

BEFORE THE IOWA BOARD OF MEDICINE

IN THE MATTER STATEMENT OF CHARGES AGAINST

JERRY G. SCHAAF, M.D., RESPONDENT

FILE No. 02-98-170

DISMISSAL ORDER

Date: February 4, 2010.

1. Respondent was issued Iowa medical license no. 18692 on July 12, 1972.
2. Respondent's Iowa medical license is active and will next expire on September 1, 2011.
3. On April 27, 2006, the Board filed formal disciplinary charges against Respondent alleging that he engaged in an inappropriate sexual relationship in July 1973 with a patient who was a minor child at the time.
4. On November 28-29, 2007, the case came for hearing before a Panel of the Board. On January 28, 2008, the Panel issued a Proposed Decision. The Panel concluded that the disciplinary charges were supported by the weight of the evidence. The Panel ordered Respondent to pay a \$10,000 civil penalty and have a chaperone present in the room at all times when he examines or treats a minor child. The Panel also placed Respondent on probation for a period of five years subject to counseling and Board monitoring.

5. On February 25, 2008, Respondent appealed the Proposed Decision of the Panel to the full Board. Respondent and the State filed written briefs and arguments. On May 14, 2008, the full Board heard oral argument from the parties. Upon careful review of the entire record and arguments of both parties, the Board voted to adopt the Proposed Decision of the Panel.

6. On June 26, 2008, Respondent filed a Formal Request for Rehearing with the Board arguing that the Board should review two assessment reports pertaining to Respondent that were submitted after the Board's Final Order. On June 30, 2008, the State filed a Joinder in the Request for Rehearing arguing that one of the assessment reports contained new information which indicated that Respondent was not safe to continue in the practice of medicine at the time because he provided medical care to two individuals with whom he was involved in long-term romantic relationships at the time he provided care. A rehearing was held on July 9, 2008. Following the hearing, the Board concluded that the new information demonstrated an additional occurrence in which Respondent lacked appropriate professional judgment when mixing the physician-patient relationship with romantic relationships. The Board ordered Respondent to complete a Board-approved sexual boundaries program and fully comply with the recommendations made by the program.

7. Respondent filed a Petition for Judicial Review in the Iowa District Court for Polk County and the administrative appeal came before the District Court for hearing on March 23, 2009. Respondent argued that the complaint against him should have been dismissed based on the defense of laches, because he was prejudiced by the passage of time

between the alleged conduct and the Board's disciplinary action. On May 4, 2009, the District Court affirmed the Decision of the Iowa Board of Medicine. The District Court concluded that Respondent did not prove by clear, convincing, and satisfactory evidence that he was prejudiced by the Board's delay in prosecution of the disciplinary matter.

8. Respondent appealed the District Court's Ruling on Judicial Review that affirmed the disciplinary action of the Iowa Board of Medicine. Recently, the Iowa Court of Appeals reversed the District Court's Ruling on Judicial Review and remanded the matter for dismissal. The Court of Appeals concluded that the Board's delay in prosecution of the disciplinary action against Respondent was unreasonable and that the delay prejudiced Respondent's defense in the matter.

THEREFORE IT IS HEREBY ORDERED: that the Board's disciplinary action in this matter is dismissed and Respondent's Iowa medical license is returned to its full privileges, free and clear of all restrictions.

IOWA BOARD OF MEDICINE



Siroos S. Shirazi, M.D., Chairman
Iowa Board of Medicine
400 SW 8th Street, Suite C
Des Moines, Iowa 50309-4686

IN THE COURT OF APPEALS OF IOWA

No. 9-978 / 09-0721
Filed December 30, 2009

JERRY G. SCHAAF, M.D.,
Petitioner-Appellant,

vs.

IOWA BOARD OF MEDICINE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

Appeal from the district court ruling that affirmed the disciplinary action of
the Iowa Board of Medicine. **REVERSED AND REMANDED.**

Michael Sellers of Sellers, Haraldson, & Binford, Des Moines, for
appellant.

Thomas J. Miller, Attorney General, and Theresa O'Connell Weeg,
Assistant Attorney General, for appellee.

Considered by Sackett, C.J., Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

Petitioner-appellant, Jerry Schaaf, M.D., appeals from the district court ruling on judicial review that affirmed the disciplinary action of the Iowa Board of Medicine (“board”). He contends no substantial evidence supports the board’s finding of guilt of the allegations contained in the complaint and statement of charges. He also contends the complaint should have been dismissed based on the defense of laches, and he was prejudiced by the delays in reporting, investigating, and prosecuting the case. We reverse and remand.

BACKGROUND. In 1998, a complaint was filed with the Iowa Board of Medicine, alleging Dr. Schaaf sexually abused the complainant in July of 1973 when the complainant was fourteen years old and continued to abuse him during his high school years. Included with the complaint was a 1997 letter written by complainant’s mother, stating that her son went with Dr. Schaaf to Omaha on the July 1973 weekend in question, stayed overnight at the doctor’s apartment there, and seemed upset after his return.

The board’s investigator interviewed some witnesses and determined that nothing inappropriate occurred, yet the investigation remained open. The investigator retired in 2001. In October of 2003 another investigator was assigned the case. She interviewed the complainant’s mother in September of 2004. The mother stated her son acted upset on returning from the weekend in Omaha with Dr. Schaaf but did not report any abuse. The same day that the investigator interviewed Dr. Schaaf’s mother, the investigator also served Dr. Schaaf with his first notice of the complaint that had been filed in 1998. In

January of 2005 complainant's mother signed a letter stating the 1997 letter had been dictated to her by her son and the statements in that letter were not true.

In April of 2006 the board filed formal disciplinary charges against Dr. Schaaf, alleging he engaged in unethical or unprofessional conduct or practice harmful or detrimental to the public. Dr. Schaaf filed a motion to dismiss based on laches. The board ruled the defense of laches was not available in board disciplinary proceedings. In an interlocutory appeal, the district court ruled laches was available and remanded to the board to consider the defense. On remand, in an order denying the motion to dismiss, the board concluded the thirty-four-year period between the alleged misconduct and the statement of charges "must be treated no differently than the shorter time gaps discussed in prior [Iowa] Supreme Court cases." The board further concluded Dr. Schaaf did not prove prejudice.

In November of 2007 the case was heard by a panel of the board. In January of 2008 the panel issued its proposed decision. It contained detailed findings, assessments of credibility, and conclusions. The panel found the State had satisfied its burden of proof. It found the complainant's testimony "more consistent, better supported, and more plausible" than Dr. Schaaf's. It recognized "some inconsistencies," but found the testimony and evidence from the complainant and the State outweighed the credibility and evidence from Dr. Schaaf. The panel concluded that Dr. Schaaf violated the statutes and rules concerning unethical or unprofessional conduct or practice harmful or detrimental to the public. It imposed sanctions that included a \$10,000 civil penalty, a

requirement Dr. Schaaf have a chaperone present when treating minor children, and five years of probation. Dr. Schaaf appealed to the full board.

Following receipt of written briefs and oral arguments, the board issued a final order on appeal in June of 2008. "Upon review of the entire record, and the arguments made by both parties on review, the board voted to adopt the panel's decision in its entirety." The board affirmed the proposed decision. Dr. Schaaf filed a request for rehearing. The State joined his request.

The board granted the requests for rehearing and heard additional evidence in July of 2008. Dr. Schaaf provided a report from a second evaluation he underwent. The State presented evidence concerning Dr. Schaaf's treatment of two patients with whom he also had had sexual relationships. The board concluded the report from Dr. Schaaf's second evaluation did not provide new information and found no reason to change its appeal decision. The board further concluded the new evidence from the State "must be considered to determine whether the sanctions are sufficient to protect the public." It affirmed the prior board decision in all respects except to add a requirement that Dr. Schaaf complete a sexual-boundaries program. Dr. Schaaf sought judicial review.

In his petition for judicial review, Dr. Schaaf alleged he

was deprived of any possibility of a fair hearing or a fair outcome due to the age of the complaint when it was filed and also due to the extended period of time involved in the investigation by the board and its rulings at various stages during the proceedings.

He further alleged his substantial rights were prejudiced by the actions of the board on many of the grounds set forth in Iowa Code section 17A.19(10).

The court considered the record from the board's action and the written and oral arguments of the parties. Considering the laches defense, the court found

that the first element of the laches defense, unreasonable delay, has been proven by clear, convincing, and satisfactory evidence in this case. Complainant waited almost twenty-five years to file a complaint with the board after the alleged incident occurred. This fact alone could constitute an unreasonable delay; however, the fact that the board waited another eight years before filing a formal statement of charges against [Dr.] Schaaf makes the delay even more unreasonable. Nearly thirty-three years elapsed between the July 4, 1973 alleged incident and the filing of charges on April 27, 2006. The court finds this to be an unreasonable delay.

The court then considered each of Dr. Schaaf's arguments concerning prejudice and found he did not prove

by clear, convincing, and satisfactory evidence that he was prejudiced by the unreasonable delay, especially in light of the fact that complainant and [Dr.] Schaaf were the only true witnesses to the alleged incident, and both were available to testify. Therefore, the court determines that [Dr.] Schaaf's laches defense must fail.

The court then considered whether substantial evidence supported the board's decision. The court quoted the board's findings on credibility quoted above and recited the bases for the board's credibility determination. The court concluded:

The board made its factual determination by assessing the credibility of complainant and [Dr.] Schaaf. While evidence certainly exists to undermine complainant's credibility, the question on judicial review is not whether evidence supports a decision that was not made, but whether evidence supports the decision that the board actually made. The board's finding that complainant's testimony was more credible than [Dr.] Schaaf's testimony is supported by substantial evidence in the record. Therefore, the court finds that the board's decision is supported by substantial evidence.

The court affirmed the board's decision. Dr. Schaaf appealed.

SCOPE AND STANDARDS OF REVIEW.

We review agency action for correction of errors at law. We apply the standards set forth in the Administrative Procedure Act, Iowa Code ch. 17A, to determine whether our conclusions are the same as those of the district court. Pursuant to Iowa Code section 17A.19(10), a court must reverse agency action when any one of several enumerated circumstances exists and substantial rights of the person seeking judicial relief have been prejudiced as a result.

Doe v. Iowa Bd. of Med. Exam'rs, 733 N.W.2d 705, 707 (Iowa 2007) (citations and internal quotations omitted). The board's findings are akin to a jury verdict, and we broadly apply them to uphold the board's decision. See *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). Evidence is substantial if reasonable minds would find it adequate to reach the same findings. *Murillo v. Blackhawk Foundry*, 571 N.W.2d 16, 17 (Iowa 1997). Assessing the weight of the evidence is within the exclusive domain of the board. *Burns v. Bd. of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993). As trier of fact, the board has the duty to determine the credibility of the witnesses. See *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995). Courts are not allowed to reassess the weight of the evidence upon review. *Christensen v. Snap-On Tools Corp.*, 602 N.W.2d 199, 201 (Iowa Ct. App. 1999).

MERITS. Laches Defense. Dr. Schaaf contends the board should have dismissed the complaint against him based on laches. Iowa is among "those jurisdictions willing to recognize a laches defense in a professional disciplinary action, but applying it to bar the action only if (1) the delay is unreasonable, and (2) prejudice to the licensee is established." *Miller v. Bd. of Med. Exam'rs*, 609 N.W.2d 478, 485 (Iowa 2000); *Sahu v. Bd. of Med. Exam'rs*, 537 N.W.2d 674, 676 (Iowa 1995). "The party asserting the defense carries the burden of

establishing the essential elements by clear, convincing, and satisfactory evidence.” *Sahu*, 537 N.W.2d at 676 (quoting *Committee on Prof'l Ethics & Conduct v. Wunschel*, 461 N.W.2d 840, 846 (Iowa 1990)). “[T]he mere passage of time is insufficient to bar the proceedings,” but we “allow the defense of laches if the licensee is prejudiced by an unreasonable delay.” *Id.*

We agree with the district court’s determination the delay in this case was unreasonable.¹ Dr. Schaaf argues he was prejudiced by the delay because (1) his own office records from the time of the alleged incident had been destroyed, (2) the records of complainant’s therapist had been destroyed, (3) complainant’s father had died, and (4) complainant’s mother was unavailable to testify due to failing health.

The board’s “order on respondent’s second motion to dismiss” considered each of the claims of prejudice made by Dr. Schaaf and concluded Dr. Schaaf did not demonstrate prejudice. The district court considered each of Dr. Schaaf’s claims of prejudice and rejected each of them.

From our review of the record, however, our conclusions are not the same as the district court’s. The length of the delay is substantially longer than cases cited in support of the district court’s decision. In *Miller*, 609 N.W.2d at 485, the

¹ We do not address the board’s argument the delay was not unreasonable because the board did not cross-appeal from the district court’s ruling. Although the board disagrees, this is not a situation in which the board seeks to uphold the district court’s ruling, but on a different ground than that relied on by the district court. See *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002) (noting “a successful party in the district court may, without appealing, save the judgment in whole or in part based on grounds urged in the district court but not included in that court’s ruling”). Here, the board argues the district court erred in determining the delay was unreasonable. A determination of the reasonableness of the delay was not a ground “not included in that court’s ruling.” See *id.*

court determined that when the investigation and peer review inquiries were factored in, roughly four and one-half years elapsed between the first complaint and the formal filing of charges against Miller. In doing so the court noted that the board conceded that devoting three years to investigating this matter was perhaps longer than the “ideal” but was not unreasonable. *Miller*, 609 N.W.2d at 485. The court further said they were inclined to agree with the board’s concession. *Id.* In *Sahu*, 537 N.W.2d at 675, Sahu was charged in federal court with inaccurate billing under the Medicaid program. There was a delay of seven years after the inaccurate billing before the board acted. The board had delayed filing the complaint during the pendency of the federal criminal charges. The court found the disciplinary proceeding was commenced within a reasonable time after the conclusion of the criminal trial. *Sahu*, 537 N.W.2d at 676.

We agree “the mere passage of time” is not sufficient to bar these proceedings. *See id.* However, the delay of forty-two years here, including about eight years between the time the board got the complaint, made one investigation, made a second investigation, and ultimately filed charges is clearly not ideal and is evidence of prejudice. This coupled with the fact that during the delay records were destroyed and the board admitted the complainant’s mother’s deposition into evidence. Thus Dr. Schaaf did not have the opportunity to cross-examine her in the presence of the decision-makers.² Given the changes in her narrative over time and the seriousness of the charge, we are not as sanguine as the panel of the board was that her deposition testimony “fairly constitute[d] her

² One of the panel members dissented from the decision not to have the record held open for her live testimony.

memory as to what occurred.” Dr. Schaaf has demonstrated he was prejudiced and has established his affirmative defense of laches. We therefore reverse the decision of the district court on judicial review and remand for dismissal of the disciplinary proceedings based on the 1973 incident.

