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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **DANIEL J. GOECKNER, Ph.D.**,
Respondent

FINAL DECISION AND ORDER
DHA Case No. SPS-11-0035
ORDER 0001896

Division of Enforcement Case No. 08 PSY 019

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

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PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services, Division of Enforcement (Division), filed a formal Complaint against Respondent Daniel J. Goeckner (Respondent) dated April 4, 2011, and an Amended Complaint dated May 31, 2011, alleging that Respondent engaged in unprofessional conduct under Wis. Admin. Code § Psy 5.01(17). Both the original and amended complaints alleged that Respondent's conduct in joining Patient M.C. in M.C.'s business ventures constituted a failure to avoid a prohibited dual relationship and was unprofessional conduct in violation of Wis. Admin. Code 5.01(17). A prehearing conference was held on June 22, 2011, and a hearing was held before the undersigned Administrative Law Judge (ALJ) on January 9 and 10, 2012. Post-hearing briefing was completed on April 3, 2012, and on May 1, 2012, the Psychology Examining Board issued an Order which was received by the Division of Hearings and Appeals on May 7, 2012, granting Respondent's request to allow this decision to be issued as a final rather than as a proposed decision.

FINDINGS OF FACT

1. Respondent is licensed to practice psychology in the State of Wisconsin pursuant to license number 57-850. Respondent's license was first granted on June 25, 1980. (Admitted in the pleadings).

2. On or about March 4, 1999, Respondent began treating Patient M.C. (Admitted in the pleadings).

3. M.C. was a construction contractor and real estate developer. (Admitted in the pleadings).

4. Respondent and M.C. had a therapeutic relationship from March 4, 1999, through July 22, 2003. (Admitted in the pleadings).

5. No later than November 11, 2000, Respondent and M.C. entered into a business relationship for the development and sale of seven residential lots on 38 acres of land owned by Respondent in Mequon, Wisconsin, and on or about March 28, 2002, they formed Twin Oaks Properties, LLC, for that purpose. (Div. Exh. 2, pp. 151-157).

6. By January 2001, Respondent was providing therapy to M.C. to address, among other things, stress and anxiety related to M.C.'s business. Other issues discussed from March of 1999 through July 2003 included issues related to depression, stress, obesity, memory problems, marital dissatisfaction, and lack of libido and impotence. (Admitted in the pleadings; January 9, 2012 Hearing Transcript ("Tr.") pp., 64-65).

7. No later than February 21, 2002, Respondent started working for M.C. to develop marketing strategies. Respondent defined his work on "marketing strategies" to be reading books from the library and business journals given to him by M.C. and summarizing them for M.C. and his employees. Between February 21, 2002, and July 23, 2003, Respondent charged M.C. $56,500.00 for Respondent's services as a real estate marketing consultant. (Div. Exhs. 5, 3, p. 6).

8. In December 2002, at the request of M.C., Respondent advanced $300,000.00 to M.C. for the purchase of land that became Avian at Tuckaway, a condominium subdivision at Franklin, Wisconsin. (Admitted in the pleadings).

9. On or about February 10, 2003, at M.C.'s request, Respondent made a capital contribution of $670,000.00 to the construction and operation of a multi-screen movie theater in Franklin, Wisconsin, to be built by Carstensen Cinema, LLC. On February 10, 2003,

Respondent and M.C. signed an operating agreement for Carstensen Cinema, LLC, by which Respondent would share in the profit or loss from the business venture. Respondent was a member of Carstensen Cinema, LLC, which became a member of Franklin Cinemas, LLC, the latter of which neither M.C. nor Respondent were members. (Div. Exh. 4, p. 185; Admitted in the pleadings).

10. On or about February 28, 2003, M.C. offered, and Respondent agreed, that Respondent would be a 45% partner with him in Wyndham Ridge, a project for the development and sale of residential lots at Franklin, Wisconsin, and a separate commercial real estate development on seven acres on Drexel Avenue in Franklin, Wisconsin. (Div. Exh. 4, p. 185).

11. The business relationships between M.C. and Respondent were reduced to writing. (Resp. Exhs. 100, 101; Tr. 151-153).

12. At all times material, an attorney was used in order to segregate therapy from business, M.C. had his own accountant or financial advisor available, and M.C. had control over the business relationships. (Tr., pp. 163-164).

13. The Division called Dr. Steven Seaman as its expert. Dr. Seaman is a licensed psychologist, who has been licensed since 1981. He has a Ph.D. as well as a postdoctoral master's degree in psychopharmacology. He practices in clinical psychology, working in a general outpatient mental health practice with adults and adolescents on a broad range of mental health issues. He also conducts evaluations and does consultations at a local hospital. He served on the Wisconsin Psychology Examining Board from 1991 to 2000 and was Chair of the Board from 1994 through 2000, a position which is elected by the Board in annual elections. Dr. Seaman reviewed the materials relevant to Respondent's relationship with M.C., including treatment records. (Tr., pp. 39-41).

14. Dr. Seaman testified that what makes the therapy relationship different from other relationships in a person's life is that the patient knows that what is said in the room is confidential and is not going to be repeated outside of the psychologist's office. In addition, unlike other relationships in the patient's life, the therapist or psychologist does not have a vested interest in what is going on in the patient's life and is not there to meet his or her own needs, but instead, puts the patient's best interests first and focuses in an unbiased way on the patient's needs and the patient's thoughts, ideas and concerns. The psychologist's own thoughts, needs and concerns should not be part of the discussion and should not get interjected into the relationship. Psychologists receive training and supervised experience in order to ensure that the patient's interests are paramount. In contrast, other people in the patient's life might have a vested interest in the decisions the patient makes or what the patient does. In order to maintain this unique relationship between the patient and psychologist, boundaries need to be established and maintained. (Tr., pp. 42-46).

