

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE MEDICAL EXAMINING BOARD

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IN THE MATTER OF DISCIPLINARY

PROCEEDINGS AGAINST:

MARK HUFFMAN,

FINAL DECISION AND ORDER

RESPONDENT

LS0105233MED  
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The State of Wisconsin, Medical Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Medical Examining Board.

The Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs with the Department General Counsel within 15 days of this decision. The Department General Counsel shall mail a copy thereof to respondent or his or her representative.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 24<sup>th</sup> day of April, 2002.

Darold Treffert, Chairperson

Medical Examining Board

**STATE OF WISCONSIN**  
BEFORE THE MEDICAL EXAMINING BOARD

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IN THE MATTER OF

DISCIPLINARY PROCEEDINGS

AGAINST:

**MARK A. HUFFMAN, M.D.,**

**PROPOSED DECISION**

RESPONDENT

LS0105211MED  
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**PARTIES**

The parties in this matter under section 227.44 of the Statutes and section RL 2.037 of the Wisconsin Administrative Code, and for purposes of review under sec. 227.53, Stats. are:

Complainant:

Represented by Attorney John R. Zwieg

Division of Enforcement

Department of Regulation & Licensing

1400 East Washington Ave.

Madison, WI 53708-8935

Respondent:

Mark A. Huffman, M.D.

4421 N. Maryland Avenue

Shorewood, WI 53211

Represented by

Attorneys Gerald P. Boyle and Melissa Karls

Boyle, Boyle & Smith, S.C.

2051 W. Wisconsin Ave.

Milwaukee, WI 53233

Disciplinary Authority:

Medical Examining Board

1400 East Washington Ave.

Madison, WI 53703

### **FINDINGS OF FACT**

1. The respondent, Mark A. Huffman, M.D., is licensed to practice medicine and surgery in the state of Wisconsin, under license number 27226, first granted on October 25, 1985. Dr. Huffman resides in Shorewood, Wisconsin, and his practice specialty is family medicine. [complaint and answer]
2. During September of 2000, Dr. Huffman was employed at Dr. King's clinic in Milwaukee, Wisconsin. [p. 175]
3. While employed at Dr. King's clinic, Dr. Huffman maintained a chaperone policy, i.e. a policy that another person be present in the room with him while conducting medical exams. This policy applied to all new patients as well as to established patients if Dr. Huffman or the staff considered it necessary. [pp. 180-181]
4. Beginning in February of 2001, Dr. Huffman was employed as Director of Primary Care Clinics at the AIDS Resource Center of Wisconsin (ARCW) at 820 North Plankinton in Milwaukee, Wisconsin. [complaint and answer; p. 177]
5. It was Dr. Huffman's stated intention to maintain at ARCW the same chaperone policy as he had operated under at Dr. King's clinic. The following written policy had been drafted by March 24, 2001, but the record does not establish the date on which it went into effect:

Although Dr. Huffman is licensed and has no medical restrictions ordered by the Wisconsin Board of Medical Examiners, Dr. Huffman has proactively taken it upon himself to protect himself and his patients by having a medical chaperone present during physical exam. This adequately provides safety for all involved, and Dr. Buggy and staff are all aware of Dr. Huffman's request and staff. [*sic*] Dr. Huffman continues to be monitored by his psychiatrist and participates in the State Medical Society's Physicians Health Program.

[pp. 179-189; ex. 7]

