

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
PSYCHOLOGY,

Petitioner,

Case No. 20-0447PL

vs.

ISAAC A. LEVINSKY, PH.D.,

Respondent.

_____ /

RECOMMENDED ORDER

On July 27 and 28, 2020, Administrative Law Judge Yolonda Y. Green of the Florida Division of Administrative Hearings (“Division”) conducted a hearing pursuant to section 120.57(1), Florida Statutes (2019), via Zoom conference.

APPEARANCES

For Petitioner: Christina Arzillo Shideler, Esquire
Ryan Sandy, Esquire
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
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For Respondent: Jonathan Rose, Esquire
Jonathan Rose, P.A.
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STATEMENT OF THE ISSUES

Whether Respondent violated section 456.072(1)(c), Florida Statutes, as alleged in the Administrative Complaint; and if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On March 11, 2019, the Department of Health, Board of Psychology (“Petitioner” or “the Department”), filed a one-count Administrative Complaint alleging Isaac Levinsky, Ph.D. (“Respondent” or “Dr. Levinsky”) violated section 456.072(1)(c), Florida Statutes (2018), by entering a plea of nolo contendere to Contribut[ing] to Delinquency of a Minor or Child. On April 5, 2019, Respondent disputed the allegations in the Administrative Complaint and generally alleged the Department’s failure to provide 20 days to respond to the investigative file before seeking a probable cause determination regarding the allegations. Respondent did not file a Motion to Dismiss and, he did not offer any evidence at hearing regarding the issue. Thus, the issue is considered abandoned. Respondent requested a hearing involving disputed issues of material fact. On April 15, 2019, the Department referred this matter to the Division and it was assigned to the undersigned.

The undersigned issued a Notice of Hearing scheduling this case for March 31, 2020. On February 27, 2020, Respondent filed an Unopposed Motion to Continue Final Hearing seeking a continuance because Respondent’s new counsel required additional time to evaluate the case, which the undersigned granted. The undersigned rescheduled this case for May 29, 2020. The parties subsequently filed two additional Motions to Continue Final Hearing due to matters related to the COVID-19 pandemic. This matter was ultimately rescheduled for July 27, 2020, and it commenced as scheduled.

The parties filed a Joint Written Statement on July 2, 2020, containing factual stipulations that have been incorporated into the Findings of Fact below, to the extent relevant.

At the hearing, Joint Exhibits 1 through 5 and 7 through 12 were admitted into evidence. Petitioner's Exhibit 1 was admitted over objection. Petitioner presented the testimony of Carolyn Stimel, Ph.D., ABPP (expert), and Agent Alexander Sorokin (by Deposition). Respondent testified on his own behalf and presented the testimony of Duncan Bowen, Ph.D. (expert); Robert W. Stewart, Ph.D. (his employer); Bruce Levinsky (his father); and Helene Levinsky (his mother). Respondent did not offer any exhibits, other than the joint exhibits.

During preliminary matters, Petitioner argued in support of its Motion for Official Recognition, which the undersigned denied. At the conclusion of the hearing, Petitioner sought to offer the deposition of Dr. James A. Hunt, Respondent's treating physician. Since this was the first time the issue was raised, the parties were directed to file memoranda of law regarding whether Petitioner could offer the deposition of Dr. Hunt as an expert witness no later than August 7, 2020. Respondent withdrew his objection on August 7, 2020. Petitioner filed the deposition of Dr. Hunt on August 12, 2020, which was identified as Petitioner's Exhibit 2. On August 14, 2020, the undersigned closed the record in this matter.

The two-volume Transcript of the proceeding was filed with DOAH on September 8, 2020. Thus, the deadline for proposed recommended orders ("PROs") was September 18, 2020. Petitioner timely filed its PRO. On September 21, 2020, Respondent filed his PRO. Given there was no objection by Petitioner or demonstration of prejudice to Petitioner, both PROs have been considered in preparation of this Recommended Order.

This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes are to Florida Statutes (2018), unless otherwise noted.

FINDINGS OF FACT

The following Findings of Fact are based on the testimony and documentary evidence presented at the final hearing, and the entire record of this proceeding.

Parties

1. The Department is the state agency charged with licensing and regulation of healthcare professionals pursuant to section 20.43 and chapter 456, Florida Statutes. The Board of Psychology is the professional licensing board charged with final agency action related to discipline against psychologists pursuant to chapter 490, Florida Statutes.

