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This order stayed pending judicial review.

STATE OF WISCONSIN
BEFORE THE PSYCHOLOGY EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS
AGAINST:

STEVEN R. STEIN, Ph.D.,
RESPONDENT

FINAL DECISION AND ORDER
LS0002231PSY

The parties to this action for purposes of section 227.53, Wis. Stats., are:

Steven R. Stein, Ph.D.
49 Kessel Court, Suite 107
Madison, WI 53711

Psychology 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

PROCEDURAL HISTORY

A hearing in the above-captioned matter was held on May 21-24, 2001, before Administrative Law Judge Jacquelynn B. Rothstein. Dr. Stein appeared in person and by his attorney Kevin F. Milliken. The Division of Enforcement appeared by its attorney John R. Zwiig. Prior to the hearing date, Count V was resolved by stipulation of the parties, and at the hearing, Mr. Zwiig moved for the dismissal of Count III. Post-hearing briefs were filed by July 27, 2001.

The Administrative Law Judge filed a Proposed Decision on October 8, 2001. Mr. Zwiig filed objections to the Proposed Decision and Mr. Milliken filed a response to the objections. The entire record of the hearing was available to the board for its review, and board members were provided with copies of the Complaint, the Proposed Decision, Mr. Zwiig's objections, Mr. Milliken's response, and the complete transcript of the hearing. Mr. Milliken and Mr. Zwiig appeared before the board to present brief oral arguments on December 17, 2001. Based upon the entire record in this case, including the evidence presented at the hearing as well as the parties' objections and argument, the Psychology Examining Board issues this Final Decision and Order.

FINDINGS OF FACT

1. Steven R. Stein, Ph.D., (dob 11/6/50) is a Wisconsin licensed psychologist. His license was granted on February 17, 1978. Dr. Stein's current address is 49 Kessel Court, Suite 107, Madison, Wisconsin 53711.
2. In October of 1983, Ms. A began receiving psychotherapy from Nancy Feingold, M.S.S.W., at the Quisling

Clinic in Madison, Wisconsin. The therapy sessions continued intermittently until March of 1994.

3. Steven R. Stein, Ph.D., began providing Ms. A with individual psychotherapy in April of 1984. The therapy sessions ended in the second half of 1986, but the two continued to see one another after that point.

4. In the second half of 1986, but prior to her therapy ending, Ms. A and her husband had a joint therapy session with Dr. Stein. Following that session, her husband left the office and Ms. A remained to speak further with Dr. Stein. Dr. Stein and Ms. A then engaged in a sexual encounter during which time he held and kissed her, and fondled her breasts and genitalia.

5. After that encounter, Dr. Stein terminated his therapeutic relationship with Ms. A.

6. In December of 1986, Ms. A resumed therapy with Ms. Feingold. In March of 1987, Dr. Stein was present during a therapy session with Ms. A and Ms. Feingold. During that session, Dr. Stein did not deny having had a sexual relationship with Ms. A.

CONCLUSIONS OF LAW

1. The Psychology Examining Board has jurisdiction in this matter pursuant to Section 455.09, Wis. Stats.

2. By having engaged in the conduct set forth in Finding of Fact #4, Dr. Stein had sexual intimacies with a client as alleged in Count I of the Complaint, in violation of section PSY 3.02 (15), Wis. Admin. Code (1986).

3. By engaging in sexual intimacies with a client as alleged in Count II of the Complaint, and by engaging in sexual intimacies with the spouse of a client to whom he was providing individual psychotherapy as alleged in Count IV of the Complaint, Dr. Stein practiced psychology in a grossly negligent manner, in violation of section PSY 3.02 (2), Wis. Admin. Code (1986).

ORDER

NOW THEREFORE IT IS ORDERED that Steven R. Stein's license to practice psychology in the State of Wisconsin is hereby suspended for one year beginning 30 days after the date on which this Final Decision and Order is signed.

IT IS FURTHER ORDERED that prior to re-licensure, Dr. Stein shall submit to and pay for a psychological evaluation by a psychologist approved in advance by the board. The evaluator shall be provided by Dr. Stein with a copy of this Final Decision and Order, and the evaluation will inquire into Dr. Stein's ability to maintain appropriate boundaries and his ability to recognize and accept responsibility for professional misconduct, especially sexual misconduct, in order to address whether Dr. Stein may safely and competently engage in the practice of psychology. Dr. Stein shall submit the evaluation to the board prior to the expiration of the one-year suspension and the board may use the evaluation as the basis for the imposition of any limitations on Dr. Stein's license when reinstated.

IT IS FURTHER ORDERED that Counts III and V of the complaint are hereby dismissed.

IT IS FURTHER ORDERED that Dr. Stein pay the costs associated with Counts I, II and IV of the Complaint. The costs of the investigation, prosecution and hearing are to be allocated as follows: (1) costs which can be identified as related to counts I, II or IV of the Complaint are to be included in the cost order; (2) costs which can be identified as related to counts III or V are to be excluded from the costs order; (3) costs which cannot so categorized are to be prorated, with 3/5 of the total cost included in the cost order. Dr. Stein is initially given 90 days following the issuance of the cost order in which to pay the costs in full without penalty. Simple interest on any unpaid balance at the rate of 1% per month following the issuance of the cost order shall accrue if the entire amount is not paid within 90 days. If Dr. Stein has not paid the entire amount by the end of the period of suspension, his license shall automatically be suspended for non-payment until the entire amount plus interest is paid, for up to one additional year.