15. Dr. Seaman testified that there are dual relationships that should not exist between a patient and psychologist. While acknowledging that in an administrative proceeding, the language of the code governs the definition of "dual relationships," Dr. Seaman testified that, pursuant to his training and experience, dual relationships that are prohibited are ones where it is "quite clear . . . to virtually all psychologists that . . . the risk of harm or the risk of impairment of objectivity or exploitation or harm to the therapy relationship is so significant that it just shouldn't happen." (Tr., pp. 48-49, 51).

16. Dr. Seaman testified that in deciding whether a dual relationship was trivial or problematic, a psychologist evaluates such factors as the nature of the interactions or relationship outside of the professional office, the frequency, extent and intensity of those interactions, and

the extent to which the other relationship impinges on the professional relationship. He stated that psychologists should engage in this analysis because they have a commitment to maintaining the professional relationship with the person seeking services and not letting other factors interfere with the commitment to keep the patient's needs and goals primary. (Tr., pp. 57-59).

17. Dr. Seaman testified with respect to other concerns regarding dual relationships. He stated that a therapy relationship is a different kind of relationship in that "people come in . . . and within an hour or two are sharing information that is, in some cases, very, very personal, sometimes information and feelings that they have not shared with even their spouse or their primary care physicians, sometimes information, feelings that they have never told anybody. And so there is a feeling of closeness or intimacy that is developed as a result of that, but it's a one-sided relationship in the sense that there is not – there are not those same kinds of feelings or information shared back." As a result, it is not unusual for very strong feelings to develop on the part of the patient or client. Because the patient has shared such personal information and knows very little about the psychologist, it is also not unusual for the patient to "fill in the blanks" to some extent, and to imbue the psychologist with the patient's own ideas of what the psychologist might be like. The process is known as transference. If there is a dual relationship, the patient may then transfer that perception of the psychologist into the other, non-therapeutic relationship, ascribing the same traits the patient has given the psychologist in the professional context to the non-professional context. (Tr., pp. 60-62).

18. Dr. Seaman testified that the psychologist's independence and distance is essential to maintaining the psychologist-patient relationship, and that research is very clear that the most important part of therapy, more so than the type of therapy that is done, is the relationship and managing that relationship. (Tr., pp. 62, 64).

19. According to Dr. Seaman, the risks of harm to the patient caused by a dual relationship in which the patient is a business partner include potential betrayal of trust, a conflict of interest, a conscious or unconscious exploitation of information that is gathered in the therapy setting, information which the psychologist would not otherwise have available and that may potentially put the psychologist in an advantageous position in the business interactions, and the psychologist injecting his own personal needs into the relationship which would result in the inability of the therapy to move forward. (Tr., pp. 104-05).

20. Respondent's notes from a May 7, 1999 session indicate that M.C. related his need for approval, and Respondent's notes from a May 21, 1999 session state that M.C. "feels his lack of approval, especially from his father, is the basis for his striving for excellence in his professional life." Dr. Seaman testified that it is fairly common for a patient who is particularly concerned about approval to also look for the psychologist's approval. (Tr., pp. 66-68).

21. Dr. Seaman testified that the minimally competent psychologist would not have engaged in the type of business transactions that Respondent engaged in with his client and if he did so, would have discontinued treatment and referred the client to someone else. (Tr., pp. 71, 74, 91-92, 108-09).

22. Dr. Seaman stated his opinion to a reasonable degree of professional psychological certainty that Respondent's business transactions through December 2002 constituted the type of dual relationship that was prohibited because the relationship had the potential of impairing his judgment, the required boundaries were violated, and there was an employment, or at least a consultation, relationship. (Tr., pp. 93-94).

23. Dr. Seaman believed it would be an "odd understanding" of the administrative code in effect at the time period in question if the phrase "dual relationship" was limited only to employees, supervisees and close friends or relatives. (Tr., pp. 123-24).

24. The treatment notes for January 11, 2001 indicate that the main focus of that day's session was to address problems with insomnia due to his snoring/apnea and stress related to his business. (Tr., p. 76; Div. Exh. 1, p. 7).

25. Dr. Seaman testified that if a patient and psychologist are in business together, how the patient deals with the stress could potentially impact the psychologist's own business interest; therefore, the psychologist might not be dealing with the patient solely on the basis of what is best for the patient. For example, it might become more difficult for the psychologist to say to the patient that the patient is overwhelmed by work-related stress and needs to take three weeks off, regardless of whether the business suffers, because the patient's health is more important. It would be more difficult to do because the psychologist is invested in the business and it could impact the psychologist's financial well-being. (Tr., p. 80).

26. Respondent's entries for M.C. on September 7, 2001 indicate an "emergency extended session" of almost two hours. The crisis was job-related stress and a problem with one of the customers, how to restructure his daily schedule to include exercise for stress management, and how to change his responsibilities in the company to better handle stress in the future. (Tr., pp. 83-84; Div. Exh. 1, p. 8).

