

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

MARILYN A. FITZGERALD, L.L.P.,

Petitioner,

v

File No. 94-11846-AA
HON. PHILIP E. RODGERS, JR.

MICHIGAN DEPARTMENT OF
COMMERCE, BOARD OF
PSYCHOLOGY,

Respondent.

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DECISION AND ORDER

Marilyn Fitzgerald, Petitioner, seeks reversal of a Final Order issued by the Board of Psychology, Respondent, revoking her license to practice psychology. Petitioner conducted a private practice in psychology in Traverse City and accepted Rebecca K. into her practice for treatment. Rebecca was seeking help to deal with a dysfunctional marriage. During therapy sessions, Rebecca K.'s husband, Randy K., was invited by Rebecca K. to attend sessions to help with communication skills. After approximately eighteen months of therapy, Petitioner terminated care in April, 1987. Rebecca K. and Randy K. subsequently divorced. After termination of therapy, Petitioner and Randy K. began dating and married in 1990.

On June 12, 1990, the Attorney General's office filed an administrative complaint against Petitioner, a limited licensed psychologist. A first amended complaint filed on December 14, 1990 was superseded by a second amended complaint filed on June 14,

1991. In the complaints, the State of Michigan alleged that Petitioner violated provisions of Michigan's Public Health Code, MCL 333.16221(a), (b)(i) and (g); MSA 14.15(16221), and MCL 333.18223(2); MSA 14.15(18223); R 338.2514(8).¹

Michigan statutory law provides for the investigation of complaints against licensees. MCL 333.16221, entitled Investigation of licensee; grounds, provides in pertinent part, as follows:

The department may investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration. The department may hold hearings, administer oaths, and order relevant testimony to be taken and shall report its findings to the appropriate disciplinary subcommittee. The disciplinary subcommittee shall proceed under section 16226 if it finds that any of the following grounds exist:

(a) A violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition which impairs, or may impair, the ability to safely and skillfully practice the health profession.

(b) Personal disqualifications, consisting of any of the following:

(i) Incompetence.

* * *

(g) A violation, or aiding or abetting in a violation, of this article or of rules promulgated under this article.

MCL 333.18223(2), entitled Licensure; qualifications, provides, in pertinent part, as follows:

. . . Except for duties performed as an employee of a governmental entity or of a nonprofit organization serving benevolent and charitable purposes, 2 limitations shall be placed on a license granted to an individual

¹ Rule 2514(8) pertains to restrictions on advertising which apply to limited license psychologists. Respondent Board affirmed the ALJ's finding that Petitioner did not violate this rule. The issue is moot; for that reason, this Court will not address the issue in this decision and order.

under this subsection. The limitations shall require supervision by a psychologist who has a license other than a limited license and shall prohibit advertising or other representation to the public which will lead the public to believe the individual is engaging in the practice of psychology. . .

The ALJ held hearings on February, 3, 1992 and June 9, 1992. In March, 1993, the ALJ issued a Proposal for Decision dismissing all charges. Subsequently, both parties filed Exceptions to the Proposal for Decision. In November, 1993, Respondent affirmed, with amendments, the ALJ's findings of fact and affirmed in part and rejected in part the ALJ's conclusions of law, and ordered that Petitioner's license be revoked.

This action commenced with the filing of a Petition for Review of Respondent's Final Order dated November 18, 1993. Petitioner seeks reversal of the above described order, vacation of the revocation of Petitioner's license, and fees and costs related to this appeal. The parties filed their respective briefs. This Court heard the parties' oral arguments on August 8, 1994 and has reviewed the petition, briefs and Court file.

At issue is whether the social/sexual relationship which Petitioner entered into with Randy K. violated the professional standards for a limited licensed psychologist. The following synopsis is taken from Petitioner's brief, pages 4-6.²

In 1985 and 1986, Ms. Fitzgerald was receiving referrals to her private practice from a marital encounter organization developed by the Catholic Church called Beginning Experience. Beginning Experience is designed for "people who are divorced and separated and getting back into the mainstream". Both men and women were referred to Ms. Fitzgerald, and she personally treated a number of them. Rebecca K. was referred to Marilyn Fitzgerald through Beginning Experience.

Ms. Fitzgerald first began treating Rebecca K. in January, 1986. Ms. Fitzgerald stated that Rebecca K.

