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STATE OF WISCONSIN
BEFORE THE PROFESSIONAL COUNSELOR SECTION
MARRIAGE AND FAMILY THERAPY, PROFESSIONAL COUNSELING AND SOCIAL WORK EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
DONALD L. KEYS, L.P.C.,	:	LS0407151CPC
RESPONDENT.	:	

The State of Wisconsin, Marriage and Family Therapy, Professional Counseling and Social Work Examining Board Professional Counselor Section, 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, Marriage and Family Therapy, Professional Counseling and Social Work Examining Board Professional Counselor Section.

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 16th day of November, 2004.

Susan Putra
Board Member
Professional Counselor Section

STATE OF WISCONSIN
BEFORE THE PROFESSIONAL COUNSELOR SECTION
MARRIAGE AND FAMILY THERAPY, PROFESSIONAL COUNSELING AND SOCIAL WORK EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	**PROPOSED DECISION LS0407151CPC**
DONALD L. KEYS, L.P.C., RESPONDENT.	

PARTIES

The parties in this matter under § 227.44, Stats., and for purposes of review under § 227.53, Stats., are:

Donald L. Keys, L.P.C.
1109 Thorn Street
St. Paul, MN 55106

Professional Counselor Section
Marriage and Family Therapy, Professional
Counseling and Social Work Examining Board
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935

This proceeding was commenced by the filing of a Notice of Hearing and Complaint on July 15, 2004. The hearing was held on August 27, 2004. Attorney John R. Zwieg appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. The respondent, Donald L. Keys, did not file an Answer to the Complaint filed in this matter and did not appear at the hearing.

Based upon the record herein, the Administrative Law Judge recommends that the Professional Counselor Section of the Marriage and Family Therapy, Professional Counseling and Social Work Examining Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Donald L. Keys, L.P.C., Respondent, date of birth March 7, 1945, is licensed by the Section as a professional counselor in the state of Wisconsin pursuant to license number 1015, which was first granted December 23, 1993. (Prior to a statutory change effective 11/01/02, Respondent's credential was a certificate as a professional counselor.)

2. Respondent was granted his credential pursuant to the grandparenting provisions of 1991 Wisconsin Act 160, § 21 (2)(f). For this reason, Respondent did not take the examination otherwise required for certification.

3. Respondent's last address reported to the Department of Regulation and Licensing is 1109 Thorn Street, St. Paul, MN 55106.

COUNT I

4. Respondent was the defendant in a criminal proceeding in Ramsey County Minnesota District Court case number 23894:

a. The Criminal Complaint, dated July 12, 1970, alleged that:

i. On July 12, 1970 Respondent removed a 17-year-old from the street, without his consent and attempted to commit sodomy on the 17-year-old.

ii. Respondent's conduct was kidnapping, in violation of Minn. Statute 609.25, and attempted sodomy with a child, in violation of Minn. Statutes 609.17 and 609.293, Subd. 4, Clause 3.

b. The Information, dated August 6, 1970, indicted Respondent on those two felony counts.

c. On January 11, 1971, as part of a plea agreement:

i. Respondent entered a plea of guilty to the charge of attempted sodomy.

ii. The State moved to dismiss the charge of kidnapping.

iii. Respondent told the court that he used a Pinkerton badge and represented himself to be a police officer to get the boy into his car. He then bound the boy's hands and eyes with tape, took the boy into a field and attempted to insert his penis in the boy's rectum.

iv. For sentencing purposes, Respondent also told the court that he had done substantially similar acts with a younger boy on June 26 or 27, 1970.

d. Judgment of Conviction on the count of attempted sodomy was entered on March 2, 1971, and Respondent was ordered to a year of confinement in the City and County Workhouse.

5. Attempted sodomy with a child is a crime substantially related to practice under Respondent's credential.

COUNT II

6. At the time Respondent applied to the Section for his credential, § 457.26 (2)(b), Stats., provided, and still provides, the Section with authority to deny a credential and to discipline a credential holder based on conviction of an offense the circumstances of which substantially relate to the practice of professional counseling.

7. The Section granted Respondent's credential in 1993 based in part on the answers he provided to the questions on the application form he submitted. One of the questions asked on the application form was whether Respondent had been convicted of a crime. Respondent, in answering that question on the application, falsely omitted any mention of his 1971 conviction, referred to in Count I.