27. M.C. also sought treatment from Respondent the very next day, September 8, 2001, in another urgent session, again regarding stress management and a particular problem with the company and one of the customers, with things not appearing to go his way, which was making

him upset and angry. M.C. saw Respondent again that week, on September 10 and 11, 2001, dealing with the same problems. (Tr., pp. 84-86).

28. Dr. Seaman testified that it was "extremely uncommon" to have four sessions within such a short period of time and that it is typically an indication of someone who is in such acute distress that the individual might be about to go into the hospital. On September 20, and September 27, 2011, M.C. again saw Dr. Seaman for stress related to his job. (Tr., pp. 86-87).

29. Dr. Seaman testified that the fact that M.C. and Respondent were in business together at the same time that M.C. was coming in for an emergency session with a great deal of job-related anxiety and stress means that there is a "blurring of boundaries" and that "it makes it very difficult to know how he's going to separate his own interest in the business from . . . his role as a treating psychologist." (Tr., p. 84).

30. Dr. Rick Bauman testified as an expert on behalf of Respondent.[1] Dr. Baumann has been a licensed psychologist in Wisconsin since 1973. He received an undergraduate degree in psychology, a master's degree in behavioral cybernetics and a Ph.D. in industrial and organizational psychology. His employment background includes working as a consultant in the former Wisconsin Department of Industry, Labor and Human Relations in the area of Occupational Safety and Health. Since 1972, he has been employed with a group of consulting psychologists whose primary focus is to work with organizations of all types, government and private, federal and state,

[1] The Division states that "Respondent chose not to present expert testimony defending his dual relationship in the circumstances of that relationship" and instead relies on a "textual defense" in which the only prohibited dual relationships were those in which the psychologist's patient was an employee, supervisee, close friend or relative. (Division's Brief-in-Chief, p. 8). With regard to the statement that Respondent failed to have expert testimony defending the relationship between Respondent and M.C., the Division is clearly incorrect: Dr. Baumann testified on Respondent's behalf as to why, in his view, the relationship between respondent and M.C. did not constitute a dual relationship that was prohibited and why the relationship did not create a risk of impairing objectivity or creating a conflict of interest. Furthermore, the Division's criticism of Respondent's reliance on a "textual defense" is confusing in that Respondent's counsel is simply asserting his interpretation of the governing provisions, which is the essence of what attorneys do.

on the assessment of individuals relative to positions that they are applying for and on team development and organization within the organization. He does not act as a therapist in that position; rather, his company acts as a resource to organizations, providing support to the organizations in the organizations' choice of therapy. He has also worked at Cardinal Stritch University since 1996 as a professor, as a practicum supervisor and in the teaching of ethics, all at the graduate level of clinical psychology, and also teaches advanced personality theory. Dr. Bauman has also taught at Marquette University, one course in the Department of Psychology that addressed the assessment of individuals for both clinical and industrial purposes, and another course in the School of Business which addressed the use of tests and the assessment of individuals for key positions within organizations. He also taught at University of Wisconsin-Milwaukee in the School of Business, a course that addressed the use of assessments in the business setting. Since 2007, he has been a teacher for the Wisconsin Psychological Association in the field of ethics and the application of ethics to all degrees of psychology in the state. (Tr., pp. 141-144, 148).

31. Dr. Bauman reviewed the same materials as those reviewed by Dr. Seaman. (Tr., p. 150).

32. Dr. Bauman testified that the business transactions between M.C. and Respondent did not constitute a dual relationship prohibited by Wis. Admin. Code § Psy 5.01(17) (1991). He based his opinion on the following. He stated that the administrative rule at the time defined dual relationship to include only treating employees, supervisees, close friends or relatives. It did not mention business relationships as being prohibited. There was no indication in the materials he reviewed that M.C. was an employee supervisee, close friend or relative of Respondent. Moreover, he believed that there is on record acceptance by the Psychology Examining Board of activities involving business relationships. (Tr., pp. 158-59).

33. Dr. Bauman further testified that the business transactions between M.C. and the Respondent were not such that they may have impaired Respondent's objectivity or created a conflict of interest. Dr. Bauman based his opinion regarding Respondent's objectivity on the following factors. First, Respondent consulted the administrative code; second, he consulted with a colleague of equal status to inquire whether the colleague believed it was appropriate to engage in such activity. Third, he called what was then the Department of Regulation and Licensing in order to obtain an opinion and was told to consult the administrative code. According to Dr. Bauman, these actions show that Respondent was "aware of his responsibility and attempted to exercise that in an appropriate professional fashion."

34. Dr. Bauman's opinion that there was not a conflict of interest was based on the following. First, Respondent and M.C. used an attorney who was chosen by M.C.. Second, they chose an accountant or financial overseer who was also chosen by M.C. Third, M.C. functioned as a managing member of the business relationships "so that effectively all of the control over the business relationship was under his control." Mr. Bauman stated that such actions were consistent with the intentions of the ethics code, which is to protect the client. (Tr., pp. 158-161).

35. On cross-examination, Dr. Bauman was asked if under the administrative rule in effect at the time, it was appropriate for a psychologist to treat his or her employer and his response was that it was not prohibited. When asked the same question again, he stated, "It may or may not be. There are other circumstances." He also stated that the code was changed in 2004 for the purpose of "clarifying." (Tr., pp. 165-167).

36. On April 18, 2003, Respondent signed a psychological evaluation report on M.C., which report was required as a prerequisite for bariatric surgery. (Admitted in the pleadings).

