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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY :
PROCEEDINGS AGAINST:

FINAL DECISION
AND ORDER
LS9802041MED

BRIAN J. EGGENER, M.D.,
RESPONDENT.

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 20th day of January, 1999.

Ronald Grossman, M.D.

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

**In The Matter Of The Disciplinary
Proceedings Against**

**PROPOSED DECISION
Case No. LS-9802041-MED**

**BRAIN J. EGGENER, M.D.,
RESPONDENT.**

PARTIES

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

Brian J. Eggener, M.D.
1628 N. Rapids Road
Manitowoc, WI 54220

Medical Examining Board
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation and Licensing
Division of Enforcement
Madison, WI 53708-8935

This proceeding was commenced by the filing of a Notice of Hearing and Complaint on February 4, 1998. A hearing was held in this matter on June 2-3, 1998. Attorney Arthur Thexton appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. Attorney Randal N. Arnold, Hinshaw & Culbertson, appeared on behalf of the respondent.

Based upon the record herein, the Administrative Law Judge recommends that the Medical Examining Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Brian J. Eggener (d.o.b. 03/19/56) was, at all times relevant to the allegations contained in the Complaint filed in this matter, a physician and surgeon licensed by the State of Wisconsin, license #27610, which was first granted on July 1, 1986. Respondent is a psychiatrist.

2. Respondent's latest address on file with the Department of Regulation and Licensing is 1628 North Rapids Road, Manitowoc, Wisconsin 54220.

3. On January 27, 1995 and on March 1, 1995, respondent was arrested by the police for disorderly conduct relating to domestic abuse to his fiancée. Respondent was convicted in Manitowoc County Circuit Court, Branch 3, of one count of disorderly conduct on May 9, 1995.

4. Respondent was arrested on August 26, 1995 and subsequently convicted of operating a motor vehicle while intoxicated.

5. On August 26, 1995, respondent was found to be in possession of marijuana and a marijuana pipe and to have Tetrahydrocannabinol ("THC") in his blood. He entered a plea of no contest and participated in a deferred prosecution program. After completing the program, the criminal charge against respondent was dismissed.

6. On May 17, 1996, while still on probation for the May 9, 1995 disorderly conduct conviction, as described in paragraph #3 herein, respondent was subjected to a urine test for drug use by his probation agent. Respondent tested positive for Tetrahydrocannabinol ("THC").

7. Tetrahydrocannabinol, which is contained in marijuana, is listed in s. 961.14 (4) (t), Stats., as a Schedule I controlled substance.

8. In April, 1997, respondent was diagnosed as being alcohol and marijuana dependent. He was also diagnosed as suffering from depression.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to s. 448.02 Wis. Stats., and s. Med 10.02 (2) Wis. Adm. Code.

2. Respondent's conduct in obtaining Tetrahydrocannabinol, which is contained in marijuana, as described in Findings of Fact 5, 6 and 7 herein, constitutes unprofessional conduct within the meaning of s. Med 10.02 (2) (p), Wis. Adm. Code.

3. Respondent's conduct as described in paragraphs 2-7 of the Complaint and Findings of Fact 3-8 herein, does not constitute unprofessional conduct within the meaning of s. Med 10.02 (2)(i), Wis. Adm. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the respondent, Brian J. Eggener, be and hereby is, REPRIMANDED.

IT IS FURTHER ORDERED that:

1. Respondent's Motion to Dismiss the charges in the Complaint relating to the alleged violations of s. Med 10.02 (2) (i), Wis. Adm. Code is granted.

2. Pursuant to s. 440.22 Wis. Stats., the cost of this proceeding shall be assessed against respondent, and 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 Medical Examining Board.

OPINION

This proceeding was commenced by the filing of a Notice of Hearing and Complaint on February 4, 1998. A hearing was held on June 2-3, 1998. Atty. Arthur Thexton appeared on behalf of the Department of Regulation and Licensing. Atty. Randal N. Arnold appeared on behalf of Dr. Eggener. Pursuant to a briefing schedule established concerning the application of the Americans With Disabilities Act, the parties submitted legal briefs, the last of which was filed on September 4, 1998.

I Alleged Violations. The Division alleges in its Complaint that by engaging in the conduct described therein, respondent violated ss. Med 10.02 (2), (i) and (p), Wis. Adm. Code. The respondent denies that the violations occurred. Paragraphs 2-8 of the Complaint read as follows:

(2) On January 27, 1995, and again on March 1, 1995, respondent was arrested by police for disorderly conduct relating to domestic abuse to his fiancée, and was convicted of one such charge (the other having been dismissed but read-in for purposes of sentencing) on May 9, 1995.

(3) On August 26, 1995, respondent was arrested for operating a motor vehicle while influenced by an intoxicant. An Intoxilyzer 5000 test showed that he had at least 0.13% alcohol by weight in his breath at that time, and he was subsequently convicted of operating while intoxicated. At the time he was arrested, he was on vacation with his daughter, age 12, who was along in a hotel room. Respondent was the sole adult caretaker of his daughter while on vacation.

(4) Also on August 26, 1995, as part of the same incident, respondent was observed to be masturbating while driving his car on a public highway.

(5) At that time, respondent was found to be in possession of marijuana and a marijuana pipe, and to have

THC in his blood. Respondent pled guilty and participated in a deferred prosecution program to avoid criminal conviction on this matter; he completed the program and the criminal charge was dismissed. By possessing and/or consuming marijuana, respondent violated s. Med 10.02 (2) (p), Wis. Adm. Code.

