

BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII JUL 6 3 55 PM '95

In the Matter of the) MED-92-93
Medical License of)
HAROLD L. GOLDBERG,) BOARD'S FINAL ORDER
Respondent.)

BOARD'S FINAL ORDER

On March 23, 1995, the duly appointed Hearings Officer submitted his proposed Findings of Fact, Conclusions of Law, and Recommended Order in the above-entitled matter to the Board of Medical Examiners ("Board"). Copies were transmitted to the parties and the parties were given an opportunity to file written exceptions; both parties filed written exceptions and statement in support of parts of the Hearings Officer's proposed Findings of Fact, Conclusions of Law, and Recommended Order and requested oral arguments.

At the Board's regularly scheduled meeting held on April 19, 1995, the Board considered the record and file as reflected in the Hearings Officer's Findings of Fact, Conclusions of Law, and Recommended Order and the Exceptions and Statements in Support and heard oral argument on behalf of both parties. Respondent was present and represented by his attorney, Gary N. Hagerman and Petitioner was represented by Lynn Minagawa. Hearings Officer Rodney A. Maile also was present.

At the Board's regularly scheduled meeting held on April 19, 1995, the Board voted to accept and adopt the Hearings Officer's Findings of Fact and Conclusions of Law and to modify the Hearings Officer's Recommended Order regarding sanctions. Copies of the Board's Proposed Final Order were transmitted to the parties and the parties were given an opportunity to file written exceptions. Petitioner filed Exceptions to the Board's Proposed Final Order and Respondent filed a Statement in Support of the Board's Proposed Final Order; neither party requested the opportunity to present oral argument.

At the Board's regularly scheduled meeting held on June 21, 1995, the Board considered the Exceptions and Statement in Support filed in response to the Board's Proposed Final Order and hereby adopts this Final Order.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board accepts and adopts the Hearings Officer's Findings of Fact and Conclusions of Law.

II. RECOMMENDED ORDER

The Board rejects the Hearing Officer's Recommended Order as to the revocation of Respondent's license and the stay of that revocation. The Board imposes the following conditions and restrictions on Respondent and his practice of medicine:

1. Respondent shall be on probation during the time Respondent maintains a license to practice medicine in the State of Hawaii;

Respondent maintains a license to practice medicine in the State of Hawaii;

2. During the probation period, Respondent shall continue to receive counseling or therapy at his own expense, from a therapist approved by the Board;

3. Respondent's therapist shall submit a report to the Board at least once a year regarding Respondent's condition and progress. The first such report shall be submitted to the Board within thirty (30) days of the date of the Board's Final Order;

4. Respondent shall not engage in the private practice of psychiatry without first obtaining the approval of the Board; and

5. Respondent shall not treat female patients in individual psychotherapy.

The conditions and restrictions placed upon Respondent and his practice may be modified or terminated in the future upon petition by the Respondent if, in the sole discretion of the Board, such modification or termination is warranted.

If Respondent violates any of the conditions or restrictions imposed by the Board's Final Order, upon the filing of an affidavit from the Regulated Industries Complaints Office that the Respondent has failed to comply with the

Board's Final Order, the Respondent's license to practice
medicine shall be summarily revoked.

JUN 21 1995

DATED: Honolulu, Hawaii, _____, 1995.

Melvin M. Kaneshiro, M.D.

George P. Kukana, MD

William L. ...

Douglas ...

James D. ... MD

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HEARINGS OFFICE



BOARD OF MEDICAL EXAMINERS
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the)	MED-92-93
)	
Medical License of)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
HAROLD L. GOLDBERG,)	CONCLUSIONS OF LAW
)	AND RECOMMENDED ORDER;
Respondent.)	APPENDICES "A" and "B"
_____)	

**HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER**

I. CHRONOLOGY OF CASE

On July 20, 1993, the Department of Commerce and Consumer Affairs, State of Hawaii, through its Regulated Industries Complaints Office (hereinafter "Petitioner"), by and through its attorney, Lynn Minagawa, filed a Petition for Disciplinary Action against the medical license of Harold L. Goldberg, M.D. (hereinafter "Respondent").

The matter was set for hearing on November 3, 1993, and the Notice of Hearing was duly served on the parties.

On August 26, 1993, Petitioner, by and through its attorney, Lynn Minagawa, filed its First Amended Petition for Disciplinary Action against Respondent.

On November 3, 1993, a hearing was conducted by the undersigned Hearings Officer. Petitioner was represented by its attorney, Lynn Minagawa. Respondent was present and was represented by his attorney, Gary N. Hagerman, Esq. During the course of the hearing, Respondent made a motion to dismiss Count II of the First Amended Petition for Disciplinary

Action. Following the arguments of counsel, the Hearings Officer granted the motion to dismiss Count II.

In order to present additional evidence, the parties agreed to reconvene for further hearings on December 28, 1993.

On December 28, 1993, the hearing on the above-captioned matter was reconvened by the undersigned Hearings Officer. The Petitioner was represented by its attorney, Lynn Minagawa. Respondent was present and was represented by his attorney, Gary N. Hagerman, Esq.

The Hearings Officer informed the parties that he had reconsidered his decision regarding the dismissal of Count II of the First Amended Petition. In light of the reconsideration, the Hearings Officer informed the parties that the hearing could be continued to provide the parties with additional time to prepare for the presentation of evidence as to Count II of the First Amended Petition.

Petitioner also requested a continuance on the basis that it was still waiting for information from Blue Cross/Blue Shield of Massachusetts that would be used as rebuttal evidence on Count I of the First Amended Petition. Petitioner explained its efforts to obtain the information in the weeks prior to the reconvened hearing. The Hearings Officer granted Petitioner's request to continue the hearing. The hearing was rescheduled to reconvene on February 7, 1994.

On February 7, 1994, the hearing in the above-captioned matter was reconvened by the undersigned Hearings Officer. The Petitioner was represented by its attorney, Lynn Minagawa. Respondent was present and was represented by his attorney, Gary N. Hagerman, Esq.