2. At all times material to the allegations in the Administrative Complaint, Respondent was licensed as a psychologist by the State of Florida, having been issued license number PY 9171.

Underlying Criminal Case

3. On or about April 26, 2017, two images of suspected child pornography were uploaded to the cloud storage associated with mobile phone number 321-890-7266.

4. That event prompted Synchronoss Technologies to report this information to the National Center for Missing and Exploited Children ("NCMEC")¹. Synchronoss Technologies provides cloud and digital storage for Verizon cell phone subscribers. On May 9, 2017, NCMEC forwarded that

¹ NCMEC is an organization that maintains databases of material that has been identified through law enforcement as child abuse material. It assists law enforcement and other agencies with locating missing children.

information as a CyberTip to Brevard County Sheriff's Office ("BCSO"). The CyberTip included the suspected pornographic images.

5. The BCSO Special Victim's Unit, which investigates online exploitation and abuse of children, investigated the case. Agent Sorokin, a law enforcement officer with extensive experience investigating crimes involving child exploitation and child pornography, was assigned to investigate the CyberTip.

6. Agent Sorokin reviewed the two images provided with the CyberTip and confirmed they were sexually explicit pornographic images depicting minor girls between the ages of 11 and 13 with exposed genitalia.² Agent Sorokin then issued a subpoena to Verizon and Synchronoss Technologies for the mobile phone number, 321-890-7266, to identify the subscriber of the phone that uploaded the pornographic images. Verizon identified the account subscriber as Respondent, and provided Respondent's address of 1323 Brumpton Place, Rockledge, Florida.

7. On April 13, 2018, Agent Sorokin conducted an interview with Respondent at his then-office, located at the VA clinic. During that interview, post-Miranda, Respondent admitted that he uploaded the images of the girls using the application BitTorrent and subsequently deleted them. He then initialed the images signifying that he recognized them as the images he uploaded.³ Respondent wrote an apology letter in which, among other things, he stated, "I am sorry I viewed anything and I am sorry to you and your families. You did not do anything wrong you were not at fault."

² Child pornography is defined as any image depicting a minor engaged in sexual conduct. § 847.001(3), Fla. Stat. Sexual conduct is defined as actual ... lewd exhibition of the genitals. §§ 827.01(1)(h) and 847.001(16), Fla. Stat.

³ Respondent signed the card acknowledging he understood his Miranda rights. He then made a series of voluntary admissions to Agent Sorokin. For instance, when asked how he recognized the images, Respondent stated that the images were on his phone; and when asked the ages of the girls in the images, Respondent stated the girls were 11 or 12.

8. With Respondent's consent, Agent Sorokin took possession of Respondent's cell phone. After obtaining a search warrant, BCSO investigators searched his phone. A subsequent forensic analysis of the phone revealed that the phone contained a web history with search terms including "innocent_girl2 at Chaturbate: full naked," and "seventeen-excuse me 13-Pornhub.com." The web bookmarks included a URL address titled "Child Psychologist Salary and Job Information." The search did not reveal any pornographic images of children on Respondent's phone as he had deleted the images.

9. On June 21, 2018, pursuant to an arrest warrant, Respondent was arrested for two counts of possession of child pornography. On August 28, 2018, the State Attorney for the Eighteenth Judicial Circuit filed a two-count Information in Case No. 18-CF-033336 against Respondent, alleging Respondent contributed to the delinquency or dependency of a minor, namely allowing and/or encouraging the sexual exploitation of a child.

10. On September 21, 2018, Respondent pled nolo contendere to two counts of contributing to the delinquency or dependency of a minor, in violation of section 827.04(1)(a), Florida Statutes, with adjudication withheld.⁴ He was sentenced to two years of probation, one year for each count.

11. Although Respondent was not required to register as a sex offender, he was required to undergo sex offender counseling. Specifically, the sentence required that Respondent not have contact or overnight visits with children under age 18. Additional conditions of supervision included: no working or volunteering at any place where children under age 18 congregate; no viewing, accessing, owning, or possessing any obscene, pornographic, or

⁴ The Administrative Complaint alleged "On or about September 21, 2018, Respondent plead nolo contendere to one count of Contribute to Delinquent Dependency of Minor or Child, in the County Court, in and for Brevard County, Florida, Case No.: 2018-MM-33336." The reference to one count instead of two counts appears to be a typographical error as the overwhelming evidence in the record reflects Respondent was charged with two counts of the crime. The typographical error does not impact the outcome of this matter.

sexually stimulating visual or auditory material; active participation and successful completion of a sexual offense treatment program; and continued psychiatric treatment, including medication management and therapy. Respondent completed the terms of his sentence and probation early.