(6) On May 17, 1996, while on probation for the matters set forth in paragraph 2, above, respondent was subjected to a urine test for drug use by his probation agent. Respondent tested positive for THC. By possessing and/or consuming marijuana, respondent violated s. Med 10.02 (2) (p), Wis. Adm. Code.

(7) In April 1997, respondent was diagnosed by competent physicians as being alcohol and marijuana dependent. He was also diagnosed as having major depression, for which he was not then in treatment. Respondent commenced treatment for depression upon receiving this diagnosis.

(8) By the pattern of behavior exhibited by the conduct described in paragraphs 2-7 above respondent has demonstrated an inability to practice with skill and safety to the patient and public, by reason of his being impaired in his judgment due to an emotional, mental, or physical condition, contrary to s. Med 10.02 (2) (i), Wis. Adm. Code.

II Applicable Law

Section Med 10.02 (2). The term "unprofessional conduct" is defined to mean and include but not be limited to the following, or aiding or abetting the same:

(i) Practicing or attempting to practice under any license when unable to do so with reasonable skill and safety to patients.

(p) Administering, dispensing, prescribing, supplying, or obtaining controlled substances as defined in s. 961.01 (4), Stats., otherwise than in the course of legitimate professional practice, or as otherwise prohibited by law.

III Determinations

The evidence presented at the hearing in this matter establishes that Dr. Eggenger engaged in unprofessional conduct by possessing and consuming THC in violation of s. Med 10.02 (2) (p), Code. The evidence presented does not establish that Dr. Eggenger practiced or attempted to practice under his license when unable to do so with reasonable skill and safety to patients.

IV Analysis

(A) In General

Except for the factual allegations contained in paragraph 4, most of the factual allegations contained in the Complaint were admitted by Dr. Eggenger in the Answer he filed in response to the Complaint. Dr. Eggenger's response in the Answer that the conduct described in paragraphs 2 to 4 of the Complaint is wholly unrelated to his practice of psychiatry has merit to some degree. Without concluding that, in general, the Board lacks authority to take action against a licensee for conduct which is not directly related to the practice of medicine, it can be stated that at least as to the conduct described in the Complaint the evidence does not support the conclusion that Dr. Eggenger's conduct constitutes "practicing or attempting to practice under any license when unable to do so with reasonable skill and safety to patients".

In reference to the allegations contained in paragraphs 5 and 6 of the Complaint relating to Dr. Eggenger's possession and consumption of marijuana and in paragraph 7 relating to the diagnosis of alcohol and marijuana dependence, there is no evidence that his consumption of these drugs occurred while providing care to patients. No testimony was offered by patients, office staff or other collateral sources indicating that Dr. Eggenger consumed marijuana or alcohol immediately prior to seeing patients or during treatment sessions.

(B) Marijuana Use

The evidence presented establishes that Dr. Eggenger engaged in unprofessional conduct by obtaining THC, which is contained in marijuana, in violation of s. Med 10.02 (2) (p), Code. Dr. Eggenger admits that on August 26, 1995, he was found to be in possession of marijuana and to have THC in his blood. He also admits that in May 1996, he tested positive for THC at the time he was subjected to a urine test for drug use by his probation agent. *Answer, par. 5 and 6.*

(C) Practicing Without Reasonable Skill and Safety to Patients.

The evidence presented does not establish that Dr. Eggenger practiced or attempted to practice under his license when unable to do so with reasonable skill and safety to patients.

1. Allegations

The Division alleges that by the pattern of behavior exhibited by the conduct described in paragraphs 2-7 of the Complaint, Dr. Eggenger "demonstrated an inability to practice with skill and safety to the patient and public, by reason of his being impaired in his judgment due to an emotional, mental, or physical condition, contrary to s.

2. Evidence Presented

(a) Sierra Tucson - Whole Person Assessment

Dr. Eggener testified that when he was informed by the Division that he needed to go for an inpatient assessment in spite of having already completed outpatient treatment, he was told that the place that would be paid for would be Rogers Memorial Hospital. He stated that due to his being a physician in the state, sometimes he needs to refer to that particular facility, and due to some confidentiality concerns he had, he basically checked into what other higher level treatment facilities were available in the country. He chose Sierra Tucson based on some very favorable reports about the quality of their facility. Dr. Eggener stated that he then hired an attorney, Mr. Arnold, who discussed with Mr. Thexton in the Division of Enforcement whether or not Sierra Tucson was an acceptable facility, and once they got approval that is where he went. His evaluation was performed during the time period from April 4, 1997 to April 10, 1997. *Tr. p. 122-123; Exhibit #7.*

The Referent Summary Report, dated April 16, 1997, is signed by Andrew J. Stropko, Ph.D., Psychologist and Michael E. Scott, M.D., Medical Director. Based upon information contained in the report, Dr. Eggener was referred by his attorney, as well as the Medical Board of Wisconsin for an evaluation as a result of several incidents which occurred in 1995. The Multidiscipline Assessment Team identified numerous problems, including but not limited to, marijuana and alcohol dependence. The diagnoses made, included but are not limited to, "Axis I: Marijuana dependence, in early full remission and alcohol dependence, in early full remission". *Exhibit #4.*

In reference to marijuana and alcohol dependence, the Multidiscipline Team recommended the following:

1. Total abstinence from marijuana, alcohol and other drugs.

Complete abstinence from marijuana and alcohol and any other drugs is absolutely necessary.

