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**BEFORE THE OREGON BOARD OF PSYCHOLOGIST EXAMINERS
STATE OF OREGON**

In the Matter of) **FINAL ORDER**
)
TRACY NEELY, MSW.) Hearing Officer Panel Case 20011643
) Agency Case OBPE 00-020

HISTORY OF THE CASE

Tracy Neely, MSW (Respondent or Neely) challenges the Board of Psychologist Examiners' (the Board) proposed imposition of a civil penalty in the amount of \$1,000 pursuant to ORS 675.110(5). On February 22, 2001, the Board issued a Notice of Proposed Civil Penalty (Notice).

The Notice proposed to impose a civil penalty of \$1,000 on Neely because the Board believed that Neely violated ORS 675.020(1)(b) and ORS 675.020(2) by authoring a January 21, 2000 report titled "Psychological Evaluation" when he was not licensed to practice psychology in the State of Oregon under ORS 675.010 to 675.150. Neely also failed to respond to the Board's inquiry in writing until after the Notice was issued. Thereafter, Neely requested a hearing challenging the proposed penalty.

On May 23, 2001, the Board referred this matter to the Hearing Officer Panel for hearing pursuant to Neely's request for hearing. On July 11, 2001, Administrative Law Judge Ella D. Johnson conducted a telephone hearing in Salem, Oregon. Assistant Attorney General Caren Rovics represented the Board and called Respondent and Board Investigator Rick Sherbert (Sherbert) as witnesses. Respondent represented himself *pro se*.

After review and consideration of the entire record, a Proposed Order was issued by Administrative Law Judge Johnson finding that Neely violated ORS 675.020(1)(b) and ORS 675.020(2), and assessed a civil penalty of \$1,000 pursuant to ORS 675.110(5). Exceptions were filed with the Board by Neely on August 17, 2001. The Board considered Neely's exceptions at its October 12, 2001 Board meeting.

ISSUES

1. Whether Respondent violated ORS 675.020(1)(b) and ORS 675.020(2) by authoring a January 21, 2000 report titled "Psychological Evaluation;" and
2. If so, whether Respondent's violation warrants assessment of a civil penalty in the amount of \$1,000 pursuant to ORS 675.110(5).

EVIDENTIARY RULING

The Board's Exhibits 1 – 5 were admitted into the record without objection. The Board stipulated that the January 21, 2000 "Psychological Evaluation" was the only violation at issue.

FINDINGS OF FACT

1. Neely has been a clinical social worker since 1997 and holds a Master of Social Work Degree (MSW) but is not currently licensed by the Board of Clinical Social Workers. He has a practice in Ontario, Oregon. On January 21, 2000, and at all times relevant to this matter, Neely was not licensed to practice psychology in the State of Oregon. (Exs. 1, 3, 4 and Neely's testimony.)
2. In June 2000, the Board received a copy of a report titled "Psychological Evaluation" authored by Neely and dated January 21, 2000. (Ex. 1.)
3. On June 29, 2000, Sherbert made contact with Neely by telephone. Sherbert told Neely that the Board had a copy of the report and that his use of the term "psychological" was a violation of the statute. Neely indicated that he was not aware of that restriction and would not do that again. Neely agreed to respond in writing to the Board. (Sherbert's testimony.)
4. Sherbert's normal practice was to tell the individual being investigated that the Board was authorized to assess a penalty of up to \$1,000 for violations of the "Practice Act" but that it was unlikely that the Board would do so if he responded in writing assuring the Board that he would discontinue the practice and would not be repeated. (Sherbert's testimony.)
5. Sherbert subsequently sent Neely a letter on June 29, 2000, along with a copy of the Board's statutes and rules, asking him to respond in writing concerning his use of the words "Psychological Evaluation" after he had reviewed the statutes and rules. Neely received the letter but failed to respond to the Board's request. (Ex. 1 and Neely's testimony.)
6. Because Neely did not respond, Sherbert sent Neely a "cease and desist" letter on October 17, 2000, directing him to respond in writing within 30 days. The letter warned Neely that he might be subject to a civil penalty in the amount of \$1,000. Neely received the letter on October 27, 2000. Sherbert did not speak to Neely between October 17, 2000 and February 22, 2001. (Exs. 1, 5 and testimony of Sherbert.)
7. Neely failed to respond, and on February 22, 2001, the Board issued the Notice. (Exs. 1, 5 and testimony of Sherbert and Neely.)