Pursuant to the request of the Hearings Officer, on February 18, 1994, the Petitioner submitted its respective Proposed Findings of Fact, Conclusions of Law and Recommended Order, and on February 22, 1994, Respondent submitted his Proposed Findings of Fact, Conclusions of Law and Decision.

Having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT

1. From December 11, 1987, and throughout all times relevant herein, Respondent was licensed to practice medicine in the State of Hawaii by the Board of Medical Examiners (hereinafter "Board"), License No. MD 6020. At all times relevant herein, Respondent's medical practice was in the field of psychiatry. Petitioner's Proposed Findings of Fact No. 1, modified.

2. Respondent's license to practice medicine in the State of Hawaii was renewed on or about January 31, 1990. Respondent's Proposed Findings of Fact No. 3.

A. Count I: The B.J.S. Complaint

3. The complainant in Count I, Mrs. B.J.S.,¹ is a resident of the State of Massachusetts. Mrs. B.J.S. testified in this matter by telephone, and did not appear personally at any of the three hearings held in this matter in Honolulu, Hawaii. While testifying from Massachusetts, Mrs. B.J.S. was represented by an attorney who was with her in Massachusetts. Mrs. B.J.S. was also represented by an attorney in the State of Hawaii, Pamela Berman, who attended the hearings held in Honolulu on behalf of Mrs. B.J.S., but did not participate in the hearings. Respondent's Proposed Findings of Fact Nos. 4, 5, and 6, modified.

4. In or around 1979, Mrs. B.J.S. and her husband commenced marriage counseling services with Respondent. At that time, Mrs. B.J.S. and her husband and Respondent were residents of Massachusetts. Petitioner's Proposed Findings of Fact No. 2.

5. Mrs. B.J.S. and her husband attended counseling sessions with Respondent approximately once or twice a month. Mrs. B.J.S. and her husband continued to receive marriage counseling from Respondent until sometime in or around 1981. Petitioner's Proposed Findings of Fact No. 3, modified.

6. In his testimony during the hearing, Respondent denied that he provided marriage counseling services to Mrs. B.J.S. and her husband. Respondent claimed that Mrs. B.J.S.'s husband first started to see him for treatment of depression in 1979. According to Respondent,

¹ The parties to this proceeding were aware of the true identity of "Mrs. B.J.S."; however, the identity of Mrs. B.J.S. was not disclosed in the evidentiary record of the hearing because of confidentiality concerns.

Mrs. B.J.S. became involved with her husband's treatment sessions. Respondent had one or two individual sessions with Mrs. B.J.S. during the course of treating her husband. Petitioner's Proposed Findings of Fact No. 4.

7. Respondent's first wife passed away in or around October 1986. Petitioner's Proposed Findings of Fact No. 6.

8. Between 1981 and 1987, Mrs. B.J.S. had no contact with Respondent. Petitioner's Proposed Findings of Fact No. 5.

9. In 1987, Mrs. B.J.S. contacted Respondent and indicated that she was seeking help for her mother, who was experiencing anxiety because she had cancer. Respondent agreed to provide treatment to Mrs. B.J.S.'s mother. Petitioner's Proposed Findings of Fact No. 19, modified.

10. Respondent provided psychiatric treatment to Mrs. B.J.S.'s mother from 1987 to 1989. As part of Respondent's treatment of Mrs. B.J.S.'s mother, Respondent also had separate consultation sessions with Mrs. B.J.S. in order to obtain information which would assist him in the treatment of Mrs. B.J.S.'s mother. The consultation sessions with Mrs. B.J.S. occurred one day prior to Respondent's appointments with Mrs. B.J.S.'s mother. Petitioner's Proposed Findings of Fact No. 20, modified.

11. In 1987, Mrs. B.J.S. decided to separate from her husband of 37 years. As a result, Mrs. B.J.S. became depressed and upset. Mrs. B.J.S. contacted Respondent and began to receive psychiatric treatment from him on April 20, 1987. Petitioner's Proposed Findings of Fact No. 7.

12. Mrs. B.J.S. described her mental state at that time as suffering from depression, being afraid of the future, and feeling distraught and alone. Petitioner's Proposed Findings of Fact No. 8.

13. Mrs. B.J.S. attended psychiatric treatment sessions with Respondent approximately twice a month. During those sessions, Mrs. B.J.S. told her problems to Respondent, and she would receive assurances from him. Petitioner's Proposed Findings of Fact No. 9, modified.

14. Mrs. B.J.S. was covered for medical expenses under her husband's medical insurance plan with Blue Cross/BlueShield of Massachusetts. Petitioner's Proposed Findings of Fact No. 21.

15. The Subscriber Claim Summaries from Blue Cross/BlueShield of Massachusetts showed that Respondent was paid for psychiatric services rendered to Mrs. B.J.S. from April 20, 1987, to June 19, 1989. The Subscriber Claim Summaries specifically state that Mrs. B.J.S. was the patient, that Respondent was the provider of services, and that the type of services that was provided to Mrs. B.J.S. was psychiatric services. The Subscriber Claim Summaries also showed that Respondent provided psychiatric services to Mrs. B.J.S. on 23 occasions. Petitioner's Proposed Findings of Fact No. 22.

16. Ms. Jan Holden, account executive with Blue Cross/BlueShield of Massachusetts, testified that she reviewed the records relating to the claims submitted by Respondent for services rendered to Mrs. B.J.S. Ms. Holden was able to obtain a copy of one Health Insurance Claim Form for each of the years that Respondent provided services to Mrs. B.J.S. Petitioner's Proposed Findings of Fact No. 23.

17. In the "Diagnosis" portion of the Health Insurance Claim Form covering the time period from June 25, 1987, to September 28, 1987, Respondent wrote that Mrs. B.J.S. was afflicted with a major depressive disorder. The Claim Form also showed that Respondent provided individual psychotherapy services to Mrs. B.J.S. Petitioner's Proposed Findings of Fact No. 24.

18. In the "Diagnosis" portion of the Health Insurance Claim Forms covering the time periods from January 14, 1988, to March 23, 1988, and from April 5, 1989, to June 19, 1989, Respondent wrote that Mrs. B.J.S. was afflicted with an adjustment disorder with depressed mood. The Claim Forms also showed that Respondent provided individual psychotherapy services to Mrs. B.J.S. Petitioner's Proposed Findings of Fact No. 25.