2. Chemical dependence treatment.

In view of the patient's documented chemical treatment and continued abstinence from drugs and alcohol over the last year, inpatient treatment is not a mandated recommendation. However, continued chemical dependency treatment is recommended. Visits at least two times a month are recommended for an indefinite period of time with an addictions specialist, such as is found at Libertas. Again, although inpatient treatment could prove beneficial for the patient, his established pattern of sobriety argues against inpatient treatment being mandated at this time. At Libertas, the patient would also have access to psychiatric consultation from Dr. Johnson, the psychiatric supervisor there.

3. Monitoring and drug screens.

A monitoring program with random drug screens for up to five years is strongly recommended.

7. Continued Alcoholic Anonymous attendance.

The patient has been attending A.A. meetings and is encouraged to continue to do this. He had some difficulty handling the spiritual aspects of the program related to religious abuse he sustained in his youth. Twelve-Step meetings are considered by the Team to be crucial. If possible, the patient should inquire about Cadeuces meeting for physicians as well as International Doctor's in A.A. (IDAA). Because of his childhood and religious abuse issues, the Team believes that participation in Rational Recovery meetings should be an option as an alternative to A.A.

Finally, it was concluded that the Team saw no evidence that the misuse of alcohol or marijuana occurred during work hours or while caring for patients and that they had no evidence of any impaired judgment or inability to decide right from wrong while exercising his professional duties.

(b) Dr. Charles Engel

Dr. Charles Engel testified at the hearing at the request of the Division of Enforcement. Dr. Engel specializes in the field of addiction medicine and has practiced addiction medicine for over 15 years. His practice involves hospital work in both psychiatric and general hospital "doing consultations, detoxification". He is also co-medical director of a residential addictions program at a local psychiatric hospital and does office evaluations and ongoing treatment of individuals with various kinds of addictions. Dr. Engel is certified by the American Society of Addiction Medicine. *Tr. p. 38-40; Exhibit #5.*

Dr. Engel estimates that in his 15 years plus career as an addiction medicine specialist he has worked with between 400 to 450 physicians who have chemical dependence of one sort or another. His patients in the past have included "quite a few psychiatrists". *Tr. p. 41-42.*

In reference to special considerations which relate to the practice of psychiatry, Dr. Engel testified that the

issue of judgment and impairment is particularly keen. In psychiatry, "what one is doing, amongst other things, is listening to other individuals talk about their behavior, their emotional behavior and symptoms, drawing conclusions from that reporting, synthesizing that information and giving advice". According to Dr. Engel, "some of the practice of psychiatry is related to medication prescription and management, but other of it is in the realm of psychotherapy, which in a simpleminded way has to do with advising other people how to conduct or change their life or their life circumstances". *Tr. p. 50-51.*

Assessments

Dr. Engel testified that when assessing physicians to determine whether they should be diagnosed as being chemically dependent and to determine whether or not they are in fact impaired and not providing reasonable and safe care to patients, he undertakes a comprehensive evaluation that most of the time involves an inpatient stay at an institution where he has privileges. During the five day inpatient stay, the physician in question participates in the standard programming and groups that are available to people who are in recovery at the institution. Dr. Engel, or the physician in charge of doing the evaluation, conducts extensive interviews with the patient and elicits a chemical use history; does a psychiatric evaluation of the patient; requires the patient to undergo various types of neuropsychological testing to determine if the physician involved has any impairments in cognitive functioning; requires the physician to undergo laboratory work including a drug and toxicology screen and typically seeks collateral information from professional partners or colleagues and even family members. *Tr. p. 69-70.*

Impairment in clinical practice

Dr. Engel testified, in reference to impairment, that clinical studies suggest that the order in which injury occurs is family, community, finances, spiritual and emotional health, physical health and finally job performance. According to Dr. Engel, individuals who are chemically dependent and actively abusing the substance upon which they are chemically dependent are not necessarily impaired in their employment. He agreed during cross-examination that as an expert in addiction medicine, it would not be appropriate professionally for him to draw the conclusion that simply because a physician is chemically dependent and actively using the substance on which he or she is dependent that the physician is impaired in his or her professional practice. He also agreed that "it is possible for a physician to be chemically dependent and engaging in active abuse of the substance to which he or she is dependent and to still be providing patient care in a safe and responsible manner". *Tr. p. 64-67.*

The criteria which Dr. Engel utilizes to form an opinion regarding whether a physician would be impaired in his or her clinical practice include: 1) the patient's own statements regarding his professional practice during the applicable time period; 2) examples of judgment in the person's personal life outside the professional practice and 3) professional literature regarding the neuropsychological effects of chemical dependency. *Tr. p. 84-89.*

First, in reference to the patient's own statements, Dr. Engel testified that he did not obtain any information from Dr. Eggener regarding his professional practice. He did not conduct an assessment of Dr. Eggener and he never interviewed him. *Tr. p. 73-74; 86, lines 20-23; 87, lines 22-24.*

Second, in reference to examples of judgment in the individual's personal life outside of professional practice, Dr. Engel testified that essentially his opinion regarding Dr. Eggener's impairment is grounded solely on the conduct which resulted in his conviction for disorderly conduct and his use of alcohol and marijuana in 1995. Dr. Engel stated that he would not dismiss entirely the contribution in his thinking as to the literature on neuropsychological impairment, however the real life examples from Dr. Eggener's history certainly in his mind would carry more weight. Dr. Engel agreed during cross-examination that simply because of the fact that Dr. Eggener ingested a substance during a time when he was chemically dependent does not establish one way or the other whether he was able to practice medicine with reasonable skill and safety to patients at that time. *Tr. p. 88-92; 89, lines 1-13.*