REVERSED AND REMANDED.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JERRY G. SCHAAF, M.D.

Petitioner,

vs.

IOWA BOARD OF MEDICINE,

Respondent.

Case No. CV 7364

RULING ON ✓
PETITION FOR JUDICIAL REVIEW

This administrative appeal came before the court for contested hearing on March 23, 2009. Attorney Michael Sellers appeared on behalf of Petitioner, Jerry G. Schaaf, M.D. Assistant Attorney General Theresa Weeg appeared on behalf of Respondent, Iowa Board of Medicine. Following oral arguments and upon review of the court file, certified record and applicable law, the Court enters the following Ruling and Orders:

BACKGROUND FACTS AND PROCEDURAL HISTORY

Jerry G. Schaaf, M.D. has practiced medicine in southwest Iowa for the past thirty-five years. When Schaaf first began practicing in Hamburg, he met complainant's mother, who was working as a nurse at Hamburg Hospital. Complainant's mother and Schaaf developed a friendship. Complainant's mother began to invite Schaaf to dinner, and he became a regular visitor to the family home. When Schaaf moved his practice to Sidney, complainant's mother and father helped finance the medical office and complainant's mother worked as his office nurse for about five years. Complainant and Schaaf developed a personal relationship, which complainant's parents encouraged to help him deal with the loss of his brother and sister. While starting his practice in southwest Iowa, Schaaf admitted to living a "gay lifestyle." Schaaf did

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not begin a long-term relationship with another man until he met JC in the late summer or fall of 1973.

Both complainant and Schaaf agree that they went on a trip to Omaha together on or around July 4, 1973. Complainant testified that Schaaf invited him to sleep in his bed with him and he did so. Complainant further testified that Schaaf proceeded to press his groin against complainant's buttocks, massaged his neck, fondled his penis, and kissed him on the cheek. This is the incident in dispute that forms the basis of the complaint. Schaaf denies any sexual contact with complainant during the Omaha trip. Complainant testified that he told his father about Schaaf's sexual advances upon returning home from the Omaha trip, and that his father asked him to tell his mother. Complainant stated that his mother was "stunned," and asked him what he wanted her to do. Complainant testified that he told his mother she should not quit her job, and she did not.¹ Complainant's parents continued to socialize with Schaaf and there is no evidence that either parent confronted him at that time. Complainant's mother kept daily journals. The relevant journal entries for July 3-5, 1973 are:

"Tuesday [July 3] . . . [Schaaf] took [complainant] home with him to stay overnight and to watch the fireworks at the Crossroads tomorrow night—it was really wonderful of him to be so considerate of [complainant] . . .

Wednesday [July 4] . . . [Schaaf] brought [complainant] home at about 3 p.m.—[complainant] was grouchy . . .

Thursday [July 5] . . . tonight I found out why [complainant] was so upset."

(Ex. 27). Complainant also testified that he told a classmate about the sexual abuse and the classmate was "clearly disturbed" by what happened.

Complainant admits to having sexual relationships with other men while in college, but he concluded that he was not a homosexual when he was 22 or 23 years old. Complainant's

¹ By this time, complainant's mother worked in Schaaf's medical office and was his employee.

relationship with Schaaf began to deteriorate after he graduated from college. Complainant attended and graduated from law school, and began practicing law in another state. Complainant was married in 1990 and had two children. The marriage ended in 1996, and complainant began to see a therapist, Dr. Mary Sherwood to deal with the stress from his divorce. Complainant saw Dr. Sherwood for five years, and during the course of his therapy, he discussed his relationship with Schaaf. Complainant testified that he confronted his parents and Schaaf in 1997, but his parents were unresponsive and Schaaf refused to acknowledge that the sexual abuse occurred.

On May 29, 1998, complainant filed a complaint with the Iowa Board of Medicine alleging that Schaaf sexually abused him on or about July 4, 1973 when he was fourteen years old. Complainant further alleged that Schaaf continued to abuse him throughout his high school years. Attached to the complaint was a letter written by complainant's mother in 1997, stating that Schaaf invited her son to his apartment in Omaha for the weekend and upon returning, complainant seemed upset. The letter further states that complainant asked her if she knew Schaaf was a homosexual, and when she asked complainant whether Schaaf hurt him, he said no. Complainant's mother's letter also states that she asked her son if he wanted her to stop working for Schaaf, and he said no. Complainant's mother ended her letter by stating that she now understands Schaaf is a child molester who sexually abused her son.

The complaint was originally assigned to investigator Mike Archibald, who interviewed some witnesses, and determined that nothing inappropriate occurred. On October 28, 2003, after Archibald retired, the file was assigned to investigator Teena Roush. Roush interviewed complainant's mother on September 29, 2004. Complainant's mother stated that complainant acted differently when he returned home from the Omaha trip with Schaaf, but that he said nothing about abuse occurring. Complainant's mother informed Roush that she remains friends

with Schaaf and considers him to be a brilliant and outstanding person. On September 29, 2004, the first notice that the complaint had been filed was served on Schaaf. On January 12, 2005, complainant's mother signed a letter stating that the 1997 letter was dictated to her by complainant and the statements contained in the 1997 letter were untrue to her knowledge.

The Board filed formal disciplinary charges against Schaaf on April 27, 2006, alleging that Schaaf violated Iowa Code § 147.55(3) and Iowa Administrative Code rule 653-12.4(3) and (36), engaging in unethical or unprofessional conduct or practice harmful or detrimental to the public, for engaging in inappropriate sexual misconduct in the practice of medicine. Schaaf filed a motion to dismiss the formal complaint based on the laches defense. The Board ruled that the laches defense is not available in a licensing board disciplinary proceeding; however, the district court ruled in an intermediate appeal that the laches defense was available, and remanded the case back to the Board with instructions to consider the laches defense. The Board considered the laches defense and denied the motion to dismiss.

On September 20, 2007, complainant's mother testified in deposition that her son did not tell her that Schaaf sexually touched him in Omaha, and if he had, she would have quit her job immediately and severed her relationship with Schaaf. She also testified that her son asked her if she knew Schaaf was a homosexual and she asked her son whether Schaaf hurt him and if he wanted her to continue to work for him. The case proceeded to an evidentiary hearing held on November 28 and 29, 2007. Complainant's classmate, who he allegedly told about the sexual abuse, testified at hearing that he does not recall the conversation and he would remember such a conversation if it had occurred. Complainant testified that he was conflicted about what occurred with Schaaf and his parents' lack of response. Complainant also testified that Schaaf's

sexual abuse continued through his high school years and that Schaaf tried to make him think he was a homosexual.

Complainant testified that Schaaf introduced him to RH, who offered him alcohol and engaged in sexual conduct with him. At hearing, RH adamantly denied complainant's allegations. Complainant testified regarding an incident that occurred after he returned from college on break, where he went to Schaaf's home and watched a pornographic gay film, after which complainant went to bed with Schaaf and another man. Schaaf admitted to this sexual encounter and testified that this was the only sexual contact he had with complainant.

Complainant listed two other persons who may have been victimized by Schaaf; however, neither corroborated the allegations. On January 28, 2008, a Proposed Decision of the Panel was filed, finding that the statement of charges was supported by the weight of the evidence and imposing multiple public disciplinary sanctions against Schaaf. Following Schaaf's appeal, the Board heard oral argument on May 14, 2008, and affirmed the panel's decision in its entirety on June 12, 2008.

On June 26, 2008, Schaaf filed a request for rehearing and submitted himself to a second evaluation at Behavioral Medical Institute of Atlanta (BMI)². On June 30, 2008, the State joined in Schaaf's request for rehearing, arguing that the new BMI report shows that Schaaf is an increased risk to the public. The Board granted the requests and conducted a hearing before a quorum of the full Board on July 9, 2008. On August 28, 2008, the Board denied Schaaf's request for rehearing because he did not present any new evidence or argument that is material to the final decision or sanctions, but granted the State's request for rehearing, finding additional evidence to support the sanctions and further ordering Schaaf to complete a Board-approved sexual boundaries program. On September 25, 2008, Schaaf filed a Petition for Judicial Review,

² Schaaf's first professional boundaries evaluation at BMI was in 2005.

arguing that the complaint should have been dismissed based on the defense of laches and that the findings and conclusions of the Board are not supported by substantial evidence.

ANALYSIS AND CONCLUSIONS OF LAW

I. Laches

Schaaf asserts that the complaint against him should have been dismissed based on the defense of laches because he was prejudiced in the prosecution due to the extraordinary passage of time. The Board asserts that Schaaf cannot establish by clear, convincing, and satisfactory evidence that the delay was unreasonable or that he was prejudiced by any delay in the filing of formal charges.

The doctrine of laches is applicable where there has been an unreasonable delay in asserting a remedy and there has been an injury or prejudice to the party against whom judgment is sought to be enforced. *Chicago, Rock Island and Pacific Railroad Co. v. City of Iowa City*, 288 N.W.2d 536, 541 (Iowa 1980) (citing *Davidson v. Van Lengen*, 266 N.W.2d 436, 439 (Iowa 1978)). The mere passage of time does not constitute injury or prejudice. *Anita Valley, Inc. v. Bingley*, 279 N.W.2d 37, 41 (Iowa 1979) (citation omitted). Laches may be used as an affirmative defense in a professional disciplinary case if the delay is unreasonable and the licensee is prejudiced by the delay. *Iowa Supreme Court Attorney Disciplinary Board v. Wintroub*, 745 N.W.2d 469, 476 (Iowa 2008); *Miller v. Iowa Board of Medical Examiners*, 609 N.W.2d 478, 485 (Iowa 2000); *Sahu v. Iowa Board of Medical Examiners*, 537 N.W.2d 674, 676 (Iowa 1995). “The party asserting the defense carries the burden of establishing the essential elements by clear, convincing, and satisfactory evidence.” *Sahu*, 537 N.W.2d at 676 (citations omitted). Generally, a factual showing of concrete prejudice is required before the laches

defense may be invoked. *Wintroub*, 745 N.W.2d at 476 (citing *Iowa Supreme Ct. Bd. Of Prof'l Ethics & Conduct v. Mulford*, 625 N.W.2d 672, 680 (Iowa 2001)).

The Court finds that the first element of the laches defense, unreasonable delay, has been proven by clear, convincing, and satisfactory evidence in this case. Complainant waited almost twenty-five years to file a complaint with the Board after the alleged incident occurred. This fact alone could constitute an unreasonable delay; however, the fact that the Board waited another eight years before filing a formal statement of charges against Schaaf makes the delay even more unreasonable. Nearly thirty-three years lapsed between the July 4, 1973 alleged incident and the filing of charges on April 27, 2006. The Court finds this to be an unreasonable delay.

Schaaf puts forth several arguments that he was prejudiced due to this unreasonable delay. First, Schaaf argues that any notes or records that might have assisted in his defense were destroyed by the hospital and by the offices where he practiced many years before the complaint was ever voiced. The Board found that Schaaf acknowledged that he likely saw complainant as a patient during his youth, and that complainant's mother confirmed that Schaaf treated complainant for ear aches and mononucleosis. (Proposed Dec., p. 4). The Court finds it unlikely that any medical records or notes that may have been lost would have added anything to Schaaf's defense, since the Board found that Schaaf treated complainant when he was a minor but made no finding regarding whether he was treating him at the time of the alleged incident. Further, it would be irrelevant whether complainant was a patient of Schaaf's at the time of the alleged incident because he was a minor, and the action would have been criminal. The Court finds that Schaaf failed to provide clear, convincing, and satisfactory evidence as to what relevant or important information may have been contained in those records; therefore, Schaaf has not met

his burden of proof to demonstrate that he was prejudiced by the loss of any medical notes or records.

Schaaf also argues that he was prejudiced by the unreasonable delay because Dr. Sherwood's psychological records and notes were destroyed. In its Proposed Decision, the Board specifically stated that it did not give any weight to any opinion Dr. Sherwood provided regarding the allegations of sexual abuse. (p. 12). The Court finds it is unlikely that Dr. Sherwood's records would have contained information helpful to Schaaf's defense; therefore, Schaaf has not provided clear and convincing evidence that he was prejudiced by their destruction.

Schaaf next argues that he was prejudiced by the unreasonable delay because complainant's father, whom complainant identified in his complaint he told about the alleged incident immediately after it occurred, died in 2002, before Schaaf was made aware of the complaint. Schaaf has not asserted what testimony he believes complainant's father would have provided; however, presuming that complainant's father would have testified that complainant did not tell him about the alleged incident after it occurred, the Court does not find that Schaaf was prejudiced by the lack of this testimony. First, in 1997 or 1998, complainant's mother wrote the letter attached to the complaint, and complainant's father, though alive, took no part in the letter. Second, the Board made a finding that there was no evidence that either of complainant's parents confronted Schaaf after the alleged incident and that Schaaf and they continued to socialize with Schaaf. (Proposed Dec., p. 6). Finally, the Board never made a finding that complainant told his father about the incident after he returned from Omaha. Therefore, even presuming that complainant's father would have testified that complainant did not tell him about the alleged incident as he claims, it is unlikely that it would have had any effect on the Board's

decision. In fact, the other two witnesses who complainant claims to have informed of the alleged incident, his classmate and his mother, testified that he did not tell them about the alleged sexual abuse, and that did not prevent the Board from finding complainant more credible than Schaaf. As a result, the Court does not find clear and convincing evidence that Schaaf was prejudiced by the lack of complainant's father's testimony, even with the presumption that he would have testified that complainant did not inform him of the alleged sexual abuse.

Lastly, Schaaf argues that he was prejudiced because complainant's mother was unavailable to testify at the hearing. The Board considered: (i) complainant's mother's journal entries stating that complainant stayed overnight with Schaaf and was grouchy and upset when he returned; (ii) the letter she sent to the Board in 1997 stating that her son spent the night with Schaaf in Omaha, he seemed upset when he returned, he asked her if she knew Schaaf was a homosexual, and he said he did not hurt him; (iii) her interview with investigator Roush on September 29, 2004, where she stated that complainant acted differently when he returned from the Omaha trip with Schaaf but he did not say anything about the alleged abuse; (iv) her January 12, 2005 signed letter to the Board stating that the statements contained in the 1997 letter were untrue; and (v) her September 20, 2007 deposition stating that complainant did not tell her that Schaaf sexually touched him in Omaha, but he did ask her if she knew Schaaf was a homosexual and she asked her son whether Schaaf hurt him and if he wanted her to quit her job, to which he replied "no." The Board determined, "[w]hile there is a factual dispute as to exactly what was said, there clearly was a conversation between [complainant and his mother] about something that happened on the Omaha trip in 1973." (Proposed Dec., p. 16).

