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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
ATHLENE ALEXIS, M.D.,	:	LS0112101MED
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 24th day of July, 2002.

Darold Treffert
Chairperson
Board of Nursing

STATE OF WISCONSIN

BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	PROPOSED DECISION
AGAINST	:	
ATHLENE A. ALEXIS, M.D.,	:	LS0112101MED
RESPONDENT	:	

ISSUE

Does the respondent's theft and self-administration of a controlled substance in a suicide gesture require the imposition of a long-term monitoring regimen for protection of the public and the respondent?

FINDINGS OF FACT

1. The respondent, Athlene Agnes Alexis, M.D., is licensed to practice medicine and surgery in the state of Wisconsin, under license number 34901. Dr. Alexis practices as an anesthesiologist.
2. In early 2001, Dr. Alexis came under great stress:
 - Her mother had died in 1996, and her father had died in 1998.
 - In early January, she discovered evidence that her husband might be having an extramarital affair with another woman.
 - At the time, her four children were ages 12, 9, 8 and 7.
 - By early February, her suspicions were being confirmed and she became very upset.
3. On February 5, 2001, Dr. Alexis called a relative and said she was planning to commit suicide. Dr. Alexis took a quantity of Versed® (midazolam hydrochloride) from Oconomowoc Memorial Hospital without the consent of the hospital and not in the course of legitimate practice, and self-administered what she knew to be a non-lethal dose. Dr. Alexis was taken into police custody and admitted to Waukesha Memorial Hospital under emergency detention [exhibit 1]. She was released on February 7, 2001.

4. Earlier on February 5, 2001, Dr. Alexis had ingested two tablets of Tylenol® No. 3 that had been prescribed for her daughter, because Dr. Alexis had a bad headache. Tylenol® No. 3 is an analgesic.

5. Versed® is a drug that affects memory, and from February 5, 2001, the date on which she self-administered Versed®, until at least February 15, 2001, Dr. Alexis exhibited a mild mental incapacitation, namely, confusion. In addition to the effect of the Versed®, this may have been due in part to an electrolyte imbalance and a major depressive episode [transcript, pp. 206-212].

6. Dr. Alexis continued to work as an anesthesiologist at Oconomowoc Memorial Hospital until February 22, 2001.

7. Around February 21, 2001, Dr. Alexis ingested two lorazepam that had been prescribed for her father, because she found out on that day that her husband had filed for divorce. Lorazepam is a tranquilizer with an antianxiety effect.

8. On February 22, 2001, Dr. Alexis called her husband and told him that he would have to take care of the children, as she was "leaving". She was located and taken into police custody. In her vehicle were a syringe and an empty bottle of labetalol hydrochloride, which she said she must have carried out of the hospital by accident. Dr. Alexis did not self-administer any medication. She was admitted to Waukesha County Mental Health Center under emergency detention [exhibit 2].

9. On February 26, 2001, Dr. Alexis was admitted to Rogers Memorial Hospital on a voluntary basis under the care of Tim Levenhagen, M.D. Upon her discharge on March 3, 2001, Dr. Levenhagen recorded the following "impression":

Axis I: Major Depression single episode

Axis II: Borderline Personality Disorder (major diagnosis)

Axis III: None

Axis IV: Moderate to severe

Axis V: Admission G.A.F. - 30

Discharge G.A.F. - 70

He prescribed Serzone® and set up individual psychotherapy with her [exhibit 11].

10. On or about March 4, 2001, Dr. Alexis took five syringes of morphine, a Schedule II controlled substance, from Oconomowoc Memorial Hospital without the consent of the hospital and not in the course of legitimate practice. She called her husband and threatened suicide. Dr. Alexis was located and taken into police custody. She did not self-administer any medication. She was admitted to Waukesha County Mental Health Center under emergency detention [exhibit 7]. Following her discharge on March 5, 2001, Dr. Alexis remained under the treatment of Dr. Levenhagen.

11. On or about July 11, 2001, Dr. Alexis was evaluated by Rush Behavioral Health [exhibit 10]. The purposes of the examination were to "perform a general psychiatric assessment, explore the circumstances surrounding reports of mental health deterioration alleged on Dr. Alexis' part, screen for the presence of substance abuse/dependence, conduct a fitness for duty examination and if indicated, render treatment recommendations."