COUNT III

8. Respondent is the defendant in a criminal proceeding in the United States District Court, District of Minnesota, Criminal No. 04-31 (DSD/SRN):

a. The case is based on a Grand Jury Indictment that:

i. Respondent violated Title 18 USC §§ 2251(a) and 2251(d) by using a person under the age of 18 to engage in sexually explicit conduct, specifically oral –genital sexual intercourse and the lascivious exhibition of genitals and the pubic area of said minor for the purpose of producing visual depictions using materials transported in interstate commerce.

ii. Respondent violated Title 18 USC §§ 2252(a)(4) and 2252(b)(d) by possessing 27 computer image files which contained visual depictions that had been shipped and transported in interstate commerce that involved the use of a minor engaged in sexually explicit conduct.

b. On June 17, 2004, following a trial, the jury found Respondent guilty and Respondent was convicted of the one count of production of child pornography and the one count of possession of child pornography.

c. Respondent is awaiting sentencing by the court.

9. The federal charges were based on allegations that Respondent:

a. Used various aliases and screen names in internet chat rooms to get young males interested in Respondent and

once he met a young male online, would suggest that the young male meet his "older friend," who was actually Respondent.

b. Using that ploy, met a 16-year-old boy, who Respondent knew to be a minor and who he took to his home where they had sex.

c. A few weeks later, in July of 2001, invited the boy back to his home and took digital pictures of the two of them performing oral sex on one another.

d. In March 2003, the boy reported Respondent to the Minnesota Internet Crimes Against Children Task Force. On April 23, 2003, law enforcement officials executed a search warrant on Respondent's home and found a container of computer floppy discs, organized by first names of males. Included under the 16-year-old boy's name were discs containing the pornographic pictures of Respondent and the boy, which the boy had previously described to law enforcement officials.

e. While executing the search warrant, they also found business cards stating that Respondent was a clinical child psychologist. Respondent is not, and never has been, licensed as a psychologist in Minnesota or any other state.

10. Production of child pornography and possession of child pornography are crimes substantially related to practice under Respondent's credential.

11. Respondent did not file an Answer to the Complaint and did not appear at the hearing held in this matter.

CONCLUSIONS OF LAW

1. The Professional Counselor Section of the Marriage and Family Therapy, Professional Counseling and Social Work Examining Board has jurisdiction in this matter pursuant to s. 457.26, (2), Stats., and ch. MPSW 20, Wis. Adm. Code.

2. Respondent, by having been convicted of attempted sodomy with a child, as described in Findings of Fact 4 and 5 herein, violated a law the circumstances of which substantially relate to the practice under his credential and engaged in unprofessional conduct, in violation of § 457.26 (2)(f), Stats., and § MPSW 20.02 (2) Wis. Adm. Code.

3. Respondent, by failing to note his 1971 conviction on his application for a credential as a professional counselor, as described in Findings of Fact 6 and 7 herein, used fraud and deception in the application for his credential and engaged in unprofessional conduct, in violation of § 457.26 (2)(f), Stats., and § MPSW 20.02 (4), Code.

4. Respondent, by violating the federal laws prohibiting production and possession of child pornography as described in Findings of Fact 8, 9 and 10 herein, violated laws, the circumstances of which substantially relate to the practice under his credential, and engaged in unprofessional conduct in violation of § 457.26 (2)(f), Stats., and § MPSW 20.02 (2), Code.

5. Respondent, by failing to file an Answer to the Complaint and failing to appear at the hearing held in this matter, is in default under s. RL 2.14, Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license (#1015) of Donald L. Keys to practice as a professional counselor, be and hereby is, REVOKED.

IT IS FURTHER ORDERED that, pursuant to s. 440.22 Wis. Stats., the cost of this proceeding shall be assessed against Respondent, and that such costs shall be payable to the Department of Regulation and Licensing.

This order is effective on the date on which it is signed on behalf of the Professional Counselor Section of the Marriage and Family Therapy, Professional Counseling and Social Work Examining Board.

OPINION

The Division of Enforcement alleges in its Complaint that by engaging in the conduct described therein, respondent violated s. 457.26 (2)(f), Stats., and s. MPSW 20.02 (2) and (4), Wis. Adm. Code. The evidence presented establishes that the violations occurred.