The Board noted that complainant's mother's testimony had wavered. (Proposed Dec., p. 19). However, the Board determined that complainant's mother consistently confirmed that

complainant spent the night in Omaha with Schaaf, he acted upset upon his return, he asked her whether Schaaf was a homosexual, and she asked him whether she should stop working for Schaaf and whether Schaaf had hurt him, to which he replied "no." Clear, convincing, and satisfactory evidence does not exist to support a claim that complainant's mother would not have testified to these consistent facts; therefore, Schaaf has not meet his burden to prove he was prejudiced by complainant's mother's unavailability to testify at hearing. Further, when denying Schaaf's motion to have the record held open to hear complainant's mother testify, the Board stated, "[t]he parties took the deposition of Complainant's mother for the purpose of perpetuating her testimony . . . The parties took her testimony by deposition to preserve it in the event she had health problems that prevented her from testifying at hearing. This is exactly what occurred." (Proposed Dec., p. 14).

The Court finds that Schaaf has not proven by clear, convincing, and satisfactory evidence that he was prejudiced by the unreasonable delay, especially in light of the fact that complainant and Schaaf were the only true witnesses to the alleged incident, and both were available to testify. Therefore, the Court determines that Schaaf's laches defense must fail.

II. Substantial Evidence

Schaaf argues that the findings and conclusions of the Board are not supported by substantial evidence. Substantial evidence means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. IOWA CODE § 17A.19(10)(f)(1). The adequacy of the evidence in the record to support a particular finding of fact must be judged in light of all the relevant evidence in the record, including any determinations of veracity by the presiding officer who personally

observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. IOWA CODE § 17A.19(10)(f)(3).

Where the evidence is in conflict or where reasonable minds might disagree about the conclusion to be drawn from the evidence, the court must give appropriate deference to the agency's findings. *Freeland v. Employment Appeal Bd.*, 492 N.W.2d 193, 197 (Iowa 1992). "The question on judicial review is not whether the evidence might support a different finding but whether the evidence supports the findings the commissioner actually made." *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 237-238 (Iowa 1981). "The possibility of drawing two inconsistent conclusions from the same evidence does not prevent the agency's decision from being supported by substantial evidence." *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 233 (Iowa 1996). The determinative factor is not whether evidence supports a different finding, but whether the evidence supports the finding actually made. *IBP v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000). Evidence is not insubstantial merely because it would have supported a contrary inference. *Id.*

The Board identified the factual issue as being whether Schaaf sexually touched complainant on or about July 3, 1973, while complainant was a minor, and stated that the issue must essentially be decided by evaluating the credibility of the witnesses. The Board held, "Complainant's testimony was more consistent, better supported, and more plausible than the testimony provided by [Schaaf]. The Board recognizes some inconsistencies, but finds that the overall testimony and supporting evidence from Complainant and the State outweighs the credibility and supporting evidence provided by [Schaaf]." (Proposed Dec., p. 20). The Board came to this conclusion based on its findings that: (i) complainant's explanation as to why he failed to report the conduct for more than twenty years was plausible and reasonable; (ii) the

level of detail and partial corroboration of complainant's story provide support for his allegations; (iii) complainant's testimony regarding the incident is supported by his mother's journal and to some extent, by her testimony; and (iv) complainant's story is corroborated by Schaaf's admission that he did later engage in sexual relations with complainant when complainant was in college. (Proposed Dec., pp. 15-18).

The Board placed a lot of weight on Schaaf's admission regarding the sexual encounter between Schaaf, complainant, and another man that took place while complainant was in college. The Board stated, "Complainant's testimony of an ongoing history of sexual conduct is made more plausible by this admission that they had a night of group sex when Complainant was an adult. To the contrary, it is less plausible that Complainant would fall into a three-way male sexual encounter with a man he considered to be his older brother, and with whom he had not had any prior discussions or conduct relating to homosexual activity." (Proposed Dec., p.18).

The Board made its factual determination by assessing the credibility of complainant and Schaaf. While evidence certainly exists to undermine complainant's credibility, the question on judicial review is not whether evidence supports a decision that was not made, but whether evidence supports the decision that the Board actually made. The Board's finding that complainant's testimony was more credible than Schaaf's testimony is supported by substantial evidence in the record. Therefore, the Court finds that the Board's decision is supported by substantial evidence in the record.

ORDER

IT IS ORDERED that the Decision of the Iowa Board of Medicine is **AFFIRMED**.

IT IS FURTHER ORDERED that court costs are assessed to the Petitioner.

SO ORDERED this 1st day of May, 2009.



RICHARD G. BLANE, II, District Judge
Fifth Judicial District of Iowa

Clerk: J C U X

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BEFORE THE IOWA BOARD OF MEDICINE

IN THE MATTER OF THE)	FILE NO. 02-98-170
STATEMENT OF CHARGES)	DIA NO. 06DPHMB018
AGAINST:)	
)	
JERRY G. SCHAAF, M.D.,	)	ORDER ON REQUEST
Respondent.	)	FOR REHEARING
)	

STATEMENT OF THE CASE

Date: *August 28, 2008.*

On April 27, 2006, the Iowa Board of Medicine (Board) filed formal disciplinary charges against Respondent alleging he engaged in unethical or unprofessional conduct or practice harmful or detrimental to the public when he engaged in inappropriate sexual misconduct in the practice of medicine. A hearing was held before a panel of the Board on November 28-29, 2007. On January 28, 2008, the panel issued a Proposed Decision of the Panel. The panel concluded that Respondent violated the Board's statutes and regulations regarding engaging in unethical or unprofessional conduct or practice harmful or detrimental to the public. The panel also imposed sanctions.

Respondent appealed the panel decision to the full Board. On June 12, 2008, the Board issued a Final Order adopting the panel decision in its entirety.

On June 26, 2008, Respondent filed a request for rehearing. Respondent submitted himself to a second evaluation at Behavioral Medicine Institute (BMI) after the contested case hearing before the panel. Dr. Gene Abel from BMI issued two reports after the evaluation. The first report was issued on May 14, 2008, which is the same date that the Board heard oral argument on Respondent's appeal. The second report was issued on May 28, 2008. Respondent argued that information in the reports justified a reversal of the Board's decision.

On June 30, 2008, the State joined in Respondent's request for rehearing. The State argued that the new BMI reports are material to show Respondent is an increased risk to the public. The State pointed to Respondent's admission to Dr. Abel that he had provided care to two patients who were sexual partners at the time care was provided. The State asked the Board to consider this new information when considering restrictions on Respondent's practice.

The Board granted the requests from both parties and conducted a hearing before a quorum of the full Board on July 9, 2008. An administrative law judge from the Department of Inspections and Appeals assisted the Board. Michael Sellers represented Respondent.

Theresa Weeg represented the State. The Board admitted Respondent's exhibits A, which was attached to his request for rehearing. The Board admitted Respondent's exhibits 1 and 2, which are medical records from the two patients referenced in Dr. Abel's report. The Board heard testimony from Dr. Abel and Respondent. The hearing was closed to the public at the election of the licensee.¹

After hearing the testimony and examining the exhibits, the Board convened in closed executive session to deliberate. *See* Iowa Code section 21.5(1)(f). The Board directed the administrative law judge to prepare the decision in accordance with its deliberations.

FINDINGS OF FACT

Dr. Abel was specifically asked by Respondent's attorney whether he thought Respondent was safe to practice medicine. Dr. Abel gave a conditional "yes." Respondent admitted that he had treated two patients (Patients 1 and 2) with whom he had had sexual relationships. Respondent stated that he had not seen Patient 1 since 2004, but continued to have a relationship with Patient 2. Dr. Abel recommended to Respondent that he send each a formal letter terminating their physician-patient relationship. Dr. Abel indicated that it is his opinion that Respondent would be safe to practice medicine if he terminated care with both of these patients. Dr. Abel stated that the reevaluation did not impact his prior opinion whether Respondent sexually abused the complainant from the original statement of charges. (Exhibit A).

Dr. Abel recommended at hearing that the Board set restrictions on Respondent's practice. Dr. Abel recommended that the Board consider requiring: 1) a chaperone with any male patient, 2) a polygraph test every six months, 3) sexual boundary course, and 4) therapy treatment. (Abel testimony).

Respondent testified that Patients 1 and 2 were both long-term partners. Respondent's relationship with Patient 1 ended in 2004. Patient 1 had a bulge in his groin area, which Respondent diagnosed as a hernia. Respondent referred Patient 1 to a different doctor who performed surgery and all other treatment. Respondent began his relationship with Patient 2 after his breakup with Patient 1. Patient 2 had two instances of kidney stones in 2005, but Respondent did not provide care in either instance other than accompanying him to the emergency room. In 2007, Patient 2 complained of being short of breath. Respondent

¹ *See* 653 IAC 24.4(4) (*citing* Iowa Code section 272C.6(1)). Respondent initially requested an open hearing, but later requested a closed hearing.

testified that he performed the exam to reduce Patient 2's medical costs. The Board had concerns that Respondent directed Patient 2 to drive from his residence in another state to Respondent's office in Iowa when Patient 2 was suffering from shortness of breath. Respondent stated that he complied with Dr. Abel's advice by formally terminating care of both patients. (Respondent testimony).

CONCLUSIONS OF LAW

A party may file an application for rehearing within 20 days from the final decision in a contested case. Iowa Code section 17A.16(2); 653 IAC 25.26. A party may request that additional evidence be considered if the party can show: 1) the evidence is material, 2) the evidence arose after the completion of the original hearing, 3) good cause exists for failing to submit the evidence, and 4) the party did not waive the right to present additional evidence. 653 IAC 25.24(2)(e), 25.26(5).

Respondent's request for rehearing: Respondent submitted the reports from Dr. Abel for the purpose of showing: 1) whether Respondent sexually abused the complainant, and 2) whether Respondent was a risk to his patients or the public in general. On the first ground, Dr. Abel came to the same conclusion that he reached in his original report. The original report was an exhibit in the contested case hearing before the panel. This is not new information. There is no reason for the Board to change its decision on this ground.

Regarding the second ground, the panel cited the original BMI report as a mitigating factor when considering restrictions on Respondent's practice. The statement by Dr. Abel in his May 14, 2008, letter regarding Respondent's risk of harm to the public or his patients is not materially different from the conclusion from the original report. The information does not weigh in favor of removing any sanctions from the order.

The State's request for rehearing: The only material information from Dr. Abel's reports was the revelation that Respondent had provided medical care to two adult males with whom he was having sexual relationships. This information was not produced at the contested case hearing. Respondent did not provide this information to Dr. Abel during the first evaluation, and the State did not know this information until Dr. Abel provided his reports after the hearings before the panel and the full Board. The State had good cause for failing to provide this information prior to the contested case hearing.

Board rules state that, "A physician shall not engage in any sexual conduct with a patient when that conduct occurs concurrent with the physician-patient relationship, regardless whether the patient consents to that relationship." 653 IAC 13.7(4)(b). In this case, Respondent provided medical care to two individuals with whom he was involved in long-term romantic relationships at the time he provided the care. Respondent's admission constitutes material information that was not available to the Board at the time that it considered sanctions. This new information must be considered to determine whether the sanctions are sufficient to protect the public.

Regarding Patient 1, Respondent examined a bulge in his groin area to determine the potential cause or problem. Respondent performed the initial exam but then referred Patient 1 to another doctor who performed the surgery and provided all treatment. Respondent's conduct was cursory and did not create a physician-patient relationship. The Board does not consider the evidence relating to Patient 1 to have an impact on the final decision or sanctions.

Respondent's action relating to Patient 2 went further. Patient 2 complained of shortness of breath. Respondent conducted a full exam in his office and ordered follow-up testing. Respondent admitted that he conducted the exam because Patient 2 had a high deductible on his insurance and did not want to pay the cost to another doctor. Respondent's care and treatment of Patient 2 created a physician-patient relationship. This action took place while Respondent was in a long-term romantic relationship with Patient 2.

There are two mitigating factors. First, Respondent has terminated his physician relationship with both individuals, as recommended by Dr. Abel. Second, neither romantic relationship arose from the physician-patient relationship, which is the principle objection sought to be prevented by the rule. In this instance, Respondent already had long-term relationships with both men before he provided any care. This is not an instance in which Respondent used his physician-patient relationship as a position of power or influence to commence a sexual relationship.

This information is troubling to the Board because it demonstrates an additional occurrence in which Respondent lacked appropriate professional judgment when mixing sexual relationships with the physician-patient relationship. At the time the Board entered its final decision, there was no evidence that Respondent had engaged in such improper conduct for more than thirty years. The new information shows that he has continued to exercise extremely poor judgment and continued to violate appropriate physician-patient boundaries. In fact, his examination of Patient 2 occurred after the statement of charges was filed in this

case. It is particularly surprising that Respondent was not paying greater attention to the Board's regulations after he was charged by the Board with committing a sexual offense.

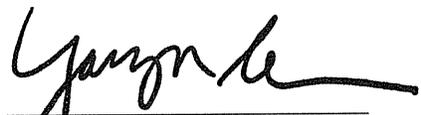
The Board carefully considered additional sanctions and restrictions that might apply. The Board concluded that the sanctions that were ordered by the panel in its January 28, 2008, decision, as adopted by the full Board on June 12, 2008, adequately address Respondent's conduct with Patient 2. While Respondent's relationship with Patient was a violation of the Board's regulations, it pales in significance to his sexual abuse of the complainant in the statement of charges. However, his conduct does demonstrate a lack of understanding and regard for the Board's regulations relating to sexual relationships. The Board finds that Respondent is in need of a course on sexual boundaries to fully understand and appreciate these regulations.

ORDER

It is hereby ordered that Respondent's request for rehearing is denied because it does not present any new evidence or argument that is material to the final decision or sanctions issued by the Board on June 12, 2008. The State's request for rehearing is granted as to the evidence concerning the two patients to whom Respondent provided care at a time when he was having a sexual relationship with them. This additional evidence supports the sanctions that were affirmed by the Board in its June 12, 2008 Order.

