

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).