19. The insurance codes that were inserted in the Health Insurance Claim Forms prepared by Respondent, corresponded to the codes used by Blue Cross/BlueShield for the diagnosis of depression and adjustment disorder. The insurance codes also corresponded to the codes used by Blue Cross/BlueShield to show that individual psychotherapy was the type of

treatment procedure that was provided to the patient. Petitioner's Proposed Findings of Fact No. 26.

20. Mrs. B.J.S.'s insurance records were reviewed by the staff of Blue Cross/ Blue Shield of Massachusetts. The staff members included specialists in the mental health field. Based on that review, the staff concluded that Respondent did render psychiatric treatment to Mrs. B.J.S. Petitioner's Proposed Findings of Fact No. 27.

21. According to Ms. Jan Holden, Blue Cross/BlueShield of Massachusetts had a policy regarding the payment of claims for a physician's consultation session with a relative of a patient. Blue Cross/BlueShield allows payment of claims for one to three consultation sessions. Ms. Holden further testified that Blue Cross/BlueShield would not pay for the 23 office visits as reflected in the Subscriber Claim Summaries, unless Mrs. B.J.S. was a patient of Respondent. Petitioner's Proposed Findings of Fact No. 29.

22. Respondent stated that it was his understanding that Blue Cross/BlueShield would not pay for any consultations with a relative of a patient. Thus, Respondent submitted the Health Insurance Claim Forms and designated some type of diagnosis to Mrs. B.J.S. for the purpose of receiving payment for the sessions he had with Mrs. B.J.S. According to Respondent, Mrs. B.J.S. was not suffering from any mental disorder as indicated in the Health Insurance Claim Forms. Petitioner's Proposed Findings of Fact No. 30.

23. Respondent testified that he billed Mrs. B.J.S. or her insurance carrier for the time he spent seeing Mrs. B.J.S. in conjunction with Respondent's treatment of Mrs. B.J.S.'s mother because Respondent could not submit such charges to her mother or her mother's insurance carrier. Respondent's Proposed Findings of Fact No. 11, modified.

24. Gerald McKenna, M.D., a psychiatrist practicing on Kauai, provided testimony regarding the billing practices of psychiatrists. Dr. McKenna stated that in instances where a family member becomes involved with the treatment of a patient, it is proper to bill for the time spent with the family member. Claims for the time spent with the family member may be submitted to the family member's insurance plan. Petitioner's Proposed Findings of Fact No. 31.

25. A written statement from Dr. McKenna was submitted as a supplement to his oral testimony. In the written statement, Dr. McKenna stated:

When billing relatives of actual patients, as I testified, it is necessary to bill those relatives "as if" they were patients, as the insurance companies do not allow billing for the input of relatives as part of the treatment. As I testified, I would then be billing on their own insurance. Because all insurance claim forms require a diagnosis, I would assign them an appropriately innocuous diagnosis consistent with the stress of dealing with this relative.

Respondent's Exhibit F. Petitioner's Proposed Findings of Fact No. 32.

26. Dr. McKenna acknowledged that his patients' files would include a notation as to whether an individual was being billed as a patient or as a family member. Petitioner's Proposed Findings of Fact No. 33.

27. Respondent did not have any medical records or files regarding the services that he provided to Mrs. B.J.S. and Mrs. B.J.S.'s mother. Respondent claimed that those records were lost during Hurricane Iniki. Petitioner's Proposed Findings of Fact No. 34.

28. From December 4, 1987, to May 18, 1989, Blue Cross/BlueShield paid for psychotherapy services to Mrs. B.J.S.'s mother. In addition to Respondent, the following individuals or entities also provided psychotherapy services to Mrs. B.J.S.'s mother from December 1987 to May 1989: Anthony P. Arnold, South Shore Psychology, John J. Curran, and Phillip Levendusky. More specifically, Respondent provided services to Mrs. B.J.S.'s mother on the following dates: December 23, 1988, January 12 and 24, 1989, February 7, 1989, March 10, 1989, April 27, 1989, and May 18, 1989. Petitioner's Proposed Findings of Fact No. 35, modified.

29. Respondent acknowledged that Mrs. B.J.S.'s mother received psychiatric treatment from other professionals from 1987 to 1989. Petitioner's Proposed Findings of Fact No. 36.

30. In or around February 1988, Respondent married his second wife. Petitioner's Proposed Findings of Fact No. 11, modified.

31. Mrs. B.J.S. continued to receive psychiatric treatment from Respondent in 1988. Mrs. B.J.S. felt that the treatment was helping her to get better because she had someone to talk to. Petitioner's Proposed Findings of Fact No. 10.

32. In or around June 1989, Mrs. B.J.S. decided to stop treating with Respondent.²

33. On or about November 1, 1989, the Board of Registration in Medicine for the Commonwealth of Massachusetts (hereinafter "Massachusetts Board") issued its Final Decision & Order in Adjudicatory Case No. 89-14-ST, and revoked Respondent's license to practice medicine in the State of Massachusetts. *See* Findings of Fact, Count II, below.

34. On or about December 2, 1989, Respondent began having a physically intimate relationship with Mrs. B.J.S. At the hearing, Respondent testified that as of December 2, 1989, Mrs. B.J.S. was no longer Respondent's patient, and that Respondent was no longer licensed to practice medicine in Massachusetts. Respondent's Proposed Findings of Fact No. 8, modified.

35. Respondent testified that prior to this time, he did see Mrs. B.J.S. in his office but that all such visits were conducted to assist Respondent in treating either Mrs. B.J.S.'s husband or Mrs. B.J.S.'s mother, who were patients of Respondent. Respondent's Proposed Findings of Fact No. 9.

36. In 1990, Respondent moved to Hawaii to take a staff psychiatrist position at the Kauai Community Mental Health Center.³ Upon arriving in Hawaii, Respondent called Mrs. B.J.S. and told her about his departure from Massachusetts. At that time, Respondent felt that he would divorce his wife and marry Mrs. B.J.S. Mrs. B.J.S. informed Respondent that she would join Respondent in Hawaii, and subsequently did so approximately 10 days later. Petitioner's Proposed Findings of Fact No. 38, modified.