In addition, the Board orders Respondent to complete a Board-approved sexual boundaries program under the direction of John Hung, Ph.D., Health Psychology Consultants, 7300 France Avenue, Suite 201, Edina, Minnesota, Ph.# 952-835-1952, no later than October 10, 2008. Respondent shall ensure that a report is forwarded to the Board directly from the program. Respondent shall fully comply with all recommendations made by the program.

The Board's June 12, 2008 Order is otherwise affirmed in all respects. Respondent is hereby put on notice that any failure to abide by this order, or the prior Board Orders, may result in additional disciplinary action.



Yaslyn Lee, M.D.
Chairperson
Iowa Board of Medicine

August 28, 2008
Date

Case No. 02-98-170
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cc: Theresa O'Connell Weeg
Michael Sellers

BEFORE THE IOWA BOARD OF MEDICINE

IN THE MATTER OF THE	)	FILE NO. 02-98-170
STATEMENT OF CHARGES	)	DIA NO. 06DPHMB018
AGAINST:)	
)	
JERRY G. SCHAAF, M.D.,	)	FINAL ORDER ON
Respondent.	)	RESPONDENT'S APPEAL
)	

Date June 12, 2008.

STATEMENT OF THE CASE

On April 27, 2006, the Iowa Board of Medicine (Board) filed formal disciplinary charges against Respondent alleging he engaged in unethical or unprofessional conduct or practice harmful or detrimental to the public when he engaged in inappropriate sexual misconduct in the practice of medicine. A hearing was held before a panel of the Board on November 28-29, 2007. On January 28, 2008, the panel issued a Proposed Decision of the Panel. The panel concluded that Respondent violated the Board's statutes and regulations regarding engaging in unethical or unprofessional conduct or practice harmful or detrimental to the public. The panel also imposed sanctions.

Respondent appealed the Proposed Decision of the Panel to the full Board. Both parties filed written briefs and arguments. On May 14, 2008, the Board heard oral argument. Attorney Michael Sellers represented respondent. Assistant Attorney General Theresa Weeg represented the State.

Respondent moved to continue the appeal hearing to allow respondent time to complete a second evaluation from the Behavioral Medical Institute (BMI). Respondent argued that the evaluation might be helpful to the Board when making its final decision. Respondent previously filed a motion to continue that was referred to Administrative Law Judge (ALJ) Jeffrey Farrell. The ALJ denied the motion. The ALJ noted that Respondent has already been evaluated by BMI, and that the evaluation was not a significant factor in the panel's decision. The ALJ stated that it was highly speculative that a second evaluation would provide any material information to the Board. The Board considered the motion and voted to deny the request to continue.

The Board then considered the appeal on the merits. Upon review of the entire record, and the arguments made by both parties on review, the Board voted to adopt the panel's decision in its entirety.

ORDER

It is hereby ordered that the Proposed Decision of the Panel, issued on January 28, 2008, is hereby affirmed.

Dated this 12th day of June, 2008.



Yasyn Lee, M.D.
Chairperson
Iowa Board of Medicine

cc: Theresa O'Connell Weeg
Michael Sellers

BEFORE THE IOWA BOARD OF MEDICINE

IN THE MATTER OF THE	)	FILE NO. 02-98-170
STATEMENT OF CHARGES	)	DIA NO. 06DPHMB018
AGAINST:)	
)	
JERRY G. SCHAAF, M.D.,)	
	)	PROPOSED DECISION
Respondent.	)	OF THE PANEL

To: Jerry G. Schaaf, M.D.

Date: January 28, 2008.

On April 27, 2006, the Iowa Board of Medicine (the Board) filed a Statement of Charges against Jerry G. Schaaf, M.D. (Respondent). The Board alleged that Respondent engaged in unethical or unprofessional conduct and/or practice harmful or detrimental to the public. The Board alleged that Respondent engaged in an inappropriate sexual relationship with a patient who was a minor child at the time.

On November 28-29, 2007, the case came for hearing before a Panel of the Board. The following Board members were present: Yasyn Lee, M.D., Dana Shaffer, D.O., Siroos Shirazi, M.D., and Janece Valentine, public member. Jeffrey Farrell, an administrative law judge from the Department of Inspections and Appeals, assisted the Board. Assistant Attorney General Theresa Weeg represented the public interest. Attorney Michael Sellers represented Respondent. The hearing was closed to the public at the election of Respondent.¹

After hearing the testimony and examining the exhibits, the Board convened in closed executive session to deliberate. *See* Iowa Code section 21.5(1)(f). The Board directed the administrative law judge to prepare the decision in accordance with its deliberations.

THE RECORD

The State's exhibits 1-39 were admitted. The State called the complainant, Teena Roush, Rizwan Shah, M.D. and Gene Abel, M.D. as witnesses. Respondent's exhibits A-HH were admitted. Respondent called Michael Minor, M.D., Ron Houston, Mike Thomas, Matt Poulter, Norman Heflin, and Kay Crawford, Ph.D. as witnesses. Respondent testified on his own behalf.

¹ *See* 653 IAC 24.4(4) (*citing* Iowa Code section 272C.6(1)). Respondent initially requested an open hearing, but later requested a closed hearing.

INTRODUCTION

This case is highly unusual because it involves an allegation that misconduct occurred more than 30 years ago. The complaining witness (Complainant) filed a complaint with the Board on May 29, 1998. The Complainant alleged that Respondent sexually abused him on July 4, 1973, when Complainant was 14 years-old. Complainant alleged that Respondent continued to sexually abuse him through his high school years. Complainant alleged that Respondent engaged in other illegal conduct, including providing him alcohol and introducing him to friends who also engaged in sexual conduct with him. (Exhibit 4).

The Board assigned the complaint to Mike Archibald for investigation. Mr. Archibald interviewed some witnesses, but he did not speak to Respondent nor did he apprise Respondent of the complaint. Mr. Archibald concluded that nothing inappropriate occurred, but he did not close the investigation. Mr. Archibald retired in 2001 and the investigation remained open. (Exhibits 7, 28).

On October 28, 2003, the file was assigned to investigator Teena Roush to complete the investigation. Ms. Roush obtained information from witnesses and other sources. She interviewed Respondent on September 29, 2004. Ms. Roush personally served Respondent with a letter that summarized the complaint. This was the first notice that Respondent received from the Board to inform him that the complaint had been filed. (Exhibits 3, 13-14).

This Panel of the Board recognizes that the age of the complaint and the delay in the investigation may make it more difficult to determine the truth as to what occurred. This issue has been discussed by the parties and the Board during the course of several motions that came before the Board prior to the contested case hearing. However, the Board determined that the complaint involves very serious allegations and the complaint deserves a resolution by the Board. The parties were able to present the testimony of most important fact witnesses, and most of them had good recall of the facts within their scope of knowledge.

FINDINGS OF FACT

Background: Respondent graduated from the University of Nebraska-Omaha in 1969, and finished his residency in 1972. He practiced briefly in Hamburg and Sidney before moving to Shenandoah. Respondent has practiced medicine in southwest Iowa for the past 35 years. He is currently affiliated with the Nebraska Medical Center through the Shenandoah Hospital. He is the Chief Medical Officer at the Shenandoah Hospital. (Respondent testimony).

It is material to discuss Respondent's sexual orientation because it is an important aspect of this case. Respondent was married but divorced in 1970 for reasons unrelated to his sexual orientation. Following the divorce, Respondent came to the realization that he was homosexual. While starting his practice in Southwest Iowa, Respondent admitted to living a "gay lifestyle." This included drinking and going to gay bars. Respondent did not begin a long-term relationship with another man until he met JC. Respondent testified that he met JC in the late summer or fall of 1973. (Respondent testimony; exhibit 23).

Respondent met Complainant's mother, who was working as a nurse at Hamburg Hospital, when Respondent first began practicing in Hamburg. Complainant's mother was very impressed with Respondent and they developed a friendship that continues to the present day. When Respondent decided to move his practice to Sidney, Complainant's mother and father helped finance Respondent's medical office. Thereafter, complainant's mother worked as Respondent's office nurse in Sidney and Shenandoah for about five years. (Exhibit F, pp. 5-6, 19-21; Respondent, Complainant testimony).

The State produced evidence showing the emotional status of Complainant's family prior to and when Respondent began his friendship with the family. The State considered this evidence important to show Complainant's vulnerability at the time. Complainant had four siblings. One of his older sisters was killed by a drunk driver in 1968. Complainant was approximately 9 years old at the time. The family was devastated by the loss. The driver was prosecuted but did not serve any jail time. In February of 1970, Complainant's older brother died in a grain bin accident on the family farm. Complainant was inseparable from his brother, and he suffered considerable trauma with his death. Complainant's only surviving sibling was an older sister who had graduated and lived outside the home. (Complainant testimony; exhibit 5, exhibit F, pp. 7-8).

Complainant's mother began to invite Respondent to dinner as their friendship developed. Respondent was grateful for the invitations, and he became a regular visitor to the family home. (Exhibit F, pp. 20-21; Complainant testimony).

It is unclear whether Complainant first met Respondent as a patient or at his home. However, it is uncontested that Respondent saw Complainant as a patient while he was a minor. Complainant specifically recalled the first time Respondent saw him as a patient at Respondent's office in Hamburg in 1971 or 1972. Complainant stated that he recalled Respondent wearing a caduceus lapel pin and asking Respondent why the caduceus was the symbol for the medical profession. Complainant stated that Respondent responded to the comment by stating "My, you're a precocious one, aren't you?", before explaining the origin of the caduceus. (Exhibit 4; Complainant testimony).

Respondent challenged the caduceus pin discussion as one of many attacks on Complainant's credibility. Respondent denied ever wearing a caduceus pin. Complainant's mother also testified that she did not recall Respondent wearing a pin. However, Respondent acknowledged that he likely saw Complainant as a patient at some point during his youth.² Complainant's mother confirmed that Respondent treated Complainant for ear aches and mononucleosis. Accordingly, the weight of the evidence demonstrates that Respondent saw Complainant as a patient during the period that Respondent was working with Complainant's mother. (Respondent testimony; exhibit F, pp. 30-31, 68-69).

Complainant and Respondent developed a personal relationship during Respondent's visits to the home and when Complainant visited his mother at the office. Complainant testified that his parents encouraged the relationship to help Complainant deal with the grief of losing his brother and sister. Complainant enjoyed Respondent's company and began to see him as a big brother and friend. Complainant stated that Respondent brought him gifts, and specifically recalled a book about guns. Respondent denied the gun book gift; Respondent testified that he would not buy such a gift because he does not like guns and would not promote them as a gift. (Complainant testimony; exhibits 4, 23).

Testimony and statements of Respondent and Complainant concerning the sexual abuse allegation of July 4, 1973: It is uncontested that Respondent took Complainant on a trip to Omaha on or around July 4, 1973. Both Complainant and Respondent initially reported the trip as commencing on July 4. However, the most persuasive evidence shows that the trip commenced on July 3.

Some aspects of the trip are not disputed. Complainant's mother wanted to take him to Omaha to buy a new pair of shoes. She discussed this with Respondent and he volunteered to take Complainant. Respondent had an apartment in Omaha at the time, and he regularly made that trip. They planned to buy the shoes and stay to watch a fireworks display. Complainant was excited to take the trip with an older male whom he respected. (Respondent, Complainant testimony; exhibits 4, 23, 27).

Respondent and Complainant agree that they purchased the shoes, went to dinner, and then a movie. It rained that night, so they did not attend a fireworks display. From that point, the stories diverge. (Exhibits 4, 23; Complainant, Respondent testimony).

Complainant testified in great detail how he and Respondent went to Respondent's apartment to spend the night. The apartment had one bedroom and a living room with a couch. Complainant was watching television on the couch when Respondent came into the living room, wearing only his underwear. Respondent invited complainant to sleep

² Respondent does not have medical records regarding Complainant because the complaint was filed long after he last treated Complainant.

in his bed with him. Complainant was hesitant, but he put his trust in Respondent and agreed to sleep in the bed. (Exhibit 4; Complainant testimony).

Complainant testified that they got into bed and Respondent began to massage his neck. Complainant shrugged off the hand, but Respondent slid up to Complainant and pressed his groin against Complainant's buttocks. Complainant stated that he froze in fear and began to cry. Respondent then fondled Complainant's penis. Respondent then kissed him on the cheek and rolled away. Complainant testified he remained in the bed, but barely slept through the night. (Exhibit 4; Complainant testimony).

Respondent has repeatedly and steadfastly denied any sexual contact with Complainant during the Omaha trip. However, his statements have changed somewhat regarding whether the two stayed overnight in Omaha. During a professional boundaries evaluation at the Behavioral Medical Institute of Atlanta (BMI) in 2005, Respondent reported that he dropped Complainant off at Complainant's home after they had dinner in Omaha.³ At hearing, Respondent testified that he could not recall staying with Complainant in Omaha, but he believed he did not. Respondent testified that it is difficult for him to remember the details of the trip because it occurred more than 30 years ago and nothing significant happened. Exhibits 3, 23; Respondent testimony).

Respondent testified that he tried to verify his whereabouts by reviewing prescription information from that time period. Respondent found that he issued several prescriptions on July 5, 1973. Based on the prescription information, he believed he could not have stayed overnight on July 4, because he could not have returned to the office the following day in time to issue the prescriptions. (Respondent testimony).

Respondent directly disagreed with at least one portion of Complainant's testimony. Complainant testified that they met Respondent's friend, JC, who joined them for dinner. Respondent testified that he did not meet JC until later that year, so he could not have joined them for dinner. JC testified by affidavit that he met Respondent in 1974. (Respondent testimony; exhibit S).

However, Respondent's testimony regarding first meeting JC is contradicted, in part, by his own prior statement. Respondent provided a letter to BMI as part of his evaluation. Respondent stated that he did not stay overnight with Complainant in Omaha because he would have spent time with his partner (JC), who was home from graduate school over the holiday. (Exhibit 23A).

³ BMI refers to Behavioral Medicine Institute of Atlanta. The Board ordered Respondent for an evaluation at BMI after Ms. Roush completed her investigation.

Evidence concerning conversations by Complainant and his parents and a classmate upon his return from Omaha: The parties put considerable emphasis at hearing on alleged conversations between Complainant and his parents. The State argued that the conversations are important to verify the events as testified by Complainant. Respondent argued that Complainant's testimony is contradicted by his mother's testimony.

Complainant testified that he told his father about Respondent's sexual advances upon returning home from the Omaha trip. He stated his father asked him to tell his mother. Complainant stated that his mother was "stunned," and asked him what he wanted her to do. He said he didn't know. He stated his mother asked him if she should stop working for Respondent. Complainant told her she should not quit her job. (Complainant testimony; exhibit 4).

