State of Washington
Department of Health
Office of Professional Standards

In the Matter of Disciplinary Action Concerning	)	
	)	No. 91-12-0017MD
	)	No. 91-12-0022MD
Herbert Wimberger, M.D.,	)	OPS No. 93-04-30-104MDB
	)	Prehearing Order No. 1
Respondent	)	Order on Motion to Dismiss

Colleen Klein, Hearings Officer for the Medical Discipinary Board (the Board), having reviewed and considered Respondent's Motion to Dismiss dated May 21, 1993, filed by Douglas A. Hofmann, attorney at law representing Herbert Wimberger, M.D. (the Respondent); the Response to Respondent's Motion to Dismiss dated June 7, 1993, filed by Beverly Norwood Goetz, Assistant Attorney General representing the Department of Health (the Department); the Respondent's Reply to Response to Motion to Dismiss dated June 10, 1993; the documents and affidavits filed in support of and in opposition to the motion to dismiss; and the pleadings filed in this matter, now hereby issues the following:

1. Procedural History

1.1 On or about March 23, 1993 a Statement of Charges was issued alleging unprofessional conduct by the Respondent in violation of RCW 18.72.030(11) of the Laws of Washington 1963, ch. 142 § 1 and RCW 18.130.180(9). In his Answer to Statement of Charges dated April 5, 1993, the Respondent

denied unprofessional conduct and requested a settlement conference followed by a formal hearing if settlement did not occur. The Respondent also identified his attorney as Douglas A. Hofmann.

1.2 On May 21, 1993, the Respondent filed a Motion to Dismiss with the Office of Professional Standards requesting dismissal of the charges against him. The Office of Professional Standards received a copy of the Department's response to the motion to dismiss by facsimile transmission on June 7, 1993 and the Respondent's Reply to the Response on June 10, 1993.

2. Contentions of the Parties

2.1 The Statement of Charges alleges that the Respondent had a sexual relationship with two patients (referred to herein as Patients One and Two) which began in 1968 and 1967 respectively. In each case, the alleged relationship is said to have lasted a few years.

2.2 The Respondent does not deny that he provided psychotherapy to Patients One and Two, however, he denies having had a sexual relationship with them. The Respondent has moved for an order dismissing the allegations against him based on the following two separate and independent grounds:

a. The section of the 1963 statute under which the Respondent was charged, RCW 18.72.030(11), was repealed in 1975 and cannot now be the basis of charges.

b. The doctrine of laches prevents the Medical Disciplinary Board (the Board) from charging the

Respondent for alleged conduct that occurred over 20 years ago.

2.3 The Respondent also asserts that public policy and the legislatively-defined purpose of the Board are not served by continued prosecution of these claims. The Respondent contends that the Board should investigate his fitness and professionalism through an objective and reasoned process.

A. 1963 Act

2.4 The Respondent claims that in 1975, the Washington legislature struck the language in the 1963 version of RCW 18.72.030(11) (the 1963 Act); that this language was never reinstated by the legislature; and that there is no "savings clause" in the 1975 legislation affecting the 1963 Act. Therefore, the Board cannot now rely on the repealed 1963 Act as the basis for disciplinary action. The Respondent further contends that the Board could have charged him under Section 11 of the 1963 Act anytime prior to the effective date of the 1975 legislation. However, as of that date, all rights and liabilities under the 1963 Act ceased to exist.

2. 5 The Department contends that the Uniform Disciplinary Act, RCW 18.130.900, requires that the Respondent be charged under the 1963 Act because it was in effect at the time of the alleged misconduct. The Department asserts that the basis for the Board's charges was not repealed by the legislature in 1975 because the 1975 legislation defining unprofessional conduct (the 1975 Act) maintains substantially similar language to the 1963 Act.

Therefore, the statutory provisions must be construed as continuations and not treated as repealed.

2.6 The Department further contends that the legislature did not intend to abrogate the Board's ability to investigate and prosecute allegations of physician-patient sexual contact by the 1975 amendments to the 1963 Act. The prosecution of charges of sexual misconduct is consistent with the Board's purpose and with legislative intent. The Department asserts that in 1975, the legislature intended that the Board have greater authority to discipline physicians by materially expanding the definition of unprofessional misconduct. The 1975 Act's amendments to the 1963 Act reflect that intent.