8. Following the Notice, Sherbert talked to Neely by telephone but did not tell him or assure him that the Board would not assess a civil penalty or that the penalty would be withdrawn or reduced. Sherbert also repeatedly directed Neely to respond in writing to the Board's request. (Testimony of Neely and Sherbert.)
9. On March 15, 2001, Neely sent his first written response to the Board. He apologized for his "mistake" and his failure to timely respond in writing as the Board requested. On that same date, Neely filed a request for hearing challenging the Notice. (Exs. 2, 4.).
10. Neely represents that he has not been subject to prior disciplinary action. (Neely's testimony.)

CONCLUSIONS OF LAW

1. Neely used the title "Psychological Evaluation" in his January 21, 2000 report when he was not licensed pursuant to ORS 675.010 to 675.150.
2. A civil penalty in the amount of \$1,000 is warranted.

OPINION

Respondent challenges both his alleged violation of ORS 675.020(1)(b) and ORS 675.020(2) and the civil penalty assessed. In that regard, the Board has the burden of proving these allegations by a preponderance of the evidence. *See* ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence).

Alleged Violation

Neely concedes that he used the title "Psychological Evaluation" in his January 21, 2000 report but argues that it was an inadvertent mistake and that he was just trying to use the same wording that was used by the agency requesting the evaluation. However, the Board does not find his argument persuasive.

ORS 675.020 states in relevant part:

"(1) To safeguard the people of the State of Oregon from the dangers of unqualified and improper practice of psychology, no person shall, unless exempted from the provisions of ORS 675.020 to 675.150 by ORS 675.090;

“* * * *

“(b) Represent oneself to be a psychologist without first being licensed under ORS 675.010 to 675.150.

“(2) As used in subsection (1)(b) of this section, ‘represent oneself to be a psychologist’ means to use any title or description of services incorporating the words ‘psychology,’ ‘psychological,’ ‘psychotherapy’ or ‘psychologist,’ or to offer or render to individuals or to groups of individuals services included in the practice of psychology.” (Emphasis added.)

The statutory scheme which governs the practice of psychologists, ORS 675.010 to 675.150 (the Practice Act) does not provide an exemption for ignorance of the law. ORS 675.020 clearly prohibits use of the word “psychological” in a title or a description of services. It also defines to “represent oneself as a psychologist” to encompass use of the word “psychological” in a title or description of services in addition to the practice of psychology. The statute does not require that the violation be intentional or with knowledge of the statute.

Neely next argues that, as a “Clinical Social Worker Associate¹,” he is entitled to perform evaluations of a psychosocial nature and that, inasmuch as the functions of psychologists and clinical social workers overlap, he is exempted from ORS 675.020 by ORS 675.090.

ORS 675.090 states in relevant part:

“(1) ORS 675.010 to 675.150 does not apply to:

“* * * *

“(b) A person who is either

“* * * *

“(C) A person pursuing certification or licensure or a graduate degree in any of the certified or licensed professions otherwise exempted from ORS 675.010 to 675.150.

¹ A “Clinical Social Worker Associate” is defined by ORS 675.510(3) as “a person who holds a master’s degree from an accredited college or university accredited by the Council on Social Work Education whose plan of practice and supervision has been approved by the [State Board of Clinical Social Workers], and who is working toward licensure in accordance with ORS 675.510 to 675.600 and rules adopted by the [State Board of Clinical Social Workers].”

“(c) A person who is licensed or certified by the State of Oregon to provide mental health services, provided that the services are rendered within the person’s lawful scope of practice and that the person does not use the title “psychologist” in connection with the activities authorized in this paragraph.

“(d) A person who is licensed, certified or otherwise authorized by the State of Oregon to render professional services, provided that the services are rendered within the person’s lawful scope of practice and that the person does not use the title ‘psychologist’ in connection with the activities authorized under this paragraph.” (Emphasis added.)