6. Mr. A, who speaks English, Spanish and Portuguese, was a bilingual case manager at the AIDS Resource Center from at least September of 2000 to April of 2001. In September of 2000, Mr. A asked a nurse at ARCW for a referral to a doctor for diarrhea, removal of a cyst, and a physical. The nurse recommended Dr. Huffman, and Mr. A first saw Dr. Huffman at the King clinic on September 8, 2000. [pp. 22-24, 73-74]
7. Dr. Huffman performed a physical examination of Mr. A at the King clinic on September 8, 2000. No-one else was present in the examination room at the time. Dr. Huffman asked Mr. A if he was "a top or a bottom". Mr. A considered the remark to be an inappropriate reference to homosexual sexual activity, but he did not respond. Shortly afterward, Mr. A told a friend at ARCW, Patrick Flaherty, about this remark and the fact that it made him feel uncomfortable. [pp. 25-6, 362-363; ex. 8, p. 18]
8. On September 20, 2000, Mr. A returned to the King clinic to obtain the results of his physical. He saw Dr. Huffman on that day and received a prescription for hemorrhoid medicine. [pp. 26-27]
9. After Dr. Huffman began working at ARCW in February of 2001, Mr. A became aware of Dr. Huffman's employment there. When ARCW changed its insurance coverage from Physicians Plus to United Healthcare, Mr. A asked Dr. Huffman for a referral to another physician, since Mr. A was concerned that being treated by an employee of ARCW might be a conflict of interest, and that services provided by Dr. Huffman would not be covered by United Healthcare. Dr. Huffman told Mr. A he could continue to treat him, and did not give Mr. A a referral to another physician. [pp. 30-32, 75-80, 178-179]
10. In February of 2001, when his hemorrhoid worsened, Mr. A went to Dr. Huffman for a referral to another doctor. Dr. Huffman did not give Mr. A a referral to another physician, and told Mr. A that he would be able to remove the hemorrhoid. Dr. Huffman examined the area of the hemorrhoid. An appointment was scheduled for March 17, 2001, but canceled and rescheduled for March 24, 2001. Both March 17th and March 24th were Saturdays, days on which the ARCW offices were closed. [pp. 33-36, 82-89]
11. Between February of 2001 and March 24, 2001, Mr. A expressed to his roommate on more than one occasion that he felt Dr. Huffman was making eye contact with him and being overly friendly, and that Dr. Huffman had suggested they could go out together. His roommate suggested that Mr. A have some other doctor do the surgery, but Mr. A said that Dr. Huffman was his doctor, that they worked in the same building, and that the insurance was taken care of, so he did not change the plans. [pp. 138, 141-146, 153-155]
12. A day or two before the surgery, Dr. Huffman prepared for Mr. A a prescription for Valium® (10 mg of diazepam) and Tylenol 3® (350 mg of acetaminophen with 30 mg of codeine). Mr. A picked the medication up from Dr. Huffman's office, and Dr. Huffman instructed Mr. A to take one of each an hour before the scheduled appointment. [pp. 34-35, 88-91, 192]
13. Dr. Huffman offered to drive Mr. A to ARCW on the day of surgery from Mr. A's apartment, a distance of one and one-half to two blocks. [pp. 35-36]
14. On March 24, 2001, Mr. A took the medication approximately one hour prior to his appointment as prescribed by Dr. Huffman, walked to the ARCW and was met at the front door by Dr. Huffman. They proceeded to an examination room, where Mr. A was placed on his back with his legs in stirrups. No-one else was present in the room during the preparation and surgery. Dr. Huffman emphasized to Mr. A that the procedure would be painful, Mr. A let Dr. Huffman know that he was nervous and a bit scared, and Dr. Huffman gave Mr. A an additional one to two milligrams of Valium® by injection, after which Mr. A felt "more sedated, a little cloudy, ... very drugged". Dr. Huffman gave Mr. A a local anesthetic by injection, surgically removed a skin tag (hemorrhoid), and sutured the incision. [pp. 37-41, 93-95, 111, 183, 190-204, 315-326]
15. Dr. Huffman's opinion was that Mr. A was not noticeably affected by the medication taken prior to arriving at ARCW. The additional one to two milligrams of Valium® Dr. Huffman injected was not sufficient to cause Mr. A to lose consciousness, and Dr. Huffman observed that he did not lose consciousness during the procedure. [pp. 198-202; ex. 12A, pp. 12-13, 22-23]
16. During the procedure, Dr. Huffman asked Mr. A if he had a boyfriend. Mr. A answered "no". Dr. Huffman said "you will, don't worry". [p. 43]
17. At some point during the procedure, Mr. A felt Dr. Huffman's hand on his penis. The hand-penis contact was not incidental (not "glancing"), the hand moved in an up-and-down fashion more than once and, in Mr. A's words, it felt like "he was trying to jerk me off. He was fondling my penis." Mr. A asked Dr. Huffman if that was part of the procedure, because he wanted it to stop, and it stopped. [pp. 41-43, 96-105, 109-110]
18. When the surgical procedure was complete, Dr. Huffman supported Mr. A while walking, as Mr. A was very weak. Dr. Huffman offered to drive him home but Mr. A declined the offer. [pp. 43-44, 330-2]
19. When Mr. A arrived at his apartment after walking home from the surgery at ARCW on March 24, 2001, he

met and spoke to his roommate. Mr. A told his roommate that after the surgery Dr. Huffman hugged him and offered him a ride home, that during the procedure Dr. Huffman touched his (Mr. A's) penis inappropriately, and that he (Mr. A) asked Dr. Huffman what he was doing. [pp. 44-45, 113-114, 133-135, 156-158]

20. On a date between March 24, 2001 and April 16, 2001, Mr. A went to check on his surgery. Mr. A was working late that evening and he spoke to a secretary, who said something like "You're always here. Don't you do anything other than work?" Dr. Huffman, who apparently overheard the remark, said to Mr. A in Spanish, words to the following effect, "If you don't have anything to do, you can always call me." [pp. 47-49]

21. Between March 24, 2001 and April 16, 2001, Mr. A did not report the event of March 24th, and he mentioned it to only one other person, because he wanted to believe that it had not happened, and because he was concerned that he might lose his job if he reported it. [pp. 50, 116; ex. 8, p. 15]