The report's diagnosis was

Axis I: Major Depressive disorder, in partial remission

Axis II: Borderline Personality disorder

Axis III: Status-post dilatation and curettage.

Axis IV: Occupational problems.

Problems relating to the primary support group.

Other psycho-social or environmental problems.

Problems relating to the social environment.

Axis V: Current G.A.F.: 68

Highest in last year: Deferred

The report's recommendations were

1. For an undetermined periods [sic] of time, at a frequency of at least once per week, Dr. Alexis would be expected to engage in psychotherapy with Dr. Levenhagen. Without exception, Dr. Alexis would be expected to adhere to all treatment recommendations and behavioral contracts outlined by Dr. Levenhagen. Additionally, Dr. Levenhagen should be allowed to regularly communicate with Dr. Gaynor, her department chair.
2. Dr. Alexis would be allowed to return to the practice of medicine on an initial part-time basis and, only under those terms and conditions outlined by Dr. Levenhagen and agreed upon by her department chair. However, she could not be considered [sic] appropriate to return, until she has demonstrated at least one month of both complete compliance with Dr. Levenhagen's treatment plan, and well as emotional and mood stability. At the earliest, she would not be expected to return to the workplace until after Labor Day. The actual timing of her return would be dictated by Dr. Levenhagen's assessment, that she has attained a sustained level and period of stability.
3. At the workplace, Dr. Alexis would be expected to undergo random urine monitoring.

No finding was made in the report that Dr. Alexis suffered from substance abuse or dependence. With the exception of an incident of forgetting to take medication while on an overseas trip, Dr. Alexis complied with the treatment recommendations.

12. Dr. Alexis's divorce was finalized in November of 2001.

13. On November 19, 2001, Dr. Levenhagen cleared Dr. Alexis to return to part-time work.

14. Dr. Alexis took a refresher course at the Medical College of Wisconsin in December of 2001.

15. Following her completion of the refresher course, Oconomowoc Hospital would not reinstate Dr. Alexis's hospital privileges because it was informed by Mr. Thexton that disciplinary action was being taken against Dr. Alexis. [transcript, pp. 8-11, 14-209, 279-283].

16. On or about February 15, 2002, Dr. Alexis was examined by Herzl Spiro, M.D., Ph.D. Dr. Spiro prepared a report of his examination and his conclusions [exhibit 22].

17. Dr. Alexis ignored state laws as well as rules of professional conduct in her suicide gestures.

18. Dr. Alexis does not have a substance abuse problem and she is not an impaired physician.

CONCLUSIONS OF LAW

I. The Medical Examining Board has personal jurisdiction over the respondent, Athlene A. Alexis, based on her holding a credential issued by the Board, and based on notice under sec. 801.04 (2), Stats.

II. The Medical Examining Board is the legal authority responsible for issuing and controlling credentials for physicians and surgeons under ch. 448, Stats., and it has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 15.08(5)(c), Stats., sec. 448.02 (3), Stats., and ch. Med 10, Wis. Admin. Code.

III. Dr. Alexis's actions on February 5, 2001 in Findings of Fact 3 are violations of law, specifically secs. 943.20 (1) (a), 961.33 and 961.41 (3g), Stats., they constitute unprofessional conduct under sec. Med 10.02 (2) (p), and (z), Wis. Admin. Code, and discipline is appropriate under sec. 448.02 (3), Stats.

IV. Dr. Alexis's actions on March 4, 2001 in Finding of Fact 10 are violations of law, specifically secs. 943.20 (1) (a) and 961.33 (3g), Stats., they constitute unprofessional conduct under sec. Med 10.02 (2) (p), and (z), Wis. Admin. Code, and discipline is appropriate under sec. 448.02 (3), Stats.

V. When discipline is imposed on a respondent, the costs of the disciplinary proceeding may also be imposed, under sec. 440.02 (2), Stats.

ORDER

THEREFORE, IT IS ORDERED that the license to practice medicine and surgery issued to Athlene A. Alexis, M.D., be suspended for a period of six months, and that this period of suspension be imposed retroactively and satisfied by the period between March 5, 2001 and September 5, 2001 during which she did not work.

IT IS FURTHER ORDERED that Dr. Alexis pay the costs of this proceeding, as authorized by sec. 440.22 (2), Stats., and sec. RL 2.18, Wis. Admin. Code, and if she fails to pay the costs within 90 days of the date of the cost order, her license will be summarily suspended, under sec. 440.22 (3), Stats.