12. There is no dispute that Respondent pled nolo contendere to a criminal offense. The question remains whether that crime relates to the practice of psychology. The Department's expert, Dr. Carolyn Stimel, answered this question in the affirmative.

Expert Testimony

13. Dr. Stimel, a practicing psychologist, has been licensed in the state of Florida for more than 30 years. Dr. Stimel has been board certified by the American Board of Professional Psychology and Forensic Psychology since 1989. Forensic psychology is the intersection between psychology and criminal legal matters. In addition to her private practice, Dr. Stimel works with the Jimmy Ryce program for sexually violent predators. Dr. Stimel's responsibilities working with the Jimmy Ryce program includes assessing whether a person should be tried as a sexually violent predator. Through her work with the program, she has evaluated and treated sex offenders for criminal cases.

14. In preparation for her testimony, Dr. Stimel relied upon the pertinent evaluations, interview of Respondent by Agent Sorokin, criminal records, and relevant depositions. More importantly, she also relied upon her observation of the full hearing to formulate her opinion. Dr. Stimel opined that downloading child pornography as related to the practice of psychology requires trust, good judgment and integrity, ability to establish appropriate boundaries, ability to control impulses, and ability to behave appropriately and responsibly.

15. Dr. Stimel's opinion of Respondent's poor judgment did not change when she learned that Respondent had voluntarily deleted the pornographic

images from his phone. In addition to the serious judgment lapse, Respondent's behavior was a significant breach of public trust.

16. As stated by Dr. Stimel, the qualities essential to the practice of psychology include good judgment and trustworthiness. Respondent's poor judgment and an inability to be boundary-observant poses a high risk of Respondent engaging in further sexual offenses involving children. Respondent's viewing child pornography, even if for a brief moment, demonstrates a disregard for a vulnerable population of society.

17. Respondent contends that he should be able to continue practicing psychology because he does not pose a threat to children. To support his argument that he does not pose a threat to children, Respondent offered the testimony of Dr. Duncan Bowen, a licensed mental health counselor. On October 9, 2018, Dr. Bowen performed a risk assessment of Respondent and concluded that Respondent does not pose a risk of emotional or physical harm to children. On April 8, 2020, Dr. Bowen performed a psychosexual evaluation of Respondent and opined that Respondent may return to the practice of psychology safely. While Dr. Bowen has conducted evaluations to determine the ability of professionals to return to work, namely law enforcement, aviators, and department of defense personnel, he has not conducted evaluations of healthcare professionals. Moreover, given that Dr. Bowen is not a licensed psychologist, Dr. Bowen could not offer an opinion on whether Respondent's crime(s) relates to the practice of psychology.

18. Respondent saw Dr. James Hunt for psychiatric sexual offender treatment, which was ordered by the court. Dr. Hunt was also Respondent's treating psychiatrist before the court ordered treatment. Respondent admitted to Dr. Hunt that he looked at child pornography and indicated that he committed the act because of obsessive compulsive disorder ("OCD"). Dr. Hunt ultimately concluded that Respondent had a compulsion to check the website depicting child pornography as a symptom of OCD and prescribed Luvox to treat the compulsive behaviors. Dr. Hunt testified that Respondent

should remain on Luvox indefinitely; otherwise, he would risk viewing child pornography again.

Testimony of Lay Witnesses

19. While Respondent contends that he should still be permitted to continue to practice psychology because he only treats adults; that factor does not erase the presence of children from the practice setting. For instance, Dr. Stewart, Respondent's employer and a licensed clinical social worker, treats patients as young as five years old. As a result, there are times children or adolescents may be in the waiting room before their appointment. In addition, a psychology license is a general license that is not restricted to any specific group of people. The licensee may see children or may be retained to see a family that includes children.

20. Although, Dr. Stewart testified he had no concerns about the safety of patients, he installed a security system after Respondent began working at his office. He also testified that he believed Respondent could continue to practice psychology safely. However, Dr. Stewart is not a licensed psychologist so his opinion does not have much weight, if any, on Respondent's ability to practice safely.