Finally, in reference to professional literature regarding the neuropsychological effects of chemical dependency, Dr. Engel testified that within several weeks of the last drinking episode, approximately 50 to 70 percent of alcoholics show various kinds of neurological or neuropsychological impairment. Such impairment relates to the individual's ability to think abstractly, to think of concepts and to shift his or her thinking from one concept to another, and in general, the individual's ability to cognitively cope with situations that require basically higher level neurological or nervous system functioning like planning, foresight and decision-making. *Tr. p. 46-47; 88, lines 16-25; 89, lines 1-13.*

Dr. Engel testified that the deficits noted above "certainly might" affect the ability of a physician to practice with skill and safety to the patients. According to Dr. Engel, one cannot categorically state that they would because in medicine there are degrees. On some occasions what you find on neuropsychological testing are subtle or mild. On other occasions, it's more pronounced. In a case where a neuropsychologist finds milder impairment, one cannot necessarily draw a conclusion between that finding and the fact of impairment in that physician's ability to practice. The correlation is not always one to one. One must look at the degree of impairment that is found. *Tr. p. 49-50; 261-263.*

Dr. Engel agreed during cross-examination that the literature which he cited does not allow one to say whether or not the neuropsychological impairment found is of such a degree that it would impair someone in the

practice of medicine. He admitted that his opinion regarding whether or not Dr. Eggener was impaired while actually treating patients is limited in its basis to what he knows about the neuropsychologic literature and what he knows generally about impaired physicians. He also admitted that the only information he had about neuropsychological testing done on Dr. Eggener was that done at Sierra Tucson in April of 1997, which indicated that there was no neuropsychological impairment of any kind. *Tr. p. 74-75; 77; 83; Ex. #4.*

In reference to his own practice, Dr. Engel testified that they do neuropsychological testing on the vast majority of physicians who come into treatment and that at least 50 percent have the deficits noted above. Dr. Engel admitted that when he does an assessment to determine whether a physician's medical practice has been affected by his or her chemical dependency, he does not simply rely on the fact that at a certain stage in the progression of disease most physicians have some impact on their practice, but rather, he does an investigation on a case-by-case basis to determine the impact. *Tr. p.49; 72-73.*

In reference to the Sierra Tucson assessment, Dr. Engel testified that he was asked by the Division to review the evaluation and comment on it. Dr. Engel responded that overall he felt that the evaluation report from Sierra Tucson was well done; however, he did not see any mention that the staff at Sierra Tucson obtained collateral information from anyone who might have been able to give further information as to whether Dr. Eggener was indeed remaining abstinent. Such parties, for example, might be a colleague, or fiancée, if he still has a relationship with her. Additionally, it would have been helpful to contact his current outpatient therapist, including possibly Dr. Johnson. Dr. Engel indicated that otherwise, the evaluation appears to him to be well done and the recommendations seem reasonable given the content of the report. Dr. Engel admitted that in connection with providing his opinions in this case, he did not seek out any information from collateral sources. He also admitted that he did not have any evidence that he developed during his review to contradict the statement contained in the Sierra Tucson report which indicates that they saw no evidence that Dr. Eggener was impaired while exercising his professional duties. *Tr. p. 77-84; 94; 109-110; Exhibit #7.*

Finally, Dr. Engel agreed that the issue regarding whether Dr. Eggener because of his chemical dependency was unable to practice with reasonable competence and safety to the public is a matter about which different examiners might disagree. He agreed that other professionals who examined Dr. Eggener might reach a different conclusion than he did about whether Dr. Eggener was unable to practice medicine with reasonable skill and safety to patients at the time he was chemically dependent and actively ingesting alcohol and marijuana. *Tr. p. 93-94.*

(c) Dr. Edward Johnson

Dr. Johnson testified at the hearing at the request of Dr. Eggener. Dr. Johnson is a psychiatrist. He is employed part-time by Brown County where he is the Associate Clinical Director for Outpatient Services. His position involves clinical supervision and direction of mental health and A.O.D.A. outpatient services at the Brown County Department of Community Programs, Mental Health and A.O.D.A. Outpatient Clinics. His position also involves a great deal of direct patient care for acutely and chronically mentally ill and "dual diagnosis" patients. He also has a part-time private practice and consulting practice. Approximately fifteen or twenty percent of his office practice "is people who have diagnoses of chemical dependency, usually along with co-morbid depression or anxiety disorders". In addition, Dr. Johnson has a part-time position as Medical Director of the Door County Department of Community Programs, which is a comprehensive county program with mental health, substance abuse, developmental disabilities and traumatic brain injury programs. He spends one day a week in Sturgeon Bay seeing patients and providing staff consultations and supervision. Dr. Johnson has been a Diplomate (in Psychiatry) of the American Board of Psychiatry and Neurology since 1976. *Tr. p. 221-222; p. 230-235; Exhibit #10.*