37. In or around April 1991, while in New York, Respondent and his wife discussed their marital problems, and Respondent decided that he could not divorce his wife at that time.

38. On or about May 17, 1991, Respondent sought counseling from Diane Forsyth, a family therapist/marriage counselor. Respondent wanted to remain in treatment with a professional following his difficulties in Massachusetts. Respondent also desired counseling

² Mrs. B.J.S. testified that the romantically intimate relationship between Respondent and Mrs. B.J.S. was initiated by Respondent on January 13, 1989, in the course of a treatment session with Respondent. Mrs. B.J.S. further testified that Respondent and Mrs. B.J.S. continued their physical relationship throughout the treatment schedule arranged by Respondent. Respondent's Proposed Findings of Fact No. 7, modified.

³ Respondent expended approximately \$25,000.00 in moving himself and his family from Massachusetts to Kauai. Respondent's Proposed Findings of Fact No. 37.

because he was experiencing conflicting emotions about his relationships with his wife and with Mrs. B.J.S. Respondent informed Ms. Forsyth that his relationship with Mrs. B.J.S. had started in December 1989. Petitioner's Proposed Findings of Fact No. 39, modified.

39. In or around June or July 1991, Mrs. B.J.S. accompanied Respondent to a session with Respondent's therapist, Ms. Forsyth. During this therapy session, Mrs. B.J.S. expressed her fondness for Respondent and her desire to continue a relationship with him. At that time, Mrs. B.J.S. did not complain that Respondent had become sexually involved with her while she was Respondent's patient, nor did Mrs. B.J.S. complain that Respondent had taken advantage of her in any way. Respondent's Proposed Findings of Fact Nos. 16 and 17, modified.

40. In or around September or October 1991, Respondent told Mrs. B.J.S. that their relationship was over and that Respondent would not be divorcing his wife. Petitioner's Proposed Findings of Fact No. 41, modified.

41. Ms. Forsyth recalled that her last conversation with Mrs. B.J.S. was in May 1992. Mrs. B.J.S. tried to solicit Ms. Forsyth's assistance in having Respondent choose Mrs. B.J.S. rather than his wife. According to Ms. Forsyth, Mrs. B.J.S. asked for confirmation as to whether Respondent's decision to stay with his wife was definite. Ms. Forsyth indicated that Respondent's decision was firm. Ms. Forsyth further testified that when she advised Mrs. B.J.S. that Respondent was not going to leave his wife, Mrs. B.J.S. became vindictive and threatening toward Ms. Forsyth. During that conversation, Mrs. B.J.S. then asked if Ms. Forsyth was aware that she had been a patient of Respondent. Ms. Forsyth did not make any effort to follow-up on Mrs. B.J.S.'s revelation that she was a patient of Respondent. Petitioner's Proposed Findings of Fact No. 42, modified, and Respondent's Proposed Findings of Fact No. 18, modified.

42. Subsequently, Mrs. B.J.S. found out that several other former patients of Respondent had filed lawsuits against him. All of the lawsuits included claims of sexual misconduct on the part of Respondent. After finding out about the other lawsuits, Mrs. B.J.S. felt used. Petitioner's Proposed Findings of Fact Nos. 43 and 44.

43. In or around December of 1992, Mrs. B.J.S., while in Honolulu, called Respondent and asked him if he was going to leave his wife. Respondent answered "no," and Mrs. B.J.S. thereafter filed a Complaint with the Regulated Industries Complaints Office which led to Count I of the Petition herein. Mrs. B.J.S. filed the complaint against Respondent with the

Regulated Industries Complaints Office because she did not want Respondent to use other people in the same way. Petitioner's Proposed Findings of Fact No. 44, modified, and Respondent's Proposed Findings of Fact No. 15, modified.

B. Count II: The Massachusetts Disciplinary Action

44. On or about February 5, 1988, Respondent was sued by a former patient for alleged medical malpractice. Petitioner's Proposed Findings of Fact No. 61, modified.

45. In or around December 1988, the Board of Registration in Medicine for the Commonwealth of Massachusetts ("Massachusetts Board"), initiated an investigation into alleged misconduct on the part of Respondent concerning his relationship with a patient.

46. On or about February 1, 1989, a Statement of Allegations was filed with the Massachusetts Board, Adjudicatory Case No. 89-14-ST, wherein allegations were made that Respondent engaged in professional misconduct in the course of his practice of medicine in the State of Massachusetts. More specifically, the Statement of Allegations alleged that Respondent engaged in sexual relations with a psychiatric patient between December 1976, and January 1987.

47. On May 23, 1989, and on June 20, 1989, a hearing was conducted in Adjudicatory Case No. 89-14-ST. In the Massachusetts disciplinary proceedings against Respondent, the female patient that was the complainant against Respondent, was referred to as "Patient A" for confidentiality purposes.

48. On May 23, 1989, as a result of information regarding Respondent's involvement with a patient, Respondent was suspended from his position as head of a major psychiatric clinic in Massachusetts. Respondent's Proposed Findings of Fact No. 24, modified.

49. On June 1, 1989, an article appeared in the **BOSTON HERALD**, in Boston, Massachusetts, which discussed Respondent's suspension from the clinic and his admission of sexual involvement with a patient. Respondent's Proposed Findings of Fact No. 25.

50. On or about November 1, 1989, the Massachusetts Board issued its Final Decision & Order in Adjudicatory Case No. 89-14-ST. The Massachusetts Board found that Respondent engaged in sexual activities with Patient A from 1976 through 1987. The sexual activities

occurred at various locations, including in Respondent's office during therapy sessions. The Massachusetts Board specifically determined:

A sexual relationship between therapist and patient is forbidden by the American Psychiatric Society as such a relationship is damaging to a psychiatric patient for it violates the basic framework of psychotherapy which provides that feelings will be explored, but not acted upon.

State's Exhibit 3, at 18, ¶ 47.

