weight of the credible, persuasive evidence proves that Mr. Gwizdala is not a threat to the public safety under appropriately restrictive conditions, including a prohibition on treating or being in contact with minors.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this case. §§ 120.569 and 120.57(1), Fla. Stat.

34. Chapters 456 and 491, Florida Statutes, and Florida Administrative Code Chapter 64B4-5 regulate mental health counseling.

35. Section 491.0045 establishes the requirements for licensure as a mental health counselor intern and provides that the Department of Health (Department) "shall register" an applicant that satisfies the applicable provisions of sections 491.0045 and 491.005.

36. Section 456.003(1) notes the Legislature's intent "that persons desiring to engage in any lawful profession regulated by the [Department] shall be entitled to do so as a matter of right if otherwise qualified." Section 456.003(2) further describes the Legislature's intent that such professions are regulated to preserve the public health, safety, and welfare.

37. Section 491.009(1) provides:

The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(c) Being 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.

38. Section 491.009(2) empowers the Department to deny licensure or impose the penalties of section 456.072(2) on an applicant who has violated section 491.009(1).

39. The Board may impose the following penalties under section 456.072(2):

(a) Refusal to certify, or to certify with restrictions, an application for a license.

* * *

(c) Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.

40. Florida Administrative Code Rule 64B4-5.001(1)(c) further provides that the Board shall, when it finds an applicant has violated sections 456.072(1)(c) or 491.009(1)(c), impose penalties ranging from a minimum of "\$1,000 fine and probation" to a maximum of "denial or \$1,000 fine and permanent revocation" for a first offense.

41. Rule 64B4-5.001(3) provides that the Board may deviate from the penalties in rule 64B4-5.001(1)(c) based on mitigating or aggravating factors, including:

- (a) The danger to the public;
- (b) The length of time since the date of the violation(s);
- (c) Prior discipline imposed upon the licensee;
- (d) The length of time the licensee has practiced;
- (e) The actual damage, physical or otherwise, to the patient;
- (f) The deterrent effect of the penalty imposed;
- (g) The effect of the penalty upon the licensee's livelihood;
- (h) Any efforts for rehabilitation;
- (i) The actual knowledge of the licensee pertaining to the violation;
- (j) Attempts by the licensee to correct or stop violations or failure of the licensee to correct or stop violations;
- (k) Related violations against the licensee in another state, including findings of guilt or innocence, penalties imposed and penalties served;
- (l) Any other mitigating or aggravating circumstances.

42. The Board bears the burden to present evidence that Mr. Gwizdala committed a crime that makes him unfit for licensing. Dep't of Banking & Fin., Div. of Sec. and Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996).

43. However, Mr. Gwizdala bears the burden of ultimate persuasion to establish by a preponderance of the evidence that he meets the requirements for licensure. See id.; Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

44. In Florida, licenses to practice are considered a privilege granted by the State, not a right. See, e.g., Lescher v. Dep't of High. Saf. & Motor Veh., 985 So. 2d 1078, 1084 (Fla. 2008); Borrego v. Ag. for Health Care Admin., 675 So. 2d 666, 668 (Fla. 1st DCA 1996). As an administrative agency, the Board has "particularly broad discretion in determining the fitness of applicants who seek to engage in an occupation in the conduct of which is a privilege rather than a right." Osborne Stern & Co., 670 So. at 934 (citing Osborne Stern & Co. v. Dep't of Banking & Fin., 647 So. 2d 245 (Fla. 1st DCA 1994) (Booth, J., concurring and dissenting)).

45. As noted in the Findings of Facts, the Board presented evidence sufficient to establish that Mr. Gwizdala committed crimes that directly relate to the practice of mental health counseling. Because of the youth of the victims, the crimes inherently involved the exploitation of vulnerability, violations of trust, and inappropriate boundary crossing. Maintenance of boundaries and trust is imperative in therapy.

46. The crimes also directly relate to Mr. Gwizdala's ability to practice as a mental health counselor intern because

they stem from tendencies, acknowledged by Mr. Gwizdala, that threaten the public safety and welfare, if left unchecked. Mental health care professionals are licensed to help preserve the public health, safety, and welfare. § 491.002, Fla. Stat.

47. Mr. Gwizdala argues that his convictions do not directly relate to mental health counseling because there is no "proximate, immediate, or unambiguous connection." Section 491.009(1)(c), however, is not limited to crimes that are committed during the practice of mental health counseling or that are related to the technical ability to practice mental health counseling. In a license revocation case under the related provision of section 456.072(1)(c), the First District Court of Appeal stated:

Several cases demonstrate that, although the statutory definition of a particular profession does not specifically refer to acts involved in the crime committed, the crime may nevertheless relate to the profession. In Greenwald v. Department of Professional Regulation, the court affirmed the revocation of a medical doctor's license after the doctor was convicted of solicitation to commit first-degree murder. 501 So. 2d 740 (Fla. 3d DCA 1987). The Fifth District Court of Appeal has held that although an accountant's fraudulent acts involving gambling did not relate to his technical ability to practice public accounting, the acts did justify revocation of the accountant's license for being convicted of a crime that directly relates to the practice of public accounting. Ashe v. Dep't of Prof'l Regulation, Bd. of Accountancy, 467 So. 2d 814 (Fla. 5th DCA

1985). We held in Rush v. Department of Professional Regulation, Board of Podiatry, that a conviction for conspiracy to import marijuana is directly related to the practice or ability to practice podiatry. 448 So. 2d 26 (Fla. 1st DCA 1984). These cases demonstrate, in our view, that appellee did not err by concluding Doll's conviction was "related to" the practice of chiropractic medicine or the ability to practice chiropractic medicine. We therefore affirm appellee's actions finding appellant in violation of section 456.072(1)(c) and revoking appellant's license.