22. On more than one occasion between March 24, 2001 and April 16, 2001, Dr. Huffman called Mr. A and said he wanted to meet with him in his office. [p. 117]

23. On April 16, 2001, Mr. A went to see Dr. Huffman in his office. Dr. Huffman told Mr. A that he (Dr. Huffman) was bipolar, and he thought he (Mr. A) was also bipolar. Dr. Huffman told Mr. A that he had tickets to the opera and invited Mr. A to go with him. Mr. A asked Dr. Huffman about hair loss, and when Dr. Huffman stood next to him to examine his hair, he rubbed his penis against Mr. A's shoulder. [pp. 46-47, 116-120, 207]

24. On April 17, 2001, the day after Dr. Huffman invited him to go to the opera, Mr. A was taking a break from work at ARCW with a friend and co-worker, Patrick Flaherty. Dr. Huffman approached and asked Mr. A in Spanish for an answer to his invitation. After work that day, Mr. Flaherty asked Mr. A about the conversation with Dr. Huffman, and asked why Dr. Huffman was speaking to him in Spanish. Mr. A thought "thank God, somebody saw something", and he then told Mr. Flaherty what happened on March 24th. The process of relating the story to Mr. Flaherty occurred gradually over three or four hours, starting with Mr. A's discomfort with Dr. Huffman's manner of speaking to him at the office, and ending with Mr. A in tears as he described the sexual assault. [pp. 46-47, 50-51, 114, 353-360, 364; ex. 8, pp. 4-13, 22]

25. When Mr. A told him of the events of March 24th, Mr. Flaherty advised him to report the matter to ARCW, which Mr. A did the following morning, April 18, 2001. Mr. A and Mr. Flaherty spoke to the Director of Human Resources at ARCW, and Mr. A again cried as he related his story. [pp. 52-53, 114-115; ex. 8, pp. 16-17]

26. Mr. A hired an attorney on either April 18th or April 19th, 2001, after he filed the report with ARCW. Mr. A mentioned to his attorney the incident on April 16th of Dr. Huffman rubbing his penis against his shoulder. [pp. 57, 115, 119-120]

27. Mr. A's roommate was away on vacation from April 9th through April 20th, 2001. When he returned on April 20, 2001, he hugged Mr. A and Mr. A "started crying his eyes out" and talked to his roommate in more detail about the events of March 24th, saying that Dr. Huffman tried to "jack him off". Mr. A also told his roommate about Dr. Huffman rubbing his penis against his shoulder. [pp. 160-161, 165-166]

28. Sexual assault of a patient, such as the assault described by Mr. A, would constitute a danger to the health, welfare or safety of the patient. [p. 214]

29. The complainant moved for the dismissal of Counts I and III of the Complaint, and no evidence was presented to support Counts I and III of the Complaint. [pp. 5-7, 121-130]

Facts to be considered only in the determination of discipline:

30. On June 7, 1991, Dr. Huffman was charged in Milwaukee County Circuit Court with sexually assaulting two of his patients in St. Mary's Hospital in Milwaukee, Wisconsin. [complaint and answer]

31. On June 20, 1991, by stipulation, the Medical Examining Board issued an order

(1) prohibiting Dr. Huffman from examining or treating any patient in person,

(2) prohibiting Dr. Huffman from dispensing, prescribing or administering controlled substances in circumstances which brought him into physical contact with patients, and

(3) allowing Dr. Huffman to do certain medical tasks which did not include examination or touching of patients, but only after the department received certification from Dr. Huffman's treating psychiatrist that Dr. Huffman was "psychiatrically and psychologically able to perform such tasks competently". [complaint and answer]

32. On January 14, 1992, by a plea agreement, the sexual assault charges were reduced from felonies to misdemeanors, and Dr. Huffman was convicted, based on his pleas of guilty, of two counts of fourth degree sexual assault. [complaint and answer]

33. On September 23, 1993, based on Dr. Huffman's convictions for sexual assault as well as his fabrication of

credentials purporting to show that he had completed an emergency medical residency at the Medical College of Wisconsin, the Medical Examining Board issued an Order (1) limiting Dr. Huffman's license as follows:

There shall be another health care professional physically present in the room with Respondent for all examinations or treatments provided to patients by Respondent. That health care provider shall sign the patient's medical record and indicate in the record that the health care provider was physically present in the room at the time the Respondent examined or treated the patient.

and (2) allowing Dr. Huffman to practice only in settings approved by the Board. The Board approved his practice in a fellowship in addiction medicine at the Medical College of Wisconsin and at Milwaukee Psychiatric Hospital. [complaint and answer]