37. Disagreements over the operation and financing of their multiple ventures escalated to the point that Respondent threatened M.C. with criminal prosecution in an effort to persuade M.C. to resolve a business dispute in Respondent's favor and have further led to multiple lawsuits between Respondent and M.C. (Div. Exhs. 2-5, 6, p. 2).

38. Respondent has never been the subject of past professional discipline.

DISCUSSION AND CONCLUSIONS OF LAW

Burden of proof.

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. § 440.20(3). To prove by a preponderance of the evidence means that it is "more likely than not" that the examined action occurred. *See State v. Rodriguez*, 306 Wis. 2d. 129, 141-142, 743 N.W.2d 460 (Ct. App. 2007), citing *United States v. Saulter,* 60 F.3d 270, 280 (7th Cir. 1995).

Alleged violations.

At the time of the conduct at issue in this case, Wis. Admin. Code § 5.01(17) (1991) provided:

> **Psy 5.01 Professional conduct.** The practice of psychology is complex and varied and, therefore, allows for a broad range of professional conduct. The following acts constitute unprofessional conduct by applicants for licensure and licensees of the board and are prohibited. . . .
>
> (17) Failure to avoid dual relationships or relationships that may impair one's objectivity or create a conflict of interest. Dual relationships include treating employes, supervisees, close friends or relatives.

Unlike the current administrative code, at the time of the alleged conduct here, the administrative code offered no separate provision defining the phrase "dual relationships," nor

did § 5.01(17) use the phrase, "prohibited dual relationships." The current version of § 5.0(17) prohibits "[f]ailure to avoid prohibited dual relationships." The current definition of "prohibited dual relationship" is contained in Wis. Admin. Code § Psy. 1.02(9), which states: "'Prohibited dual relationship' means a dual relationship which may impair objectivity or effectiveness, or permit exploitation, or create an actual, apparent or potential conflict of interest." The phrase "dual relationship" is now defined as "a situation in which a psychologist provides professional services to a person with whom the psychologist has another relationship such as, but not limited to, relatives, close friends, employees or employers, students or other supervisees." Wis. Admin. Code § 1.02(5m).

Both the original Complaint and the First Amended Complaint used the phrase "prohibited dual relationship" which was contained and defined in the current version of the administrative code but was not contained or defined in the version of § Psy 5.01(17) that existed at the time of Respondent's conduct. In addition, both the Complaint and Amended Complaint also used the current definitions of "prohibited dual relationship" and "dual relationship," definitions which were not yet in existence during the time period in question. The First Amended Complaint in this case states:

> 17. Wisconsin Administrative Code § Psy 1.02(5m) defines "dual relationship' as "a situation in which a psychologist provides professional services to a person with whom the psychologist has another relationship such as, but not limited to, relatives, close friends, employees or employers, students or other supervisees."
>
> 18. Wisconsin Administrative Code § Psy 1.01(9)[2] defines "prohibited dual relationship" as "a dual relationship which may impair objectivity or effectiveness, or permit exploitation, or create an actual, apparent, or potential conflict of interest."
>
> 19. Respondent's conduct in joining Patient M.C. in Patient M.C.'s business ventures constituted failure to avoid a prohibited dual relationship, and is unprofessional conduct in violation of Wis. Admin. Code § Psy 5.01(17).

[2] This citation appears to contain a typographical error: the Division likely meant 1.02(9), not 1.01(9).

Accordingly, Respondent argues that the Division charged him with a "violation of a Code provision that did not exist at the time of the complained of conduct." (Respondent's Brief-in-Chief, p. 2, n.1).

Although not critical to this decision, I note that Respondent's characterization is inaccurate. While it is true that the definitions contained in paragraphs 17 and 18 were based on the current code rather than on the code in effect at the time of the conduct, paragraph 19 clearly charges Respondent with "unprofessional conduct in violation of Wis. Admin. Code § Psy 5.01(17)," a provision which did in fact exist at the time of the conduct. Nor is it significant that paragraph 19 contains the phrase "prohibited dual relationships," a phrase which was not used in 5.01(17) at the time of the conduct. The version of § 5.01(17) that was in place during the relevant time period explicitly stated that "dual relationships" were "prohibited." Therefore, the Amended Complaint's use of the phrase, "prohibited dual relationship," was not in itself misleading. In addition, Respondent was clearly on notice of the violation alleged, § 5.01(17), and the facts which formed the basis of that allegation, and was able to adequately prepare a defense to the allegation. Moreover, to the extent there was any question about which administrative code language governed the disciplinary proceedings, it was clear that Respondent was aware during the deposition of the Division's expert three months prior to the date of the hearing that the language of the applicable provisions had changed between the time of the conduct and the time the Complaint and Amended Complaint were issued. (Resp. Exh. 107, p. 38).

Respondent also states that under the current version of § Psy 5.01(17), there are alternative ways of committing unprofessional conduct: by failing to avoid a "dual relationship" *or* by failing to avoid "relationships that may impair one's objectivity or create a conflict of

interest." He asserts that the Division's Amended Complaint specifically limits its allegation to "failure to avoid a prohibited dual relationship" and did not allege that he failed to avoid "relationships that may impair one's objectivity or create a conflict of interest." (Respondent's Brief-in-Chief, p. 3). Respondent appears to suggest that this tribunal may not consider the issue of whether Respondent's relationship with M.C. was one which "may impair [his] objectivity or create a conflict of interest."