I. Applicable Law

457.26 Disciplinary proceedings and actions.

(2) Subject to the rules promulgated under s. 440.03 (1), the appropriate section of the examining board may reprimand a credential holder or deny, limit, suspend, or revoke a credential under this chapter if it finds that the applicant credential holder has done any of the following:

(f) Engaged in unprofessional or unethical conduct in violation of the code of ethics established in the rules promulgated under s. 457.03 (2).

MPSW 20.02 Unprofessional conduct. Unprofessional conduct related to the practice under a credential issued under ch. 457, Stats., includes, but is not limited to, engaging in, attempting to engage in, or aiding or abetting the following conduct:

(2) Violating a law of any jurisdiction, the circumstances of which substantially relate to the practice under the credential.

(4) Using fraud or deception in the application for a credential.

RL 2.14 Default. If the respondent fails to answer as required by s. RL 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence. The disciplinary authority may, for good cause, relieve the respondent from the effect of such findings and permit the respondent to answer and defend at any time before the disciplinary authority enters an order or within a reasonable time thereafter.

II. Summary of Evidence

A. Criminal Convictions

The evidence presented establishes that Mr. Keys has been convicted of crimes that substantially relate to practice under his credential. He was convicted of one count of attempted sodomy with a child in 1971 and one count of production of child pornography and one count of possession of child pornography on June 17, 2004. *Exhibits 3, 4, 5, 6, and 7.*

B. Fraud or Deception in the Application Process

The evidence presented establishes that Mr. Keys did not disclose on his application for a credential that he had been convicted in 1971 of one count of attempted sodomy with a child. One of the questions on the application form that Mr. Keys submitted asked whether he had been convicted of a crime. Mr. Keys, in answering that question on the application form, falsely omitted any mention of his 1971 conviction.

III. Analysis

Section 111.321 and 111.322, Stats., prohibit a licensing agency from discriminating against an individual on the basis of a conviction record. Section 111.335 (1) (c), Stats., provides that notwithstanding s. 111.322, it is not discrimination because of conviction record to terminate from licensing any individual who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the licensed activity.

The purpose of the exception structured by the Legislature in s. 111.335 (1) (c), Stats., was discussed by the Wisconsin Supreme Court in *County of Milwaukee v. Labor and Industry Review Commission*, 139 Wis. 2d 805, 407 N.W. 2d 908 (1987). Although the Court's discussion focused on the employment area, the societal interests discussed are relevant to the licensing area. The Court stated, Id. at 821, that:

> It is evident that the legislature sought to balance at least two interests. On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

In reference to assessing the risk of recidivism, the Supreme Court stated, Id. at 823-824, that:

> In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related. ...
>
> Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. ...
>
> It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.

In reference to the practice of a professional counselor, the practice of professional counseling is defined in s. 457.01 (6), Stats., as follows:

> **(6) "Professional counseling"** means applying a combination of human development, rehabilitation and either psychosocial or psychotherapeutic principles, procedures or services that integrate a wellness, pathology and multicultural model of human behavior in order to assist an individual, couple, family, group of individuals, organization, institution or community to achieve mental, emotional, physical, social, moral, educational, spiritual, vocational or career development and adjustment through the life span of the individual, couple, family, group of individuals, organization, institution or community.

The term "psychotherapy" is defined in s. 457.01 (8m), Stats., as follows:

> **(8m) "Psychotherapy"** means the diagnosis and treatment of mental, emotional, or behavioral disorders, conditions, or addictions through the application of methods derived from established psychological or systemic principles for the purpose of assisting people in modifying their behaviors, cognitions, emotions, and other personal characteristics, which may include the purpose of understanding unconscious processes or intrapersonal, interpersonal, or psychosocial dynamics.

In this case, Mr. Keys has shown by his conduct that he is untrustworthy, dishonest and incapable of practicing as a licensed professional counselor in a manner that safeguards the interest of the public. If permitted to continue to practice as a licensed professional counselor,
he would be presented with ample opportunity to engage is similar criminal misconduct and to cause further harm and injury to the public.

IV. Discipline

Having found that Mr. Keys violated laws relating to the practice of professional counseling, a determination must be made regarding whether discipline should be imposed, and if so, what discipline is appropriate.

The Professional Counselor Section of the Marriage and Family Therapy, Professional Counseling and Social Work Examining Board is authorized under s. 457.26 (2), Stats., to reprimand a credential holder, or limit, suspend or revoke a credential that it grants under ch. 457, Stats., if it finds that a credential holder has engaged in conduct described under that section.