51. Based on Respondent's sexual activities with Patient A, the Massachusetts Board concluded that Respondent:

- a) deviated from good and accepted medical practice;
- b) committed gross misconduct in the practice of medicine;
- c) practiced medicine beyond its authorized scope; and
- d) was guilty of gross incompetence.

Consequently, the Massachusetts Board ordered that Respondent's license to practice medicine in the State of Massachusetts be revoked. The Massachusetts Board also imposed a fine against Respondent in the amount of \$10,000.00. Petitioner's Proposed Findings of Fact Nos. 45 and 46, modified.

52. However, the Massachusetts Board also allowed the Respondent to file a petition for reinstatement of his license to practice medicine, at the conclusion of one year, with the proviso that the petition for reinstatement include the following:

- a) a rehabilitation plan;
- b) a then-current psychiatric evaluation;
- c) a plan for continued therapy;
- d) a plan for monitoring;
- e) a plan for community service; and
- f) a description of Respondent's interim activities and a statement of why it would be in the public interest for the Massachusetts Board to reinstate Respondent's license.

53. By letter dated January 20, 1990, Respondent informed the Professional and Vocational Licensing Division of the Department of Commerce and Consumer Affairs, State of

Hawaii, that the Massachusetts Board had revoked his medical license on November 1, 1989. Respondent included a copy of the Massachusetts Board's Decision. Respondent's Proposed Findings of Fact No. 26, modified.

54. By letter dated February 26, 1990, James L. Tullis, M.D., Chairman of the Massachusetts Medical Society Committee on Ethics and Discipline, informed Respondent:

The Committee on Ethics and Discipline has completed its review of the Board of Registration in Medicine action. While the Committee cannot and does not condone sexual relationships with a patient, it does recognize the extraordinary circumstances which you experienced.

After careful review of the materials presented, the Committee could find no reason why you should not remain a member of the Massachusetts Medical Society.

Respondent's Exhibit E.

55. By letter dated March 8, 1990, Staff Attorney Cynthia S. Nakamura of the Regulated Industries Complaints Office, Department of Commerce and Consumer Affairs, State of Hawaii, responded to Respondent's January 20, 1990 letter. In her March 8, 1990 letter, Ms. Nakamura informed Respondent that he had not reported the disciplinary action taken by the Massachusetts Board, to the Board of Medical Examiners within thirty days, as required by Hawaii Revised Statutes ("HRS") §453-8(a)(14). However, in light of the fact that Respondent made a late disclosure of the Massachusetts disciplinary action, Ms. Nakamura wrote, "At this time this office will close the above-referenced case, and will take no further action against you." In her March 8, 1990 letter, Ms. Nakamura did not make any reference to any other possible violations of HRS §453-8. A true and accurate copy of the March 8, 1990 letter is attached hereto as Appendix A, and by this reference incorporated herein. Petitioner's Proposed Findings of Fact Nos. 48 and 49, modified.

56. Respondent was aware of the possibility that he could be subject to disciplinary action in the State of Hawaii as a result of the revocation of his license to practice medicine in Massachusetts. Petitioner's Proposed Findings of Fact No. 50.

57. As of March 8, 1990, Petitioner had the authority and ability to take disciplinary action against Respondent for violation of HRS §§453-8(a)(7), (8), (9) or (11) based upon the disciplinary action imposed by the Massachusetts Board. However, the Petitioner did not initiate

disciplinary action against the Respondent at that time. Respondent's Proposed Findings of Fact No. 28, modified.

58. By letter dated March 30, 1990, Respondent informed Ms. Nakamura that Rhode Island also took disciplinary action against his license to practice medicine in that state. Respondent indicated that the Rhode Island disciplinary action was based on the Massachusetts disciplinary action. Respondent sent the letter because he was aware of a possible violation of the law if he did not report the disciplinary action in a timely manner. Petitioner's Proposed Findings of Fact No. 51.

59. By letter dated April 6, 1990, Ms. Nakamura acknowledged receipt of Respondent's March 30, 1990 letter. Ms. Nakamura stated that the information regarding the Rhode Island action would be made a part of the records in Case No. MED 90-19, i.e., the case involving Respondent's reporting of the Massachusetts disciplinary action. Petitioner's Proposed Findings of Fact No. 52. A true and accurate copy of the April 6, 1990 letter is attached hereto as Appendix B, and by this reference incorporated herein.

60. As of April 6, 1990, Petitioner had the authority and ability to take disciplinary action against Respondent under HRS §§453-8(a)(7), (8), (9) or (11), based upon the disciplinary action taken by the States of Massachusetts and Rhode Island. Respondent's Proposed Findings of Fact No. 31, modified.

61. Respondent did not recall having any conversations with Ms. Nakamura about the letters that he received from her. Petitioner's Proposed Findings of Fact No. 53.

62. At the time that Respondent reported the Massachusetts and Rhode Island disciplinary actions to the Professional and Vocational Licensing Division and to the Regulated Industries Complaints Office, Respondent was contemplating moving to Hawaii to work for the State of Hawaii. Petitioner's Proposed Findings of Fact No. 54, modified.

63. In or around March or April 1990, Respondent had a telephone conversation with John Tamashiro, who then was the Executive Secretary of the Board of Medical Examiners. During that conversation, Respondent read excerpts of Ms. Nakamura's March 8, 1990 letter to Mr. Tamashiro. Respondent asked Mr. Tamashiro if there would be an impediment to keeping his medical license and/or working in Hawaii. Based upon his understanding of Ms. Nakamura's letter, Mr. Tamashiro informed Respondent that Mr. Tamashiro did not believe that the

Regulated Industries Complaints Office would be taking any further disciplinary action against Respondent, and therefore there would not be any impediments to Respondent maintaining his license in the State of Hawaii. Petitioner's Proposed Findings of Fact No. 55, modified, and Respondent's Proposed Findings of Fact No. 35, modified.

64. In 1990, Respondent wrote to Ms. Alma Takata, who was the Chief of the Division of Mental Health of the Department of Health, State of Hawaii. Respondent expressed interest in applying for a psychiatrist position with the Department of Health and moving to Honolulu. As part of her responsibilities, Ms. Takata had the authority to make the final approvals for the hiring of personnel in the Division of Mental Health. Petitioner's Proposed Findings of Fact No. 56, modified.

