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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
John Powers,	:	LS0501271MED
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 rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 16th day of March, 2005.

Alfred Franger
Board Member
Medical Examining Board

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	PROPOSED DECISION
JOHN F. POWERS, P.A.	:	AND ORDER
RESPONDENT	:	LS0501271MED

The parties to this action for the purposes of Wis. Stat. § 227.53 are:

John F. Powers, P.A.
1914 Maplewood Place
Onalaska, Wisconsin 54650

Division of Enforcement
Department of Regulation and Licensing
1400 East Washington Avenue
P.O. Box 8935

Medical Examining Board
Department of Regulation & Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

On January 11, 2005, the Department of Regulation and Licensing, Division of Enforcement filed a complaint seeking discipline against John F. Powers, P.A. The Complaint and a Notice of Hearing was served on the respondent by mail. The respondent failed to file an answer or other responsive pleading.

A hearing in the above-captioned matter was held on February 23, 2005 before Administrative Law Judge Dennis C. Schuh. The Division of Enforcement appeared by Attorney Michael Berndt. The respondent failed to appear.

On the basis of the entire record herein, the administrative law judge recommends that the Medical Examining Board adopt as its final decision in this proceeding, the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. John F. Powers, P.A., Respondent, date of birth December 9, 1948, is licensed by the Wisconsin Medical Examining Board as a physician assistant in the state of Wisconsin, pursuant to license number 30, which was first granted November 18, 1975.

2. Respondent's last address reported to the Department of Regulation and Licensing is 1914 Maplewood Place, Onalaska, WI 54650.

3. On March 3, 1993, Respondent was charged in Milwaukee County Wisconsin Circuit Court case number 93 CM 302246 with one count of Fourth Degree Sexual Assault, a class A misdemeanor, in violation of Wis. Stat. § 940.225(3m), for allegedly having sexual contact with a 10-year-old boy on December 17, 1990.

4. On April 7, 1993, Respondent was convicted of the charge and sentenced to 8 months in the House of Corrections. Imposition of the sentence was stayed and Respondent was placed on probation for 2 years with the Sex Offender Unit. Conditions of probation included:

- a. 30 days in the House of Corrections with work and treatment release.
- b. Counseling for sexual dysfunction.
- c. No contact with victim. No unsupervised contact with any minor.

5. Fourth Degree Sexual Assault, a violation of Wis. Stat. § 940.225(3m), is a law the circumstances of which substantially relate to practice by a physician assistant.

6. Between January 2000 and April 26, 2002, Respondent was employed as a physician assistant at the VA Medical Center (VAMC) in Tomah, Wisconsin.

7. On March 27, 2000, the Medical Center Director at VAMC revised Respondent's scope of practice to provide:

- a. A staff member was to be present during all examinations performed by Respondent in which underpants (briefs) were typically pulled down or removed, including all genitourinary and anal/rectal examinations.

b. Respondent was to wear gloves during all genitourinary and rectal examinations.

8. From 2000 to March 2002, Mr. A, a patient at VAMC, saw Respondent for medical care on several occasions for various conditions. On one occasion, Respondent saw Mr. A, diagnosed genital warts and recommended surgery. Mr. A had that surgery at the VA hospital in Madison on September 11, 2001. Mr. A required follow-up laser surgery which was performed in Madison on March 7, 2002. Mr. A had an appointment to see Respondent at VAMC on April 5, 2002.

9. In March 2002, Mr. A resided in La Crosse, which is 42 miles from VAMC, but is adjacent to Onalaska, where Respondent resided. On March 25, 2002:

a. Respondent called Mr. A's residence and spoke with the woman with whom Mr. A lived. Respondent said he had some paperwork regarding a recent surgery and asked if he could drop it off at their residence. She agreed he could do so.

b. Respondent arrived at the residence around 7:30 p.m. and visited with Mr. A's girlfriend until Mr. A returned home around 9:45 p.m. The three of them talked until approximately 11:00 p.m., when Mr. A's girlfriend went to bed.

c. After Mr. A's girlfriend went to bed, Respondent asked Mr. A if he would allow Respondent to examine Mr. A's genital area where the surgery occurred. Because Respondent had provided his medical care for two years and was the one who recommended the surgery, Mr. A agreed to the examination.

d. Respondent appeared to be examining Mr. A's genitals to see if the area had healed properly and placed his face near Mr. A's penis. During the examination, the manner in which Respondent was touching Mr. A's genitals caused Mr. A to become partially aroused.

e. Respondent said to Mr. A "Do you want me to do it?" Before Mr. A could answer and without Mr. A's consent, Respondent placed his mouth on Mr. A's penis and began stimulating it. Mr. A told Respondent to stop and jumped up. Mr. A told Respondent to leave and escorted him out of the apartment.