PARTIES

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

Complainant:

Division of Enforcement

Department of Regulation and Licensing

1400 East Washington Ave.

Madison, WI 53708-8935

Respondent:

Athlene A. Alexis, M.D.

19775 Foxkirk Court

Brookfield, WI 53045

Disciplinary Authority:

Medical Examining Board

1400 East Washington Ave.

Madison, WI 53703

PROCEDURAL HISTORY

A. This case was initiated by the filing of a complaint (DOE case # 01 MED 80) by Attorney Arthur Thexton with the Medical Examining Board on December 5, 2001. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on December 10, 2001 to Dr. Alexis, who received it on December 17, 2001.

B. An answer was filed on January 2, 2002 on behalf of Dr. Alexis by attorney Paul R. Erickson of Gutglass Erickson Bonville Seibel&Falkner, S.C., 735 N. Water Street, Suite 1400, Milwaukee, WI 53202-4267.

C. A prehearing conference was held on January 8, 2002, at which time a hearing was scheduled for March 6th and 8th, 2002. Additional prehearing conferences were held on February 6th, 20th, and 28th, 2002, and the hearing was rescheduled to March 2002.

D. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on March 20, 2002.

25, 2002. Dr. Alexis appeared in person and represented by Mr. Erickson. The Department's Division of Enforcement was represented by Mr. Thexton. Following his adverse examination of Dr. Alexis, Mr. Thexton offered for filing an Amended Complaint to Conform to the Proof. The Amended Complaint was received and filed after paragraphs 2 and 6 were struck from the original Complaint. The other paragraphs of the Amended Complaint expanded and clarified paragraph 2 of the original Complaint, removed the claim that Dr. Alexis had committed unprofessional conduct by being convicted of a crime, and corrected an oversight in the charging statutes. At the end of the hearing, a request by Mr. Thexton to present rebuttal testimony was denied, and closing arguments were heard on April 10, 2002. The hearing and closing argument were recorded, and transcripts were prepared and delivered on May 1, 2002. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

APPLICABLE STATUTES AND RULES

Statutes

448.02 Authority.

...

(3) INVESTIGATION; HEARING; ACTION. (a) The board shall investigate allegations of unprofessional conduct and negligence in treatment by persons holding a license, certificate or limited permit granted by the board.

...

(c) Subject to par. (cm), after a disciplinary hearing, the board may, ... when it finds a person guilty of unprofessional conduct or negligence in treatment, do one or more of the following: warn or reprimand that person, or limit, suspend or revoke any license, certificate or limited permit granted by the board to that person.

...

943.20 Theft.

(1) ACTS. Whoever does any of the following may be penalized as provided in sub. (3):

(a) Intentionally takes and carries away, uses, transfers, conceals, or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of such property.

...

961.38 Prescriptions.

...

(5) No practitioner shall prescribe, orally, electronically or in writing, or take without a prescription a controlled substance included in schedule I, II, III or IV for the practitioner's own personal use.

961.41 Prohibited acts A - penalties.

...

(3g) POSSESSION. No person may possess or attempt to possess a controlled substance or a controlled substance analog unless the person obtains the substance or the analog directly from, or pursuant to a valid prescription or order of, a practitioner who is acting in the course of his or her professional practice, or unless the person is otherwise authorized by this chapter to possess the substance or the analog.

...

Wisconsin Administrative Code

Med 10.02 Definitions.

...

(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.

...

(z) Violating or aiding and abetting the violation of any law or administrative rule or regulation the circumstances of which substantially relate to the circumstances of the practice of medicine.

...

ANALYSIS

This is a disciplinary proceeding conducted under the authority of ch. 227, Stats. and RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a complaint with the Medical Examining Board alleging that the respondent, Athlene Alexis, M.D., violated rules regulating the practice of medicine and surgery. Dr. Alexis did not contest the major facts that support the legal conclusion that she violated rules of professional conduct. She violated sec. 943.20(1) (a), Stats., prohibiting the theft of property, sec. 961.38 (5), Stats prohibiting the taking of a controlled substance without a prescription, and sec. 961.41 (3g), Stats., prohibiting the unauthorized possession of a controlled substance. These violations constitute unprofessional conduct under sec. Med 10.02 (2) (p) and (z), Admin. Code.