65. After Respondent submitted his application for employment, Ms. Takata did not perform any direct investigation regarding Respondent's background and qualifications. However, Ms. Takata had continuing communications with Mr. John Tamashiro. Based on her communications with Mr. Tamashiro, Ms. Takata believed that Respondent's license to practice medicine in the State of Hawaii, was in good standing. Petitioner's Proposed Findings of Fact No. 57.

66. Respondent testified that he understood from Ms. Nakamura's letters that after the Regulated Industries Complaints Office had reviewed the Massachusetts and Rhode Island disciplinary actions, the Regulated Industries Complaints Office had decided not to pursue further disciplinary action against Respondent. Respondent's Proposed Findings of Fact No. 32, modified.

67. Respondent testified that he relied upon the letters from Ms. Nakamura in making his decision to accept a job with the State of Hawaii and move to Kauai, Hawaii. Respondent's Proposed Findings of Fact No. 33, modified.

68. At the hearing convened on February 7, 1994, Mr. Tamashiro reviewed Ms. Nakamura's letter dated March 8, 1990, for the first time. Mr. Tamashiro testified that after reading the letter, he understood Ms. Nakamura's letter to mean that the disciplinary action in case no. MED-90-91 was closed and that the Regulated Industries Complaints Office would not be taking any further disciplinary action against Respondent. Respondent's Proposed Findings of Fact No. 36, modified.

69. The patient with whom Respondent had sexual relations as set forth in the Massachusetts disciplinary action obtained a judgment against Respondent in 1990. Petitioner's Proposed Findings of Fact No. 61, modified.

70. During the latter part of 1990, Respondent moved to Hawaii to take a staff psychiatrist position at the Kauai Community Mental Health Center. As of the time Respondent moved to Hawaii, Respondent's license in the State of Massachusetts had already been reinstated.

71. In or around early January 1991, Respondent started working as the Medical Director of the Kauai Community Mental Health Center, Division of Mental Health, Department of Health, State of Hawaii.

C. Other Matters Concerning Respondent's Professional Status

72. In or around August 1990, Patient A received a judgment against Respondent in the amount of \$1.8 million.

73. Subsequently, three other former patients of Respondent filed lawsuits against him in the State of Massachusetts. All of the plaintiffs alleged sexual misconduct on the part of Respondent. One of the lawsuits was settled without an admission of guilt on the part of Respondent. The other lawsuits were still pending as of the date of the hearing. Petitioner's Proposed Findings of Fact No. 62, modified.

74. By letter dated August 10, 1992, Roger A. Konwal, M.D., informed Ms. Kim Robinson of the Department of Professional Regulation, State of Illinois, of the results of his examination of Respondent. Dr. Konwal stated:

Dr. Goldberg appears to have learned from this experience and also gives evidence of personal growth. He remains in therapy and has plans to restructure his professional life to avoid any future problems. He does not plan to treat borderline patients in individual therapy. He plans to concentrate on a medication management practice. A secretary will always be available in an adjoining room.

On examination, Dr. Goldberg shows no evidence of antisocial traits or psychiatric pathology. His standards, both personally and professionally, are extremely high. He has a dynamic personality and intelligence that would explain his success as a director of a large mental health center. Dr. Goldberg's gross lapse in professional standards appears

to have been an isolated incidence -- albeit of long duration. Through his continuing therapy and self-education, he has come to deal well with the issues of counter-transference and power that related to his professional lapse.

It is my recommendation that the board issue an unrestricted medical license to Dr. Harold Goldberg.

Respondent's Exhibit C.

75. Respondent testified that his present practice does not entail one on one therapy with patients. Respondent further testified that his practice is established on Kauai in accordance with the guidelines recommended by Dr. Roger A. Konwal, whose medical report dated August 10, 1992 was received as an exhibit herein. Respondent's Proposed Findings of Fact No. 20.

76. Witnesses Sherry Harrison, Wayne Law, Alma Takata, Tom Leland, M.D., Gerald McKenna, M.D. and Diane Forsyth, all testified that they had no knowledge of any complaint concerning Respondent since he has been practicing in Hawaii nor have they heard of any complaint alleging any type of sexual impropriety. Respondent's Proposed Findings of Fact No. 21.

77. Ms. Forsyth testified that based upon her therapeutic sessions with Respondent, Ms. Forsyth was of the opinion that Respondent would not have a recurrence of the type of incident that was the subject of the Massachusetts disciplinary action. Respondent's Proposed Findings of Fact No. 19, modified.

78. The Division of Mental Health hired Respondent as a staff psychiatrist for its Kauai Community Mental Health Center. As staff psychiatrist, Respondent does not perform individual psychotherapy. Petitioner's Proposed Findings of Fact No. 58.

79. Ms. Sherry Harrison, Chief of the Adult Mental Health Division of the Department of Health, was familiar with Respondent's practice on Kauai. Ms. Harrison stated that she heard many positive statements about Respondent. She was not aware of any complaints against Respondent regarding his work on Kauai. Ms. Harrison also testified that if Respondent was not able to practice, then services in Kauai would be affected. Petitioner's Proposed Findings of Fact No. 59.

80. Mr. Wayne Law, Chief of the Kauai Community Mental Health Center, acts as Respondent's supervisor. Mr. Law stated that from the beginning, Respondent disclosed his difficulties in Massachusetts. Mr. Law testified that he was pleased with Respondent's work and has not received any complaints against him. Mr. Law further testified that the Kauai Community Health Center would experience problems if Respondent was not able to practice. Petitioner's Proposed Findings of Fact No. 60, modified.

81. As of the date of the hearing, Respondent had complied with the disciplinary sanctions imposed by the Massachusetts Board.

82. In addition to his responsibilities as a staff psychiatrist, Respondent has been involved in other community and professional activities relating to mental health, including membership on the Medical Advisory Committee of the Mental Health Division, Department of Health.