B. Laches

2.7 The Respondent contends that the charges against him should be dismissed based on the doctrine of laches because he is prejudiced by the delay of over twenty years between the time of the alleged conduct and the issuance of charges. Mr. Hofmann cites medical disciplinary cases from other jurisdictions which have found that laches may be applied to bar a disciplinary proceeding if prejudice is established.

2.8 The Respondent maintains that all of the elements of laches are present in this case. Patients One and Two knew or had reasonable opportunity to discover a cause of action against the Respondent; they unreasonably delayed for over 20 years in making their complaints to the Board; and

the delay has prejudiced the Respondent. The Respondent asserts that he is prejudiced in his ability to defend against the charges because the evidence that he would have relied upon has been lost or destroyed; because witnesses that he would have called are unavailable; and because the memories of witnesses that may be available have faded or have been distorted with the passage of time. Further, the Respondent asserts that prejudice can be conclusively presumed in this case because the delay is grossly unreasonable.

2.9 Finally, the Respondent asserts that prosecution of these claims would not serve the Board's purpose which is to protect the public, not punish physicians. The Respondent asserts that the issue is "how far back in time the Board can go, and to what extent an individual's rights and liberty can be trampled, to protect the 'public interest'"

2.10 The Department maintains that a medical disciplinary action alleging unprofessional conduct is not barred either by an existing statute of limitations or by the equitable doctrine of laches pursuant to RCW 4.16.160. The Department cites disciplinary cases from other jurisdictions that have rejected the defense of laches for reasons of both sovereign immunity and governmental protection of a public right. Further, the Department contends that permitting the Respondent to asset a defense of laches would contravene the express statutory policy of

protecting the public health against professional misconduct.

2.11 In the alternative, the Department asserts that even if laches could be asserted in a medical disciplinary proceeding, the Respondent would be unable to show that the state unreasonably delayed in bringing the charges or that the Respondent is damaged by the delay. The Department did not have knowledge of or reasonable opportunity to discover the complaints of misconduct until December of 1991 and January 1992. The Department then promptly began its investigation and notified the Respondent of the complaints. The Department asserts that the complainants' knowledge cannot be imputed to the Department and even if it could, the delay in the complainants coming forward is reasonable in light of the circumstances.

2.12 Finally, the Department asserts that the Respondent has not shown how the passage of time has actually prejudiced or disadvantaged him. Discovery in this case is not complete and the Department maintains that the medical records and one of the witnesses which the Respondent claims were unavailable have been located. Therefore, the Department asserts that it would be premature to decide the issue of prejudice or disadvantage prior to discovery.

3. Conclusions of Law

3.1 The presiding officer or hearings officer shall rule on all prehearing motions.

A. Repeal

3.2 Prior to June 12, 1975, unprofessional conduct was defined under the 1963 Act to include the following:

> (1) Conviction in any court of any offense involving moral turpitude in which case the record of such conviction shall be conclusive evidence;
>
> (11) Repeated acts of immorality, or repeated acts of gross misconduct in the practice of the profession;

3.3 In 1975, the legislature enacted the 1975 Act which eliminated Section (11) of the 1963 Act and amended section (l)to read as follows:

> (1) The commission of any act involving moral turpitude, dishonesty, corruption, whether the same be committed in the course of his or her relations as a physician, or otherwise, and whether the same constitutes a crime or not; and if the act constitutes a crime, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action. Upon such conviction, however, the judgment and sentence shall be conclusive evidence at the ensuing disciplinary hearing of the guilt of the respondent physician of the crime described in the indictment or information, and of his or her violation of the statute upon which it is based.

The 1975 legislature also added the following new provision to RCW 18.72.030:

> (12) Gross incompetency in the practice of medicine and surgery.

3.4 The legislature did not expressly repeal Section (11) of the 1963 Act. The introductory paragraph to the 1975 legislation clearly states that the 1975 Act amends and adds new sections to the existing 1963 Act (see Respondent's Exhibit G, Chapter 61, Laws of 1975). However, Washington

courts have found that "provisions omitted in the section which an amendment purports to change are considered repealed". [emphasis added] Ward v. Washington State University, 39 Wn. App. 630, 695 P.2d 113 (1985). The issue is whether Section 11 of the 1963 Act was "omitted" from the 1975 Act.

3.5 In Ward, a statutory provision providing a military benefit was eliminated from subsequent legislation without a savings clause. The court found that the provision was repealed. Here, unlike Ward, the legislature did not merely eliminate Section 11. Rather, as discussed below, the legislature incorporated and expanded the prohibitions of Section 11 into other sections of the 1975 Act.