²In her brief, Petitioner referenced the transcripts of ALJ hearings, held on February 3, 1992 and June 9, 1992, to support the following statements. For purposes of this Order, this Court has omitted page references to the transcripts.

told her "that [her] marriage was over, [and] she was coming to [Ms. Fitzgerald] for adjustment counseling to get back on her feet, presumably because of Ms. Fitzgerald's experience in the area of adjustment disorders. During the course of eighteen months of counseling, Rebecca K. revealed that her husband had been involved in numerous affairs, had left Rebecca K. five times, and that each such separation involved a woman.

Rebecca K. sought counseling from Ms. Fitzgerald because Rebecca K.'s marriage was over and she needed counseling to make a fresh start. To effectuate Rebecca K.'s goals, Ms. Fitzgerald set forth several areas that would be concentrated on during the therapy, including increasing Rebecca K.'s self-esteem, developing independent thinking and behavior, and developing the ability to identify feelings and needs, and to express these to significant others.

Among other things, Ms. Fitzgerald encouraged Rebecca K. to complete her teaching certification, which she eventually did. This facilitated bolstering Rebecca K.'s self-esteem and ability to think and act independently.

At the request of Rebecca K., Rebecca K.'s estranged husband, Randy, was invited to several counseling sessions. Randy K. was never a patient of Marilyn Fitzgerald; Ms. Fitzgerald never kept notes or records of Randy K., never billed for services to Randy K., and never addressed any distinct concerns or problems that he might have had. He never attended a session from beginning to end, but would simply fill a situational role-playing duty, and, when done, "would be back out the door".

In March, 1987, Ms. Fitzgerald completed a gradual movement out of private practice. She ceased treatment of Rebecca at that time, believing Rebecca was essentially independent and self-sufficient. Ms. Fitzgerald provided the name of another therapist should Rebecca K. seek treatment in the future. The eighteen months Ms. Fitzgerald spent counseling Rebecca K. was significantly longer than the three to four months she typically spent with a patient, and Ms. Fitzgerald believed that, at that time, the initial therapy goals that had been set out had been satisfied.

In August of 1987, Ms. Fitzgerald met Randy K. for a social breakfast at his invitation. Randy K. had been separated and living apart from Rebecca K. for almost two years at that time. Randy K. had requested the meeting

to discuss separation issues relating to the couple's children. Most of the conversation was social. Ms. Fitzgerald and Randy K. had what one would term a "first date" in October or November of 1987. A romantic relationship ensued, culminating in their cohabitating in August, 1988, and their marriage thereafter. They remain married today.

Concerned of the effect her relationship with Rebecca K.'s former husband would have on her, Ms. Fitzgerald discussed with Rebecca K. whether dating Randy K. would be a problem to Rebecca K. In a phrase quoted by Administrative Law Judge Renee Russell in her Proposal for Decision, Rebecca K. "laughed it off". Although no American Psychological Association standard was at all critical of Ms. Fitzgerald's actions, since Randy K. had not been a patient of hers, Ms. Fitzgerald sought to protect Rebecca K. and provided her with referral information, should problems develop.

The following text from Respondent's brief, pages 4-5 includes facts which, in some instances, are contrary to the history and relationships as described above in Petitioner's brief.³

. . .Some time [sic] in the spring of 1986 Randy K. moved back to the marital home he shared with Becky K. Petitioner was aware that Randy K. moved back in with his family, and that during the entire time Petitioner was counseling Becky K. between January 1986 and March or April 1987 the couple remained married and living together. . .

Becky K's initial visits to Petitioner were bi-monthly, but at times she was seen on a weekly basis. In approximately October 1986 Petitioner also began seeing Randy K during therapy sessions. Petitioner testified that she saw Randy at Becky's request, and did not consider him to be a patient but saw him "during parts of sessions, I think about nine times". Christine Nicewicz, an investigator with the Department of Commerce, Health Investigation Division, testified that she interviewed Petitioner in conjunction with this licensing matter and was told by Petitioner that Petitioner first began seeing Randy K in October 1986.

³ In its brief, Respondent referenced the transcripts of ALJ hearings, held on February 3, 1992 and June 9, 1992, to support the following statements. For purposes of this Order, this Court has omitted references to the transcripts.

There is minor variance regarding the date of the last therapy session. Becky K testified it was in the spring of 1987 that she stopped seeing Petitioner. Ms. Nicewicz testified that Petitioner told her the therapeutic relationship with Becky K ended in February of 1987 and that she then terminated her therapeutic relationship with Randy K in March of 1987. Petitioner's records show a last therapy session on approximately March 10, 1987.