Complainant's mother did not quit her job. There is no evidence that either parent confronted Respondent at that time. They continued to socialize with Respondent, including having him and his friends over at the family home for dinner. (Complainant testimony).

Respondent's father died in 2002. He did not make any statements regarding the sexual abuse allegations to investigators or other persons before he passed away. Accordingly, the parties' focus turned to Complainant's mother. Complainant's mother has made varying statements during the course of the investigation.

Complainant's mother's first statement known to the investigation is a written letter that was attached to Complainant's complaint to the Board. The letter was authored in 1997 or 1998. The letter stated that Respondent invited her son to his apartment in Omaha for the weekend. Upon returning, Complainant seemed upset, so she talked to him. Complainant asked her if she knew that Respondent was a homosexual. The mother asked if Respondent hurt Complainant. Complainant said "no." Complainant's mother asked her son if he wanted her to stop working for Respondent, and he responded "no." She stated that she did not realize the truth about the sexual abuse until after Complainant wrote a book in 1990 as a catharsis to his emotional issues. She ended her letter by stating that she now understands that Respondent is a child molester who sexually abused her son. (Exhibit 5).

On September 29, 2004, Ms. Roush, a Board investigator, interviewed Complainant's mother. Complainant's mother recounted the time when her son went to Respondent's Omaha apartment. She told Ms. Roush that Complainant acted differently when returned home. She stated that Complainant said nothing, and if the abuse did occur, he might have been too embarrassed to talk about it. She said that she asked her son if he was hurt, and felt she asked the right questions. (Exhibit 12; Roush testimony).

Ms. Roush stated that Complainant's mother told her that she remains friends with Respondent. She considers Respondent to be a brilliant and an outstanding person. Ms. Roush was struck when Complainant's mother asked Ms. Roush twice during the interview, "As a mother, what would you do?" Complainant's mother stated that she was torn between supporting her son and tearing down Respondent and his reputation. (Exhibit 12; Roush testimony).

On January 12, 2005, Complainant's mother purportedly wrote another letter. However, the body of the letter was written by Respondent; Complainant's mother only signed her name. This letter stated that the 1997 letter was dictated to her by Complainant after he verbally and emotionally abused her and her husband for over a week. She stated that the statements in the 1997 letter were untrue to her knowledge and not her own. She stated that she wrote the 1997 letter to end the abuse by Complainant against her and her husband. (Exhibit 33; Respondent testimony).

On September 20, 2007, Complainant's mother testified at a deposition to perpetuate her testimony in this matter. Significantly, prior to the deposition, Complainant remembered that his mother had written daily journals when he was young. His mother produced copies of journal entries from June and July of 1973. A typed version of the journal entries was entered into evidence. (Exhibit 27; Complainant testimony).

The relevant journal entries for July 3-5, 1973 are:

Tuesday [July 3] . . . [Respondent] took [Complainant] home with him to stay overnight and to watch the fireworks at the Crossroads tomorrow night – it was really wonderful of him to be so considerate of [Complainant]. . . .

Wednesday [July 4] . . . [Respondent] brought [Complainant] home at about 3 p.m. – [Complainant] was grouchy

Thursday [July 5] . . . tonight I found out why [Complainant] was so upset.
. . .

(Exhibit 27).

Complainant's mother testified that her son did not tell her that Respondent sexually touched him in Omaha. She stated that if he had, she would have quit her job immediately and severed her relationship with Respondent. However, she also confirmed most of the statements in her 1997 letter to the Board. She testified that her son asked her if she knew Respondent was a homosexual. She testified that she asked her son whether Respondent hurt him, and if he wanted her to continue to work for Respondent. She said

that Complainant did not tell her that Respondent had hurt him. (Exhibit F, pp. 35-36, 74-76).

Complainant stated in his complaint to the Board that he also told a high school classmate about the sexual abuse. Complainant testified that the classmate was “clearly disturbed” by what happened. However, the classmate completed an affidavit and testified during hearing that he does not recall the conversation. He stated that, based on the nature of the allegations, he would have remembered such a conversation if it had occurred. (MT testimony; exhibit N).

Evidence regarding additional contact between Complainant and Respondent:

Complainant testified that Respondent’s relationship with his mother and father continued after he returned from Omaha. His mother’s journal verifies his testimony. For example, the journal states that Respondent had dinner at Complainant’s family home on Friday, July 6, 1973, just two days after returning from Omaha. They had dinner with Respondent on multiple occasions over the following weeks. Complainant’s mother took special note of dinner on the Sunday following the Omaha trip, in which Respondent treated Complainant and her to a French restaurant. The journal notes the cost of the meal and the purchase of French wine. (Exhibit 27; Complainant testimony).

Complainant testified that he was conflicted about what occurred with Respondent and his parents’ lack of response. Complainant testified that he was struggling with his grief over losing his siblings and he felt lonely. He looked up to Respondent as a brother and thought Respondent cared about him. Complainant avoided Respondent for a while after the Omaha incident, but started to spend time with Respondent as time went on. (Complainant testimony).

Complainant testified that Respondent’s sexual abuse continued through his high school years. The incidents are not as well-defined as the first incident, but complainant testified that Respondent would take him on drives where they would stop to kiss and touch. On other occasions, Respondent served Complainant alcohol at Respondent’s home, during which Respondent would kiss and fondle Complainant. (Complainant testimony).

Complainant testified that Respondent tried to make him think he was homosexual. Complainant was attracted to girls at the time, but Respondent made demeaning remarks about women and repeatedly told Complainant he was gay. Complainant was confused about his sexual identity, and began to accept Respondent’s statements and conduct. He considered Respondent’s sexual conduct toward him as “part of the package” of the relationship he had with Respondent. (Complainant testimony).

Complainant testified that Respondent introduced him to other friends, including RH. RH was one of Respondent’s patients. He also became a social friend of Respondent and

Complainant's mother, and was a dinner guest at Complainant's home. Complainant alleged that Respondent introduced him to RH, who then offered alcohol and engaged in sexual conduct with him. At hearing RH adamantly denied Complainant's allegations against him. RH acknowledged that he was a friend of the family and had dinner at their home, but he denied any sexual or emotional relationship with Complainant. (Complainant, RH testimony; Exhibits 4, R).

Additional events and persons named: Complainant continued to see Respondent after he left for college. Complainant described other events in his complaint that may not necessarily arise to a violation, but they are outlined here because they may impact the credibility and believability of the witnesses.

Complainant outlined in his complaint an incident which Respondent took a friend and Complainant to Kansas City for a weekend during the Christmas break. Complainant alleged that Respondent got drunk and took them to gay bars. Later, the three were involved in an auto accident. Complainant testified that the car was a total loss, and one of Respondent's friends (NH) had to come get them. Respondent recalled the accident and testified that it occurred when he hit a stretch of ice on a bridge. Respondent stated that he had not been drinking because the accident occurred early in the evening between 5:00 to 6:00 p.m. NH also testified that Respondent had not been drinking. However, NH had not been with them before the accident, and he testified that they called him to pick them up between 9:00 and 10:00 p.m. (Complainant, Respondent, RH testimony; Exhibits 4, P).

Complainant also described an incident that occurred after he returned from college on break. Complainant stated that he went to Respondent's home and Respondent showed a pornographic gay film, after which Complainant went to bed with Respondent and another man. (Exhibit 4).

While Respondent denied all prior sexual contact with Complainant, he admitted to this sexual encounter. Respondent testified that this was the only sexual contact he had with Complainant. Respondent argued that this incident is not a violation of the Board's rules because it was a consensual act with a consenting adult. (Respondent testimony; Exhibit 23A).

Respondent stated during the investigation and during his testimony that he and Complainant did not discuss their respective sexual lifestyles while Complainant was in high school and college. Complainant brought girlfriends home from college, and often brought them by Respondent's office or home. However, Respondent also told the Board investigator when first interviewed that Complainant experimented with homosexuality with an Iowa drama group while in college. Respondent testified at hearing that Complainant shared his experimentation while visiting during a break from college.

Respondent testified that this insight may have led to the sexual encounter with Complainant and another man. (Exhibits 3, 14, 23A; Respondent testimony).

Complainant listed in an addendum to his complaint another person who may have been victimized by Respondent. Complainant stated that his information was merely a rumor. He provided the name to the Board because Respondent had developed the same type of relationship with the family as Respondent had with his family. The Board contacted the person (MP). MP stated that his family has been friends with Respondent for years, and he had never witnessed any inappropriate behavior by Respondent. MP testified to the same at hearing. (Exhibits 7, M; Complainant, MP testimony).

Complainant also listed CG as another person who may have been victimized by Respondent when he was a minor. Complainant stated that the basis for his suspicion was that Respondent told Complainant that CG had approached him to inquire about a sex change operation. Complainant testified that this comment served as a red flag for him. Respondent denied any sexual contact with CG, but acknowledged visiting with CG about gender reassignment surgery. Respondent denied sharing that information with Complainant and does not know how Complainant would have obtained that information. (Exhibit X, Depo. pp. 147-49).

Events leading to the filing of the complaint: Complainant testified that his relationship with Respondent began to deteriorate after he graduated from college. Complainant invited Respondent to his graduation from a prestigious university. Complainant was “taken aback” when Respondent did not appear. Complainant began to think that his relationship with Respondent, which he still considered to be brotherly at the time, was not as strong as he thought it was. He described another incident at his parents’ home in which Respondent made a joke about “getting” Complainant when he was 14 years old. Complainant felt this comment further showed that Respondent did not genuinely care for him, but rather, Respondent took advantage of him. He had no further sexual contact with Respondent after that. (Complainant testimony).

Complainant admittedly had sexual relationships with other men while in college. He stated his last homosexual experience occurred when he was 22 or 23 years old. At this time, he came to the conclusion that he was not homosexual, and that Respondent convinced him that he was gay in order to promote his own agenda. (Exhibit 4; Complainant testimony).

Complainant attended and graduated from law school, and began practicing law in another state. He was married in 1990, and had two children from that marriage. That marriage ended in 1996, and Complainant began to see a therapist, Mary Sherwood. Respondent saw Dr. Sherwood for five years. Complainant testified that he initially began to see Dr. Sherwood to deal with the stress of his divorce. He then began to

discuss the impact of the deaths of his sister and brother when he was a child. Complainant testified that he began to realize that he never fully came to terms with their deaths. During the course of these discussions with Dr. Sherwood, Complainant discussed his relationship with Respondent, including the sexual contact between the two. Complainant testified that he learned how his feelings of loss and worthlessness made him vulnerable to victimization. He testified that he began to understand that his relationship with Respondent was not the brotherly relationship he thought it was. (Complainant testimony).

In 1997, complainant made a decision to confront his parents and Respondent. Complainant testified that his father was not responsive. His mother did not understand why he was raising claims against Respondent. He asked his mother to write a letter to the Board, which eventually was provided as an attachment to his complaint. (Complainant testimony; Exhibit 5).

Complainant confronted Respondent. Respondent first thought that Complainant was asking for an apology for the three-way sexual encounter that occurred when Complainant was in college. Respondent stated that he felt bad about that incident because it violated his rules against having sex with friends and having sex in groups. However, Complainant went on to demand an apology for the Omaha trip in 1973. He also asked why Respondent had not attended his graduation or wedding. Respondent refused to acknowledge that the 1973 sexual abuse occurred, which made Respondent angry. Complainant demanded that Respondent pay for his therapy, but Respondent refused. Complainant was unhappy that no one would respond, so he filed the complaint with the Board. (Complainant, Respondent testimony; Exhibit 23A).

Complainant's parents discussed their son's allegations with Respondent. Respondent denied the allegations. He told the parents that he was concerned about Complainant's mental state, and told them he was delusional and he could be dangerous. (Respondent testimony; Exhibits 3, 12, 14).

Complainant testified why it took him so long to file the complaint with the Board. He stated that this is not an instance of a "recovered recollection," as made in some cases involving child victimization. Rather, Complainant testified that it took him a long time to understand that Respondent had taken advantage of his vulnerable state. Once he came to that realization, he decided to come forward. (Complainant testimony).

Expert testimony: The State introduced the deposition of Dr. Sherwood, but did not argue that Dr. Sherwood provided an opinion regarding whether sexual abuse occurred. The Panel considered Dr. Sherwood's therapy as a context out of which Complainant decided to come forward with his accusations. Accordingly, the Panel did not give any

weight to any opinion Dr. Sherwood provided regarding the allegations of sexual abuse in her complaint letter. (Exhibits 6, 37).

Respondent presented Dr. Crawford's expert testimony to attack Dr. Sherwood's therapy methods. Dr. Crawford has a doctorate in clinical social work and has practiced for 34 years. A portion of her practice involves working with adults who are survivors of child sexual abuse. (Crawford testimony; exhibit U).

Dr. Crawford found several faults in Dr. Sherwood's methods and summarized her treatment as "therapy gone bad." She testified that there is no indication Dr. Sherwood has a specialty in sexual abuse treatment, there was no psychiatric testing or case consultation, or any evidence that she properly concluded her therapy. Dr. Crawford indicated that she was "aghast" with the statements Dr. Sherwood made in her complaint letter and questioned the support Dr. Sherwood used to make the allegations against Respondent. Dr. Crawford testified that Dr. Sherwood should have questioned her client's allegations against Respondent, particularly in light of Complainant's highly organized thought process and known experimentation with homosexuality away from Respondent. Dr. Crawford also questioned Dr. Sherwood's complaint letter because she had not read Respondent's letter and had not read the entire novel Respondent had written. (Crawford testimony).

Still, Dr. Crawford did not believe Complainant completely fabricated his allegations. She agreed that Complainant was vulnerable during his childhood due to the deaths of his brother and sister. Rather, she believes Dr. Sherwood could have influenced Complainant's recollections in a way to piece together why he is hurt and angry by attaching his past homosexual activity to a person who has been influential in his life. Dr. Crawford interviewed Respondent and felt he was candid. Dr. Crawford did not personally interview Complainant (she reviewed his video deposition), and did not review other exhibits and testimony that was submitted during this case. (Crawford testimony).

The Panel did not consider Dr. Crawford's testimony particularly helpful as to her attack on Dr. Sherwood's opinions, because the Panel did not give Dr. Sherwood's opinion or complaint letter any weight as to the question of abuse. The Panel considered Dr. Crawford's opinion as to how Complainant may have reached the point of making his allegations, as part of the record as a whole.