The purposes of discipline by occupational licensing boards are to protect the public, deter other licensees from engaging in similar misconduct and to promote the rehabilitation of the licensee. State v. Aldrich, 71 Wis. 2d 206 (1976). Punishment of the licensee is not a proper consideration. State v. MacIntyre, 41 Wis. 2d 481 (1969).

The Division of Enforcement recommends that Mr. Keys' license to practice as a professional counselor be revoked. Mr. Keys' position regarding appropriate discipline is set forth in two letters, dated July 20, 2004, that he sent to the Division of Enforcement in which he stated the following: [1]

> I neither agree or disagree with the allegations in the Stipulation for revocation of my licenses. However, will provide no opposition to the revocation of my licenses. Case Number L50407151CPC and Case L50407152SOC/Professional Counselor License and Social Worker License.

Based upon the evidence presented, the Administrative Law Judge recommends that Mr. Keys' license to practice as a professional counselor be revoked. This measure is designed primarily to assure protection of the public and to deter other licensees from engaging in similar misconduct.

The evidence presented establishes that Mr. Keys has been convicted of crimes that substantially relate to practice under his credential. He was convicted of one count of attempted sodomy with a child in 1971 and one count of production of child pornography and one count of possession of child pornography on June 17, 2004. *Exhibits 3, 4, 5, 6, and 7.*

1. Both letters contain the same information, except in one letter the case number relating to the action involving his credential as a licensed professional counselor is underlined and in the second letter the case number involving his credential as a licensed professional counselor is underlined. *Exhibits 1 and 2*.

The evidence presented also establishes that Mr. Keys did not disclose on his application for a credential that he had been convicted in 1971 of one count of attempted sodomy with a child. One of the questions on the application form that Mr. Keys submitted asked whether he had been convicted of a crime. Mr. Keys, in answering that question on the application form, falsely omitted any mention of his 1971 conviction.

Additional evidence of dishonesty and deception include the following:

> 1) Mr. Keys pled guilty to the charge of attempted sodomy with a child at a hearing held before a judge in Minnesota on January 11, 1971. At the hearing, Mr. Keys admitted that he had committed a similar offense with a younger boy on June 26th or 27th of 1970. He stated that he picked up both boys in the same manner; that on each occasion he used a Pinkerton badge that looks like a police badge and that he represented himself as a police officer. *Exhibit 4, p. 8-11.*
>
> 2) Mr. Keys was convicted of one count of production of child pornography and one count of possession of child pornography on June 17, 2004. During the investigation of those charges, a search warrant was executed at Mr. Keys' home at which time the investigators seized several items, including business cards advertising Mr. Keys as a clinical child psychologist. Mr. Keys is not and has never been, licensed as a psychologist in Minnesota or any other state. *Complaint, paragraph 11 (e); Exhibit 5, p. 3.*

Mr. Keys has shown by his conduct that he is untrustworthy, dishonest and incapable of practicing as a licensed professional counselor in a manner that safeguards the interest of the public.

V. <u>Costs of the Proceeding</u>

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 Administrative Law Judge's recommendation that the full costs of the proceeding be assessed is based primarily on fairness to other members of the profession.

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.

This approach to the imposition of costs is supported by the practice of the Wisconsin Supreme Court, which is granted similar discretionary authority by SCR 22.24 to impose costs in attorney disciplinary hearings. The Court acknowledges the logic of imposing the cost of discipline on the offender rather than on the profession as a whole, and routinely imposes costs on disciplined respondents unless exceptional circumstances exist. <u>In the Matter of Disciplinary Proceedings against M. Joanne Wolf</u>, 165 Wis. 2d 1, 12, 476 N.W. 2d 878 (1991); <u>In the Matter of Disciplinary</u>

Proceedings against Willis B. Swartwout, III, 116 Wis. 2d 380, 385, 342 N.W. 2d 406 (1984).

Based upon the record herein, the Administrative Law Judge recommends that the Professional Counselor Section of the Marriage and Family Therapy, Professional Counseling and Social Work Examining Board adopt as its final decision in this matter, the proposed Findings of Fact, Conclusions of Law and Order as set forth herein.

Dated at Madison, Wisconsin this 10th day of September, 2004.

Respectfully submitted,

Ruby Jefferson-Moore
Administrative Law Judge