The ALJ's Proposal for Decision included an analysis of whether there was a patient/therapist relationship between Randy K. and Marilyn Fitzgerald. Petitioner denies that Randy K. was her patient. The ALJ concluded that Randy K. was not Petitioner's patient. Respondent concluded that Randy K. was in fact Petitioner's patient and cited testimony of the two expert witnesses. Respondent's Findings of Fact and Conclusions of Law, p 5. Petitioner argues in her brief that the experts were responding to hypothetical scenarios rather than the facts of this case. This Court finds that the experts' opinions based on the hypothetical facts are material to this controversy.

Testifying as expert witness for the State of Michigan was licensed psychologist, Charles Clark, Ph.D. Testifying as expert witness for Petitioner was licensed psychologist, Barry Mintzes, Ph.D. The following excerpts of the ALJ's Proposal for Decision are summarized and reflected in Respondent's Findings of Fact and Conclusions of Law:

Charles Clark, Ph.D., is a licensed psychologist with a private practice in Ann Arbor. He has been licensed in Michigan since 1981. He testified as a [sic] expert on behalf of the State for purposes of developing the proper standard of care. Dr. Clark stated that there is no separate standard of care for limited licensed psychologists or psychologists, nor is there a different standard by region in the state.

Dr. Clark stated that in marital counseling even where one partner starts the counseling, when both participate, both are patients. When [c]ouple therapy ends and a counselor continues to see only one partner, it can become sticky because of the potential for it to appear that a therapist is taking sides with the partner still in therapy. Further, a therapist should not assume that telling patients that therapy is terminated means

that their feelings about the therapist-patient relationship automatically terminate.

Although there is no school of thought that restricts all future contact between a therapist and a patient, a therapist owes a standard of care and consideration beyond the technical end of therapy and the therapist should carry the burden of proof that no harm to a patient has occurred where as in this case, a relationship with one partner continues past the official therapy. This is especially true during the first three (3) months or so after termination of therapy.

* * *

Barry Mintzes, Ph.D., has been licensed as a psychologist in Michigan for twenty one (21) years. At the time of the hearing he was engaged in the private practice of psychotherapy in East Lansing, Michigan. He is also involved in forensic psychological evaluations and correctional consultations. Exhibit A is Dr. Mintzes resume.⁴ He was qualified as an expert to speak to the standard of care regarding issues in this matter.

* * *

Dr. Mintzes has served on committees of State Boards considering the ethical issues regarding therapists and patients and has reviewed the materials regarding the complaint against Marilyn Fitzgerald. He described a dual relationship as one where the therapist is having a relationship with a patient in addition to the therapeutic relationship. He stated that the American Psychological Association has written standards which prohibit dual relationships with patients that are currently patients. Only recently have standards addressed relationships with former patients. Only since February of 1992 have these issues been drafted into standards. These standards would prohibit sexual relationships with former patients sooner than two (2) years after the end of [the] therapy relationship. In addition, the American Association of Marital and Family Therapy has a code which prohibits sex with former patients. This code has been in effect since 1991. According to Dr. Mintzes there were no code or written standards that he was aware of with specific standards and time-frame prohibitions against sex with former patients during the 1987 through the 1989 period relevant to the relationship between Marilyn Fitzgerald and Randy K.

⁴ The exhibit is omitted from this Decision and Order.

The concerns and issues which arise when a therapist has sex with a former patient include: the nature of the therapist-patient relationship and the extent of the therapist's power and authority over her patient. When a therapist has such influence over a patient, it raises questions of whether therapy ever ends. There is also the issue of transference in that a patient's feelings toward a therapist continue after therapy ends and there is no way to tell when transference ends. Dr. Mintzes stated that the fact that standards were just written in 1992 reflects a difficulty in addressing all of the variables that might arise in dual relationships. Even the two (2) year standard that has evolved recently is a beginning and other considerations may indicate that the therapist-patient relationship is not over after two (2) years. But he opined that after two (2) years there is an increased likelihood that problems may have been resolved.

Dr. Mintzes has opined that it is best for a therapist to consider a patient a continuing patient after the end of sessions because that patient may want to return to deal with other issues or the same problem after a period of time. As sex enters the picture, a therapist can't continue helping a patient as a patient. . . .It appeared to Dr. Mintzes that there was a gradual change from therapy to social relationship with Randy K. However, Marilyn Fitzgerald had the duty to clarify and control that relationship.