Dr. Alexis admitted the one instance of self-administration of Versed® in a suicide gesture, and denied any other use of controlled substances taken from the hospital. The parties disagree over whether the self-medication impaired her ability to practice medicine. Dr. Alexis in her answer said that "at no time while under the influence of Versed® was she actively practicing medicine but evidence was presented that her memory was impaired by Versed® at least until February 15th, a time during which she was practicing medicine, and it is safe to conclude that she was in fact under the influence of Versed®. Nevertheless, there was insufficient proof that she was unable to practice with reasonable skill and safety, so there is no finding that she violated sec. Med 10.02 (2) (i).

There were other facts related to drug diversion and drug use which pale in comparison to the major facts, but which deserve mention and consideration. Specifically, Dr. Alexis violated the laws and rules against theft and possession of a controlled substance a second time on March 4, 2001 when she removed five syringes of morphine from Oconomowoc Hospital. In addition, during the time period of February 5th to February 21st, Dr. Alexis self-administered controlled substances for which she did not have a valid prescription. Specifically on February 6th, she took two Tylenol® No. 3 that had been prescribed for her daughter, because she had a bad headache, and on February 21st, she took lorazepam that had been prescribed for her father, because she found out on that day that her husband had filed for

divorce. Administrative notice is taken, from the Physician's Desk Reference, that Tylenol® 3 has an analgesic effect, and that Lorazepam is a tranquilizer with an antianxiety effect.

The only major dispute between the parties is over the discipline to be imposed. The focus of the hearing was whether Dr. Alexis's self-administration of Versed® justifies or requires imposition of a long-term monitoring regime. At the risk of some oversimplification, the parties' disagreement centered on whether Dr. Alexis's action should be characterized as "drug abuse". Expert testimony was offered by both parties.

The expert witness for the complainant was David Benzer, D.O., who is board-certified in family medicine and addiction medicine, and who currently specializes in addiction medicine. He has treated over 1,000 physicians since 1979, including more than 50 anesthesiologists. He founded and was director of the McBride Center at Milwaukee Psychiatric Hospital from 1984 to 1996, then founded the Harrington Recovery Center. He has been Medical Director since 1998 of the Wisconsin State Medical Society's statewide physician health program, and is highly experienced and knowledgeable in dealing with drug abusers. Dr. Benzer stated that he treats drug diversion the same whether it was "once or a hundred times", basically because he is quite experienced in dealing with abusers who minimize, project and rationalize, and he is skeptical of the self-reports he receives from people who are referred to him [transcript, pp. 57-59]. One of his main points was that anesthesiologists must be treated differently than other physicians because the drugs that they work with, have access to, and tend to divert can be lethal if misadministered even slightly [transcript, pp. 48-49].

Dr. Benzer stated that three anesthesiologists who were patients of his group, in treatment for drug abuse, relapsed and died [transcript, pp. 62-65], and these deaths, not surprisingly, had an emotional impact on him [transcript, p. 97]. He said as a result of his experience, he has "made darned sure that very very tight structure and monitoring were going to be in place if an anesthesiologist was going to go back to the operating suite." It is the ALJ's conclusion that despite Dr. Benzer's truly impressive resume of experience treating drug abusers, his opinions must be discounted because his past experiences with anesthesiologists have closed his mind to even the slightest possibility that an anesthesiologist could divert and self-administer a drug and not present a significant risk of repeating the behavior. He said that he considers it irrelevant whether an anesthesiologist has a diagnosis of substance abuse, because the consequences of any repetition of the diversion and self-administration are so dire. He supported the state's proposed monitoring order that includes urine screens and therapy for at least five years because "what we have here is an anesthesiologist who has diverted from the workplace and self-administered, and that's the only fact I need." [transcript, p. 65]. He then characterized Dr. Alexis as almost by definition impaired, or at least potentially impaired, due to substance abuse [transcript, pp. 80-81], and that the monitoring regime's purpose would be to prevent her from relapsing and possibly killing her by accident [transcript, p. 100].

Dr. Benzer's inflexible position amounts to a categorical imperative. He has prejudged the facts of Dr. Alexis's case because of a general rule. Although his opinions on the treatment of substance abuse deserve great weight, his opinion on the need for such treatment in this case is not entirely objective.