Dr. Johnson testified that in 1997, Toni Hanna, who is a certified alcohol and drug abuse counselor at Libertas, asked him to see Dr. Eggener for the purpose of medication monitoring and general oversight of his treatment program as a dual diagnosis individual. He saw Dr. Eggener on four occasions between July 18, 1997, and October 17, 1997. Dr. Johnson testified that the Axis I diagnoses were marijuana dependence in stable remission; alcohol abuse in stable remission and episodic major depression in stable remission. His treatment of Dr. Eggener includes prescribing Prozac, 20 milligrams a day, for the purpose of reducing the likelihood of a recurrent episode of major depression. According to Dr. Johnson, Toni Hanna is seeing Dr. Eggener for alcohol and drug abuse counseling; Sue Schutz is seeing him for counseling relating to his diagnosis of major depression and his vast need to make major lifestyle changes to get his life in order and his illness in remission, and that he is seeing him for medication management and some sort of clinical oversight of primarily the AODA treatment. *Tr. p. 222; 254-256; 279; 331-333; 339; 342; Exhibit #11.*

Dr. Johnson stated that in the course of his involvement with Dr. Eggener's care he reviewed the Sierra Tucson report; the case file with Toni Hanna and her supervisor at Libertas on numerous occasions; the records of Sue Schutz, an independent outpatient psychotherapist who saw Dr. Eggener for counseling related to his diagnosis of major depression; a copy of a deposition taken of Dr. Eggener by the Division; reviewed three letters written by professional colleagues or employees of Dr. Eggener, and he spoke with Dr. Eggener a total of five times, in person at his office. *Tr. p. 253-256.*

Finally, Dr. Johnson testified that, based upon information which he reviewed in the course of his involvement with Dr. Eggener's care, he would not necessarily conclude, in the absence of direct evidence of Dr. Eggener drinking or using marijuana while he was treating patients or on call, that he was unable to practice medicine with

reasonable skill and safety to patients in 1995 when he was arrested for disorderly conduct and use of marijuana. He stated that he had no reason to believe that Dr. Eggener was practicing in an impaired fashion at any time. He admitted during cross-examination that he had not looked at Dr. Eggener's charts of the patients that he diagnosed or treated and that he had not directly reviewed Dr. Eggener's actual practice of psychiatry in any way. *Tr. p. 250; 255-257; 263-264; 275-277.*

(d) Toni Hanna

Ms. Hanna testified at the request of Dr. Eggener. She is an alcohol and other drug abuse ("AODA") counselor with Libertas in Green Bay. She has held that position for about 9 years. Ms. Hanna provides individual, family and group therapy. She does intensive outpatient treatment; conducts family therapy one week out of each month and educates adults and adolescents. In reference to case management, Ms. Hanna works with developmentally disabled clients from BARC Industries, mostly on an individual basis. She is certified by the WI Alcoholism and Drug Counselor Certification Board, Inc. *Tr. p. 349-350; 363; Exhibit #12.*

Ms. Hanna testified that in May 1996, Dr. Eggener called her and said that he wanted to come in and talk with her and that he thought he had a problem with marijuana. Dr. Eggener was on probation and his probation officer had done a urine analysis which Dr. Eggener knew would come back positive for marijuana. She met with Dr. Eggener on May of 1996, at which time she started a course of treatment for him. As a result of her initial assessment and based upon her use of the Substance Use Disorder Diagnostic Schedule ("SUDDS") in effect at that time, she diagnosed him as being alcohol and marijuana dependent. She testified that under the current SUDDS, which is based upon the current Diagnostic and Statistical Manual of Mental Disorders, ("DSM") she would not get a diagnosis of alcohol dependence, but rather a diagnosis of alcohol abuse. *Tr. p. 258-259; 351-352; 367-368; 374, lines 20-25; 375-376, lines 1-9; Exhibit #13.*

In reference to treatment, Ms. Hanna initially recommended intensive outpatient treatment but ultimately recommended individual sessions. According to Ms. Hanna, Dr. Eggener knew that he needed to go for an assessment. About that time, Dr. Eggener was told that he had to go for an assessment out of town. He finally went to Sierra Tucson. Up until that time, she met with him for individual sessions. She said that the longer he stayed clean and sober the more she knew that he did not need intensive outpatient treatment. She said that she continues to see Dr. Eggener and the last time that she saw him was the week prior to the hearing. *Tr. p. 321; 352-354.*

Ms. Hanna further testified that Dr. Eggener was discharged from her care in April 1997, because he had about a year of "clean time, being chemically abstinent from mind and mood altering chemicals". He was working what she believed to be an excellent recovery program. He was readmitted to her care when he left Sierra Tucson. Thereafter, she saw him sometimes once a month, sometimes every six or seven weeks. In reference to his personal recovery program, Ms. Hanna recommended that Dr. Eggener continue to maintain chemical abstinence. She said that she also believes that he needs to continue seeing Dr. Edward Johnson or someone to continue to treat the depression. She does not recommend further outpatient, alcohol or other drug abuse treatment at this point in time because he has over two years of clean time. She does not believe that he is currently in need of any type of treatment or monitoring, of any kind, in order to protect the public. *Tr. p. 355-360; 368; 371; 375.*

Finally, Ms. Hanna testified that Dr. Eggener has made it very clear to her that he has never used alcohol or marijuana at a time when he was seeing patients or was on call to be available to see patients; that she does not have any information from Dr. Eggener or any other source indicating that he ever used alcohol or marijuana or was under the influence of alcohol or marijuana while he was seeing patients or was on call to be available to see patients, and that she does not have any information from any source that would lead her to conclude that at any time Dr. Eggener was ever unable to practice medicine with reasonable skill and safety to his patients. *Tr. p. 359-360; 363, lines 21-25; p. 364, line 1.*

V. Discipline

Having found that Dr. Eggener engaged in unprofessional conduct, a determination must be made regarding whether discipline should be imposed, and if so, what discipline is appropriate.