3.6 Even if Section (11) of the 1963 Act had been repealed, the legislature's repeal of a statute with a simultaneous enactment of substantially the same statutory provisions has been deemed to be only a nominal repeal. The rights and liabilities are not affected by a simultaneous repeal and re-enactment. In Re Frederiksen, 25 Wn. App. 726, 610 P. 2d 371 (1979), Whalen v. Labor and Industries, 35 Wn. App. 283, 655 P.2d. 1389 (1983), State v. Nichols, 718 P.2d 1261 (Idaho, 1986).

> ...Thus it is said that the simultaneous repeal and re-enactment of substantially the same statutory provision is to be construed, not as a true repeal, but as an affirmation and continuation of the original provision. All rights and interests arising under the original statute are therefore preserved; by the same token, liabilities which have arisen under a statute are not affected by its repeal and re-enactment. Where a

> statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute, it follows that while the re-enacted provisions are deemed to have been in operation continuously from the original enactment, the additions or changes are treated as amendments effective from the time the new statute goes into effect.

[emphasis added] In Re Frederiksen, at 735 quoting 73 Am. Jur. 2d Statutes § 391, at 509 (1974).

3.7 The rule of simultaneous repeal and reenactment has been followed by the courts in other jurisdictions in medical disciplinary proceedings. Lyness v. Com., State Bd. of Medicine, 561 A.2d 362 (Pa. Cmwlth, 1989). In Lyness, a physician was charged with misconduct under a 1974 act which the physician claimed was repealed without a savings clause by subsequent legislation in 1985. The court found that the repeal of the 1974 statute by the 1985 statute did not terminate the Board's authority to proceed against the physician pursuant to the 1974 act. In its decision,the court focused on the fact that the physician's conduct would be grounds for revocation or suspension of his license under both the repealed statute and the simultaneously enacted new legislation.

3.8 In this case, a comparison of the 1975 Act and the 1963 Act shows that there is substantial similarity in the conduct proscribed under each statute relating to moral conduct. The 1975 legislation not only carried forward the 1963 Act’s essential prohibition against "repeated acts of immorality", it also expanded the prohibition to include a single act of moral turpitude, corruption or dishonesty.

Furthermore, the 1975 Act added a new prohibition against gross incompetency.

3.9 In Haley v. Medical Disciplinary Board, 117 Wn.2d 720, 818 P.2d 1062 (1991), the Washington Supreme Court compared a Maryland statute prohibiting the "immoral conduct of a physician in his practice as a physician" with the Washington statute prohibiting "moral turpitude, dishonesty and corruption" relating to the person's profession. The comparison of these statutes by the Court indicates the substantial similarity in meaning between the terms "immorality" and "moral turpitude, corruption and dishonesty". Moreover, the court found Washington's prohibition to be more broad because the prohibited conduct under the Maryland statute had only to relate to the physician's professional practice. Consistent with the Court's analysis in Haley v. Medical Disciplinary Board, supra, the alleged misconduct in this case, if proven, would constitute unprofessional conduct under Section (11) of the 1963 Act or Section (1) or (12) of the 1975 Act.

3.10 The Respondent's assertions that the 1975 Act divested the Board of authority to prosecute repeated acts of immorality occurring prior to 1975 is also contrary to the very purpose of the 1975 legislation and the intent of the legislature. The legislature's intent that repeated acts of immorality occurring prior to 1975 continue to be prosecuted as unprofessional conduct is evident by its expansive amendment of Section (1) to cover such conduct and

by its contingent deletion of Section 11 on the enactment of new Section 12 covering gross incompetency (see Department's Exhibit D, Bill Analysis). Furthermore, the purpose of the 1975 Act was to strengthen the Medical Disciplinary Act and to expand the authority of the Board (See Department's Exhibit D, Bill Analysis). Clearly, the legislature intended to preserve and, in fact, to expand the conduct described as unprofessional conduct. The legislature did not intend to strip or narrow the Board's authority to take action against physicians for repeated acts of immorality arising prior to 1975.