10. There was no medical purpose for Respondent to touch Mr. A's penis in that manner.

11. Third Degree Sexual Assault, a violation of Wis. Stat. § 940.225(3), is a law the circumstances of which substantially relate to the circumstances of the practice of medicine.

CONCLUSIONS OF LAW

1. The Wisconsin Medical Examining Board has jurisdiction to act in this matter, pursuant to Wis. Stat. §448.02(3) and Wis. Admin. Code MED §10.02(2) (h), MED 10.02 (2) (r), and MED 10.02(2) (z).

2. Respondent's conduct as set forth in paragraphs 8 through 10, inclusive, tended to constitute a danger to the health, welfare and safety of his patient and are acts which showed Respondent to be unfit for the practice of physician assistant.

3. Respondent's conduct as described in paragraphs 3 and 4 was unprofessional conduct contrary to § 448.02(3), Wis. Stats., and Wis. Admin, Code MED §10.02(2) (r) in that he was convicted of a crime that relates to the practice of physician assistant.

4. The conduct described in paragraphs 8, 9, and 10, above, constitutes a violation of Wisconsin Administrative Code MED §10.02(2) (h) and Wis. Stat. §448.02(3).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the license of JOHN F. POWERS, P. A. to act as a physician

assistant is **REVOKED**.

IT IS FURTHER ORDERED that JOHN F. POWERS P.A. pay the assessable costs of this proceeding.

This Order is effective on the date of its signing.

OPINION

Applicable Law

Wisconsin Statutes §448.02(3) provides in part;

448.02(3) (a) _____

(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. ...

448.02(3)(b) _____

(b) After an investigation, if the board finds that there is probable cause to believe that the person is guilty of unprofessional conduct or negligence in treatment, the board shall hold a hearing on such conduct.

448.02(3) (c) provides in part

“...[A]fter 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.”

Wis. Admin. 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:

...

(h) Any practice or conduct which tends to constitute a danger to the health, welfare, or safety of patient or public.

...

(r) Conviction of any crime which may relate to practice under any license, or of violation of any federal or state law regulating the possession, distribution, or use of controlled substances as defined in s. 961.01(4), Stats. A certified copy of a judgment of a court of record showing such conviction, within this state or without, shall be presumptive evidence thereof.

...

(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.

It is well established that the objectives of professional discipline include the following: (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct.

State v. Aldrich, 71 Wis. 2d 206, 209 (1976).

Punishment of the licensee is not an appropriate consideration.

State v. McIntyre, 41 Wis. 2d 481, 485 (1969).

The state's purpose in licensing professionals is to protect its citizens.

Strigenz v. Department of Regulation and Licensing 103 Wis.2d at 286, 307 N.W.2d at 667.

License revocation is the ultimate means of protecting the public short of fining or imprisonment.

Strigenz v. Department of Regulation and Licensing, 103 Wis.2d 281, 287, 307 N.W.2d 664 (1981).

On January 27, 2005 the Department of Regulation and Licensing, Division of Enforcement filed a Complaint and Notice of Hearing alleging three violations of professional licensing and standards by the Respondent John F. Powers. An Affidavit of Mailing indicates that the documents were sent to the Respondents last known address of 1914 Maplewood Palace, Onalaska, Wisconsin and to his attorney.

More than twenty days have elapsed and there has been no answer or other responsive pleading filed by the respondent. The respondent failed to appear at the scheduled hearing and no one appeared on his behalf.

Section RL 2.14 of the Wisconsin Administrative Code provides that a respondent who fails to answer a complaint or fails to appear at a hearing is in default. If found to be in default, the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence against the respondent.

At the hearing the complainant introduced as Exhibit 1 a certified copy of the criminal complaint and the judgment of conviction in Milwaukee County Circuit Court Case #93 CM 302246 entitled State of Wisconsin v. John F. Powers dob12-9-48. The criminal complaint alleges that the respondent had hand to penis contact with a ten year old child at the respondent's home without the victim's consent contrary to Wis. Stat. 940.225(3m), a Class A misdemeanor. The respondent entered a plea of no contest and was convicted on April 7, 1993. The Circuit Court imposed and stayed a sentence of eight (8) months in jail, placed the respondent on probation for two years in the Sex Offender Unit. The Circuit Court imposed, as conditions of probation that the respondent, serve 30 days in jail, engage in counseling for sexual dysfunction, have no contact with the victim and have no unsupervised contact with any minor.