Respondent's assertion is not convincing. First, it is clear from the record, including the Division's briefs and its expert testimony, that the Division has been operating under the assumption that the language "or relationships that may impair one's objectivity or create a conflict of interest" is simply an *explanation* of the preceding phrase "dual relationship" and that these phrases do not constitute separate violations or even separate means of committing the same violation. Relying on a dictionary definition of the word "or" contained in Webster's New World Dictionary of the American Language, 2nd College Ed. 1982, the Division states that the term "or" as used in the phrase "or relationships that may impair one's objectivity or create a conflict of interest" should be read as "a conjunction introducing a synonymous word or phrase." (Division's Brief-in-Chief, p. 10). In other words, the phrase "relationships that may impair one's objectivity or create a conflict of interest" is just another way of saying "dual relationship." While some canons of statutory construction might undermine that interpretation (*i.e.*, the Division's interpretation could render the phrase "dual relationship" a nullity), the Division's interpretation appears to have legitimacy in light of the subsequent history of that provision. The current code prohibits a psychologist from failing to avoid a "prohibited dual relationship" which is now defined in a manner very similar to the code's former phrase "relationships that may impair one's objectivity or create a conflict of interest." As previously stated, "prohibited dual

relationship" is now defined as "a dual relationship which may impair objectivity or effectiveness, or permit exploitation, or create an actual, apparent, or potential conflict of interest." Wis. Admin. Code § Psy 1.01(9).

However, even if the Division's interpretation is incorrect, the allegation contained in paragraph 19 of the Amended Complaint is broad enough to include all of § Psy 5.01(17) and not just the "dual relationship" language. Paragraph 19 states that Respondent's conduct "constituted failure to avoid a prohibited dual relationship *and is unprofessional conduct in violation of Wis. Admin. Code § Psy 5.01(17).*" (Emphasis added). Finally, even if Respondent is correct that the Complaint alleged only a "dual relationship" and not a "relationship[] that may impair one's objectivity or create a conflict of interest," it is clear from the hearing transcript that the issue of whether Respondent failed to avoid a "relationship[] that may impair one's objectivity or create a conflict of interest" was fully tried by both parties, with their respective experts testifying on that issue. Thus, that issue is properly before this tribunal.

Admissibility of Dr. Seaman's testimony regarding minimally acceptable standards for psychologists.

At the hearing, counsel for the Division repeatedly asked Dr. Seaman questions related to the minimally acceptable (or minimally competent) standard of care for psychologists, asserting that this issue is relevant in all licensing disciplinary actions. (Tr., pp. 71-72; 91-92, 95). Counsel for Respondent objected to this line of questioning on grounds that the questioning was irrelevant and overbroad. Respondent's counsel asserted that the issue of minimal standard of competency is relevant to standard of care allegations, not to dual relationship allegations. The ALJ reserved judgment on the objection and directed the parties to brief the issue. (Tr., pp. 96-97).

In his brief, Respondent argues that the Amended Complaint did not allege that Respondent failed to adhere to minimally acceptable standards; therefore, consideration of this issue at hearing would violate his due process rights. He also renews his objection based on relevancy, asserting that he was charged with very specific conduct – failure to avoid a dual relationship – and that the issue of minimally acceptable standards is irrelevant to the charge alleged.

In support of its position that the issue of minimally acceptable standards is always relevant in disciplinary proceedings, the Division relies on the following cases: *Gilbert v. Medical Examining Board*, 119 Wis. 2d 168, 349 N.W.2d 68 (1984); *Stringenz v. Dept. of Regulation and Licensing, Dentistry Examining Board*, 103 Wis. 2d 281, 307 N.W.2d 664 (1981); *Noesen v. Dept. of Regulation and Licensing, Pharmacy Examining Board*, 2008 WI App 52, 311 Wis. 2d 237, 751 N.W.2d 385; *Krahenbuhl v. Dentistry Examining Board*, 2006 WI App. 73, 292 Wis. 2d 154, 713 N.W.2d 152; and *Gimenez v. Medical Examining Board*, 203 Wis. 2d 349, 552 N.W.2d 863 (Ct. App. 1996).

The Division's reliance on these cases is misplaced. They simply do not stand for the proposition that the Division states they do, namely, that the issue of whether a licensee adhered to minimally acceptable or competent standards is an issue in every disciplinary proceeding, including those which allege violations of § Psy 5.01(17). The cases which require professional Boards to examine whether the licensee adhered to minimally acceptable standards of care involve allegations related to general standard of care violations. Indeed, in *Krahenbuhl*, a case involving unprofessional conduct by perpetrating fraud on a patient, the court rejected the argument that the Dentistry Examining Board needed to determine whether the dentist's methods were below minimally acceptable standard of care. The court stated that the tests articulated in

Gilbert and *Giminez* (which includes analyzing minimally acceptable standards of care) "does not apply to professional discipline cases such as this one that are not based on allegations involving a course of treatment that is dangerous or detrimental to the patient or the public." *Krahenbuhl*, 2006 WI App. 73, ¶ 1. The court further noted: "*Giminez*, which involved an entirely different statute than the one at issue here, expressly limits the application of the test to cases where the medical professional is charged with choosing a course of treatment that is dangerous or detrimental to his or her patient or to the public." *Id.*, ¶ 25.

Accordingly, I will not consider any testimony regarding the minimally acceptable standards for psychologists or what the minimally competent psychologist would or would not have done.

Violations of the Wisconsin Administrative Code.