34. Allegations that Dr. Huffman had inappropriate contact with a patient led on October 13, 1994, to his suspension from the fellowship in addiction medicine at the Medical College of Wisconsin and the suspension of his privileges at Milwaukee Psychiatric Hospital. The incident involved Dr. Huffman violating the limitation on his license by performing a physical examination on a patient when no other health care professional was in the room, and Dr. Huffman conducting outpatient treatment sessions when no other health care professional was in the room, during which Dr. Huffman kissed a patient on the cheek and Dr. Huffman and the patient hugged. On November 17, 1994, the Medical Examining Board by stipulation issued an Order suspending Dr. Huffman's license. [complaint and answer]

35. On August 22, 1996, the Medical Examining Board issued an Order reinstating Dr. Huffman's license but imposing limitations that (1) he not perform patient care while in the physical proximity of a patient or in the same room as a patient, and (2) that he not accept any employment unless specifically permitted by the Board. [complaint and answer]

36. On September 4, 1998, the Medical Examining Board modified the limitations on Dr. Huffman's license to permit him to perform patient care while in the physical proximity of a patient or in the same room as a patient, "subject to the terms and conditions established by the Order" [*sic*; meaning unclear]. [complaint and answer]

37. The Medical Examining Board removed all limitations on Dr. Huffman's license on March 1, 2000. [complaint and answer]

## ANALYSIS

This is a disciplinary proceeding conducted under the authority of ch. 227, Stats. and ch. RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a complaint with the Medical Examining Board alleging that the respondent, Dr. Mark A. Huffman, violated rules regulating the practice of medicine. The burden of proof is on the Division of Enforcement to prove the allegations of the complaint by a preponderance of the evidence. Sec. 440.20(3), Stats.; 75 Att. Gen. 76; Gandhi v. Medical Examining Board, 168 Wis.2d 299, 483 N.W.2d 295 (Ct.App. 1992). The Division met its burden of proof on the one count that was prosecuted through the hearing.

When filed, the disciplinary complaint in this matter contained three counts. At the start of the hearing, the attorney for the complainant moved to dismiss count III of the complaint. This was based upon his conclusion that limitations placed on Dr. Huffman's license by the Rehabilitation Review Panel under the Caregiver Law did not apply to Dr. Huffman's employment at the AIDS Resource Center. The motion to dismiss was granted subject to the Board's ratification. Midway through the first day of hearing, Mr. Zweg moved to dismiss count I of the complaint. This was based on his conclusion that the law authorizing the Rehabilitation Review Panel to place limitations on licenses changed on September 1, 2000, and the relevant incidents in the complaints occurred at a time when the limitations had lost their force. The second motion to dismiss was also granted subject to the Board's ratification.

The remaining count, Count II, alleged that Dr. Huffman sexually assaulted a patient, thereby endangering the patient's health, safety or welfare. The only two witnesses to the incident were Dr. Huffman and his patient, Mr. A. Mr. A claimed that Dr. Huffman stroked his (Mr. A's) penis during the course of a surgical procedure. [pp. 41-43, 96-105, 109-110] Dr. Huffman denied doing so, and he denied touching Mr. A's penis at any time during the procedure except following the surgery when Mr. A was standing and he (Dr. Huffman) had to place and secure pads at the surgery site, requiring him to move his (Mr. A's) penis and testicles out of the way. [pp. 204-205, 326-329] The contact described by Dr. Huffman could not have been confused with what Mr. A described, and there is a simple and crucial disagreement over the hand-penis contact described by Mr. A. Dr. Huffman agreed that there would have been no legitimate medical reason for him to stroke Mr. A's penis, and that a doctor stroking a patient's penis for no medical reason would put the patient at risk for psychological harm. [p. 214] Thus, the single issue to be decided was whether it occurred.

### Credibility

If the matter had to be resolved by choosing which of the two, doctor or patient, was the more believable witness, the case would be decided in Mr. A's favor by a narrow margin. Dr. Huffman's testimony, by itself, was consistent and believable. As a witness, Dr. Huffman was composed, and his demeanor showed no sign of lying. Mr. A's testimony was also by itself consistent and believable, but Mr. A, though outwardly controlled, was not so completely composed, and his demeanor showed a suppressed emotional turmoil that gave added credence to his testimony. He was clearly uncomfortable as a witness, but he willingly made eye contact and he appeared attentive and earnest. He occasionally repeated questions before answering them, as if to be sure he understood them, and he was always willing to answer even difficult questions, though answering sometimes appeared to involve a struggle, as he worked hard to find the right words. (Some of this may have been due to the fact that his first language is Spanish.) His body language during parts of his testimony appeared uncomfortable, and once or twice it was painfully so. Near the end of his lengthy testimony and cross-examination, his body language and his facial expression clearly showed that he was beaten down by the process. The ALJ found no reason to disbelieve Dr. Huffman's testimony based on his demeanor, but neither did Dr. Huffman match Mr. A's painful earnestness, and the ALJ was unable to draw any conclusion from Dr. Huffman's demeanor as to whether he was lying or telling the truth. On the other hand, the ALJ had no doubt that Mr. A was telling the truth as he believed it. The believability of Dr. Huffman's presentation was also seriously undermined by the admitted fact that on a previous occasion years ago, he initially denied having committed similar acts, acts that were later legally established to have occurred, which in plain terms means that on a comparable occasion of similar gravity, Dr. Huffman lied. [p. 335]