The Medical Examining Board is authorized under s. 448.02 (3), Stats., to warn or reprimand a credential holder, or limit, suspend or revoke any license, certificate or limited permit granted by the board to that person if it finds that the person engaged in unprofessional conduct.

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 recommends that the Board's standard, five-year impairment order be imposed, with credit for treatment completed. The standard order includes, but is not limited to, a requirement that the licensee attend weekly treatment and counseling and submit to urine screens twice each week. The Division stated that monitoring provisions and the consistent position of the Board that practitioners practice under a limited license with regular monitoring appropriate to where they are in their treatment and recovery for a period of five years before being given unlimited licenses should be adhered to in this case. Finally, the Division stated that if the tribunal seriously consider any other order than the Board's standard monitoring order, then the order should require Dr. Eggener to submit to a urinalysis at any time upon request of the board or its designated agents, and that the order require him to report any use of mood altering substances immediately to the department. *Tr. p.*

Dr. Eggener stated that under the totality of the circumstances in this case, a reasonable penalty for the two instances of possession of marijuana charged by the board would be a public reprimand. He argued that to impose mandatory testing and mandatory treatment without evidence of any impairment of professional practice, or without evidence of any threat to the safety of the public would be nothing more than penalizing someone for having an illness, which is clearly prohibited under the Americans With Disabilities Act. *Tr. p. 401, 409.*

The Administrative Law Judge recommends that Dr. Eggener be reprimanded for his possession and consumption of marijuana (THC). This measure is designed primarily to deter other licensees from engaging in similar misconduct. The evidence presented does not reflect that a limited license is required to assure protection of the public or to promote Dr. Eggener's rehabilitation.

In reference to protection to the public, there is no evidence in the record which indicates that Dr. Eggener's possession and consumption of marijuana constituted a danger to the safety of his patients. As noted previously, no testimony was offered by patients, office staff or other collateral sources indicating that Dr. Eggener consumed or was under the influence of marijuana immediately prior to seeing patients or during treatment sessions. In addition, Dr. Johnson testified that since Dr. Eggener has not use alcohol or marijuana for two years, he does not think that there is a need to protect the public. There are some additional things that he would recommend clinically for the sake of Dr. Eggener's quality of recover and to prevent whatever minimal risk of relapse there may be, but that would not be because of a sense that they are necessary to protect the public. *Tr. p. 264.*

In reference to rehabilitation, the record reflects that Dr. Eggener has sought treatment for his use of marijuana. Ms. Hanna testified that in May 1996, Dr. Eggener called her and said that he wanted to come in and talk with her and that he thought he had a problem with marijuana. Dr. Eggener was on probation and his probation officer had done a urine analysis which Dr. Eggener knew would come back positive for marijuana. She met with Dr. Eggener on May of 1996, at which time she started a course of treatment for him. As a result of her initial assessment and based upon her use of the Substance Use Disorder Diagnostic Schedule ("SUDDS") in effect at that time, she diagnosed him as being marijuana dependent. In reference to his personal recovery program, Ms. Hanna recommended that Dr. Eggener continue to maintain chemical abstinence. She said that she also believes that he needs to continue seeing Dr. Edward Johnson or someone to continue to treat the depression. She does not recommend further outpatient, alcohol or other drug abuse treatment at this point in time because he has over two years of clean time. She does not believe that he is currently in need of any type of treatment or monitoring, of any kind, in order to protect the public. In 1997, Ms. Hanna asked Dr. Johnson to see Dr. Eggener for purposes of medication monitoring and general oversight of his treatment program. Ms. Hanna continues to see Dr. Eggener. She testified that the last time that she saw him was the week prior to the hearing.

Dr. Johnson testified that he saw Dr. Eggener at least four times for 50-60 minute sessions between July and October of 1997. His diagnosis included "marijuana dependence in stable remission". He stated that based on clinical grounds along, Dr. Eggener has now been straight and sober for 2 years. He has been in intensive outpatient treatment and aftercare counseling for that 2 year period. But for this case, Dr. Eggener would have been discharged to a program of personal recovery after a year. He testified that a week before the hearing he conferred with Toni Hanna and they agreed that now that Dr. Eggener is 2 years abstinent and in recovery and has had treatment for those 2 years, probably a follow-up contact once every 2 months would be what would appear to be clinically appropriate. If something were to happen where he would start feeling like he was at risk of relapse, either he or Ms. Hanna might suggest more intensive treatment. As long as that's not an apparent problem, the follow-up contact with Ms. Hanna every 2 months for another year is what they recommend at this time. *Tr. p. 268-270; Ex #11.*

Finally, at the request of the Board, Dr. Eggener agreed to be evaluated at Sierra Tucson. Based upon the Referent Summary Report, dated April 16, 1997, the Multidiscipline Assessment Team identified numerous problems, including but not limited to, marijuana and alcohol dependence. The diagnoses included, but are not limited to, "Axis I: Marijuana dependence, in early full remission and alcohol dependence, in early full remission". In reference to marijuana dependence, the Team recommended complete abstinence from marijuana; continued chemical dependency treatment in the form of visits at least two times a month for an indefinite period of time with an addictions specialists, such as is found at Libertas (at Libertas, Dr. Eggener would also have access to psychiatric consultation from Dr. Johnson), and a monitoring program with random drug screens for up to 5 years. They saw no evidence that the misuse of alcohol or marijuana occurred during work hours or while caring for patients or of any impaired judgment or inability to decide right from wrong while exercising his professional duties. *Exs. 4, 7.*

VI. Americans With Disabilities Act

Pursuant to a briefing schedule established at the hearing relating to the application of the Americans With Disabilities Act ("ADA"), the parties submitted legal briefs in support of their positions.