EXPLANATION OF VARIANCE

The Psychology Examining Board accepts and adopts the Administrative Law Judge's Findings of Fact. The Board accepts and adopts the ALJ's Conclusions of Law 1 and 2. The Board does not accept the ALJ's Conclusions of Law 3 and 4, and reaches a different conclusion, as explained below.

The burden of proof to be applied to actions in 1986 is "a preponderance of the evidence". The ALJ made Finding of Fact 4 as follows: "In the second half of 1986, but prior to her therapy ending, Ms. A and her husband had a joint therapy session with Dr. Stein. Following that session, her husband left the office and Ms. A remained to speak further with Dr. Stein. Dr. Stein and Ms. A then engaged in a sexual encounter during further with Dr. Stein. Dr. Stein and Ms. A the engaged in a sexual encounter during which time he held and kissed her, and fondled her breasts and genitalia." The ALJ concluded that the event constituted engaging in sexual intimacies with a client as alleged in Count I of the Complaint, but that the event did not constitute gross negligence. The

Board disagrees and concludes that it constitutes gross negligence.

The ALJ's conclusion was based on an analysis of the legal standard found in *Gilbert v. Medical Examining Board*, 119 Wis. 2d 168, 196, 349 N.W.2d 68 (1984). In that case, the Medical Examining Board was interpreting its rule Med 16.02 (1) (g) that defined unprofessional conduct as "any practice or conduct under license or certificate granted by the examining board which tends to constitute a danger to the health, welfare or safety of the patient or public". The Supreme Court ruled that, in order to conclude that a doctor had violated that rule, the Medical Board would have to have unequivocal expert "testimony that a minimally competent physician would have chosen a different course of treatment which would have avoided or minimized the unacceptable risks...". *Gilbert* at 197. The ALJ here said that *Gilbert* standard had not been met.

The Board does not accept this analysis. The standard here is not the Medical Board's rule defining unprofessional conduct. The standard was the "practicing of psychology in a grossly negligent manner". In 1986 ordinary negligence was defined as "the failure to exercise that degree of care, skill and judgment which is usually exercised by the average psychologist having due regard for the state of psychological science at the time in question", and "grossly negligent" was defined in section Psy 3.01 (2) as "some higher degree of a failure to exercise ordinary care of judgment in a given situation. In other words, gross negligence or grossly negligent distinguishes between gross or grave acts of negligence as compared to less serious or more ordinary acts of negligence." The ALJ said that where gross negligence is alleged, the testifying expert must unequivocally indicate that a minimally competent practitioner would have chosen a different course of treatment which would have avoided or minimized the unacceptable risks to the patient, and "there was no unequivocal statement by Dr. Malzer, the Board's expert, that a minimally competent practitioner would have chosen a different course of treatment which would have avoided or minimized the unacceptable risk to Ms. A." That analysis does not address the Psychology Board's rule.

Dr. Malzer was not asked to state in so many words whether Dr. Stein's actions constituted gross negligence, but he did testify amply to the poor judgment evidenced by Dr. Stein in his interaction with Ms. A. The board may not rely on its knowledge to supply evidence which is lacking, *Gilbert* at 204-5 but based on the testimony and other facts of the record, the board may rely on its expertise to make the determination that certain actions constitute gross negligence. The Board concludes that Dr. Stein's actions in engaging in sexual intimacies with Ms. A at a time when she was still his patient and at a time when he was also providing psychotherapy service to her husband evidenced an extremely high degree of a failure to exercise ordinary care of professional judgment, thus constituting gross negligence. The one witness who was asked a question in terms of gross negligence agreed that such behavior, if it occurred, would constitute gross negligence. The witness was Dr. Stein himself, at page 484 of the hearing transcript.

Based on the severity of the violation in Conclusion of Law 2, as well as the additional violation in Conclusion of Law 3, the Board imposes a one-year suspension of Dr. Stein's license, to commence 30 days after the date of the order to allow Dr. Stein to provide for an orderly evaluation of his practice. The ALJ's recommendation of a six-month suspension was based in part on the age of the case and the Board accepts that ameliorating factor in imposing a one-year suspension for violations that would otherwise likely justify revocation.

At the time the suspension terminates, the Board will consider the need to impose limitations on Dr. Stein's license to insure that he can practice safely and that the public is protected. Dr. Stein is ordered to obtain a mental health evaluation to present to the Board prior to that time, with the details of that evaluation set forth in the order above.

The Board orders Dr. Stein to pay the costs of this proceeding related to counts I, II and IV. The details of the preparation of the cost order and of Dr. Stein's payment of the costs are set forth in the order above.

Dated this 20th day of December, 2001.

Barbara A. Van Horne, Ph.D.

Chair, Psychology Examining Board