If this were all, a recommendation for discipline would be made based on a preponderance of the evidence, which is the necessary legal standard. There is, however, more evidence in this case than just the testimony of Dr. Huffman and Mr. A about the incident, and the additional evidence corroborates and substantiates Mr. A's story. Taken as a whole, the evidence in the case leads to a recommendation for discipline based on far more than a mere preponderance of the evidence.

#### Alternative explanations

In order to be found not guilty of unprofessional conduct, a respondent is not required to come up with a credible alternative motive or explanation, i.e. Dr. Huffman does not have to explain why Mr. A would say the things he has. Nevertheless, an alternative motive or explanation might allow the facts to be fit into a scenario other than the one told. In this case, no credible alternative motive or explanation can reasonably be found. The two possibilities that were raised were (1) that Mr. A fabricated his charges in order to obtain a financial settlement from a tort suit, and (2) that he imagined Dr. Huffman's hand on his penis.

The only support for the former is that Mr. A hired an attorney, yet the timing of that event actually conflicts with such a motivation. Mr. A hired an attorney on April 18th or 19th, 2001, only after he reported the incident to ARCW at Mr. Flaherty's urging, and more than three weeks after he told his roommate. In addition, Mr. A testified credibly that he has no present intention of filing a suit:

Q [by Mr. Boyle]: Is it your intention on suing ARCW?

A [by Mr. A]: Is it my intention on suing ARCW. Right now I have no intentions of doing anything. I'm just -- I'm here right now.

Q: Is it your intention in suing Dr. Huffman for the conduct that took place when he was doing a procedure on you on March 24th in the year 2001?

A: You know, I have no idea what the future lies.

...

Q: Have you told anyone in the world that it is your present -- no. Since the first time you met Ms. Lewison [Mr. A's attorney], have you told anyone in the world it's your -- your intention of considering a civil suit against ARCW or any of their affiliates or Dr. Huffman?

A: I guess the answer to that question would be no. I'm living day by day.

[pp. 57-60] The record contains no substantial evidence that Mr. A fabricated his claims in order to initiate a civil suit.

The second possible explanation is that Mr. A imagined the contact. The ALJ considered this as the only possible way to reconcile the parties' diametrically opposed positions, but ultimately concluded that Mr. A did not imagine the sexual assault. The two elements that suggest the possibility are (1) that Mr. A was aware of and concerned about what he perceived as homosexual advances by Dr. Huffman, and (2) that Mr. A was under the influence of drugs at the time. By the time he went into surgery, Mr. A had ample cause to be concerned about Dr. Huffman, because Dr. Huffman had asked him if he was a "top or bottom", Mr. A felt Dr. Huffman was making eye contact with him and being overly friendly, Dr. Huffman had suggested they could go out together, Dr. Huffman had given him drugs, including Valium®, to take before the surgery, Dr. Huffman had offered to drive him to ARCW for the

surgery, he was alone with Dr. Huffman in the ARCW building (other than the Saturday morning cleaning crew), and Dr. Huffman offered and administered more Valium® intravenously; in addition, Mr. A had heard of Dr. Huffman's previous sexual assaults on male patients. These concerns do not add up to evidence that Mr. A unconsciously manufactured the sexual assault, however, and as for the influence of drugs, neither Dr. Huffman nor his expert, Dr. Rincon, testified that the Tylenol 3® and the Valium® would have had an effect on Mr. A that might have caused him to hallucinate or feel something that wasn't there; on the contrary, their testimony was that Mr. A's consciousness and mental processes would not have been affected by the drugs. If there had been a significant passage of time between the incident and Mr. A's first description of it, time during which his imagination could have enlarged the event, the possibility would be greater than it is, but Mr. A told his roommate immediately, and there is thus no chance that his imagination expanded with time. No evidence supports the theory that Mr. A imagined the contact, and in percentage terms, the possibility is less than 10%.

#### Corroboration from Mr. A's roommate and his co-worker at ARCW

Important corroboration of Mr. A's testimony was provided by the testimony of a co-worker at ARCW, Patrick Flaherty, and by Mr. A's roommate at the time, both of whom were credible witnesses at the hearing.