As previously stated, at the time of the conduct alleged in this case, Wis. Admin. Code § 5.01(17) provided:

> **Psy 5.01 Professional conduct.** The practice of psychology is complex and varied and, therefore, allows for a broad range of professional conduct. The following acts constitute unprofessional conduct by applicants for licensure and licensees of the board and are prohibited. . . .
>
> (17) Failure to avoid dual relationships or relationships that may impair one's objectivity or create a conflict of interest. Dual relationships include treating employes, supervisees, close friends or relatives.

Unlike the current administrative code, at the time of the alleged conduct the administrative code offered no separate provision defining the phrase "dual relationships." Respondent asserts that under § 5.01(17) as it existed at the time of the alleged conduct, the definition of "dual relationships" was contained in the second sentence of subparagraph (17), which states: "Dual relationships include treating employes, supervisees, close friends or relatives." Respondent's position is that any relationship outside of those specifically listed

cannot constitute a dual relationship under that provision. As support for this interpretation, Respondent notes the current definition of "dual relationship" which states: "'Dual relationship' means a situation in which a psychologist provides professional services to a person with whom the psychologist has another relationship *such as, but not limited to*, relatives, close friends, employees or employers, students or other supervisees." (Emphasis provided). Respondent notes that the current definition, unlike the prior version of § Psy 5.01(17), contains the language "but not limited to," which Respondent asserts is evidence that the prior version meant to limit the definition of dual relationship to only those relationships specifically delineated in § Psy 5.01(17).

Respondent's interpretation is not convincing. "Generally, the word 'includes' is to be given an expansive meaning, indicating that which follows is but a part of the whole. . . . [C]ourts may read 'includes' as a term of limitation or enumeration, so that a statute encompasses only those provisions or exceptions specifically listed . . . only where there is some evidence that the legislature intended it to apply." *Wisconsin Citizens Concerned for Cranes and Doves v. Wisconsin Dept. of Natural Resources*, 2004 WI 40, ¶ 17 n.11, 270 Wis. 2d 318, 677 N.W.2d 612; *see also State v. Popenhagen*, 2008 WI 55, ¶ 43, 309 Wis. 2d 601, 749 N.W.2d 611; Wisconsin Bill Drafting Manual 2011-2012, § 2.01(1)(i) at 39 ("The term 'includes' conveys a meaning of nonexclusiveness and allows a court or administering agency to adopt additional meanings . . . . Do not use 'includes but is not limited to.' That phrase is redundant.").

Here, there is no evidence that the term "include" is used as a limitation or enumeration, encompassing only those relationships specifically listed. The fact that the language, "but not limited to" was subsequently added to the rule does not necessarily mean that prior to the

addition of that language, the list of relationships contained in the provision was an exhaustive list of the relationships constituting dual relationships. Equally plausible is that the language was added to clarify that the original list of relationships was not exhaustive. Therefore, the general rule regarding "includes" (or, in this case, "include") applies, and that term is given an expansive meaning, indicating that the list which follows is but a part of the whole. As a result, a business relationship with a client may also constitute a dual relationship even though it is not contained in the list of relationships provided in § Psy 5.01(17).

Having determined that relationships other than those specifically enumerated in Wis. Admin. Code § Psy 5.01(17) may constitute a dual relationship, the next question is whether the relationship in this case was a dual relationship or one that that may have impaired Respondent's objectivity or created a conflict of interest. Based on the facts of this case, the preponderance of evidence shows that Respondent's business relationship with M.C. was a dual relationship and one that may impair Respondent's objectivity or created a conflict of interest.

The scale of Respondent's business relationship with M.C. in terms of dollars, duration and immediate connection to the topics and purpose of the therapeutic relationship warrants the finding of a violation under Wis. Admin. Code § Psy 5.01(17). The business relationship included the following: (1) the development and sale of seven residential lots on land owned by Respondent at Mequon, Wisconsin, and the formation of Twin Oaks Properties, LLC, for that purpose; (2) Respondent's work for M.C. to develop marketing strategies, for which Respondent charged M.C. $56,500.00; (3) Respondent's advancement of $300,000.00 to M.C. in aid of the purchase of land that became Avian at Tuckaway, a condominium subdivision at Franklin, Wisconsin; (4) Respondent's capital contribution of $670,000.00 to the construction and operation of a multi-screen movie theater in Franklin, Wisconsin, to be built by Carstensen

Cinema, LLC, whose operating agreement stated that Respondent would share in the profit or loss from the business venture; and (5) Respondent's becoming a 45% partner with M.C. in Wyndham Ridge, a project for the development and sale of residential lots at Franklin, Wisconsin, and a separate commercial real estate development on seven acres on Drexel Avenue in Franklin, Wisconsin.

During the course of Respondent's business relationship with M.C., one of the primary issues for which M.C. was seeking therapeutic help was work-related stress, in addition to more intimate issues such as the need for approval, marital dissatisfaction, lack of libido and impotence. At times, there were emergency and extended therapy sessions indicating that M.C.'s problems were acute.