21. In support of Respondent, Dr. Stewart testified that Respondent is well thought of in the community and is gentle with patients. As expected, Respondent's parents, Bruce and Helene Levinsky, also offered support. Mrs. Levinsky described her son as being compassionate and empathetic toward others. She also testified that he would not be a danger to children. Respondent's father, Bruce Levinsky, joined his wife in support of their son by testifying that he is a caring psychologist.

Allegations of Coerced Confession

22. At hearing, Respondent testified that his confession was coerced by Agent Sorokin, and he actually did not download child pornography. Respondent testified that Agent Sorokin coerced him to give a false confession through the use of intimidating tactics. Agent Sorokin did not

testify in person and, thus, was unable to defend himself against Respondent's claims at the hearing.

23. However, the undersigned carefully observed the demeanor of Respondent as he testified and carefully reviewed the record regarding all aspects of this case, including the circumstances surrounding the alleged false confession. Based on the circumstances, namely the recorded interview; identifying information associating Respondent with the phone used to upload the images; Respondent's motivation to cast the events in a particular light;⁵ and the number of admissions Respondent made to others besides Agent Sorokin, it is determined that Respondent's claim of a coerced confession is not supported by the record.⁶ Likewise, the undersigned finds Respondent's denial that he downloaded child pornography is not credible.

24. Respondent's denial was not credited based on more credible evidence discovered during the criminal investigation. Furthermore, his credibility was diminished by deceptive testimony at hearing. For example, Respondent testified that he was not aware that he had a right to an attorney during a criminal interrogation and claimed that Agent Sorokin did not read him his Miranda rights. When confronted with the transcript of the interview, he acknowledged that Agent Sorokin read his Miranda rights. The undersigned's review of the transcript and audio recording revealed that the agent read Miranda rights to Respondent and Respondent acknowledged his understanding of those rights verbally and in writing by initialing the card with Miranda warnings.

⁵ Dr. Stimmel testified that most people accused of a sexual offense attempt to minimize, deny, or rationalize their actions.

⁶ In his recorded statement, he verbally admitted to downloading and viewing the pornographic images of two prepubescent girls. He wrote an open letter apologizing to the persons depicted in the images. During his visits with Dr. Hunt, he admitted that he viewed the images due to OCD and there was no reference to him being coerced into the statement until a year later. For instance, on July 11, 2018, Respondent reported to Dr. Hunt that he had to watch [child pornography] because of his OCD.

25. In another example, Respondent admitted to Dr. Bowen and Dr. Hunt, who were tasked with evaluating him, that he downloaded and viewed child pornography, and he later testified at hearing that he did not provide truthful information to those evaluators.

26. Despite the Respondent's contention that Agent Sorokin coerced him to confess, the alleged false confession has not been considered with respect to whether Respondent committed the violations alleged in the Administrative Complaint. The undersigned is charged with assessing whether the crime to which Respondent pled nolo contendere relates to the practice of psychology, and not to try the underlying criminal case (nor does the Division have jurisdiction to reconsider the findings of those criminal allegations in this proceeding). The evidence of record contains clear and convincing evidence that Respondent's crime relates to the practice of psychology.

27. In addition to the other findings herein, the undersigned finds Respondent did not access the two images while physically at work and the images did not depict a known patient, or family member of a patient. Respondent's license has never been disciplined.

Ultimate Findings of Fact

28. Dr. Stimel credibly opined that the crime of contributing to the delinquency of a minor relates to the practice of psychology because it demonstrates that the psychologist lacks good judgment and trustworthiness, and lacks an inability to be boundary-observant.

29. The undersigned also finds, by clear and convincing evidence, that Respondent's plea of nolo contendere to two counts of contributing to the delinquency of a minor by downloading child pornography, is related to the practice of psychology.

CONCLUSIONS OF LAW

30. The Division has jurisdiction over the parties and the subject matter of this proceeding. §§ 456.073(5), 120.569, and 120.57(1), Fla. Stat. (2020)

31. The Department has authority to investigate and file administrative complaints charging violations of the laws governing psychologists. § 456.073, Fla. Stat.

32. This is a proceeding in which the Department seeks to impose discipline against Respondent's license to practice psychology. Thus, the Department bears the burden of proving the specific allegations that support the charges alleged in the Administrative Complaint by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *Fox v. Dep't of Health*, 994 So. 2d 416 (Fla. 1st DCA 2008); *Pou v. Dep't of Ins. & Treas.*, 707 So. 2d 941 (Fla. 3d DCA 1998).

