

Before the
New Hampshire Board of Registration in Medicine
Concord, New Hampshire 03301

In the Matter of:

Docket No. 87-0001

David C. Whitenack, M.D.

DECISION

By the Board: Stephen A. Tzianabos, M.D., chairman; Douglas M. Black, M.D.; Wallace Buttrick, M.D.; Marcel R. Dupuis, M.D.; Maureen P. Knepp, P.A.-C.; and John S. Perley, members. Robert E. Porter, M.D., member, dissenting in part and issuing a separate statement.

Appearances: Edward L. Cross, Esq., Wiggin & Nourie, for the Complainant; Steven L. Tober, Esq., Aeschliman & Tober, for the Respondent.

Background

This is a disciplinary proceeding conducted by the New Hampshire Board of Registration in Medicine ("the Board") under RSA 329:17 for the purpose of examining allegations of professional misconduct against David C. Whitenack, M.D. ("Respondent"), a specialist in psychiatry. These allegations were set forth in a Notice of Hearing served April 13, 1987 and concerned possible unprofessional, negligent or immoral conduct in the Respondent's treatment of Betty L. Sprague ("Complainant").

Ms. Sprague filed a written complaint with the Board on October 31, 1986 which was informally investigated prior to the commencement of this proceeding. The Board's preliminary investigation involved interviews with both the Respondent and the Complainant which revealed relatively few factual discrepancies in their respective positions. The Board was also advised that the New Hampshire

Psychiatric Society had acted upon Ms. Sprague's allegations by suspending the Complainant's membership privileges for two years and requiring that his practice be supervised, and that the Respondent had appealed this decision to the American Psychiatric Association.

A prehearing conference was held on June 3, 1987 which lasted approximately two hours. Attempts to reach a voluntary settlement at that time were unsuccessful, and Ms. Sprague was granted a continuance to obtain counsel to assist her in presenting her view of the case.

A second prehearing conference was held on August 5, 1987 which was also about two hours in duration. A hearing date was established, a discovery schedule was established, the production of certain documents was ordered, and the nine issues to be examined as possible violations of RSA 329:17, VI(d) were more specifically articulated (Prehearing Order of August 14, 1986 at 5-6).

A final prehearing conference was held on October 28, 1987 which was also about two hours in duration. At this conference, the allegations concerning the drug Xanax (Issue No. 8) were withdrawn. Based upon the parties' written and oral prehearing statements, the factual questions which remained in dispute primarily involved differences of emphasis or degree rather than fundamental conflicts as to whether an alleged incident occurred.

An evidentiary hearing was held on November 13, 1987, at which both parties appeared and gave testimony. Rev. Wesley Burrell, a pastoral counselor, also testified on behalf of the Complainant, and Dr. Stephen G. Cronin, M.D., a board-certified psychiatrist, testified as a neutral expert witness at the request of the Board.

The parties were afforded the opportunity to submit written memoranda or argument before December 1, 1987, at which time the record was closed.

At the October 28, 1987 prehearing conference, the Respondent requested the Board to declare that no disciplinary action could be taken unless the facts supporting such action were established by "clear and convincing" evidence, and not merely by a "preponderance" of the evidence. The Board advised the Respondent to present his case on the assumption that a preponderance standard of proof would be used, but that the Board would deliberate further and announce its decision at a later date.

The Board has concluded that no useful regulatory purpose would be served by abandoning the long-established "preponderance" of the evidence test in favor of the more stringent "clear and convincing" evidence standard.^{1/} The 1986 amendments to RSA 329:17 which provide for public disciplinary hearings still retain limitations on public disclosure which are not present in the case of podiatrists, pharmacists, dentists, veterinarians, and other health care professionals, all of whom are subject to discipline based upon a "preponderance" of the evidence presented. See RSA Chapters 315, 318, 317 and 332-B. The presence or absence of public hearings is unrelated to the standard of proof which will apply in a given legal

^{1/} Although the standard of proof was not directly addressed at the time, the Supreme Court has affirmed disciplinary sanctions against both a dentist and a doctor which were imposed under the "preponderance" of the evidence standard. Appeal of Beyers, 122 N.H. 934 (1982) (Dental Board); Appeal of Plantier, 126 N.H. 500 (1985) (Medical Board).

proceeding. Most civil proceedings are public and most employ the "preponderance" standard.

It is true that a "clear and convincing" standard of proof governs disciplinary proceedings involving New Hampshire lawyers, but this practice results from a policy determination made by the Bar Association, and not because special procedural protections are legally required when a lawyer's occupational license is in jeopardy or because disciplinary proceedings involving lawyers are open to the public.^{2/} In fact, the proceedings of the Bar Association's Professional Conduct Committee are generally kept confidential.

Findings of Fact

Dr. Whitenack was licensed to practice medicine in New Hampshire in 1972. He has maintained a private practice of psychiatry in this state since that time, and has been the subject of no other disciplinary proceedings by the Board.

^{2/} The Supreme Court has acquiesced in, but has not mandated the use of the "clear and convincing" standard of proof in cases of lawyer discipline. This standard was first mentioned in Musselman's Case, 111 N.H. 402 (1971), where the Court held that the evidentiary record supported the master's findings of fact, but neither accepted nor rejected the master's ruling on the standard of proof. In DeCato's Case, 117 N.H. 885, 886 (1977), the "clear and convincing" standard was employed by mutual consent of the parties because it was prescribed by Rule 39 (10)(g) of the Rules of Judicial Conduct. The use of a higher standard of proof in cases involving judges whose tenure in office is subject to constitutional protections can be distinguished from its use in cases involving lawyers. Nonetheless, the "clear and convincing" standard has become an accepted feature in the proceedings of the Bar Association's Professional Conduct Committee. See, e.g. Eades' Case, 118 N.H. 815, 817 (1978).