As noted previously, the evidence establishes that Dr. Eggener engaged in unprofessional conduct by obtaining and consuming THC, in violation of s. Med 10.02 (2) (p), Code. The evidence does not establish that

Dr. Eggener practiced or attempted to practice under his license when unable to do so with reasonable skill and safety to patients.

In reference to the violation relating to Dr. Eggener's use of marijuana, the Division argues that the monitoring provisions and the consistent position of the Board that practitioners practice under a limited license with regular monitoring appropriate to where they are in their treatment and recovery for a period of five years before being given unlimited licenses should be adhered to in this case. Dr. Eggener argues that to impose mandatory testing and mandatory treatment without evidence of any impairment of professional practice, or without evidence of any threat to the safety of the public would be nothing more than penalizing someone for having an illness, which he argues is clearly prohibited under the Americans With Disabilities Act.

Applicable Law

42 USC 12102 Definitions. As used in this Act: (2) **Disability**. The term "disability" means, with respect to an individual:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 USC 12210 *Illegal Use of Drugs* (a) *In general*. For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the entity acts on the basis of such use. (b) *Rules of construction*. Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who: 1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use; (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or (3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (1) and (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(d) **Definition of illegal use of drugs**. (1) *In general*. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 USC 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal Law.

(2) **Drugs**. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act.

28 CFR 35.104 Definitions.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

Based upon the legal briefs filed by the parties, they agree on several areas: 1) the purpose of the ADA is to eliminate discrimination against individuals on the basis of disability; 2) Subchapter II of the Act prohibits discrimination by public entities, which includes the Board; 3) drug addiction is a physical or mental impairment which constitutes a disability under the Act; 4) the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use and 5) the Board may adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described under sec. 12210 (a) (1) and (2) of the Act is no longer engaging in the illegal use of drugs.

In general, the parties disagree on the following: 1) whether Dr. Eggener's marijuana dependency constitutes a disability under the Act; 2) whether his use of marijuana in May 1996, constitutes "currently engaging in the illegal use of drugs" under sec. 12210 of the Act; 3) whether the Board has adopted reasonable policies or procedures including, but not limited to, drug testing to ensure that individuals referred to under sec. 12210 (a) (1) and (2) of the Act are not currently using illegal drugs, and 4) whether there is a permissible basis for limiting Dr. Eggener's license.

First, in reference to whether Dr. Eggener's marijuana dependency constitutes a disability under the Act, in my opinion the answer is yes.

The Division argues that the tribunal heard abundant testimony from Dr. Eggener's therapists, colleagues, former wife and current girlfriend that his professional life was unaffected by his chemical dependency. There was no testimony that any of his major life activities were substantially limited. He testified that he no longer considers himself alcohol or marijuana dependent. Therefore, his chemical addiction, although an impairment, does

not rise to the level of a disability for ADA purposes and he does not qualify for ADA protection. *Division's Memorandum of Law Concerning Americans With Disabilities Act, p. 8-10.*

Dr. Eggener argues that a person is disabled under ADA if he or she has a record of, or is regarded as having, a physical or mental impairment that substantially limits one or more major life activities. Drs. Engel and Johnson testified that Dr. Eggener's illness was one which would substantially impair major life activities and that a stigma would remain even after successful treatment. His professional life was not impaired, but other major life activities, including leisure and recreational activities, self-esteem and family relationships were affected by his dependency. Even absent these findings, he has a medical history of chemical dependency. Therefore, he is protected by the ADA even without a showing of current limitations in a major life activity. *Respondent's Reply Memorandum of Law Concerning the Americans With Disabilities Act, p. 4-5.*

The term "disability" is defined in sec. 12102 (2) to mean with respect to an individual: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment, or (C) being regarded as having such an impairment.

The Administrative Law Judge concurs with Dr. Eggener that since he has a medical history of chemical dependency he is protected under the Act even without a showing of current limitations in a major life activity.

Second, in reference to whether Dr. Eggener's use of marijuana in May 1996, constitutes "currently engaging in the illegal use of drugs", in my opinion the answer is no.

The Division argues that Dr. Eggener was a current user of illegal drugs in 1995 and 1996, when the conduct for which the Division seeks discipline occurred. He was not using drugs at the time of the hearing, but s. Med 10.02 (2) (p), Wis. Adm. Code, does not require him to be using at the time of the hearing. Consequently, Dr. Eggener is not entitled to ADA protection from discipline for his actions in 1995 and 1996. Arguable he still fits the definition of a current user because of his history of recurrent illegal drug use, the risks of relapse, particularly for a physician, and his mere two years of recovery. *Division's Memorandum of Law Concerning Americans With Disabilities Act, p. 6.*

Dr. Eggener argues that he is not a current user of illegal drugs and that it would defeat the goals of the ADA to allow the Board to sanction him for past substance abuse problems which he has presently overcome. If the Division is correct, all recovering addicts who used drugs or alcohol at the time of their misconduct are ipso facto current drug users and, therefore, subject to carte blanche discrimination. *Respondent's Reply Memorandum of Law Concerning the Americans With Disabilities Act, p. 6.*

The Administrative Law Judge concurs with Dr. Eggener that the evidence does not establish that his use of marijuana in 1995 and 1996 constitutes "currently engaging in the illegal use of drugs" as the term is defined under the Act.