33. 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). As stated by the Supreme Court of Florida, the clear and convincing evidence level of proof:

Clear and convincing evidence requires that 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 *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); *see also In re Henson*, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of

proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous.” *Westinghouse Electric Corp. v. Shuler Bros.*, 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

34. A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). Penal statutes must be construed in terms of their literal meaning and words used by the Legislature may not be expanded to broaden the application of such statutes. Thus, the provisions of law upon which this disciplinary action has been brought must be strictly construed, with any ambiguity construed against Petitioner. *Elmariah v. Dep't of Prof'l Reg.*, Bd of Med., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); *see also Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 100 (Fla. 1st DCA 2008); *Whitaker v. Dep't of Ins. & Treas.*, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); *Dyer v. Dep't of Ins. & Treas.*, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

35. The allegations of fact set forth in the Administrative Complaint are the grounds upon which this proceeding is predicated. *Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); *see also Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Thus, the scope of this proceeding is properly restricted to those matters as framed by Petitioner. *M.H. v. Dep't of Child. & Fam. Servs.*, 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

36. The Administrative Complaint charged Respondent with violating section 456.072(1)(c), by pleading nolo contendere to the crime of contribut[ing] to the delinquency of a minor or child, which, when it relates to downloading child pornography, is related to the practice of psychology. Section 456.072(1)(c) provides in pertinent part:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession.

37. As set forth in the Findings of Fact herein, the act that reflects lack of trust and poor judgment was Respondent downloading child pornography. Thus, Petitioner proved that Respondent violated sections 456.072(1)(c), as alleged in the Administrative Complaint.

38. Whether a particular crime is related to a profession is not limited to its connection to the technical ability to practice the profession. As stated by the First District:

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 [Respondent's] conviction was "related to" the practice of chiropractic medicine or the ability to practice chiropractic medicine.

Doll v. Dep't of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007).

39. The same analysis applies to the crime to which Respondent pled nolo contendere. Dr. Stimel opined that Respondent lacked the ability to be boundary-observant, lacked trustworthiness, and lacked good judgment. The Findings of Fact support the undersigned's conclusion that Respondent violated section 456.072(1)(c), by pleading nolo contendere to contributing to the delinquency of a minor or child, which relates to the practice of psychology.

40. Pursuant to section 456.072(2), the Board of Psychology has adopted disciplinary guidelines for penalties imposed for violations of section 456.072.

41. The range of penalties for a violation of section 456.072(1)(c), is as follows: from suspension and a fine up to \$10,000.00 to revocation. Fla. Admin. Code R. 64B19-17.002.⁷

42. The rules also provide aggravating and mitigating circumstances to consider should the recommended penalty fall outside the disciplinary guidelines as follows:

(2) Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating circumstances the following:

- (a) The danger to the public;
- (b) The length of time since the date of violation;
- (c) The number of complaints filed against the licensee;

⁷ The guidelines in effect at the time of Respondent's plea were those effective on June 21, 2017. Despite the correct date of the appropriate guidelines, the penalty provided in the Department's PRO reflects the range for guidelines that became effective on June 20, 2018.

- (d) The length of time the licensee has practiced without complaint or violations;
- (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 the licensee has made toward rehabilitation;
- (i) The actual knowledge of the licensee pertaining to the violation;
- (j) Attempts by the licensee to correct or stop violations or refusal by the licensee to correct or stop violations;
- (k) Related violations found against the licensee in another state including findings of guilt or innocence, penalties imposed and penalties served; and
- (l) Any other mitigating or aggravating circumstances that are particular to that licensee or to the situation so long as the aggravating or mitigating circumstances are articulated in the Board's final order.

43. Regarding the appropriate penalty, Respondent argued in his PRO the following:

70. However, significant precedent exists with regard to an appropriate penalty in this matter should a violation be found. In *Department of Health, Board of Psychology v. Brown, DOAH Case No 01-4192, June 18, 2002*, a psychologist pleaded guilty to battery and resisting an officer without violence, and pleaded no contest to the offense of indecent exposure in a public place. In that case, the Respondent removed his penis from his trousers by a condominium pool and shook it while in the presence of two women. He whistled at the two women to get their attention while shaking his penis. Upon seeing Respondent's actions, they yelled and he attempted to flee the area, only to be intercepted by a local police officer. Dr. Brown was evaluated by a psychologist and diagnosed with exhibitionism, a condition wherein the afflicted

person derives sexual excitement from displaying their genitals to unsuspecting or unwilling observers. The Department eventually filed an administrative complaint alleging a violation of § 490.009(2)(c), Fla. Stat., for being found guilty of a crime directly related to the practice of his profession.