The respondent's expert witness was Herzl R. Spiro, M.D., Ph.D., who is board-certified in psychiatry. Dr. Spiro was instrumental in establishing the Alcoholism and Drug Abuse Center at Johns Hopkins in 1968, he was the founding director of the Rutgers Mental Health Center in 1971, and from 1975 to 1985 he was director of Psychiatry and Mental Health at the Milwaukee County Medical Complex. His experience in the area of substance abuse qualifies him to render opinions with approximately as much authority as Dr. Benzer.

Dr. Spiro testified that Dr. Alexis does not have a substance abuse problem. He reviewed the Rush Interdisciplinary Assessment Capsule for Dr. Alexis [exhibit 10], focusing on the Axis II diagnosis of Borderline Personality Disorder. He testified that he reviewed both the report and all of the supporting notes for the report, and that he found no substantiation for that diagnosis. He also examined Dr. Alexis himself and he testified to a reasonable degree of medical certainty that she does not have a borderline personality disorder [transcript, p. 15]. His own diagnosis was that at the time of the incidents in the complaint, Dr. Alexis was suffering from a Major Depressive Disorder, which he further explained as follows: "This woman had a single episode of a major depressive disorder, recovered -- quite quickly, actually -- a

is fully recovered in a matter of months. And the likelihood of this happening to her again is extremely low ..." [transcript, p. 169]. With regard to her use of drugs, Dr. Spiro testified that none of the substance abuse diagnoses or sub-diagnoses in DSM-IV applies to Dr. Alexis [transcript, p. 172].

Based in part on Dr. Spiro's testimony, and in large part on common sense, the ALJ finds that Dr. Alexis does not have a substance abuse problem. Her actions on February 5, 2001 do not put her in the category of drug abusers. She used a drug to threaten suicide; she did not use it for pleasure or self-gratification or for any of its physical or mental effects. It is true that if she returns to work she will have access to controlled substances which can be used to end life and it is almost certainly true that she still has stress in her life. However, (a) it is very unlikely that the level of stress will rise again to the same level, (b) even if it does, the stressors may not include a person who could be expected to change his behavior in response to a suicide threat, and (c) Dr. Alexis has almost certainly learned that the use of a controlled substance to make a suicide gesture has much longer-term negative effects than she could have imagined.

Mr. Thexton offered for filing an amended complaint which included two additional charges of self-administration of controlled substances without a prescription from an authorized prescriber, based on Dr. Alexis's use of Tylenol® No. 3 and lorazepam. Those charges in the amended complaint were not accepted, but the facts permit additional argument that Dr. Alexis has an inclination toward drug diversion, self-administration, and abuse. Given different facts and circumstances, that might be a reasonable interpretation, but because the drugs were used for their legitimate therapeutic purposes, it is not a reasonable inference to consider them evidence of drug abuse. An AMA Ethical Opinion was entered into evidence that begins with "Physicians generally should not treat themselves or members of their immediate families" [exhibit 18]. It is difficult to tell whether the opinion prohibits actions such as Dr. Alexis's, and further, although her ingestion of controlled substances that were prescribed for family members might be interpreted as a violation of sec. Med 10.02 (2) (p), I suspect that the Medical Examining Board does not wish to begin imposing discipline for a physician's use of left-over medication in the medicine cabinet, as long as it is used for its proper purpose.

Discipline

The purposes of professional discipline have been set forth in Wisconsin Supreme Court Rule SCR 21.03(5), which applies to attorneys and states: "Discipline for misconduct is not intended as punishment for wrongdoing, but is for the protection of the public, the courts and the legal profession." The Wisconsin Supreme Court has extended this in various attorney discipline cases, including Disciplinary Proc. Against Kelsay, 155 Wis.2d 480, 455 N.W.2d 871 (1990), by saying that the protection is "from further misconduct by the offending attorney, to deter other attorneys from engaging in similar misconduct and to foster the attorney's rehabilitation." That framework has been adopted by regulatory agencies, including the Department of Regulation and Licensing, in disciplinary proceedings for other professions.

Discipline should not be imposed on Dr. Alexis for attempting to kill herself, as she did not do that. Dr. Alexis administered what she knew to be a non-lethal dose, and her action was not an attempt to commit suicide. Discipline should also not be imposed for her attention-seeking suicide gesture; there is no rule of professional conduct that prohibits such an action. Discipline should be imposed for the violations that Dr. Alexis did commit: three instances of theft of controlled substances, two instances of improper possession of controlled substances, and one instance of self-administration of a controlled substance. These are serious violations and require far more than an administrative warning, as suggested by Mr. Erickson, or even a reprimand. At the other end of the disciplinary spectrum, even Mr. Thexton agrees that revocation is not necessary in this case, so that leads to a disciplinary order that involves a suspension or limitations, or both.