Complaint produced as Exhibit 5, a Report of Contact prepared by Jeanne Reinart RN, acting Patient Representative at Tomah VAMC, located in Tomah, Wisconsin. The Report of Contact sets forth the complaint of Mr. A as set forth in Counts 2 and 3 of the complaint herein.

The Administrative Law Judge took judicial notice under Wisconsin Statutes 902.01 of the published decision of the State of Wisconsin Court of Appeals in State v. John F. Powers, 2004 WI App 156, 687 N.W2d 50. That decision is an appellate review of La Crosse County Circuit Court case 02 CF 258 with the same title, a criminal case stemming from the events detailed in Exhibit 5. The Court of Appeals noted that the Circuit Court held a preliminary hearing and found probable cause that the respondent committed the felony offense of third degree sexual assault. Respondent's counsel "conceded at the close of the preliminary hearing that the court 'has sufficient information based on the preliminary hearing to indicate that there's probable cause on Count II' which charged third-degree sexual assault, also a felony."

The Court of Appeals summarized the factual background as follows;

"¶ 4 Powers is a physician's assistant. At the time of the alleged offense, he worked for the Tomah VA Medical Center, which is operated by the United States Department of Veterans Affairs. The State alleged in the complaint that Powers engaged in non-consensual sexual intercourse with a person who had recently undergone surgery at the VA Medical Center and had a scheduled followup appointment there."

State v. Powers, 04 WI App 156, 687 N.W.2d 50

The burden of proof is set forth in Wis. Stats., 440.20 (3) as a preponderance of the evidence.

The respondent's behavior established by this record constitutes a violation of at least three separate sections of the regulations governing professional conduct. The conduct as described in Count I of the department's complaint establishes a conviction of a crime which relates to his practice. The conduct described in Count 2 is conduct which tends to constitute a danger to the health, welfare or safety of a patient or the public. That same activity is the basis for Count 3 and demonstrates a violation of a law, the circumstances of which substantially relate to the circumstances of the practice of medicine.

Both of the instances of sexual assault occurred after the respondent obtained his license as a physician assistant. The first offense is egregious as the victim was a young child. The second offense is equally as troubling for several reasons. The respondent had previously undergone counseling for sexually dysfunctional behavior which had not adequately rehabilitated the respondent so as to protect future patients and the public from further assaults. The respondent was able to contact the second victim as a direct result of the practice of medicine, as the victim was a patient being treated for a sexually transmitted

disease. Clearly this conduct is substantially related to the practice of medicine by the respondent and is exactly the type of conduct that the regulation is designed to prohibit.

The respondent's sexually dysfunctional behavior is of long standing duration with occurrences of assaultive behavior spanning 10 years. The respondent's behavior has not been remediated by previous rehabilitation attempts. These factors indicate that revocation of his license is the most appropriate response. The respondent has demonstrated that he should not be placed in a position of public trust.

A license suspension or revocation is a penalty that should be reserved for those circumstances in which the issue of public protection requires the ultimate response. The circumstances here rise to that level. The safety of the public would not be adequately protected by calling the respondent's attention to his deficit and requiring that he improve his education and training or merely engage in more counseling. License limitations would not adequately protect the public as demonstrated by the fact that the second offense occurred at a location remote from the work environment. The respondent manipulated the circumstances to place himself and his patient at a location where coworkers and supervisors could not intervene. Such behavior clearly indicates that license limitations would not be effective to protect the public.

A revocation will also serve the third purpose of discipline, to deter other licensees from similar conduct. The medical profession requires and receives a special trust from the public. Our health, welfare, safety and our most intimate details are routinely shared and entrusted to medical personnel. The respondent's conduct here jeopardized the patient's health and welfare and violated the special trust placed in him by that patient. The attempt to gain his own sexual satisfaction under those circumstances should not be tolerated or treated lightly. A revocation of license sends a strong message to deter other licensees from similar conduct.

Costs

The assessment of costs against a disciplined professional is authorized by sec. 440.22(2), Wis. Stats., and sec. RL 2.18, Wis. Admin. Code, but neither the statute nor the rule clearly indicates the circumstances in which costs are to be imposed. The Medical Examining Board has the discretion to impose all, some, or none of the costs of the proceeding.

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 Veterinary 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 on two factors. First, the Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Moreover, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions, and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following an evidentiary or default hearing, that licensee should bear the costs of the proceeding.

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

Dated this 23rd day of February, 2005.