Dr. Seaman testified regarding the paramount importance of the psychologist-patient relationship, the need for confidentiality and the psychologist's objectivity. The extensive business relationship held significant potential for compromising the therapeutic relationship, Respondent's objectivity and the patient's expectation of and need for confidentiality, particularly given the possibility that the business relationship could turn sour, as it did here. Indeed, as a result of the litigation resulting from the business relationship between Respondent and M.C., Respondent's confidential communications were in fact disclosed. At the June 25, 2010 jury trial involving Respondent and M.C., the following testimony from Respondent was elicited:

> Q Will you also concede that in that [University psychology] program there is training about the significance of maintaining patient confidences?
>
> A Yes, there is.
>
> Q Will you concede that it is incredibly important to someone who is coming to see you as a patient that they know they can bare their soul to you about their

concerns, their problems, their self-esteem so that you can help them, and they can trust that you will not share that information with other people?

A Basically, yes.

Q That is part of your training at the University of Illinois; is it not?

A That is correct.

Q That is part of the expectation in your professional code of conduct; is it not?

A That is correct.

Q It is also part of the expectation that's placed upon you as a required professional by the State of Wisconsin; is it not?

A That is correct.

Q Yet you walked into this courtroom in a fight over money and testified under oath as to the intimate details of your patient's life to start your testimony in this case. Is that true?

A That is correct.

(Div. Exh. 3, pp. 15-16). While this disclosure did not occur during the therapeutic relationship, Respondent's extensive and complex business relationships with M.C. created a substantial risk of such disclosure occurring.

Dr. Seaman also testified that one of the dangers of the therapist and client being in a business relationship is that the manner in which the patient deals with the stress could potentially impact the psychologist's own business interest; therefore, the psychologist might not address the patient solely on the basis of what is best for the patient. For example, because of the psychologist's investment in the business and potential threats to the psychologist's financial well-being, it might become more difficult for the psychologist to tell the patient that the patient is overwhelmed by the stress and needs to take time away from the business, regardless of whether the business suffers, because the patient's health is more important.

Dr. Seaman also testified that it is fairly common for a patient who is particularly concerned about approval, as was Respondent, to also look for the psychologist's approval. This also had the potential to give Respondent an unfair advantage in the business relationship and to work against M.C.'s therapeutic and business interests.

Dr. Seaman stated his opinion to a reasonable degree of professional psychological certainty that Respondent's business transactions with M.C. constituted the type of dual relationship that was prohibited. He stated that the relationship had the potential of impairing Respondent's judgment and that the relationship had the potential for an impermissible blurring of boundaries and difficulty in separating Respondent's own interests in the business from his role as a treating psychologist.

Based on the foregoing, I conclude that the preponderance of evidence supports the Division's allegation that the business relationship between Respondent and M.C. constituted a dual relationship prohibited by § Psy 5.01(17) and was one which "may impair [] objectivity or create a conflict of interest."

Dr. Bauman's testimony to the contrary was not sufficiently persuasive. One of the primary grounds on which he based his conclusion that the business transactions between M.C. and Respondent did not constitute a dual relationship has already been rejected above – *i.e.*, that § Psy 5.01(17) (1991) defined dual relationship to include only treating employees, supervisees, close friends or relatives, and that a business relationship could not be a prohibited dual relationship. Dr. Baumann also based his opinion on his belief that there was on record acceptance by the Psychology Examining Board of activities involving business relationships. However, that case, *In the Matter of Disciplinary Proceeding Against Andrew W. Kane*, Case No. LS 9805081 PSY (March 8, 2000), was not in fact a Board decision, but was a decision issued by a hearing examiner.

While this tribunal generally follows prior decisions of professional Boards, the *Kane* decision, issued by a hearing examiner, is not precedent in this proceeding.

In addition, while not necessarily condoning the outcome in the *Kane* decision, I also note that *Kane* is distinguishable from the situation here because the scope of the business interactions in *Kane* does not come close to what transpired here. That case involved a one-time loan of a psychologist, Dr. Kane, to his client of $1,800 for her mortgage payments and other bills, such as telephone and gas, related to her house. She needed the loan in order to postpone or eliminate foreclosure by her bank. Dr. Kane, after consulting with a colleague, executed a promissory note which was due a year and a half later, for the amount, plus interest, at a rate of 15% per annum, with payments made monthly, and which provided Dr. Kane a lien on the client's home. The client repaid Dr. Kane the amount, plus interest, when she sold her house, one month after the date the loan was due, in October of 1985. In addition, Dr. Kane hired the client for miscellaneous office services at various times during a four-month period in 1984, for which the client was paid less than $70, and for photocopying in 1985, for which she was credited on her bill in the amount of $370.

Unlike *Kane*, which involved relatively simple transactions for discrete amounts during a relatively short period of time, this case involves complex business transactions involving hundreds of thousands of dollars over the course of several years, during a time in which the patient was being treated for anxiety and stress related to his business, among other problems.

Dr. Bauman also stated his belief that the business transactions between M.C. and the Respondent were not such that they may have impaired Respondent's objectivity or created a conflict of interest. With respect to objectivity, Dr. Baumann based his opinion on the following facts. First, Respondent consulted the administrative code prior to entering into the transactions; second, he consulted with a colleague of equal status and inquired as to whether it was inappropriate

to engage in such activity; and third, he called what was then the Department of Regulation and Licensing in order to obtain an opinion whereupon he was told to consult the administrative code. Dr. Bauman's opinion that there was not a conflict of interest was based on the fact that Respondent and M.C. used an attorney who was chosen by M.C., they chose an accountant or financial overseer who was also chosen by M.C., and M.C. functioned as a managing member of the business relationships.

I conclude that the factors identified by Dr. Baumann against a finding of a dual relationship and a risk of impairment of objectivity or a conflict of interest are outweighed by the factors identified by Dr. Seaman in support of such findings.