71. The Department's expert witness in that matter was Dr. Carolyn Stimel. Dr. Stimel, who did not examine Respondent, testified that Brown was mentally unfit to practice psychology at the time, as she believed that someone having psychological, emotional, or sexual problems which affect their ability to work effectively with patients is not mentally fit to practice psychology. Despite this opinion and Brown's uncontested diagnosis with a sexual disorder, his license was suspended for one year or a lesser period of time if he could show the Board he was rehabilitated.

44. Here, the facts involve child pornography where children were exploited, which was not the case in *Department of Health, Board of Psychology v. Brown*. Further, Respondent refuses to accept responsibility for his actions and has since denied he committed the acts, which would make it difficult for Respondent to show he has been rehabilitated.

45. Respondent offered two other cases as comparators. However, both cases are also factually dissimilar from this case and, thus, are not persuasive as a comparator for the appropriate penalty for Respondent. *See Dep't of Health v. Cohen, M.D.*, Case No. 10-3101PL (Fla. DOAH Sept. 14, 2010; Fla. DOH Jan. 5, 2011)(medical doctor was found guilty of nonconsensual sexual misconduct with a patient and the board imposed suspension followed by two years of probation); *Dep't of Health, Board of Osteopathic Medicine v. David Simon, D.O.*, Case No. 13-4756 (Fla. DOAH July 30, 2014; Fla. DOH Dec. 31, 2014)(osteopathic physician found to have committed consensual

sexual misconduct with a patient over the course of a year and Board imposed probation for two years and PRN participation).

46. The closest comparator analogous to the matter involving Respondent is *Department of Health v. Christopher Carter, M.D.*, Case No. 12-1575PL (Fla. DOAH Nov. 26, 2012; Fla. DOH Feb. 12, 2013). In that case, the Administrative Complaint alleged Respondent knowingly possessed material containing images of child pornography, which included “visual depictions of sexually explicit conduct, the production of which involved the use of minors engaging in sexually explicit conduct.” Respondent, there, pled guilty to one count of possession of child pornography. In a charge similar to the allegations in this case, the Administrative Complaint alleged that:

Respondent’s ... plea of guilty ...of the crime of possessing child pornography, relates to the practice of medicine and his ability to practice medicine in that the crime demonstrates a lack of emotional stability and mental fitness, unsound judgment, and lack of integrity and respect for the well-being of human beings.

47. In its Final Order, the Board of Medicine revoked Dr. Carter’s license. The Final Order in *Carter* is the most directly analogous and comparable case in fact and law to the instant case. There is no clear and convincing reason why the Board should impose a different penalty.

48. Similar to *Carter*, it is not necessary to find factors to support deviation from the disciplinary guidelines as the recommended penalty is within the guidelines of Florida Administrative Code Rule 64B19-17.002. However, to the extent aggravating or mitigating factors are necessary, as it relates to aggravating factors, rule 64B19-17.002(2)(a)(e) and (j) would be applicable. The exploitation and harm to the victims caused by child pornography viewed by Respondent is extensive because child pornography is a “permanent record” of sexual exploitation of a child. *See Paroline v. U.S.*, 134 S. Ct. 1710, 1716-17 (2014). Respondent has also not demonstrated

rehabilitation, which could be demonstrated by showing remorse or acceptance of his actions. To the contrary, he now denies viewing the pornographic images and claims he was coerced into a false confession, which is the exact opposite of rehabilitation. Suspension and a fine in this case, would not be a deterrent factor as Respondent insists he did nothing wrong.

49. While Respondent has completed the sex offender treatment and has years of service as a psychologist, those factors are not sufficient to disregard the factors supporting the recommendation herein.

50. Psychologists operate from a position of trust and there is an expectation of trustworthiness and good judgment on the part of persons holding a license to practice psychology. Here, Respondent's actions show a clear violation of the trust invested in him as a psychologist. Further, contributing to sexual exploitation of children clearly demonstrates impaired judgment of Respondent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Psychology enter a Final Order finding that Respondent violated section 456.072(1)(c), Florida Statutes, and revoking his license to practice psychology.

DONE AND ENTERED this 23rd day of October, 2020, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of October, 2020.

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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.