Although the statute provides an exemption from ORS 675.020 for individuals who are licensed, certified or otherwise authorized by the State of Oregon and providing services within the lawful scope of practice, without exception none of these individuals are authorized to use the title “psychologist” in connection with their professional services. Moreover, at the time of the hearing, Neely was not licensed, certified, or otherwise authorized to perform the work of a clinical social worker. He argued, however, that he was an “Associate Clinical Social Worker” pursuing his licensure as a clinical social worker. ORS 675.090(b)(C) provides an exemption from ORS 675.020 for individuals who are pursuing licensure or certification but also prohibits such individuals from using the title “psychologist” in connection with their professional services. However, Neely failed to provide any evidence of his licensure status except for his own testimony. But even if he was an individual who was pursuing licensure, he was not authorized to use the title “psychologist.”

The Board interprets the provisions of ORS 675.090 consistent with ORS 675.020 to prohibit the use of the word “psychological” as a derivative of “psychologist.” Even when there is another plausible and equally compelling interpretation, the agency’s interpretation of a statute the agency is charged with enforcing is entitled to deference and will generally be upheld unless the agency’s interpretation is unreasonable or inconsistent with the statute. *Booth v. Tektronix*, 312 Or 463 (1991); *Pease v. National Council on Comp. Ins.*, 128 Or App 471, 475 (1994). The Board’s interpretation of ORS 675.090 is consistent with ORS 675.020 and is not unreasonable or inconsistent with the statute. Consequently, the Board concludes that Neely violated ORS 675.020(1)(b) and ORS 675.020(2) by using the word “psychological” in the title of his January 21, 2000 report.

Civil Penalty

Neely argued that the assessment of the maximum penalty of \$1,000 in this matter was “outlandishly harsh and severe.” In support of his argument, Neely contended that Sherbert misled him with assurances that initial violations were routinely handled by a

“stiff warning.” He also testified that, although he did not respond in writing to the Board, he apologized several times to Sherbert and assured him that he understood the law and that there would be no further violations.

ORS 675.110 states in pertinent part:

“The State Board of Psychologist Examiners shall have the following powers, in addition to the powers otherwise granted under ORS 675.010 to 675.150, and shall have all powers necessary or proper to carry the granted powers into effect:

“* * * *

“(5) To impose civil penalties not to exceed \$1,000.”

The Board imposed the maximum penalty of \$1,000. Although Sherbert confirmed the portion of Neely’s testimony concerning whether a lesser sanction was available for initial violations, Sherbert also testified that he always told Neely orally and in writing to respond to the Board’s investigation in writing. Sherbert credibly testified that after the cease and desist letter was sent on October 17, 2000, he never told Neely that it was unlikely that a civil penalty of \$1,000 would be assessed or that it would be reduced to a “stiff warning.” This contradicts Neely’s testimony that Sherbert made those statements after the October 17, 2000 letter was issued. Neely’s testimony is not persuasive inasmuch as he is a poor historian with respect to his conversations with Sherbert. The Board finds that Neely was not misled.

At hearing, the Board explained that it proposed the maximum civil penalty both because of Neely’s violation of the statute and his failure to timely respond to the Board’s inquiry by indicating that he understood the law and that there would be no further violations. Even though Neely may have given assurances to Sherbert that he understood the law and that such violations would not reoccur, the Board wanted his assurances in writing. Neely failed to provide written assurances prior to issuance of the Board’s Notice. Even at hearing, Neely did not seem to understand the Board’s reason for assessing the penalty or the Board’s need to have his response in writing.

With respect to the amount of the penalty, Neely argued that the amount was “outlandishly harsh and severe.” The Board responded that assessment of the maximum penalty was within its discretion inasmuch as the statute places no restrictions on its ability to assess the maximum civil penalty so long as the penalty does not exceed \$1,000. The Board does not find the amount of the penalty to be “outlandishly harsh and severe” in light of Neely’s failure to respond to the Board’s inquiry as directed and the Board’s need to get Neely’s attention, thereby insuring that there would be no further violations. In light of these circumstances, a civil penalty of \$1,000 is warranted.

ORDER

IT IS HEREBY ORDERED that Tracy Neely is assessed a civil penalty in the amount of \$1,000 for violation of ORS 675.020(1)(b) and 675.020(2).

Dated this 7 day of January, 200~~8~~²³ at Salem, Oregon.

Redacted

Jana Zeedyk, Ph.D. *U*
Chair

RIGHT TO JUDICIAL REVIEW:

You have the right to appeal this Order to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the day this Order was served on you. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the day it was *mailed*, not the day you received it. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.