The second stated purpose of discipline is to deter other professionals from engaging in similar misconduct, which contemplates the effect of the order in this case on other doctors who will read about it. For that purpose alone, it is the ALJ's opinion that the theft and misuse of controlled substances must involve a significant suspension, on the order of 6 to 12 months. Dr. Alexis did not practice for over a year, initially because she chose not to, and later because she was not cleared to return to practice or her employer required a refresher course, or her employer was deterred from rehiring her due to the pendency of these proceedings. A six-month suspension for her offenses is recommended, though the Board may exercise its discretion in deciding what length of suspension would be most appropriate and have the most beneficial effect on other professionals. Since it has been established that she is capable of returning to work (either with or without a monitoring program), the suspension may be imposed retroactively and satisfied by the time during which she did not practice.

As for Dr. Alexis's rehabilitation, and to prevent her further misconduct, the third and first purposes of discipline, this

proceeding has almost certainly already had that effect. There would be no way that a monitoring scheme or any other discipline could prevent Dr. Alexis from committing suicide but, as stated before, this case does not involve suicide or attempted suicide. involves the use of drugs in a suicide gesture. Dr. Alexis has already discovered that such violations of the rules of professional conduct can make her life miserable long after the suicide gesture is resolved, and she is not likely to steal and misuse drugs again even *in extremis*.

With regard to limitations, it is the ALJ's opinion that Dr. Alexis can be allowed to return to practice without limitations. does not have a substance abuse problem, and a monitoring order such as that proposed by the State is simply not necessary. underwent treatment with Dr. Levenhagen for her psychological problems, and he has concluded that she no longer needs his services. If the Board feels it would be abdicating its duty by not doing all it can to protect the public, then a limitation could be placed on Dr. Alexis's license requiring regular monitoring and reports to the board, but it should be for psychological or psychiatric difficulties, i.e., to guard against a possible recurrence of depression, not for drug use, and since she has already completed treatment with Dr. Levenhagen, it should require only occasional visits.

If deemed necessary, such an order could be similar to the following: "Within 30 days of this order, Dr. Alexis shall enter into and maintain a counseling relationship with Tim Levenhagen, M.D. or another psychologist or a psychiatrist approved by the board. Dr. Alexis shall provide to her counselor copies of this Final Decision and Order, as well as any supporting reports or documents requested by the counselor. The counselor shall assess Dr. Alexis and provide appropriate psychotherapy. Dr. Alexis shall cooperate with and follow all recommended treatment. The schedule of treatment shall be determined by the counselor, but Dr. Alexis shall be seen by the counselor for treatment at least one time each month. Treatment shall continue for five years. Dr. Alexis shall provide the counselor with a current release authorizing release of all treatment records and reports to the Board, and permitting the counselor to disclose and discuss Dr. Alexis's treatment and rehabilitation with the Board or any member thereof, or with any employee of the Department of Regulation and Licensing acting under the authority of the Board. Copies of these releases shall be filed simultaneously with the Department Monitor. The treating counselor shall submit quarterly reports to the Board regarding Respondent's participation and progress in treatment. Submission of the reports by the treating professionals shall be Respondent's responsibility. The due date for the first report and subsequent reports shall be determined by the Department Monitor. If Dr. Alexis fails to cooperate with treatment, or otherwise violates the terms of this order, the counselor shall immediately submit written notification to the Board. Violation of any term or condition of this Order may constitute grounds for revocation of Respondent's license as a psychologist in Wisconsin. Should the Board determine that there is probable cause to believe that Respondent has violated the terms of this Order, the Board may order that Respondent's license be summarily suspended pending investigation of and hearing on the alleged violation. All releases, notifications and reports required by this Order shall be mailed to Department Monitor, Department of Regulation And Licensing, Division of Enforcement, 1400 East Washington Ave., P.O. Box 8935, Madison, WI 53708-8935."

Costs.

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

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

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

Dated and signed: May 6, 2002

John N. Schweitzer

Administrative Law Judge

Department of Regulation and Licensing