The State called Rizwan Shah, M.D. as an expert to discuss why Complainant may have continued to have a relationship with Respondent even after the alleged sexual abuse. Dr. Shah is a medical doctor who has focused her practice on the evaluation and assessment of sexual abuse victims. (Shah testimony; Exhibit 35).

Dr. Shah testified that a teenage child may continue to have a relationship with an abuser if the child is not in control of that relationship. Dr. Shah testified that one aspect of control may occur if the adult is in a position of authority over the child. Another factor might be if parents or other authority figures continue to socialize with the abuser; this sends a signal to the child that they have not been hurt. Dr. Shah stated that it is uncommon for child victims to report abuse early; the average delay is 3.8 years between the abuse and the report. Dr. Shah also testified that it is common for victims to want their families to recognize the victimization, and to want the offender to admit wrongdoing. (Shah testimony).

After Ms. Roush completed her investigation, the Board ordered Respondent to attend an evaluation at Behavioral Medical Institute of Atlanta (BMI). BMI conducted a number of assessments, including a neuropsychological assessment, psychological testing, and polygraph testing. The testing showed that Respondent had age-appropriate sexual interests and he passed the polygraph test. BMI cited concerns on one test (VRT), which indicated an 81 percent probability that Respondent had molested a female or male child at some point in his past. However, BMI was not able to conclude with any degree of certainty from that test, or any other test, that Respondent had molested Complainant when he was a minor. BMI did cite some other concerns, including whether Respondent was completely forthcoming during his interviews, and that Respondent admittedly engaged in sexual conduct with Complainant when he was an adult. (Exhibit 23).

Respondent attempted to rebut the finding on the VRT through the testimony of Dr. Michael Minor, a psychologist and assistant professor with the University of Minnesota. Dr. Minor is a clinician and researcher specializing in child sexual abuse. Dr. Minor questioned the probability estimate because Dr. Abel has not published the algorithm or variables that determine the probability figure. Dr. Abel responded by testifying that the empirical support he used to create his model is available online. Further, he testified that the VRT probability rating is only a factor; it does not mean the event actually occurred. The Panel did not ultimately consider the VRT rating as a factor when deciding whether Respondent abused Complainant. (Minor, Abel testimony; Exhibit HH).

CONCLUSIONS OF LAW

Respondent's motion to hold open record: During the course of the hearing, Respondent asked to have the record held open for two reasons: 1) to hear Complainant's mother testify directly before the Panel, and 2) to allow time to decide whether to submit an expert to respond to Dr. Abel. The Board denied the motion on a 3-1 vote. The dissenting member raised the concern about hearing directly from Complainant's mother so the Panel would have the opportunity to ask questions. The majority felt that the deposition was adequate.

The parties took the deposition of Complainant's mother for the purpose of perpetuating her testimony. She is elderly and has had some health problems in the past. In fact, she broke her hip the week before the hearing, which precluded her from appearing in person. There is no question that she was competent at the time she took the deposition. The parties took her testimony by deposition to preserve it in the event she had health problems that prevented her from testifying at hearing. This is exactly what occurred.

The Panel does not find sufficient reason to hold open the hearing to have Complainant's mother testify in person. This case has been pending for some time, and both parties have had more than sufficient time to question Complainant's mother. If Respondent had additional questions to ask her, he could have done that during or after the deposition. The Board concluded that Respondent was not prejudiced by the decision not to hold the record open.

The Panel likewise did not believe it necessary to hold the record open to allow Respondent time to decide whether to call another expert to rebut Dr. Abel's testimony. Dr. Abel's BMI report has been available to Respondent since 2005. Dr. Abel was listed as an expert witness and could have been questioned or deposed prior to the hearing. In any event, Dr. Abel's opinions were not controlling or decisive in this case, so any additional testimony regarding Dr. Abel's testimony would be minimally helpful, if helpful at all. Again, the Board determined that Respondent was not prejudiced by the decision not to hold the record open.

Merits of the Statement of Charges: The Board is a professional licensing board created to review applications for licenses and regulate the profession. *See generally* Iowa Code chapters 147, 148. The Board may discipline licensees pursuant to the standards set forth in the code. *See* Iowa Code sections 147.55, 148.6 and 272C.10. The Board has adopted rules pursuant to Iowa Code chapter 17A to help define the statutory standards. *See* 653 IAC 12.4 (2005) which is now located at 653 IAC 23.1(3) and (4).

The statement of charges alleges that Respondent violated Iowa Code section 147.55(3) and 653 IAC 12.4(3) and (36) engaging in unethical or unprofessional conduct or practice harmful or detrimental to the public when he engaged in inappropriate sexual misconduct in the practice of medicine.⁴ There is no dispute that Respondent committed a violation of the Board's regulations if he sexually touched Complainant on or about July 3, 1973. Complainant was only 14 years of age at the time, so any sexual contact would constitute a criminal violation.⁵ Further, the record established that Respondent had an ongoing physician-patient relationship with Complainant into his college years. Either status

⁴ The regulatory provisions have since moved to 653 IAC 23.1(3) and (4).

⁵ See Iowa Code section 725.10 (1975), which is now located at section 709.8. The statute, for purposes of this case, has not substantively changed since 1973.

would constitute a violation. The question is whether the conduct occurred. The State has the burden of proof by a preponderance of the evidence to prove the charge. *See Eaves v. Iowa Board of Medical Examiners*, 467 N.W.2d 234 (Iowa 1991).

In reviewing the charge and the evidence, the Panel focused on the July 3, 1973, event. Complainant alleged other incidents of sexual abuse, but they are not as well-defined and the timing of those incidents are not clear. The Panel considered the evidence concerning ongoing sexual contact in weighing the credibility of the testimony rather than to establish independent violations.

This case must essentially be decided by evaluating the credibility of the witnesses. In assessing credibility, the Board considered generally-recognized standards, including the following:

1. Whether the testimony is reasonable and consistent with other evidence you believe.
2. Whether a witness has made inconsistent statements.
3. The witness's appearance, conduct, age, intelligence, memory and knowledge of the facts.
4. The witnesses' interest in the trial, their motive, candor, bias and prejudice.

State v. Holtz, 548 N.W.2d 162, 163 (Iowa App. 1996) (citing Uniform Jury Instructions).

Complainant's credibility: The first question impacting Complainant's credibility is why he would wait more than 20 years after the initial offense to file a complaint with the Board. Complainant's explanation as to how he fell into victimization, why he continued a relationship with Respondent despite being victimized, and why he failed to report the conduct for more than 20 years, was plausible and reasonable when considering the evidence as a whole. Complainant was devastated by the loss of his older sister and brother in a two year period. He was the only child left in the home after their deaths. There is no dispute that Complainant's grief left him in a position of vulnerability. Complainant connected with Respondent, who took on a role like a big brother. Respondent was a young doctor who lived an exciting lifestyle. Respondent was routinely invited to Complainant's home and enjoyed the trust of the entire family, who encouraged the relationship between the two.

Assuming for the moment that Complainant was victimized on July 3, 1973, it is reasonable to see how he could fall into a pattern of victimization. He stated that he told his parents about the abuse when he returned home. His mother has corroborated,

through her testimony and her journal, that Complainant was upset after returning, and that she responded to him by asking if he was hurt and whether he wanted her to quit working for Respondent. While there is a factual dispute as to exactly what was said, there clearly was a conversation between the two about something that happened on the Omaha trip in 1973. Notwithstanding that conversation, Respondent was invited back into the family home within the next two days. Complainant's parents continued to socialize with Respondent and took Complainant to dinner and other events with Respondent. In light of his age and emotional state, Respondent could rationally feel that his parents either did not take his complaint seriously or felt that Respondent was a positive role model notwithstanding his conduct.

Again assuming that Complainant was victimized, it is also reasonable to see why he may have waited so long to file a complaint. Once he graduated from law school, he moved to the East Coast and did not frequently return to Iowa. He did not have any motivation to file a complaint with the Board until he began therapy during his divorce in 1996. During his therapy, he began to better deal with his grief from losing his siblings, which led him to dealing with his victimization by Respondent. At that point, he felt the need to confront his parents, Respondent, and then file the complaint.

This finding is supported by the testimony of Dr. Shah, who testified that child victims frequently wait for years before reporting their victimization. Dr. Shah described how victimization may continue when parents do not take complaints by children seriously or disbelieve their children.

The Panel does not find persuasive the premise offered by Dr. Crawford that Complainant may have emotionally created these allegations against Respondent as a way of dealing with his grief and finding a person to place blame for his pain. The Panel is not persuaded that Complainant would go to the lengths he did to confront his parents and Respondent, file a complaint with the Board, and travel to Des Moines to testify before the Board, as a means to artificially deal with the tragedy that has occurred in his life. If he was looking for a means to place blame, he could have done that with his therapist without ever confronting anyone or filing a complaint with the Board.

The second question concerning Complainant's credibility concerns conflicting statements from other individuals. Complainant's initial complaint, with amendments, is exceedingly lengthy and detailed. Respondent presented affidavits and/or testimony from nearly every person mentioned in the complaint. On first blush, the contradictory testimony appears significant because Complainant appears to be standing alone against every other witness in this case. However, when scrutinized more closely, there are problems or explanations with many of the contradictory statements.

Respondent submitted the testimony of RH to refute Complainant's allegation that RH also engaged in sexual conduct with Complainant. However, RH has a personal interest in denying the allegations because Complainant accused him of wrong-doing. His testimony cannot be disregarded, but it cannot be taken at face-value due to his own self-interest.

Respondent submitted the testimony of NH and JC regarding the Kansas City car accident to show that Respondent had not been drinking prior to the accident. However, NH was not with Respondent prior to the accident and did not have personal knowledge whether Respondent had been drinking or was intoxicated at the time. JC had been with Respondent and testified by affidavit that he had not been drinking. However, the record shows a significant conflict in testimony with regard to this incident. Respondent testified that he could not have been drunk because the accident occurred early in the evening (between 5:00 and 6:00 p.m.). NH testified that he was called later that night (between 9:00 and 10:00 p.m.). This is a significant time discrepancy, particularly when Respondent is using the timeframe as evidence of his innocence.

Respondent submitted the testimony of MP to refute that he was a child victim of Respondent. However, Complainant never said that MP was a victim. Complainant stated that he got MP's name merely by rumor and that Respondent had become a friend of MP's family in the same way he befriended Complainant's family. Complainant made the same caveat with regard to GC, with the exception that Complainant testified how Respondent told him that GC asked about a sex change operation. There is no evidence that Respondent engaged in any sexual contact with GC, but Respondent admitted that he had a brief conversation with GC about a sex change operation. This testimony supports Complainant's credibility, because there is no evidence to indicate how Complainant would have obtained that information other from Respondent.

The only remaining fact witness (other than Complainant's mother) is MT. MT refuted Complainant's statement that he told MT about Respondent's sexual abuse. MT has no interest in the proceeding. He remembered Respondent, but testified with certainty that Complainant had not talked to him about being sexually abused. It is reasonable to believe that MT would remember the conversation, particularly considering the unusual and serious nature of the allegations. The State did not produce any evidence to explain this contradiction. However, with that said, MT is the only witness presented by Respondent who clearly and without question contradicted Complainant's statements.

There is no clear evidence that Complainant has an alternative motive to manufacture a claim against Respondent. When Complainant confronted Respondent in 1997, he demanded that Respondent pay his therapy bills. However, there is no evidence that Complainant ever followed through on his demand. Complainant has never filed a lawsuit against Respondent. Complainant is a successful lawyer who has no known

financial incentive to file an untrue claim. At the time he made the complaint, he had not had regular contact with Respondent for many years, so there is no other evident reason why he would decide to file a claim against Respondent without good reason. In fact, Complainant had family and professional reasons not to file a complaint, in the event his name becomes known during the course of this litigation.

Complainant described the events of July 3-4, 1973, in considerable detail. Some of the details are not disputed. For example, it is undisputed that Respondent took Complainant to Omaha, Respondent rented an apartment in Omaha at the time, they shopped for shoes, they went to a movie, went out to dinner, and did not attend holiday fireworks due to rain. Complainant provided precise details, such as the name of the movie, the food he ate at the restaurant, the name of the television show he watched at Respondent's apartment, and the course of events immediately before and during the alleged sexual abuse. The degree of detail and the partial corroboration lend support to Complainant's allegations.

Complainant's testimony regarding the first incident of abuse is also supported by his mother's journal, and to some extent by his mother's testimony. The journal makes clear that Complainant stayed overnight at Respondent's apartment, which had been a major point of contention between Respondent and Complainant prior to the discovery of the journal. This fact is important because it supports Complainant's credibility on an important fact, and it proves that Respondent had the opportunity to commit the offense.

The mother's journal also made clear that they had a discussion about Complainant being upset upon returning from the trip. While they differ to the extent of the conversation, the mother corroborates that Respondent was upset and that he discovered that Respondent was a homosexual. This conversation, at a minimum, was enough for the mother to ask if Respondent hurt Complainant and whether he wanted her to quit her job. Complainant's mother testifies to sufficient facts to provide support to her son's testimony as to what happened upon returning from Omaha.

Complainant's story is also corroborated by Respondent's admission that they did engage in sexual relations when Complainant was in college. Dr. Abel also found this event notable. Complainant's testimony of an ongoing history of sexual conduct is made more plausible by this admission that they had a night of group sex when Complainant was an adult. To the contrary, it is less plausible that Complainant would fall into a three-way male sexual encounter with a man he considered to be his older brother, and with whom he had not had any prior discussions or conduct relating to homosexual activity.

Respondent's credibility: Respondent's credibility was impacted by some of the evidence discussed above. One example is the three-way sexual encounter discussed above. It is more difficult to believe that Respondent had group sex with a family friend on a whim after a night of drinking if there had been no prior sexual contacts or

discussion of sexual orientation. Another example is Respondent's statements that Complainant did not stay overnight at his apartment in Omaha in 1973. It is true that Respondent might not remember an insignificant event, assuming nothing notable occurred. However, this was a one-time overnight trip with a 14 year old boy. The Kansas City trip is another example. Respondent testified that the accident occurred early in the evening, when his friend testified that it happened approximately four hours later. Respondent also made contradictory statements regarding when he began his relationship with JC, which was important because Respondent used him as an alibi to his whereabouts on the night of July 3, 1973.