COPY

BEFORE THE
BOARD OF PSYCHOLOGIST EXAMINERS
STATE OF OREGON

4 In the Matter of:) Case No. 00-20
5 TRACY NEELY, MSW,)
6 Licensee.) NOTICE OF PROPOSED
CIVIL PENALTY
(ORS 675.110(5))

7 TO: TRACY NEELY, MSW,

8 The Board of Psychologist Examiners (Board) is the state agency responsible for
9 licensing, disciplining and regulating psychologists in the State of Oregon.

10 1.

11 The Board proposes to impose a civil penalty against Tracy Neely, MSW, (Mr. Neely)
12 for violations of ORS 675.020(1)(b) and ORS 675.020(2) (improper practice of psychology by
13 representing oneself to be a psychologist by use of any title or description of services
incorporating words psychology, psychological, psychotherapy or psychologist).

15 2.

16 At all times material herein, Mr. Neely was not licensed to practice psychology in the
17 State of Oregon under ORS 675.010 to 675.150. The facts and the alleged statutory violation of
18 ORS 675.020(1)(b) and ORS 675.020(2) supporting this proposed civil penalty are described as
19 follows:

20 2.1 In June of 2000 the Board received a copy of a "Psychological Evaluation"
21 written by Tracy Neely, MSW, dated January 21, 2000.

22 2.2 On June 29, 2000 the Board, through it's Investigator, Rick Sherbert, wrote to Mr.
23 Neely stating that his January 21, 2000 report titled "Psychological Evaluation" was in violation
24 of ORS 675.020(1) and ORS 675.020(2). Mr. Neely was sent a copy of the Board's statutes and
25 rules and he was requested to respond, in writing, to the Board after reviewing these documents.

26

1 - NOTICE OF PROPOSED CIVIL PENALTY (ORS 675.110(5)) (Tracy Neely, MSW)
CR/cr:GEN72964

1 2.3 As of October 17, 2000, Mr. Neely had not written to the Board. On that date the
2 Investigator for the Board sent another letter to Mr. Neely advising of possible legal sanctions for
3 using any title or description of services incorporating the words psychology, psychotherapy or
4 psychologist, including a civil penalty of up to \$1,000. This letter directed Mr. Neely to respond
5 to the Board within thirty (30) days of receipt of the letter. The October 17, 2000 letter was sent
6 to Mr. Neely by certified mail and the return receipt has a signature date of October 27, 2000.

7 2.4 To date, Mr. Neely has not responded to the Board's letter of October 17, 2000.

8 3.

9 The Board alleges that because Mr. Neely has described and identified his evaluations by
10 use of the word "psychological" this act violates ORS 675.020(1)(b) and ORS 675.020(2).

11 4.

12 Therefore, the Board proposes to assess a civil penalty of \$1,000.00 under ORS 675.110(5).

13 5.

14 Mr. Neely has the right, if he requests, to have a formal contested case hearing before the
15 Board or its hearings officer to contest the matter set out above, as provided by Oregon Revised
16 Statutes 183.310 to 183.550. At the hearing, Mr. Neely may be represented by an attorney and
17 subpoena and cross-examine witnesses.

18 6.

19 That request for hearing must be made in writing to the Board, must be received by the Board
20 within thirty (30) days from the mailing of this notice and must be accompanied by a written answer
21 to the charges contained in this notice.

22 7.

23 If Mr. Neely requests a hearing, before commencement of that hearing, Mr. Neely will be
24 given information on the procedures, right of representation, and other rights of parties relating to the
25 conduct of the hearing as required under ORS 183.413-415, before commencement of the hearing.

26
e 2 - NOTICE OF PROPOSED CIVIL PENALTY (ORS 675.110(5)) (Tracy Neely, MSW)
CR/cr:GEN72964

2 If Mr. Neely fails to request a hearing within 30 days, or fails to appear at the hearing as
3 scheduled, the Board may issue a final order by default and impose the above sanctions against Mr.
4 Neely's submissions to the Board to-date regarding the subject of this disciplinary case and all
5 information in the Board's files relevant to the subject of this case automatically become part of the
6 evidentiary record of this disciplinary action upon default for the purpose of proving a prima facie
7 case. ORS 183.415(6).

8 DATED this 22 day of February, 2001.

9 BOARD OF PSYCHOLOGIST EXAMINERS
10 State of Oregon

11 Redacted

12 Michelle Whitehead, Ph.D.
13 Chair

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