Based on the entire record, the Division has met its burden of establishing that Respondent violated Wis. Admin. Code § 5.01(17).

Appropriate discipline.

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division recommends that Respondent's license be revoked. Respondent's counsel states that there should be no discipline because there was no violation.

I conclude that the Division's recommendation is too severe under the circumstances here. Instead, I conclude that a reprimand and suspension of six months is appropriate, with a requirement that Respondent complete fifteen hours of ethics courses approved by the Psychology Examining Board prior to his license becoming reinstated.

In addition to the three purposes of discipline noted above, I base the discipline imposed in this case on the following factors. Respondent has been a practicing psychologist for over

thirty years and has no prior disciplinary record. In addition, there was no evidence to dispute Dr. Baumann's testimony that Respondent contacted the former Department of Regulation and Licensing before entering into the business relationships and that he was told to check the administrative code, which he did. Likewise, there was no evidence disputing the testimony that prior to entering into the business relationship with M.C., Respondent spoke with a colleague of equal stature to inquire about the appropriateness of such conduct. These actions demonstrate that Respondent was at least cognizant of his ethical and professional responsibilities, although it should have been obvious to him that the scope of his business relationships with M.C. posed real and significant risks to the therapeutic relationship, the type of risks expressly contemplated by § Psy 5.01(17).

I also note that in addition to the egregiousness of the conduct constituting a violation of Wis. Admin. Code § Psy 5.01(17), the Division bases its revocation request in part on Respondent's failure to testify and to appear for the second day of hearing. Respondent appeared at the hearing during the entire first day, during which he did not testify. On the second day scheduled for hearing, rather than present any further testimony in Respondent's defense in addition to the testimony of Dr. Bauman, Respondent's counsel rested its case. Respondent was not present. Respondent's counsel argues that this was a tactical decision and that there was no need for Respondent's testimony because counsel believed the Division had not met its burden. While it is impossible to speculate whether Respondent's testimony would have helped or hurt his case, either in proof of the alleged violation or in the disciplinary phase of the hearing, I cannot conclude that his failure to testify or appear on the second day of hearing is grounds for more severe discipline. He was available for hearing the first day of hearing and could have been called by the Division, who had named him as a potential witness. That a tactical decision was made by Respondent's

counsel to not have Respondent testify on his own behalf should not be used against Respondent in disciplining him.

The Division also states that Respondent's conduct during the therapeutic relationship and during the lawsuits and disciplinary proceeding which followed demonstrate that he cannot be rehabilitated because he does not believe he did anything wrong. However, the decision in this case and the discipline imposed should serve to demonstrate to Respondent that his conduct was in fact wrong and in violation of the administrative code and should promote the interests of rehabilitation, protection of the public and deterrence.

Costs.

The Division requests that Respondent be ordered to pay the full costs of its investigation and of these proceedings. In *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), the Chiropractic Examining Board stated that the determination of costs should be based on consideration of several factors, including:

1. The number of counts charged, contested, and proven;
2. The nature and seriousness of the misconduct;
3. The level of discipline sought by the parties;
4. The respondent's cooperation with the disciplinary process;
5. Prior discipline, if any;
6. The fact that the Department of [Safety and Professional Services] is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct;

7. Any other relevant circumstances.

Considering the factors delineated in the *Buenzli-Fritz* decision, Respondent should be assessed seventy-five percent of the recoverable costs. The Amended Complaint only alleged one count, although the conduct forming the basis of that count occurred over several years. The conduct was serious and the Division recommends revocation as a result. The discipline actually imposed is a reprimand and suspension of six months, with fifteen hours of ethics training. Moreover, Respondent has not had any other disciplinary action taken against him in his thirty-plus years of practice.

In addition, there is no argument that certain allegations were investigated and litigated unnecessarily and, given the program revenue nature of the Department of Safety and Professional Services, fairness dictates imposing seventy-five percent of the costs of these disciplinary proceedings on Respondent and not on fellow members of the psychology profession who have not engaged in such conduct.

Based on the foregoing, it is appropriate to require Respondent to pay seventy-five percent of the costs incurred in this matter. The amount of costs will be determined pursuant to Wis. Admin. Code § SPS 2.18.

ORDER

For the reasons set forth above, IT IS ORDERED that Respondent Daniel J. Goeckner will undergo a **reprimand** and that his license to practice psychology in the State of Wisconsin be and is hereby **suspended for a period of six months** and will not be reinstated until Respondent completes **fifteen hours of ethics training approved by the Psychology Examining Board.**

IT IS FURTHER ORDERED that Respondent shall pay **seventy-five percent of the recoverable costs** in this matter in an amount to be established pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

Department Monitor
Department of Safety and Professional Services
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935
Telephone: (608) 267-3817
Fax: (608) 266-2264

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Daniel J. Goeckner.

Dated at Madison, Wisconsin on June 8, 2012.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
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Telephone: (608) 266-7709
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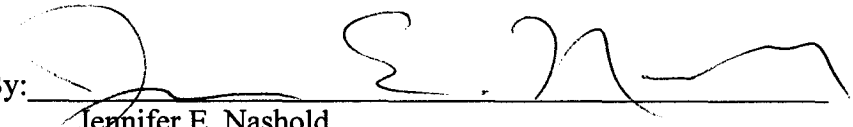
By: 
Jennifer E. Nashold
Administrative Law Jud

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