Immediately upon reaching home following the surgery on March 24th, Mr. A reported to his roommate that during the procedure Dr. Huffman touched his (Mr. A's) penis inappropriately, that he (Mr. A) asked Dr. Huffman what he was doing, and that after the surgery Dr. Huffman hugged him and offered him a ride home.

On April 17th, Mr. A told his story to Patrick Flaherty, a co-worker at ARCW. Mr. Flaherty's description of what Mr. A told him is entirely consistent with Mr. A's testimony in the hearing. Furthermore, Mr. Flaherty's description of what Mr. A told him contains important indicia of credibility. Mr. Flaherty said the following:

...

All I could tell was that he was extremely traumatized because at this point he had broken down and was crying.

...

[I]t took [Mr A] three-and-a-half hours to get to this point to tell me this and that he was broken down. And it was clear, I have never before seen [Mr A] cry or, frankly, really ever talk about a personal problem. And it was clear that he was feeling very hurt and violated to me.

...

[Question by attorney: "When over the course of those hours did he tell you about the touching?]

Towards the end. He started with telling me about the verbal stuff, which actually was happening the week we talked, and apparently built up courage to tell me that.

...

[ex. 8, p. 10-12, with ellipses indicating material edited out for clarity]

One very small detail of Mr. A's story is modified by Mr. Flaherty's testimony. Although Mr. A said that Dr. Huffman hugged him after walking him to the front door, Mr. Flaherty related this in a way that makes the hug less likely. Mr. Flaherty said "Dr. Huffman, again, offered to walk him home, and [Mr A] said no, that's fine. Huffman walked down the whole way, kind of hugging [Mr A], until he got to the front door. And then [Mr A] left and got home." [ex. 8, p. 15] Although it may still be true that Dr. Huffman hugged Mr. A when they reached the front door, Mr. Flaherty's description makes sense and describes what may have happened sufficiently that no finding of fact is made that Dr. Huffman hugged Mr. A.

#### Other indications by Dr. Huffman of interest in Mr. A

Mr. A related a number of facts that establish that Dr. Huffman had a personal interest in him, and that Dr. Huffman viewed him as homosexual. Dr. Huffman denied some of the facts, such as asking Mr. A if he was a top or a bottom, telling Mr. A he could call him if he had nothing better to do, and telling Mr. A not to worry, as he would have a boyfriend. However, a sufficient number of the facts were either admitted by Dr. Huffman or corroborated by other witnesses to establish all of them as true based on Mr. A's convincingly credible testimony.

When Dr. Huffman performed a physical examination of Mr. A at the King clinic on September 8, 2000, Dr. Huffman asked Mr. A if he was "a top or a bottom". Mr. A considered the remark to be an inappropriate reference to homosexual sexual activity, but he did not respond. Mr. Flaherty provided important corroboration of this, saying that Mr. A mentioned the comment to him at the time, which was well before March 24, 2001. During the procedure on March 24th, Dr. Huffman asked Mr. A if he had a boyfriend. Mr. A answered "no". Dr. Huffman said "you will, don't worry". When the surgical procedure was complete, Dr. Huffman supported Mr. A while walking, as Mr. A was very weak. Dr. Huffman offered to drive him home but Mr. A declined the offer. On a date between

March 24, 2001 and April 16, 2001, Mr. A went to check up on his surgery and a secretary said "You're always here. Don't you do anything other than work?", which caused Dr. Huffman to say to Mr. A in Spanish, "If you don't have anything to do, you can always call me." On April 16, 2001, when Mr. A went to see Dr. Huffman in his office, Dr. Huffman told Mr. A that he had tickets to the opera and invited Mr. A to go with him, then when Dr. Huffman stood next to him to examine his hair Dr. Huffman rubbed his penis against Mr. A's shoulder. Mr. A mentioned this incident on April 18th or 19th to his attorney, and on April 20th to his roommate.

#### Dr. Huffman's chaperone policy

One troubling aspect of Dr. Huffman's position in this case related to his discussion of his chaperone policy. As a consequence of his prior misconduct, he maintained a chaperone policy at the two clinics where he worked prior to taking the position with ARCW, the King Clinic and the McDaniel Clinic. He further stated that it was his intent to have chaperones present for all patients at ARCW. His stated reasons for the policy were (1) that it would protect him from false claims,

(2) that it was a good standard to have a chaperone present, and (3) that the policy he was working with at the King and McDaniel Clinics worked quite well. "So during the interim of setting up the ARCW clinic, we -- I felt that I should continue to follow that protocol to the best of my ability." The protocol which had been drafted but may or may not have been in effect on March 24, 2001, was as follows:

Although Dr. Huffman is licensed and has no medical restrictions ordered by the Wisconsin Board of Medical Examiners, Dr. Huffman has proactively taken it upon himself to protect himself and his patients by having a medical chaperone present during physical exam. This adequately provides safety for all involved, and Dr. Buggy and staff are all aware of Dr. Huffman's request ....