III. CONCLUSIONS OF LAW

Petitioner has charged Respondent Goldberg with violating the provisions of HRS §§ 453-8(a)(7), 453-8(a)(8), 453-8(a)(9) and 453-8(a)(11), which read in relevant part:

§ 453-8 Revocation, limitation, suspension, or denial of licenses. (a) In addition to any other actions authorized by law, any license to practice medicine and surgery may be revoked, limited, or suspended by the board at any time in a proceeding before the board, or may be denied, for any cause authorized by law, including but not limited to the following:

- ...
- (7) Professional misconduct, hazardous negligence causing bodily injury to another, or manifest incapacity in the practice of medicine or surgery;
 - (8) Incompetence or multiple instances of negligence, including but not limited to, consistent use of medical service which is inappropriate or unnecessary;
 - (9) Conduct or practice contrary to recognized standards of ethics of the medical profession as adopted by the Hawaii Medical Association or the American Medical Association;
- ...

- (11) Revocation, suspension, or other disciplinary action by another state or federal agency of a license, certificate, or medical privilege for reasons as provided in this section[.]

A. Count I: The B.J.S. Complaint

After thoroughly reviewing the evidence presented at the hearing, particularly the testimonies of the witnesses, the Hearings Officer must conclude that the preponderance of the evidence did not establish that Respondent violated the provisions of HRS § 453-8(a)(7), 453-8(a)(8) and 453-8(a)(9), as to Count I of the First Amended Petition for Disciplinary Action.

As noted by the Petitioner, in the majority of cases involving alleged sexual misconduct on the part of a physician, the outcome of the case hinges upon the credibility of witnesses. After reviewing the testimonies and exhibits presented by the respective parties, the Hearings Officer concludes that the recollections of both Mrs. B.J.S. and Respondent are equally credible and plausible.

While Respondent does not dispute that he had a relationship with Mrs. B.J.S., the critical issue in this case is the chronology of how the relationship developed. The Hearings Officer finds that both Mrs. B.J.S. and Respondent had equally credible explanations of when and how their relationship developed. Accordingly, the Hearings Officer concludes that the preponderance of the evidence presented at the hearing did not support a finding that Respondent engaged in sexual relations with Mrs. B.J.S. while Respondent was treating Mrs. B.J.S. as his patient.

The Hearings Officer therefore concludes that the preponderance of the evidence presented at the hearing did not establish that Respondent violated the provisions of HRS §§ 453-8(a)(7), (8) and (9) as to Count I.

B. Count II: The Massachusetts Disciplinary Action

As a starting point, the Hearings Officer generally adopts the Petitioner's proposed conclusions of law, as set forth below, with some modifications.

First, there is no dispute that the Massachusetts and Rhode Island Boards took disciplinary action against Respondent's license to practice medicine in Massachusetts and Rhode Island. However, Respondent argued that Count II of the First Amended Petition should be dismissed on the basis of equitable estoppel.

Respondent argues that Petitioner was made aware of the Massachusetts disciplinary action in 1990; however, Petitioner did not pursue a disciplinary action on the basis of the Massachusetts disciplinary action at that time. Instead, Petitioner sent a letter to Respondent regarding his *failure to report the Massachusetts disciplinary action in a timely manner*. In that March 8, 1990 letter, Petitioner also indicated that no further action would be taken.

Respondent further argues that he had a telephone conversation with Mr. John Tamashiro about the March 8, 1990 letter. Following his conversation with Mr. John Tamashiro, Respondent was told that there was no impediment to maintaining his license to practice medicine in Hawaii. Respondent asserts that based on the letters that he received from Petitioner in 1990, and his conversations with Mr. Tamashiro and Ms. Alma Takata, he decided to move to Hawaii. Respondent therefore argues that Petitioner should be estopped from pursuing disciplinary action against him on the basis of the Massachusetts disciplinary action.

In *Waugh v. University of Hawaii*, 63 Haw. 117, 621 P.2d 957, (1980), the Hawaii Supreme Court restated the elements of equitable estoppel that the Court enunciated in *Doherty v. The Hartford Insurance Group*, 58 Haw. 570, 574 P.2d 132 (1978) and stated that "one invoking equitable estoppel must show that he or she has detrimentally relied on the representation or conduct of the person sought to be estopped, and that such reliance was reasonable." *Id.*, at 129, 130. The doctrine of estoppel, however, may not be used in such a way as to hinder the state in the exercise of its sovereign power, although the doctrine is applied where it is necessary to prevent manifest injustice. *Filipo v. Chang*, 62 Haw. 626, at 634, 635.

Turning now to the present case, the only issue that was addressed in the March 8, 1990 letter, was Respondent's failure to report the Massachusetts disciplinary action within 30 days as required by HRS §453-8(a)(14). In the First Amended Petition for Disciplinary Action filed on August 26, 1993, the Petitioner has charged Respondent with violating HRS §§ 453-8(a)(7), (8), (9) and (11).

Although the timely prosecution of cases is encouraged, the Hearings Officer notes that there are no statutes of limitation that are applicable in this case. The Hearings Officer also cannot ignore the seriousness of the matter that led to the Massachusetts disciplinary action. Furthermore, at the time that Respondent reported the Massachusetts disciplinary action, he was aware that he also could be subject to disciplinary action in Hawaii.

Upon reviewing the entire factual circumstances of this case, the Hearings Officer concludes that manifest injustice would not result if Petitioner is allowed to pursue Count II. As such, the Hearings Officer denies Respondent's motion to dismiss Count II of the First Amended Petition for Disciplinary Action.

Turning now to the Massachusetts disciplinary action, the Massachusetts disciplinary action was based on Respondent's sexual involvement with a patient. Accordingly, the Massachusetts Board concluded that Respondent: 1) deviated from good and accepted medical practice; 2) committed gross misconduct in the practice of medicine; 3) practiced medicine beyond its authorized scope; and 4) was guilty of gross incompetence.

Based on the foregoing, the Hearings Officer concludes that Petitioner proved by a preponderance of the evidence that Respondent violated HRS §§453-8(a)(7), (8), (9), and (11) as to Count II.