Dr. Mintzes opined that there may have been many reasons why Rebecca⁵ . . . did not object when she was asked by Marilyn Fitzgerald if there was a problem in Ms. Fitzgerald seeing Randy K. socially. And Rebecca . . . may have been hurt or uncomfortable with the relationship without expressing it. To protect Rebecca . . ., some of the steps Ms. Fitzgerald took which were appropriate included: talking to Rebecca . . . and asking directly if she was upset and referring her to another therapist. However it would also have been more appropriate if Ms. Fitzgerald would have allowed for some period of time after notice to Rebecca . . . of the intent to start a social relationship with Randy K. so that Rebecca . . . could consider and address her concerns before Ms. Fitzgerald and Randy K. started up a regular social relationship. It would not be difficult for a therapist to predict that seeing the husband of a couple recently in therapy would cause problems for a wife.

pp 20-21, 24-27, ALJ's Proposal for Decision.

⁵The Court has deleted all references to last names from this and other references to the ALJ opinion.

The ALJ addressed the issue of whether there was an applicable standard that established that after the end of therapy, at some prescribed point in time, it was acceptable for a therapist to enter into a relationship with a patient or a patient's spouse. The ALJ quoted Dr. Clark, as follows, regarding this issue:

It is Dr. Clark's opinion that a therapist has an obligation to exercise discipline to guard against situations that could give rise to inappropriate relations with patients or former patients. And even though there are no specific written standards other than draft policies regarding a post-therapy relationship with a former patient and dual relationships are not precluded absolutely, there is an increasing body of opinion on dual relationship problems and a growing consensus making more of these situations inappropriate. As a source of information on the "going standard of care" a therapist has publications, continuing education courses, seminars, and association meetings that can be used as references.

The central issue in this controversy is whether revocation of Petitioner's license to practice as a limited licensed psychologist in the State of Michigan is justified on the whole record of the proceedings. MCL 24.306(1); MSA 3.506(206)(1) states, in pertinent part, as follows:

Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

* * *

(c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

The Supreme Court describes MERC v Detroit Symphony Orchestra (DSO), 393 Mich 116; 223 NW2d 283 (1974) as the leading case setting forth the scope of judicial review of administrative

decisions.⁶ The DSO Court sets the standard, as follows:

Const 1963, art 6, § 28...sets forth the minimum constitutional scope of judicial review of administrative decisions.

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the court as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, ruling and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

* * *

Although such a review does not attain the status of de novo review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns, the courts must walk the tightrope of duty which requires judges to provide the prescribed meaningful review.

DSO, supra at pp 121 and 124. See also In re Payne, 444 Mich 679, 693; 514 NW2d 121 (1994). Otherwise stated,

An administrative decision involving the exercise of discretion is subject to reversal by the courts only where the evidence establishes that the agency has abused its discretion by arbitrary action. Evans v United States Rubber Co, 379 Mich 457; 152 NW2d 641 (1967); Crider v Michigan, 110 Mich App 702, 716; 313 NW2d 367 (1981).

Bannan v City of Saginaw, 120 Mich App 307, 324; 328 NW2d 35, aff'd 420 Mich 376; 362 NW2d 668 (1984).

The element of time is critical to the instant dispute. The

⁶ See Oakland Co v Michigan, 432 Mich 49, 60; 438 NW2d 61 (1989), n 4.

above quoted text reveals that the amount of time which lapsed between the end of the therapist-patient relationship (Spring, 1987) and Petitioner's participation in a social/sexual relationship with Randy K. (Late Summer, 1987) did not meet the standard which was later (in 1992) articulated by the American Psychological Association. The following remarks from pages 18-19 of the People's Response to Respondent's⁷ Closing Argument and Motion to Exclude Testimony succinctly describe the time element of the standard of care to which a therapist must adhere:

In fact, both experts in the immediate case testified that the current two-year rule is only a minimum and variables can still make it a violation of the standard of care even after two years. Certainly the professional community is aware of the problem posed by these situations, and the standard of care . . . is as reasonably precise as the subject matter permits. At the very least the responsible therapist must carefully consider his/her anticipated actions and the impact those actions can be expected to have on the former patient. The therapist must then take all reasonable steps to avoid any harm. That expectation isn't unduly vague -- it is just common sense. . .

The American Psychological Association's (hereafter APA) formal adoption of specific, minimum standards occurred after the termination of the subject therapist-patient relationships. Dr. Mintzes testified that there had been on-going professional discourse about problems identified with dual relationships. The APA standards codified the standard which had been presented as an issue within recent years at seminars and in the continuing education and professional literature of practicing psychologists, according to Dr. Mintzes.