Inexplicably, Dr. Huffman did not follow the protocol with Mr. A, either for his first visit at the King Clinic where it was supposedly in force, or at ARCW, where -- in force or not -- it was his own best judgment that it should be followed. A number of facts suggest that Dr. Huffman was attracted to Mr. A, leading to the inference that Dr. Huffman chose to take advantage of an opportunity to be alone with Mr. A, though the evidence does not actually lead to the conclusion that Dr. Huffman "set up" the occasion in advance. The evidence rather suggests that it just worked out that way. Nevertheless, Dr. Huffman could have avoided the incident if he had listened to his own good advice regarding the need to have a chaperone present.

Dr. Huffman's explanation for why he saw Mr. A and another patient at ARCW on Saturday is complicated but at least minimally plausible. He stated that after he began employment at ARCW he wanted to continue seeing some of his former patients who were uncomfortable going to an AIDS Resource Center (though this category would not include Mr. A), and that Drs. McDaniel and King agreed to let him see those patients at their clinics on their call days, Saturday or Sunday once or twice a month. Dr. Huffman arranged for Mr. A and a second patient to meet him at Dr. King's clinic on Saturday, March 17th, but he discovered that the staff at that clinic had already scheduled a full day of patients for him. He rescheduled the two patients to the following Saturday at Dr. McDaniels' clinic, but on Wednesday or Thursday of that week he found out that Dr. McDaniels didn't want to go in to the office that Saturday, so Dr. Huffman rescheduled the two appointments to be seen at ARCW. [pp. 298-304, 337-338] Dr. Huffman testified that he attempted to arrange for a chaperone to be present, but that two possible chaperones were both unavailable. [pp. 185] Even given this chain of circumstances, his decision to ignore his own chaperone policy and to schedule a young man for genital-area surgery for a time when there would be no other staff in the office was incomprehensibly foolish of him.

Had things gone differently, had he been able to see Mr. A at the King clinic, or had he been able to obtain a chaperone, there would now be no disciplinary proceeding. It is quite possible that the sexual assault would not have happened had any one of a number of factors been different. The evidence does not strongly suggest that Dr. Huffman premeditated the assault, but neither did his better judgment interfere once he found himself alone with a young man in a compromising situation.

All of the above evidence does not prove beyond all doubt that Dr. Huffman sexually assaulted Mr. A on March 24, 2001, but the evidence is strong, in fact far more than a preponderance, that he did. In percentages, the ALJ concluded that there may be less than a 10% chance that Mr. A's imagination manufactured the hand-penis contact and that Dr. Huffman is telling the truth. If that is so, though, Dr. Huffman really has no-one to blame but himself, since he ignored the lessons he should have learned from the past, and he ignored his stated policy of having a chaperone to guard against false claims. In the final analysis, it is far more likely than not that the incident occurred as Mr. A related it, and that Dr. Huffman sexually assaulted Mr. A.

#### Discipline.

Dr. Huffman engaged in unprofessional conduct under section Med 10.02 (2) (h) of the Wisconsin Administrative Code by endangering Mr. A's health, safety or welfare, and discipline may be imposed under section 448.02 (3) (c) of the Wisconsin Statutes.

The purposes of professional discipline have been set forth by the Wisconsin Supreme Court in various cases involving attorneys, such as State v. Kelly, 39 Wis.2d 171, 158 N.W.2d 554 (1968), State v. MacIntyre, 41

Wis.2d 481, 164 n.w.2d 235 (1969), State v. Cory, 51 Wis.2d 124, 186 N.W.2d 325 (1970), and State v. Aldrich, 71 Wis.2d 206, 237 N.W.2d 689 (1976). Those purposes are (1) to rehabilitate the offender, (2) to protect the public, by assuring the moral fitness and professional competency of those privileged to hold licenses, and (3) to deter others in the profession from similar unprofessional conduct. That framework has been adopted by regulatory agencies, including the Department of Regulation and Licensing, for disciplinary proceedings for other professions.

In addition to considering the gravity of this offense, Dr. Huffman's prior disciplinary history should be considered. Disciplinary Proceedings Against Eisenberg, 81 Wis.2d 175, 259 N.W.2d 745 (1977); State v. MacIntyre, 41 Wis.2d 481, 164 N.W.2d 235 (1969).