3.11 Even when there has been an express repeal of a statute, Washington courts have not terminated all rights under the repealed statute when such a construction would foster an absurd result. Whalen v. Labor and Industries, 35 Wn. App. 283, 665 P.2d 1389 (1983). Despite the legislature's express repeal of a statute, the court in Whalen concluded that the legislature did not intend an unqualified repeal of a statute because the legislature designated the new law as amendatory and because the legislature reenacted substantially the same rights under the new legislation. Likewise, in this case, adoption of the Respondent's interpretation would lead to a result inconsistent with the legislature's intent to strengthen and expand the authority of the Board and inconsistent with the legislature's reenactment of provisions which continue to prohibit the conduct alleged in this case. The legislature

did not intend for misconduct of the type alleged in this case to go unsanctioned.

3.12 The 1975 Act did not divest the Board of authority to charge a physician with unprofessional misconduct under Section 11 of the 1963 Act for repeated acts of immorality occurring prior to the effective date of the 1975 Act. This result would be inconsistent both with legislative intent and the 1975 legislative enactments.

B. Laches

3.13 The Respondent next contends that the charges against him should be dismissed based on the doctrine of laches. Washington courts have not specifically addressed whether laches can be used to bar a medical disciplinary action brought by the state. In general, equitable defenses are not available against the government if their application would encroach upon governmental sovereignty, or interfere with proper discharge of governmental duties, curtail an exercise of police power or violate public policy. Finch v. Mathews, 74 Wn.2d. 161, 443 P.2d 833 (1968), Housing Authority v. Sewer and Water District, 56 Wn. App. 589, 784 P.2d 1284 (1990). However, the doctrine of laches has been applied to bar some actions by the state in certain situations.

3.14 In one case, the Washington Supreme Court weighed and considered certain factors in determining if laches should be applied in an action for a writ and injunction against a school district. Lopp v. Peninsula School

District, 90 Wn.2d 754, 585 P.2d 801 (1978). The court stated:

> ...Courts in other jurisdictions regard the nature of the case to be one factor to consider when determining whether laches should be applied. Other factors include the circumstances, if any, justifying the delay, the relief demanded, and the question of whether the rights of defendant or other persons, such as the public, will be prejudiced by the maintenance of the suit. [citations omitted]...We think the balancing approach is more logical...The nature of the lawsuit, here a public interest lawsuit, is simply another factor to be considered by the court in determining whether the doctrine of laches should be applied.

Lopp v. Peninsula School District, 90 Wn.2d 754, 585 P.2d 801(1978). Although factually, procedurally and contextually Lopp, supra, is very different from the case at hand, the Lopp case indicates the Washington Supreme Court's consideration of the rights and interests of the parties in determining the fairness of proceeding in a particular case.

3.15 A review of the decisions from other states shows that generally the defense of laches is not available to bar an action brought by the state in its sovereign capacity to enforce or protect a public right or public interest. Corpus Juris Secundum, Vol. 30A, § 131, pg. 358 (1976). Although the courts in other jurisdictions are divided on the issue whether laches may be applied to bar a disciplinary action by the state, some courts have held that laches is available to bar a medical disciplinary proceeding if prejudice can be established. Appeal of Plantier, 126 N.H. 500, 494 A.2d 270 (1985), Lyness v. Com., State Bd. of Medicine, 561 A.2d 362 (Pa. Cmnwlth, 1989). In Plantier, the court used both a due

process and laches analysis to consider the interests of the state and the prejudice to the defendant. Under the circumstances of that case, the New Hampshire court concluded that it was fundamentally unfair to make the physician defend against the charges.

> ...Due process is the New Hampshire Constitution's version of principles of equity and application of a laches-type doctrine is deemed a part of the process due a person whose economic life and professional career are on the line.

Plantier, supra at 1141.

3.16 While the traditional application of the doctrine of laches focuses on the prejudice to the defendant that may result from an unreasonable delay in bringing charges, a due process analysis considers the fairness of bringing the action based on all of the interests at stake in a particular case. The Respondent has raised due process and fairness issues in his argument and in the cases that he has cited in support of his position. Given the significant public and private interests involved in a medical disciplinary proceeding, a due process analysis, rather than a traditional laches analysis, may be more appropriate. Furthermore, a due process analysis is not inconsistent with the Washington Superior Court's equitable analysis of laches in Lopp, supra.

3.17 While Washington courts have not determined whether laches can be applied to bar a medical disciplinary proceeding in Washington, the Washington Supreme Court has

found that the due process clause applies to medical disciplinary proceedings. In re Kindschi, 52 Wn.2d. 8, 11-12, 319 P.2d 824 (1958), Haley, supra at 732.