Doll v. Dep't of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007) (upholding the revocation of a license to practice chiropractic medicine based on a conviction for conspiracy to defraud a health beneficiary program under 18 U.S.C. sections 371 and 1347).

48. In Rush v. Department of Professional Regulation, Board of Podiatry, 448 So. 2d 26, 27-28 (Fla. 1st DCA 1984), the First District found that conspiracy to import marijuana directly related to the practice of podiatry, even though it was not related to the appellant's technical ability to practice podiatry, because the crime represented a threat to the public health and welfare.

49. In another case, an Administrative Law Judge recommended denial of petitioner's application for a license as a registered pharmacy technician because petitioner's conviction of unlawful sexual activity with a minor directly related to her

ability to practice. Donald v. Bd. of Pharm., Case No. 10-0857 (Fla. DOAH June 30, 2010).

50. Mr. Gwizdala also asserts that his convictions do not directly relate to mental health counseling, in part, because he is willing to accept a restriction on his license limiting his practice to adults only. However, the Board is authorized to place restrictions on a license only when the licensee has violated a provision of section 456.072 or 491.009. See §§ 456.072(2) and 491.009(2), Fla. Stat. If Mr. Gwizdala's crimes were unrelated to mental health counseling, it would not be necessary nor would the Board be authorized to restrict his license and practice to adults.

51. Additionally, Mr. Gwizdala argues that his convictions do not violate the provisions of section 456.0635. This section requires the Board to deny licensure to applicants convicted of specific statutory crimes, subject to certain conditions. This section does not apply. The Board does not assert that Mr. Gwizdala was convicted of the listed offenses. Section 456.0635 does not affect the Board's authority under section 491.009(1)(c).

52. In his PRO, Mr. Gwizdala cites a guidance document from the Equal Employment Opportunity Commission related to consideration of conviction records in hiring. As this is

a licensure case unrelated to hiring, the document is not relevant.

53. At the hearing, the Board argued that the undersigned may not consider whether the Board should issue a license subject to restrictions. The Board did not reassert this argument in its PRO. In any event, this proceeding is a de novo determination, see section 120.57(1)(k), of whether Mr. Gwizdala is entitled to a license. Neither the Florida Statutes nor the Florida Administrative Code prohibits an Administrative Law Judge from recommending issuance of a license subject to conditions.

54. The Board may approve Mr. Gwizdala's application for licensure subject to restrictions necessary to protect the public health, safety, and welfare. It is not required to do so. See §§ 491.009(2) and 456.072(2), Fla. Stat.

55. In determining the correct penalty for a violation of 491.009(1)(c), the Board may, but is not required, to consider mitigating and aggravating circumstances. See Fla. Admin. Code R. 64B4-5.001(3). Here, mitigating circumstances include the length of time since Mr. Gwizdala's last conviction, his efforts at rehabilitation, the effect of denial on his livelihood, and his positive involvement with community service. Aggravating factors include the youth of his victims in multiple incidents and the potential danger to the public.

56. Section 456.072(2) allows the Board to issue a restricted license. The following restrictions on Mr. Gwizdala will protect the health and safety of the public:

A. Restrict Mr. Gwizdala's practice to adults only and prohibit practice in any setting involving minors;

B. Require Mr. Gwizdala to enter a professional boundaries contract with PRN, with duration and monitoring to be determined by PRN;

C. Require Mr. Gwizdala to successfully complete a comprehensive course on professional boundaries.

RECOMMENDATION

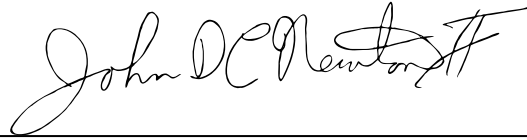
Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board issue a final order granting Mr. Gwizdala a license to practice subject to these restrictions:

A. Restrict Mr. Gwizdala's practice to adults only and prohibit practice in any setting involving minors;

B. Require Mr. Gwizdala to enter a professional boundaries contract with PRN, with duration and monitoring to be determined by PRN;

C. Require Mr. Gwizdala to successfully complete a comprehensive course on professional boundaries.

DONE AND ENTERED this 29th day of April, 2014, in
Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 2014.

ENDNOTES

^{1/} All references to the Florida Statutes are to the 2013
codification.

^{2/} The Notice of Intent to Deny incorrectly cites to section
491.009(2)(c).

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.