Ms. Sprague was 34 years old, married, and the mother of two children, aged 12 and 5, in April 1986. She had been experiencing marital difficulties prior to April 1986 and participated in psychotherapy with a pastoral counselor for about three and one-half years. She is now separated from her husband, has custody of her children and is gainfully employed. A divorce action has not been filed.

Dr. Whitenack provided psychoanalytically oriented psychodynamic insight oriented psychotherapy to Ms. Sprague from April 2, 1986 through August 8, 1986. She was referred to him by her pastoral counselor, Rev. William Hurst, who had decided to retire. Rev. Hurst had worked with Dr. Whitenack at the Durham Pastoral Counseling Center and had treated Ms. Sprague for several years.^{3/} He previously referred Ms. Sprague to Dr. Whitenack in October 1983 for the prescription of anti-anxiety medication.

Ms. Sprague initially visited Dr. Whitenack once a week, but began twice a week visits at the end of May 1986. She voluntarily terminated treatment with Dr. Whitenack on August 8, 1986, after a total of 26 visits, and subsequently began seeing a psychologist named Eva Powers and Dr. Ralph Luce, M.D.^{4/}

^{3/} Dr. Whitenack advised the pastoral therapists at the Durham Pastoral Counseling Center during 1979 and 1980, and later served as President of the Center's Board of Directors (1982-1984).

^{4/} Dr. Luce, a psychiatrist, has seen Ms. Sprague on two occasions (Exhibit 4). In June 1986, she began marital counseling with Rev. Wesley Burwell, a therapist recommended to her by Dr. Whitenack. The Complainant was also evaluated by Stephen Warshaw, Ph.D., a psychologist, in August 1986, and Marcie Lister, a social worker, in September 1986.

Dr. Whitenack diagnosed Ms. Sprague's condition as an adjustment disorder with anxiety features.

The Complainant displayed almost immediate signs of an "eroticized transference" towards Dr. Whitenack in that she became romantically infatuated with him. The Respondent promptly recognized this phenomenon and viewed it as a possible vehicle for effective therapy. He also recognized that this type of transference also represented a barrier or "resistance" to meaningful treatment which needed to be overcome.

The Respondent and Complainant sat adjacent to each other on a couch during treatment sessions. On one or two occasions when she was crying or otherwise upset, he perfunctorily comforted her by holding her hand or patting her knee. Dr. Whitenack briefly hugged the Complainant in a platonic manner at the close of the last dozen treatment sessions, and paternally kissed her forehead during three such hugs. Although it was not so intended, this conduct had the effect of encouraging the Complainant's romantic interest in the Respondent.

Dr. Whitenack engaged in no overt sexual conduct towards the Complainant, and at no time advised her to engage in vigorous, frequent or unusual sexual activities. At an early point in the treatment, he asked the Complainant if she was thinking about having an affair with him, but this question was raised to provide a focal point for discussing her obvious eroticized transference and attempting to discover the underlying emotional needs which it was masking. On other occasions he attempted to deflect her expressions of interest in romantic activity by suggesting that it would be an inappropriate and unrewarding experience for both of them.

Dr. Whitenack did not see or attempt to see the Complainant outside of their regularly scheduled sessions. His behavior toward her, when examined in context, could not have been reasonably construed as an invitation to establish a romantic or other personal relationship with him. Nor did he comport himself in a manner which was intended to intensify or encourage Ms. Sprague's openly expressed romantic attraction towards him.

Dr. Whitenack attempted to discuss Ms. Sprague's infatuation with him in a casual, yet directed fashion which, he hoped, would: 1) help her become aware of underlying emotions which might cause her behavior to fall into patterns which were not always productive for her; and 2) not appear critical or unaccepting of these emotions.

The Respondent occasionally used erotic or "street" language during his treatment of the Complainant. This language was responsive to the topics being discussed. It was not gratuitous or used to arouse the Complainant sexually.

Dr. Whitenack performed a type of psychotherapy with the Complainant which was personally designed by him, but can be generally described as belonging to the "interpersonal school." Although debate exists with the field of psychiatry concerning the methods and results of interpersonal psychotherapy, this school is both well-established and reputable.

Interpersonal psychotherapy calls for the therapist to interact to some degree with the patient while also monitoring the strength and nature of his emotional involvement to avoid a loss of objectivity. Practitioners may engage in hugging or other non-erotic touching of patients, and there may be a sharing of observations and emotional responses between patient and therapist.

During the course of Ms. Sprague's treatment, she and the Respondent were on a first name basis. Dr. Whitenack occasionally revealed facts concerning his personal life to the Complainant for the purpose of addressing themes which she introduced into the therapy. This practice was consistent with his treatment method which gave particular emphasis to the establishment of a sufficient bond of trust to facilitate the patient's eventual need to discuss matters which are intensely personal and usually painful to confront.

One such personal detail concerning Dr. Whitenack was the fact that he had previously gone through a period of painful emotional experiences during which he had derived some comfort from realizing that he had a gun located in his office. This disclosure arose in the context of a discussion intended to determine the nature and extent of the Ms. Sprague's complaints of depression. At that time, Dr. Whitenack encouraged her to share such feelings with him and to believe she had some control over the painful emotions in her life. The Respondent's remarks were not intended to condone suicide, nor, when examined in context, were they reasonably likely to create such an impression.

Over a 15 year period, the Respondent has drunk beer or other alcoholic beverages during the treatment sessions of a total of three or four selected patients. The appointments of these patients were scheduled in the late afternoon to facilitate this consumption of alcohol. Ms. Sprague was not one of these patients.

The Respondent told the Complainant about this practice during one of her two final sessions, after she had begun to realize that he would not become personally involved with her and amorous feelings