Petitioner, in her brief, reargues the facts of this matter and does not allege that either expert was not competent or that the evidence is not substantial or material. This Court finds the following analysis in MEA v N Dearborn Hts Schools, 169 Mich App 39, 46; 425 NW2d 503 (1988) to be applicable to this matter and

⁷ Read as Respondent to the initial complaint, i.e. Marilyn Fitzgerald.

instructive:

MERC's meticulously detailed opinion contains findings of fact and conclusions of law that neither the conduct of the superintendents of either school district or of the districts were in violation of PERA §10(1)(a). A substantial portion of appellant's brief reargues disputed issues of fact. Findings of fact of the commission, "if supported by competent, material and substantial evidence on the record considered as a whole shall be conclusive." Section 16(a), PERA, MCL 423.216(e); MSA 17.455(16)(e). Strict deference must be given to an administrative agency's findings of fact. MERC v Kleen-O-Rama, 60 Mich App 61; 230 NW2d 308(1975). Appellate review should not invade the province of administrative fact findings "by displacing an agency's choice between two reasonably differing views." MERC v Detroit Symphony Orchestra, Inc., [supra.]

Respondent, in its decision to revoke Ms. Fitzgerald's license, overturned the ALJ's conclusion that the existing guidelines were not sufficient to put the therapist on notice that her commencing a relationship with Randy K. would impact "her ability to safely and skillfully practice". ALJ Proposal for Decision, p 31.

This Court finds that Respondent's conclusion, that Marilyn Fitzgerald's entering into a social/sexual relationship with Randy K. less than one year after the nebulous termination of therapy is a violation of the professional standard of care, is supported by competent, material and substantial evidence on the whole record. MCL 24.306(1)(d). Notwithstanding the absence of promulgated standards at the time Ms. Fitzgerald terminated her therapist-patient relationships, there is substantial evidence which a reasoning mind would accept as sufficient to support the Board's conclusion. Russo v Dep't of Licensing and Regulation, 119 Mich App 624, 633; 326 NW2d 583 (1982)⁸.

At a minimum, Petitioner was obligated to do no harm. The consensus of the expert witnesses was that the actions Ms.

⁸ See also State Board of Dentistry v Blumer, 78 Mich App 679; 261 NW2d 186 (1977); Krohn v Board of Medicine, 98 Mich App 129, 133; 296 NW2d 57 (1980).

Fitzgerald took, after the fact, did not adequately protect either of her patients against harm which might result from the brief interval of time between the termination of the therapist-patient relationships and her participation in a social-sexual relationship with Randy K.

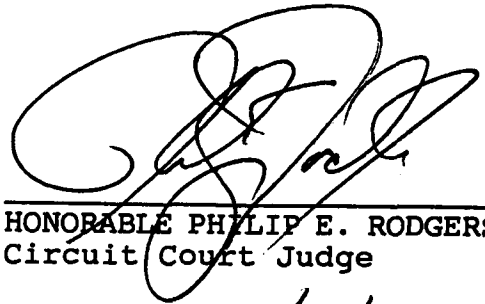
The ALJ's proposal reviewed testimony of Paul Kauffman, Ph.D. who stated in deposition that he had formally agreed to supervise Ms. Fitzgerald in her practice of psychology. There is substantial evidence to show an inadequacy of that supervisory relationship. Dr. Kauffman testified that he and Petitioner "just crossed paths occasionally and talked about cases occasionally." Kauffman deposition, June 12, 1992, p 8. Dr. Kauffman adamantly refused to believe the hypothetical scenario in which Respondent's counsel presented the facts of this matter which relate to Ms. Fitzgerald's social relationship with Randy K. Kauffman deposition, pp 12-19. This Court finds Respondent's conclusion that "[t]he evidence brought forth in this matter shows by a preponderance of the evidence that Respondent was not properly supervised" to be reasonable. §18223(2) and §16221(g).

Respondent Board's rulings, as hereafter described, overturned the ALJ conclusions:

- 1) Petitioner's action constituted negligence or lack of due care in violation of §16221(a);
- 2) Petitioner was personally disqualified as incompetent pursuant to §16221(b)(i);
- 3) Petitioner violated §18223(2) and §16221(g) by not being properly supervised.

The Board's rulings were "supported by competent, material and substantial evidence on the whole record". MCL 24.306(1)(d). This Court is persuaded that Respondent Board's revocation of Petitioner's license is not arbitrary or capricious. MCL 24.306(1)(e). Nor is the Board's ruling an error of law or an unlawful procedure which results in material prejudice to Ms. Fitzgerald. MCL 24.306(1)(f) and (c).

For the foregoing reasons, this Court affirms Respondent Board's Order and denies the Petition. No costs are awarded.
IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/13/95