The rules of construction found under paragraph (b) of sec. 12210 states that nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs *or has otherwise been rehabilitated successfully and is no longer engaging in such use ...* (emphasis added). The term "current illegal use of drugs" means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

The evidence presented reflects that Dr. Eggener has been rehabilitated successfully and that he has not used marijuana since May 1996. According to Ms. Hanna, Dr. Eggener has over two years of "clean time". The evidence does not establish that Dr. Eggener's use of marijuana occurred recently enough to justify a reasonable belief that his drug use is current or that continuing use is a real and ongoing problem.

Third, in reference to whether the Board has adopted reasonable policies or procedures including, but not limited to, drug testing to assure that individuals referred to under sec. 12210 (a) (1) and (2) of the Act are not currently using illegal drugs, in my opinion the answer is no.

As noted previously, it is not a violation of the Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (1) and (2) is no longer engaging in the illegal use of drugs. *42 USC 12210; 28 CFR 35.131.*

The Division argues that under the statutes and relevant regulations, the Board is entitled to assurance that Dr. Eggener is no longer engaging in illegal drug use. Under the Act, impairment or risk to the public is not a prerequisite to drug testing. The only requirement is that the policy or procedure be reasonable. Since the five-year plan, including monitoring and random drug screening, that the Division is seeking is also recommended by the nationally recognized AODA treatment facility chosen by Dr. Eggener, it must be reasonable. *Division's Memorandum of Law Concerning Americans With Disabilities Act, p. 13.*

Dr. Eggener argues that the Board has not adopted a policy or procedure relating to drug testing of physicians who formerly engaged in illegal drug use. The Department has failed to cite any published statute, administrative rule, policy or procedure that permits drug testing of a physician under the circumstances of this case. The only thing the Department can point to as a policy or procedure is the "standard" stipulation that has apparently been accepted by some physicians in non-contested case. *Respondent's Reply Memorandum of Law Concerning the Americans With Disabilities Act, p. 2-5, 9-11.*

The Administrative Law Judge concurs with Dr. Eggener's conclusion that based upon the record in this

proceeding the Board has not adopted a policy or procedure relating to the drug testing of physicians who "formerly" engaged in illegal drug use. The only provision which could be interpreted as a policy or procedure adopted by the Board relating to drug use is the Impaired Professionals Procedure set forth in ch. RL 7, Wis. Adm. Code. That procedure, which does not apply in this case, is intended to apply when allegations are made that a credential holder has practiced a profession while impaired by alcohol or other drugs or when a credential holder contacts the departments and requests to participate in the procedure. As previously stated, the evidence does not establish that Dr. Eggener practiced while impaired by drugs.

Finally, in reference to whether there is a permissible basis for limiting Dr. Eggener's license, in my opinion the answer is no.

The Division argues that the 5-year Impairment Stipulation is a supervised rehabilitation program with monitoring and random drug screens that is generally imposed on physicians, whether or not they are "addicted", who engage in illegal drug use and in illegal or unprofessional conduct arising from drug or alcohol use, whether or not that conduct occurred during work hours or while caring for patients. Federal law permits the Board to hold all physicians, disabled and not disabled, to the same performance and conduct standard, even if an individual physician's illegal behavior or unprofessional conduct is caused by alcohol or drug addiction. The Division agrees that the Board may not administer its licensing program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability. But, the Board may discriminate on the basis of illegal drug use. Even if the discipline the Division seeks is discriminatory, Dr. Eggener is not entitled to ADA protection from discrimination because of illegal drug use and illegal actions based on alcohol and drug use in 1995 and 1996. Dr. Eggener is not being singled out for "discrimination". The Division seeks to have him placed on a 5-year rehabilitation program that is standard for any similarly situated physician with a like diagnosis. *Division's Memorandum of Law Concerning Americans With Disabilities Act, p. 11-12.*

Dr. Eggener concedes that the Board must have the authority to limit the license of a physician suffering from chemical dependency where necessary to protect the public. He argues that the Division failed to prove that he violated s. Med 10.02 (2) (i). That regulation, when a violation has been properly charged and proved, correctly focus on the behavior of the physician and its relationship to medical competence and patient safety, rather than on the physician's disability. Dr. Eggener also concedes that if a violation of s. Med 10.02 (2) (h) or Med 10.02 (2) (i), had been proven by the Division the Board would have the authority to consider limitation of his license, including mandatory drug testing and compulsory medical treatment. Having failed to establish a violation of the regulation, the Division now argues incorrectly that such limitation can be imposed even without a finding that Dr. Eggener's conduct posed a danger to the safety of patients, thus attempting to accomplish in a prohibited way what it failed to accomplish by legitimate means. *Respondent's Memorandum of Law Concerning Americans With Disabilities Act, p. 10-11.*

The Administrative Law Judge concurs with Dr. Eggener that absent a finding that his use of marijuana posed a danger to the safety of patients, there is no permissible basis for limiting his license.

Based upon the record herein, the Administrative Law Judge recommends that the Medical 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 15th day of December 1998.

Respectfully submitted,
Ruby Jefferson-Moore
Administrative Law Judge