On June 20, 1991, by stipulation based on criminal charges against Dr. Huffman of sexual assault, the Medical Examining Board issued an order prohibiting Dr. Huffman from examining or treating any patient in person. On September 23, 1993, based on Dr. Huffman's convictions for sexual assault as well as on his fabrication of credentials purporting to show that he had completed an emergency medical residency at the Medical College of Wisconsin, the Medical Examining Board issued an Order limiting Dr. Huffman's license as follows: "There shall be another health care professional physically present in the room with Respondent for all examinations or treatments provided to patients by Respondent. That health care provider shall sign the patient's medical record and indicate in the record that the health care provider was physically present in the room at the time the Respondent examined or treated the patient." On November 17, 1994, the Medical Examining Board by stipulation issued an Order suspending Dr. Huffman's license, based on allegations that Dr. Huffman violated the limitation on his license by performing a physical examination on a patient when no other health care professional was in the room, and by conducting outpatient treatment sessions when no other health care professional was in the room, during which Dr. Huffman kissed a patient on the cheek and Dr. Huffman and the patient hugged. On August 22, 1996, the Medical Examining Board issued an Order reinstating Dr. Huffman's license but imposing a limitation that he not perform patient care while in the physical proximity of a patient or in the same room as a patient. On September 4, 1998, the Medical Examining Board modified the limitations on Dr. Huffman's license to permit him to perform patient care while in the physical proximity of a patient or in the same room as a patient, "subject to the terms and conditions established by the Order". On March 1, 2000, the Medical Examining Board removed all limitations on Dr. Huffman's license.

The first stated purpose of discipline is rehabilitation of the offender. Dr. Huffman's license has already been suspended and limited. The orders recited above have sought Dr. Huffman's rehabilitation, and were ultimately unsuccessful. The attorney for the complainant argued persuasively that the goal of rehabilitation is no longer practical and that there is no alternative left to revocation.

For the protection of the public, especially the protection of persons like Mr. A, the same conclusion must be reached, i.e. that the Medical Examining Board has tried the other reasonable disciplinary alternatives unsuccessfully, and that no alternative to revocation remains.

As for the deterrence of other professionals, the imposition of discipline serves the purpose of publicizing prohibited behavior in a profession, and of assisting other professionals in avoiding similar misconduct. Having given Dr. Huffman so many chances already, imposing anything less than revocation would send a message to the profession that a doctor may repeatedly engage in unprofessional conduct, even sexual assault, without loss of license.

#### Costs.

Section 440.22(2), Stats., provides in relevant part as follows:

In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department.

The presence of the word "may" in the statute is a clear indication that the decision whether to assess the costs of this disciplinary proceeding against the respondent is a discretionary decision on the part of the board, and that the board's discretion extends to the decision whether to assess the full costs or only a portion of the costs.

The ALJ's recommendation that the full costs of the proceeding be assessed is based on two factors. First, the Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Moreover, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions, and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in

misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following a full evidentiary hearing, that licensee should bear the costs of the proceeding.

Second, while not every count of the Complaint in this matter was proven, it is well established that the allocation of prosecutorial effort between proven and unproven counts in administrative disciplinary proceedings is not a basis for reducing the costs assessed against a licensee. The Wisconsin Supreme Court has repeatedly ruled in attorney discipline cases that it is irrelevant that the Board of Attorneys Professional Responsibility has failed to prevail on one or more of the counts, so long as the board is successful in establishing professional misconduct. see, *inter alia*, Disciplinary Proceedings Against Preloznik, 169 Wis. 2d 137, 151, 485 N.W.2d 249 (1992). The count that was prosecuted through hearing was the most serious of the original three, and the attorney for the complainant moved to dismiss the other two counts as soon as he obtained information that they could not be proved. No evidence was taken in the hearing on Counts I and III.

### **CONCLUSIONS OF LAW**

I. The Medical Examining Board has personal jurisdiction over Mark A. Huffman, M.D., based on his holding a credential issued by the board, and based on notice under section 801.04 (2), Stats.

II. The Medical Examining Board is the legal authority responsible for issuing and controlling credentials for physicians, under chapter 448, Stats., and it has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under section 15.08(5)(c), Stats., section 448.02, Stats., and chapter Med 10, Wis. Admin. Code.

III. Counts I and III of the Complaint must be dismissed upon motion and upon an absence of supporting evidence.

IV. The violation in Finding of Fact 17 constitutes unprofessional conduct, under section Med 10.02 (2) (h), Wis. Admin. Code, and discipline is appropriate, under section 448.02 (3) (c), Stats.

### **ORDER**

THEREFORE, IT IS ORDERED that the license to practice medicine and surgery in Wisconsin issued to Mark A. Huffman, M.D. is hereby revoked.

IT IS FURTHER ORDERED that Counts I and III of the Complaint be dismissed.

IT IS FURTHER ORDERED that Mark A. Huffman, M.D. reimburse the Department of Regulation and Licensing for its costs in this proceeding, as authorized by section 440.22 (2), Stats., and section RL 2.18, Wis. Admin. Code.

Dated and signed: February 28, 2002

John N. Schweitzer

Administrative Law Judge

Department of Regulation and Licensing

**Note:** This publication differs from the issued decision in that "Mr. A." has been substituted where the patient's name appears in the original decision.