3.18 Due process involves principles of fundamental fairness and justice. The application of due process in a particular case considers the competing interests at stake under the circumstances of each case. Among the competing interests at stake in a medical disciplinary action are the government's interest in protecting the public health and well-being, the physician's interest in retaining a license to practice medicine and their mutual interest in avoiding an erroneous determination of the charges.

3.19 The legislature has determined that the protection of the health and well-being of the public is of paramount importance. RCW 18.72. To protect the health and well being of the public, the Washington State Medical Disciplinary Board (the Board) has been charged with the duty of investigating complaints of unprofessional conduct and issuing charges against a physician if there is reason to believe unprofessional conduct has occurred. Because of the significance of the public's interest in a disciplinary case, the Board is to pursue vigorously its disciplinary task. Haley, supra at 727.

3.20 A physician's private interest in retaining a license to practice medicine is also substantial. A license to practice medicine represents not only a significant investment of time and money but also a person's livelihood

and professional standing and reputation. Although this interest is subject to the police power of the state to protect the health and well being of the public, a person's license to practice medicine should not be revoked, suspended or restricted without sufficient proof of unprofessional conduct. To protect the interests of a physician charged with unprofessional conduct, the physician is afforded a right to a hearing which includes the right to produce witnesses and evidence on his or her behalf. RCW 18.130.190.

3.21 In a disciplinary proceeding, a physician's interest in retaining a license may directly conflict with the Board's duty to protect the public by pursuing its disciplinary duties. However, both parties share a mutual interest in avoiding an erroneous determination in a particular case. This interest also lies at the heart of due process.

3.22 Due process requires that the hearing be both meaningful and appropriate to the nature of the case. In Re Myricks, 85 Wn.2d 252, 533 P.2d 841 (1975). A hearing in which the Respondent does not have an opportunity to present relevant and material evidence to rebut the elements of a charge is not meaningful, does not constitute due process and may lead to an erroneous decision.

3.23 In this case, due process requires that the prejudice to the Respondent in his ability to defend against the charges be weighed against the interest of the State in

protecting the public health and well being. The factors the decision maker should consider in determining if, and to what extent, the Respondent has shown prejudice in his ability to defend against the charges include, but are not limited to, the following:

a. Whether after diligent efforts, the Respondent is unable to obtain actual and relevant evidence that once likely existed but now no longer exists or is otherwise unavailable;

b. Whether the Respondent's inability to obtain actual and relevant evidence is through no fault of the Respondent;

c. Whether the evidence would directly rebut one or more elements of the charges; and

d. Whether, as a result and as a matter of law, it would be fundamentally unfair to proceed to hearing on the charges.

3.24 The factors considered in balancing the State's interest in protecting the health and well being of the public include, but are not limited to, the following:

a. Whether the charges reflect on the Respondent's current ability to practice medicine with reasonable skill and safety;

b. Whether the charges reflect on the integrity and standing of the medical profession in the eyes of the public; and

c. Whether dismissal of the charges prior to hearing would deter future complaints to the Board;

3.25 At this time, the Respondent's assertions that he is substantially prejudiced in defending against the Board's actions are for the most part speculative. The Respondent

has not deposed the complainants in an attempt to ascertain the identity or whereabouts of persons he may want to call as witnesses at hearing nor has he determined if witnesses' memories have actually faded with time. Although the Respondent's destruction of his medical records for the complaining witnesses may hypothetically pose some element of prejudice, it is not sufficient in itself to establish the fundamental unfairness of proceeding to hearing on the charges. The Respondent's motion to dismiss the charges against him is premature and should be denied at this time.

3.26 The parties have not raised or argued the effect of the Respondent's motion to dismiss on the charge relating to the Respondent's alleged failure to comply with an interim order for a psychological evaluation. Therefore, the Hearings Officer will not address that issue at this time.

4. Order

Based on the above Procedural Findings, Findings of Fact and Conclusions of Law, the Hearings Officer hereby orders the following:

4.1 The Respondent's Motion to Dismiss is DENIED.

The parties are advised that the decision of the Hearings Officer may be appealed to the presiding officer of the Board within ten days of service of this decision and order on the parties. Appeal is not required to preserve the record related to this decision and order for judicial review after the final order has been issued in this case.

DATED THIS 7th DAY OF JULY, 1993

/s/

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COLLEEN KLEIN
Review Judge
Office of Professional Standards