IV. RECOMMENDED ORDER

For the reasons set forth above, the Hearings Officer recommends that the Board find and conclude that the preponderance of the evidence did not establish that Respondent violated the provisions of HRS §§453-8(a)(7), (8) and (9) as to Count I of the First Amended Petition.

The Hearings Officer further recommends that the Board find and conclude that the preponderance of the evidence established that Respondent Goldberg violated the provisions of HRS §§453-8(a)(7), (8), (9) and (11) as to Count II of the First Amended Petition.

As to the appropriate sanctions that should be imposed on Respondent for the violations found in Count II, the Hearings Officer would note the following circumstances:

1. that the Respondent, the former executive secretary for the Board, the Department of Health officials that were involved in hiring Respondent, and the Hearings Officer, all understood that the March 8, 1990 letter indicated that the Regulated Industries

Complaints Office had closed the case and that no further action would be taken against Respondent;

2. given the considerable amount of prosecutorial discretion that is vested in the Regulated Industries Complaints Office, such a disposition was possible, although apparently not intended;
3. the Regulated Industries Complaints Office has not yet pursued disciplinary action against Respondent based upon the Rhode Island disciplinary action; and
4. by the time Respondent moved to Hawaii, his license to practice medicine had already been reinstated.

Therefore, it was not altogether unreasonable for the Respondent to have believed that the Regulated Industries Complaints Office decided not to pursue any additional disciplinary action against Respondent based upon the disciplinary action taken against him in Massachusetts.

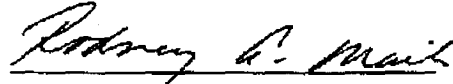
The equitable arguments notwithstanding, the Hearing Officer believes that only one sanction would be appropriate for the kinds of violations found in Count II of the First Amended Petition for Disciplinary Action: revocation. However, in light of the circumstances of this particular case, however, the Hearings Officer recommends that the Board revoke Respondent's license to practice medicine in the State of Hawaii for a period of two years, with the revocation stayed on the following conditions:

1. Respondent be ordered to pay a fine of \$5,000.00 within 120 days of the date of the Board's final order;
2. Respondent be placed on probation for a period of five (5) years from the date of the Board's final order,
3. During the probation period, Respondent shall continue to receive counseling or therapy at his own expense, from a therapist approved by the Board;
4. The Board may require periodic reports from Respondent's therapist regarding Respondent's condition or progress;
5. Respondent not engage in the private practice of psychiatry without first obtaining the approval of the Board; and
6. Respondent not treat female patients.

Lastly, the Hearings Officer would recommend that if Respondent violates any of the terms set forth above during the period of probation, upon the filing of an affidavit from the

Regulated Industries Complaints Office that the Respondent has failed to comply with the Board's Final Order, the Respondent's license be summarily revoked.

DATED: Honolulu, Hawaii, February 14, 1995.



RODNEY A. MAILE
Senior Hearings Officer
Department of Commerce
and Consumer Affairs



JOHN WAIHEE
GOVERNOR

ROBERT A. ALM
DIRECTOR

ALFRED G. COSTA
COMPLAINTS AND
ENFORCEMENT OFFICER

STATE OF HAWAII
REGULATED INDUSTRIES COMPLAINTS OFFICE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

March 8, 1990

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HONOLULU, HI 96804

HILO OFFICE
P. O. BOX 424
HILO, HI 96721

KONA OFFICE
P. O. BOX 310
KAILUA-KONA, HI 96741

MAUI OFFICE
P. O. BOX 518
WAILUKU, MAUI, HI 96793

KAUAI OFFICE
P. O. BOX 110
LIHUE, KAUAI, HI 96766

Harold L. Goldberg, M. D.



Re: RICO Case No. MED 90-19

Dear Dr. Goldberg:

I am a staff attorney with the Regulated Industries Complaints Office of the Department of Commerce and Consumer Affairs. The above-referenced case has been assigned to me for review and disposition.

I have carefully reviewed the file and supporting documents in this matter. Based on that review, it appears you failed to report in writing, within thirty (30) days, to the Board of Medical Examiners in Hawaii the disciplinary action issued against you by order of the Board of Registration in Medicine for the Commonwealth of Massachusetts. Said order was dated November 1, 1989.

By your above-described conduct, you may have violated Hawaii Revised Statutes Section 453-8(14) (failure to report disciplinary action by another jurisdiction to the Board within thirty days). However, you did by letter dated January 20, 1990 make disclosure, although untimely, to the Professional and Vocational Licensing Branch of the Department of Commerce and Consumer Affairs instead of the Board of Medical Examiners, thereby mitigating against further violations of the law. Under the law, disclosures of this nature must be made to the Board of Medical Examiners.

At this time this office will close the above-referenced case, and will take no further action against you. You are, however, strongly advised to abide by all licensing laws in future. Failure to do so may result in administrative action against your medical license.

Appendix A

A

Harold L. Goldberg, M.D.
March 8, 1990
Page 2

Should you have any questions regarding the application of the licensing laws to your practice, you are strongly urged to seek the advice of counsel.

Very truly yours,



Cynthia S. Nakamura
Staff Attorney

CSN:gke

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
P 124 149 920



JOHN WAINES
GOVERNOR

ROBERT A. ALM
DIRECTOR

ALFRED G. COSTA
COMPLAINTS AND
ENFORCEMENT OFFICER

STATE OF HAWAII
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KAUAI OFFICE
P. O. BOX 445
LIHUE, KAUAI, HI 96766

April 6, 1990

Harold L. Goldberg, M. D.



Re: RICO Case No. MED 90-19

Dear Dr. Goldberg:

Thank you for your letter of March 30, 1990 and its enclosures. Because it appears the Rhode Island action was based on the disciplinary action taken against you by the Massachusetts Board, I will make that material a part of the file and record of the above-entitled case, rather than opening up another case under a separate number.

As I indicated to you in my letter of March 8, 1990, the above-entitled case was closed and no further legal action will be taken thereon at this time.

Your cooperation is appreciated.

Very truly yours,

Cynthia S. Nakamura
Staff Attorney

CSN:gke

Appendix B

B

TOTAL P.01