Respondent obviously has an interest in the hearing, which is true in every case that comes before the Board. However, the evidence shows some examples how Respondent used his relationship with Complainant's mother, at least in a subtle manner, to possibly influence her statements or testimony. For example, when Ms. Roush finished interviewing Respondent, they discussed whether Ms. Roush was going to interview Complainant's mother. Ms. Roush said she was. Respondent quickly got in his car and drove to the mother's home to tell her that Ms. Roush was going to be coming to interview her. If Respondent had nothing to hide, he would not have needed to go to her home.

As another example, Respondent hand-wrote a letter for Complainant's mother in 2005 (after he learned about the complaint) that refuted the letter she previously wrote in 1997. The letter was entirely written by Respondent, and only signed by Complainant's mother. By comparison, Complainant's mother wrote the entire 1997 letter. While she has said Complainant dictated the 1997 letter to her, she also testified that each statement in the letter is true (with the exception of the concluding sentence to which she has no personal knowledge).

Complainant's mother's credibility: Complainant's mother was considered an important witness by both parties because she could either corroborate or dispute Complainant's allegations as to what occurred when he returned home from the Omaha trip in 1973. Her testimony has wavered some, but she ultimately testified similarly to the letter that was filed with the Board in 1997. The Panel finds her testimony to fairly constitute her memory as to what occurred. As discussed above, the Panel finds that the testimony provided by Complainant's mother supports and corroborates her son's allegations.

Complainant's mother has always been in a difficult position regarding the question whether Respondent sexually abused her son. She helped Respondent get established in his first solo practice office, she worked for him, and he became one of her best friends. She and her husband trusted Respondent and thought he would be a good influence on their son. The entire family was in turmoil due to the loss of two children, and

Respondent became a major part of their life at that time. Besides being an employer and friend, Respondent offered Complainant's mother distractions by taking her to fun events like dinner and plays. It is understandable, under these circumstances, how a family might be unable or unwilling to emotionally deal with the allegation of sexual touching by their good friend and employer against their son. Ms. Roush testified to the mother's distress and uncertainty with facing this problem, as recounted from her interview in 2004. As a result, Complainant's mother has tried to walk a line between the two sides.

Summary and Finding: Based on the discussion above, the Panel finds that the State has satisfied its burden of proof. Complainant's testimony was more consistent, better supported, and more plausible than the testimony provided by Respondent. The Board recognizes some inconsistencies, but finds that the overall testimony and supporting evidence from Complainant and the State outweighs the credibility and supporting evidence provided by Respondent. The Panel hereby finds the statement of charges to be supported by the weight of the evidence.

DECISION AND ORDER

The violation is extremely serious and an appropriate sanction must be imposed. The Panel considered licensing conditions that would provide additional safeguards to prevent any future violations. The Panel balanced this public protection interest against other factors, most notably the time between the sexual abuse with Complainant and the information from the BMI evaluation. Thirty-five years have passed between the initial sexual abuse with Complainant and the decision in this case. At that time, Respondent was a young doctor who was new to understanding his sexual orientation. Respondent is now a 65 year-old man who is in a committed relationship and approaching the end of his medical career. The BMI evaluation report indicates that Respondent does not currently have a sexual interest in children. There was no evidence to indicate any sexual concerns since Complainant was in high school, which is more than 20 years ago. The Panel does not make these comments to condone what Respondent did; rather, they are made to distinguish the breadth of conditions it might impose if considering a more current violation.

1. **CIVIL PENALTY:** Respondent shall be assessed a civil penalty in the amount of **\$10,000**. The civil penalty shall be paid within twenty (20) days of the date of this Order by delivery of a check or money order, payable to the Treasurer of Iowa, to the executive director of the Board. The civil penalty shall be deposited into the State General Fund.

2. **CHAPERONE:** Respondent shall have a chaperone present in the room at all times when he is examining or treating a minor child. Each chaperone shall be approved by the Board before acting as a chaperone. Each chaperone shall file a

sworn report to the Board attesting to the compliance with this condition of the Order. Reports shall be filed by the 10th of each month that this Order is in effect. Respondent is responsible to ensure that all reports are filed.

3. **PROBATION:** Respondent shall be placed on probation for a period of **five years**, subject to the following terms and conditions:

A. **Board Monitoring Program:** Respondent shall contact Shantel Billington, Compliance Monitor, Iowa Board of Medicine, 400 SW 8th Street, Suite C, Des Moines, IA 50309-4686, Ph. #515-281-3654, to establish a monitoring program. Respondent shall fully comply with all requirements of the monitoring program.

B. **Counseling:** Respondent shall submit to the Board for approval the name and CV of a counselor to provide sexual misconduct counseling.

(1) The counselor shall submit written quarterly reports to the Board concerning Respondent's progress. The reports shall be filed with the Board not later than 1/20, 4/20, 7/20 and 10/20 of each year of this Order.

(2) Respondent shall continue with counseling until discharged by the Board-approved counselor and until Respondent's discharge from counseling is approved by the Board.

(3) Respondent shall meet with his Board-approved counselor as frequently as recommended by the counselor and approved by the Board. All costs associated with the counseling shall be the responsibility of Respondent.

C. **Quarterly Reports:** Respondent shall file sworn quarterly reports with the Board attesting to his compliance with the terms of this Order. The reports shall be filed not later than 1/10, 4/10, 7/10 and 10/10 of each year of the Order.

D. **Board Appearances:** Respondent shall make appearances before the Board or a Board committee annually or upon request. Respondent shall be given reasonable notice of the date, time and location for the appearances. Said appearances shall be subject to the waiver provisions of 653 IAC 24.2(5)(d).

E. **Monitoring Fee:** Respondent shall make a payment of \$100 to the Board each quarter for the duration of this Order to cover the Board's monitoring expenses in this matter. The monitoring fee shall be received by the Board

with each quarterly report from Respondent required by this Order. The monitoring fee shall be sent to: Shantel Billington, Compliance Monitor, Iowa Board of Medicine, 400 SW 8th Street, Suite C, Des Moines, IA 50309-4686. The check shall be made payable to the Iowa Board of Medicine. The Monitoring Fee shall be considered repayment receipts as defined in Iowa Code section 8.2.C.

4. Respondent shall obey all federal, state and local laws, and all rules governing the practice of medicine in Iowa.

5. In the event Respondent leaves Iowa to reside or practice outside the state, Respondent shall notify the Board in writing of the dates of departure and return. Periods of residence or practice outside the state of Iowa will not apply to the duration of this Order.

6. In the event Respondent violates or fails to comply with any of the terms or conditions of this Order the Board may initiate action to suspend or revoke the Respondent's Iowa medical license or to impose other license discipline as authorized in Iowa Code Chapters 148 and 272 and 653 IAC 25.

7. Respondent shall pay a disciplinary hearing fee of \$75.00. Iowa Code section 272C.6(6); 653 IAC 25.33(2). Respondent shall also pay any costs certified by the executive director. *See* 653 IAC 25.33(3). All sanctions, fees and costs shall be paid in the form of a check or money order payable to the State of Iowa and delivered to the Board of Medical Examiners within thirty days of the issuance of the final decision.

Dated this 28th day of January, 2008.

Affirmed by:



Yasyn Lee, M.D.



Siroos Shirazi, M.D.



Janece Valentine

Dissenting:

A handwritten signature in cursive script, appearing to read "Dana Shaffer".

Dana Shaffer, D.O.

cc: Theresa O'Connell Weeg
Assistant Attorney General

Michael Sellers
Respondent's Attorney

BEFORE THE IOWA BOARD OF MEDICINE

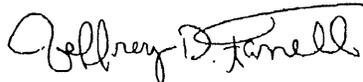
In the Matter of the Statement of	)	File No. 02-98-170
Charges Against:	)	Case No. 06DPHMB018
)	
)	
Jerry G. Schaaf, M.D.,	)	ORDER REGARDING REQUEST
	)	FOR RECONSIDERATION
Respondent.)	

On May 9, 2008, respondent filed a request for reconsideration of a denial of his motion to continue. Respondent contended that I misunderstood the facts, as set forth in the motion. He cited no legal authority supporting a request for reconsideration of a denied motion to continue. In any event, I reviewed the additional information from the request for reconsideration. I found no information that changes the conclusion I reached in my prior order.

ORDER

Respondent's request for reconsideration is denied. The hearing remains set for May 14, 2008, as previously scheduled.

Dated this 12th day of May, 2008.



Jeffrey D. Farrell
 Administrative Law Judge
 Wallace State Office Building – Third Floor
 Des Moines, Iowa 50319
 515-281-6870 (phone)
 515-281-4477 (fax)

cc: Theresa O'Connell Weeg (by fax: 281-7551)
 Michael Sellers (by fax: 515-221-2702)
 Iowa Board of Medical Examiners (by fax: 281-8641)

BEFORE THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF IOWA

IN THE MATTER OF THE	)	FILE NO. 02-98-170
STATEMENT OF CHARGES	)	DIA NO. 06DPHMB018
AGAINST:)	
)	
JERRY G. SCHAAF, M.D.,	)	ORDER ON RESPONDENT'S
	)	SECOND MOTION TO DISMISS
Respondent.)	

Date: July 31, 2007.

INTRODUCTION

Respondent's motion to dismiss came on for hearing before the Iowa Board of Medical Examiners (the Board) on May 24, 2007. Attorney Michael Sellers represented Respondent Jerry SchAAF. Assistant Attorney General Theresa Weeg represented the State. The Board included the following members: Yasyn Lee, M.D, Chair; Dana Shaffer, D.O., Vice Chair; Blaine Houmes, M.D., Siroos Shirazi, M.D.; Carole Frier, D.O.; Sally Schroeder, Tom Drew, and Janece Valentine, public members. Jeffrey Farrell, an administrative law judge, assisted the Board during deliberations and drafting of this order.

STATEMENT OF THE CASE

This case concerns a statement of charges filed on April 27, 2006. The statement of charges alleges that Respondent engaged in unethical or unprofessional conduct detrimental to the public by engaging in inappropriate sexual misconduct with a patient who was a minor child at the time. The statement of charges alleges that the conduct occurred over 30 years ago.

On or about November 20, 2006, Respondent filed a motion to dismiss. The motion alleged several grounds, including failure to produce evidence to support the claim, statute of limitations, due process, and laches. On December 14, 2006, the Board denied the motion on all grounds. With regard to the laches defense, the Board stated that Respondent had not cited to any authority establishing that a laches defense is available in a medical disciplinary proceeding in Iowa.

Respondent sought judicial review of the Board's December 14, 2006 decision. The parties represented that, in a hearing before the Polk County District Court on March 16, 2007, the Court expressed a concern about the laches decision. The Court noted that two Iowa Supreme Court cases (*Sahu v. Board of Medical Examiners*, 537 N.W.2d 674 (Iowa 1995) and *Miller v. Board of Medical Examiners*, 609 N.W.2d 478 (Iowa 2000)), held

that the doctrine of laches is available in a medical licensing case. The Court was concerned that the Board did not reach a decision on the merits of the laches issue. Rather than proceeding further on that issue, the parties agreed to present the issue to the Board a second time.

On or about March 19, 2007, Respondent filed a substituted and amended second motion to dismiss. Respondent represented in his motion that the alleged misconduct occurred approximately 34 years ago. The alleged victim has since graduated from Harvard University and University of Iowa School of Law, and is a practicing attorney in another state. In 1998, while receiving mental health therapy attendant to his divorce proceedings, the alleged victim filed a complaint with the Board regarding Respondent's alleged conduct. The alleged victim's therapist also filed a complaint around the same time.

Respondent submitted affidavits and written statements designed to attack the accuracy and credibility of Respondent's allegations. While this evidence may be valuable at a hearing on the merits of the statement of charges, the Board does not view it as helpful to Respondent's laches defense. Rather, the Board focused on four sources of evidence that would have been available to Respondent if a statement of charges had been filed at an earlier date. Those sources of information are:

1. the alleged victim's father;
2. a third-party witness to sexual activity;
3. the alleged victim's ex-brother-in-law;
4. Respondent's medical records for the alleged victim.

The alleged victim's father passed away in 2003. Respondent argued the father's testimony would have been important because the alleged victim has stated that he first told his father about Respondent's sexual contact. The father would have been able to confirm or deny that conversation.

The third-party witness passed away at an unknown date. He was allegedly involved in an incident involving joint sex acts with Respondent and the alleged victim. The alleged victim claims this incident occurred after his initial sexual contact with Respondent, and while he was still a minor. Respondent claims this witness would have testified that this incident occurred when the alleged victim was 24 years old, and that the alleged victim precipitated the incident.

The ex-brother-in-law passed away at an unknown date. Respondent claims that this witness could testify to the alleged victim's personality and credibility, particularly as related to the alleged victim's divorce from the witness' sister.

Respondent stated that he no longer has any patient records regarding the alleged victim. He argued that the records could be material to show the nature and timing of any physician-patient relationship.

The State's attorney agreed that the alleged victim's father and the third-party witness could have provided material evidence if they were still alive. However, the State contends that any prejudice is minor. For example, the alleged victim also stated he told his mother about Respondent's conduct shortly after telling his father, and his mother is alive and competent to testify. The State argued that the patient records are not material because the alleged victim was a minor at the time of the sexual contact, so the failure to prove an ongoing physician-patient relationship would not preclude the finding of a violation. The State argued that the death of the ex-brother-in-law was not prejudicial because others could testify to Respondent's conduct during the dissolution, to any extent it is relevant to this case. The State argued that the most significant evidence in the case will be the testimony of Respondent and the alleged victim, as they are the only first-hand witnesses regarding the allegations in this matter.

CONCLUSIONS OF LAW

The doctrine of laches may be used as an affirmative defense when an unreasonable delay in one party's assertion of its rights causes disadvantage or prejudice to another party. *Committee on Professional Ethics v. Wunschel*, 461 N.W.2d 840, 846 (Iowa 1990). The party who asserts the doctrine must prove each element by clear, convincing, and satisfactory evidence. The asserting party must show that the delay caused prejudice. The party cannot prove prejudice merely from the passage of time.

As referenced earlier, the Iowa Supreme Court has considered a laches defense in Board proceedings on two occasions. The Court rejected the defense in both cases. In *Sahu*, the Court refused to dismiss the case when the Board filed a statement of charges seven years after the physician allegedly submitted inaccurate bills to the Medicaid program. 537 N.W.2d at 676. The Court noted that the delay was justified as the Board waited for the outcome of federal criminal charges on a case with the same factual basis. In *Miller*, the Court affirmed the Board in a case involving a three year delay between the alleged conduct and the statement of charges. 609 N.W.2d at 485. In that instance, the Court found the delay to be reasonable in light of the number of patients involved in the investigation, the volume of the records, and the need to conduct peer review.

Similarly, in a lawyer disciplinary case, the Supreme Court rejected a laches defense regarding a complaint filed seven years after the alleged misconduct. *Wunschel*, 461 N.W.2d 845-46. The complaint concerned an attorney's conduct during the course of a business transaction between the attorney and a non-lawyer individual. The attorney claimed that a number of documents were no longer available, including tax records,

telephone bills, and other documents that would have supported his defense. The Court evaluated each class of lost records, and found that they would have added little to his defense.

On the surface, Respondent has a sympathetic argument simply based on the number of years between the alleged misconduct and the charges in this matter. The statement of charges were filed more than 30 years after the alleged misconduct, which is significantly longer than the time considered in the above-discussed cases. Moreover, the Board received the complaint eight years prior to filing the statement of charges. Unlike *Sahu*, the Board did not have a strategic reason to delay filing the statement of charges. Rather, the delay in this case was largely due to a backlog in the Board's investigative process. Certainly, this case will not serve as a model for timely complaint processing.

Notwithstanding the delay, the Supreme Court has made it abundantly clear on repeated occasions that a party cannot prove a laches defense solely based on the passage of time. Laches is not like a statute of limitations – there is no magic time period that automatically precludes a case from going forward. Accordingly, the 34 year time gap between Respondent's alleged misconduct and the statement of charges must be treated no differently than the shorter time gaps discussed in prior Supreme Court cases.

The Board must also consider its overriding purpose, which is to protect the public through regulation of the profession. The allegations against Respondent are of a very serious nature and demand proper review. If allegations are substantiated after an evidentiary hearing, the Board must consider appropriate discipline. It is true that the Board may be criticized for filing the statement of charges so long after the complaints were made. Still, the nature of the allegations are such that the Board cannot cast a blind eye simply to avoid criticism.

The critical element of Respondent's laches claim is whether he has been prejudiced by the delay. He must prove this element by clear, convincing, and satisfactory evidence. The most relevant evidence on the prejudice claim regards the evidence that might have come from the three deceased witnesses and the destroyed medical records.

The Board finds the State's argument regarding prejudice to be persuasive. First, there is no showing how the medical records would have helped Respondent's defense. If Respondent had sexual contact with a minor, the Board may find a violation and impose discipline and the existence of a continuing physician-patient relationship is not determinative.

There is no showing how Respondent's case is prejudiced by the death of the alleged victim's brother-in-law. It is unclear how his testimony would be relevant to the ultimate allegations. In any event, there are living witnesses who can provide the same or similar testimony regarding the alleged victim's biases or conduct surrounding his divorce.

The other two witnesses could have offered material evidence, but Respondent has not proved prejudice by clear, convincing, and satisfactory evidence. The alleged victim reportedly first told his father about Respondent's sexual contact. However, Respondent also reportedly told his mother shortly thereafter. The mother has had health problems, but there is no proof that she will not be able to testify in the future. The mother could provide essentially the same testimony as the father.

The witness who allegedly had a sexual liaison with Respondent and the alleged victim could have offered evidence that may have impacted the credibility of the alleged victim's claim that the encounter occurred when he was still a minor. Respondent claims that this witness would testify that this incident occurred when the alleged victim was 24, and not when he was a minor. The witness would also testify that the sexual contact occurred at the alleged victim's suggestion. The third-person witness would be material to the issues of when and how this specific incident occurred. However, his absence does not significantly prejudice Respondent's defense with regard to the earlier alleged sexual contact while the alleged victim was a minor. No one alleges that the third-person witness was present for the initial sexual contact, he was allegedly only present during a later incident.

Respondent submitted a number of affidavits from witnesses who contradict statements made by the alleged victim in an attempt to undermine the alleged victim's claims. These affidavits may help Respondent on the merits of the case, however, they undercut his laches defense. The affidavits show that Respondent has located and produced a number of witnesses who will provide testimony in support of his case. Respondent may use these witnesses, or their sworn statements, in an attempt to undermine the alleged victim's testimony at a hearing on the merits. This case will ultimately be decided based on the believability and credibility of Respondent and the alleged victim. Respondent has shown he is well-equipped to challenge the alleged victim's claims at a hearing on the merits.

ORDER

THEREFORE: Respondent's motion to dismiss is hereby denied. The Board shall set this matter for a contested case hearing by a separate order.

Dated this 31st day of July, 2007.

A handwritten signature in black ink, appearing to read "Yasyn Lee", written over a horizontal line.

Yasyn Lee, M.D., Chair
Iowa Board of Medical Examiners
400 S.W. 8th Street, Suite C
Des Moines, Iowa, 50309-4686

cc: Theresa O'Connell Weeg
Michael Sellers

BEFORE THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF IOWA

IN THE MATTER OF THE) DIA NO. 06DPHMB018
STATEMENT OF CHARGES AGAINST:) CASE NOS. 02-98-170
)
) BOARD RULING DENYING
JERRY G. SCHAAF, M.D.) RESPONDENT'S MOTION
) TO DISMISS
Respondent)

Date: December 14, 2006

On April 27, 2006, the Iowa Board of Medical Examiners (Board) filed a Notice of Hearing alleging that Jerry G. Schaaf, M.D. (Respondent) engaged in unethical or unprofessional conduct or practice harmful or detrimental to the public when he engaged in inappropriate sexual misconduct in the practice of medicine. A Notice of Hearing initially scheduled the hearing for June 14, 2006. The hearing has now been continued to January 24, 2007. On or about November 20, 2006, Respondent filed a Motion to Dismiss and Brief In Support Of Motion To Dismiss. On December 1, 2006, the state filed a Resistance To Respondent's Motion To Dismiss. The Board met by telephone conference on December 14, 2006 to discuss the Motion to Dismiss in closed session, pursuant to Iowa Code section 21.5(1)(f). In open session, the Board approved a motion denying the Motion to Dismiss.

The confidential Statement of Matters Asserted, which was attached to the Notice of Hearing, states that Respondent engaged in an inappropriate sexual relationship with a patient who was a minor child at the time, over thirty years ago. Respondent asserts that the pending disciplinary proceeding should be dismissed because the Board's investigation did not produce substantive evidence supporting the Complainant's allegation, and because even if proven, the complaint would be barred by the statutes of limitation set forth in Iowa Code section 614, by the otherwise applicable criminal statutes of limitation, and by constitutional guarantees of due process. Finally, Respondent invokes the defense of laches.

Statutes of limitation applicable in criminal and civil proceedings do not apply to Board of Medical Examiners' disciplinary proceedings. Sahu v. Board of Medical Examiners, 537 N.W.2d 674, 676 (Iowa 1995). Respondent cites a case from the New Hampshire Supreme Court in support of his assertion of the defense

of laches. Appeal of Plantier, 126 NH 500, 494 A2d 270 (1985). The cited case is not controlling in the state of Iowa. In Plantier, the New Hampshire Supreme Court applied the due process clause of the New Hampshire State Constitution and concluded, in part, that the New Hampshire Medical Board committed reversible error in considering a complaint of sexual misconduct that was over nine years old when it revoked a physician's license. In reaching this decision, the Court invoked the equitable doctrine of laches. The Court noted that the party asserting laches bears the burden of proving both that the delay is unreasonable and that prejudice resulted from the delay. Id. at 271, citing Jenot v. White Mt. Acceptance Corp, 124 N.H. 701, 710, 474 A.2d 1382, 1387(1984).

Respondent cites no authority establishing that the laches defense is available in a medical disciplinary proceeding in Iowa. The Board was aware of the age of this complaint when it found probable cause to hold a hearing. Respondent continues to practice medicine in this state, and the allegations raise very serious concerns about patient safety and welfare and Respondent's fitness to practice medicine. The Board believes that the important factual issues presented by this case, including the factual issues raised by Respondent to support his Motion to Dismiss, should be resolved following a contested case hearing.

IT IS THEREFORE ORDERED that the Motion to Dismiss is hereby **DENIED**.

Dated this 14th day of December, 2006.



Yasin Lee, Chairperson
Iowa Board of Medical Examiners

cc: Theresa O'Connell Weeg
Office of the Attorney General
Attorney for State

Michael Sellers
Attorney for Respondent

BEFORE THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF IOWA

IN THE MATTER OF THE) DIA NO. 06DPHMB026
STATEMENT OF CHARGES AGAINST:) CASE NOS. 03-00-999
) 12-06-06P02:49 RCVD
)
)
JERRY G. SCHAAF, M.D.) ORDER GRANTING EXTENSION
) TO FILE BRIEF IN SUPPORT
Respondent) OF DISCOVERY MOTIONS

On April 27, 2006, the Iowa Board of Medical Examiners (Board) filed a Statement of Charges alleging that Jerry G. Schaaf, M.D. (Respondent) engaged in unethical or unprofessional conduct or practice harmful or detrimental to the public when he engaged in inappropriate sexual misconduct in the practice of medicine. A Notice of Hearing initially scheduled the hearing for June 14, 2006. The hearing was later continued to November 15, 2006 and has now been continued to January 24, 2007.

On November 15, 2006, the parties presented oral arguments on a number of pending discovery motions. The parties were asked to provide legal authorities/briefs supporting their respective positions by December 1, 2006. On December 1, 2006, the state filed a request for extension until December 8, 2006. Respondent has not yet filed a brief. IT IS THEREFORE ORDERED that the state's request for extension of time for briefs is GRANTED. The parties shall file all briefs on the pending motions by December 8, 2006.

Dated this 4th day of December, 2006.



Margaret LaMarche
Administrative Law Judge
For the Iowa Board of Medical Examiners

cc: Theresa O'Connell Weeg
Office of the Attorney General
Hoover Building
Des Moines, Iowa 50319
and by FAX: (515)281-7551

Michael Sellers
One Corporate Place
1501 42nd St., Suite 380
West Des Moines, IA 50266-1005
and by FAX: (515) 221-2702

Kent Nebel
Director of Legal Affairs
Iowa Board of Medical Examiners
400 SW 8th Street, Suite C
Des Moines, IA 50309-4686
and by FAX: (515) 281-8641

BEFORE THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF IOWA

IN THE MATTER OF THE	)	FILE NO. 02-98-170
NOTICE OF HEARING FOR)	
)	
JERRY G. SCHAAF, M.D.,	)	NOTICE OF HEARING
)	
RESPONDENT.)	

COMES NOW the Iowa Board of Medical Examiners on April 27, 2006, and files this Notice of Hearing pursuant to Iowa Code Section 17A.12(2). Respondent was issued Iowa medical license no. 18692 on July 12, 1972. Respondent's license is active and will next expire on September 1, 2007.

A. TIME, PLACE AND NATURE OF HEARING

1. Hearing. A disciplinary contested case hearing be held on June 14, 2006, before the Iowa Board of Medical Examiners. The hearing shall begin at 8:30 a.m. and shall be located in the conference room at the Iowa Board of Medical Examiners office at 400 SW 8th Street, Suite C, Des Moines, Iowa.

2. Answer. Within twenty (20) days of the date you are served this Notice of Hearing you are required by 653 Iowa Administrative Code 12.18 to file an Answer. In that Answer, you should also state whether you will require a continuance of the date and time of the hearing.

3. Presiding Officer. The Board shall serve as presiding officer, but the Board may request an Administrative Law Judge make initial rulings on prehearing matters, and be present to assist and advise the board at hearing.

4. Hearing Procedures. The procedural rules governing the conduct of the hearing are found at 653 Iowa Administrative Code Chapter 12. At hearing, you will be allowed the opportunity to respond to the charges against you, to produce evidence on your behalf, cross-examine witnesses, and examine any documents introduced at hearing. You may appear personally or be represented by counsel at your own expense. If you need to request an alternative time or date for hearing, you must review the requirements in 653 Iowa Administrative Code 12.24. The hearing may be open to the public or closed to the public at the discretion of the Respondent.

5. Prosecution. The office of the Attorney General is responsible for representing the public interest (the State) in this proceeding. Pleadings shall be filed with the Board and copies should be provided to counsel for the State at the following address: Theresa O'Connell Weeg, Assistant Attorney General, Iowa Attorney General's Office, 2nd Floor, Hoover State Office Building, Des Moines, Iowa 50319.

6. Communications. You may not contact board members by phone, letter, facsimile, e-mail, or in person about this Notice of Hearing. Board members may only receive information about the case when all parties have notice and an opportunity to participate, such as at the hearing or in pleadings you file with the Board office and serve upon all parties in the case. You should direct any questions to Kent M. Nebel, J.D., the Board's Legal Director at 515-281-7088 or to Assistant Attorney General Theresa O'Connell Weeg at 515-281-6858.

B. LEGAL AUTHORITY AND JURISDICTION

7. Jurisdiction. The Board has jurisdiction in this matter pursuant to Iowa Code Chapters 17A, 147, 148, and 272C (2005).

8. Legal Authority: If any of the allegations against you are founded, the Board has authority to take disciplinary action against you under Iowa Code Chapters 17A, 147, 148, and 272C (2005) and 653 Iowa Administrative Code Chapter 12.12.

9. Default. If you fail to appear at the hearing, the Board may enter a default decision or proceed with the hearing and render a decision in your absence, in accordance with Iowa Code Section 17A.12(3) and 653 Iowa Administrative Code 12.28.

C. SECTIONS OF STATUTES AND RULES INVOLVED

COUNT I

10. Respondent is charged under Iowa Code section 147.55(3) (2005) and 653 IAC sections 12.4(3) and 12.4(36) with engaging in unethical or unprofessional conduct or practice harmful or detrimental to the public when he engaged inappropriate sexual misconduct in the practice of medicine.

D. STATEMENT OF MATTERS ASSERTED

11. A short and plain Statement of the Matters Asserted was reviewed and approved by the Board at the time this Notice of Hearing was filed. A Statement of the Matters Asserted shall be furnished to Respondent as an attachment to this Notice. However, this short and plain statement of the matters asserted is not a public record.

E. SETTLEMENT

12. Settlement. This matter may be resolved by settlement agreement. The procedural rules governing the Board's settlement process are found at 653 Iowa Administrative Code 12.25. If you are interested in pursuing settlement of this matter, please contact Kent M. Nebel, J.D., Legal Director at 515-281-7088.

F. PROBABLE CAUSE FINDING

13. On this 27th day of April, 2006, the Iowa Board of Medical Examiners found probable cause to file this Notice of Hearing.



Bruce L. Hughes, M.D., Chairperson
Iowa Board of Medical Examiners
400 SW 8th Street, Suite C
Des Moines, Iowa 50309-4686