IN THE COURT OF APPEALS OF THE STATE OF OREGON

DON LANGENBERG,

Petitioner,

v.

THE OREGON BOARD OF LICENSED PROFESSIONAL COUNSELORS AND THERAPISTS,

Respondent.

CA A91275

FINAL ORDER ON RECONSIDERATION

Respondent Oregon Board of Licensed Professional Counselors and Therapists submits herewith its Final Order on Reconsideration March 22, 1996.

There will not be a supplemental judicial review record filed in this case.

Respectfully submitted,

THEODORE R. KULONGOSKI #70080
Attorney General
VIRGINIA L. LINDER #80294
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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed the original Revised Order on Reconsideration with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97310, on March 22, 1996.

I further certify that I served the Revised Order on Reconsideration upon Mark C. Hoyt, attorney for petitioner, on March 22, 1996, by mailing a copy, with postage prepaid, in an envelope addressed to:

Mark C. Hoyt
Attorney at Law
P.O. Box 56688
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BEFORE THE OREGON BOARD OF
LICENSED PROFESSIONAL COUNSELORS AND THERAPISTS

In the matter of the License of DONALD LANGENBERG	))))	FINAL ORDER UPON RECONSIDERATION License No. C0177 Case No. 95-CTB-001

History of the Case: A Notice of Proposed License Suspension was served on the licensee on October 6, 1994, pursuant to ORS 675.754. A request for hearing was made on October 28, 1994. A hearing convened on March 7, 1995, in Salem, Oregon. At that hearing, the licensee was represented by Mark Hoyt, attorney at law. J. Kevin Shuba, assistant attorney general, appeared on behalf of the State. The hearing was continued until March 29, 1995, and the hearing concluded on March 30, 1995. The record remained open until May 24, 1995, after both parties had an opportunity to submit briefs. A proposed order was mailed August 4, 1995. Exceptions were filed by the licensee. The Board convened on October 20, 1995, and adopted the proposed order, with some amendments.

Legal Issue: Did the licensee violate ORS 675.745(1)(d); OAR 833-60-001(1)(a), (1)(b), (2)(c) and/or (4)? If so, what is the appropriate sanction?

Legal Arguments: Counsel for the licensee raised several legal issues seeking dismissal of the action. Those issues must be resolved prior to addressing the factual issues and conclusions in this case.

First, counsel argues that the Board lacks jurisdiction to sanction the licensee in this case. This case first presented itself to the Board of Licensed Counselors and Therapists when the Board received a complaint about the licensee from Dr. George Lathan. After the Board had initiated an inquiry, Dr. Lathan withdrew his complaint. This withdrawal was a condition of a settlement in regard to various legal claims. Both the licensee and his wife were a party to the agreement.

The Board reviews complaints in executive session. It is the Board's standard practice to notify all licensees of all Board meetings through a newsletter. The Notice of Public Meeting indicates that the Board will discuss outstanding complaints. No list of licensees subject to this review was included.

The Board proceeded with the investigation and issued a proposed sanction despite the withdrawal of the complaint. The Board made these decisions in executive session. Licensee avers that the Board lost jurisdiction in this case when the withdrawal was made.

OAR 833-50-030 provides for the mechanisms of handling complaints. Complaints shall be in writing and shall be signed. See Subsection (3). Subsection (5) provides that failure of a complainant to comply with Board requirements may result in dismissal of the complaint. Furthermore, both the complainant and the licensee are entitled to notice of the meeting at which the Board will review the complaint.

Counsel argues that the withdrawal of the complaint by Dr. Lathan requires dismissal of the action. The Board is obligated to license those individuals who meet the statutory qualifications, and to establish a code of ethics for licenses. See 675.785(11). The Board may suspend, revoke or refuse to renew the license of a licensee if there has been a violation of several enumerated standards. These charges do not depend on the existence of a complaint from an outside source. While the Board may have rules as to handling a complaint, a complaint is not the only means the Board may have of becoming aware of a problem. For example, if the Board learned of an activity from reading an article in a newspaper, the Board would be free to investigate the matter if there was a basis for believing that there was some violation of the Board's standards.

This is the case here. The complaint may have been withdrawn. Regardless of this, the Board was aware of some potential problems related to the licensee's conduct. The Board had every right to proceed if there was a foundation for finding that there might be a disciplinary concern. In fact, the Board would be remiss if they did not investigate problems simply because of the withdrawal of a complaint.

It is suggested that the Board lost jurisdiction to address this action when the complaint was withdrawn. The Board's jurisdiction over the licensee is by virtue of the license that is held by Mr. Langenberg. By seeking the privilege of being licensed, the licensee has submitted to the Board's jurisdiction, and is subject to discipline by the Board.

It is further asserted that the licensee did not receive adequate notice that the Board would be reviewing his case. Licensee knew of the complaint. He was not personally aware of the date that the Board would deliberate on the matter. Licensee was mailed regular notices of Board meetings. Licensee was notified of all Board meetings through the normal course of business. Because the Board handles disciplinary issues in Executive Session, and he would not be allowed an opportunity to participate, there is no loss of due process because the licensee was not sent an individual notice of the Board's intent to meet in regard to his case.

Again, it is argued that the Board's failure to provide the licensee with individualized notice took away the Board's jurisdiction. There is no authority for this proposition. The Board has jurisdiction over all licensees as it relates to disciplinary matters.

Counsel's third request for dismissal relates directly to the facts in this case, and will be discussed in the conclusion. It is suggested that this matter be dismissed because of the failure to prove a violation of any standard of ethics.

Licensee argued before the Board that the rules alleged to have been violated are unconstitutionally vague. This argument was not made at the hearing, but was included in the closing arguments and exceptions. The constitutional issues were not properly raised and are waived by licensee. The Board also finds that OAR 833-60-001(1)(a)(b) and (2)(a) were properly adopted and are not unconstitutionally vague.

Findings of Fact: (1) Licensee has been licensed under ORS 675.725 as a professional counselor since December, 1990. (2) In 1987, the licensee opened Milestones, an alcohol and drug rehabilitation facility. (3) Licensee acted as Executive Director of Milestones from its inception until February, 1994. (4) The facility was incorporated and the licensee owned some of the shares. Some of the shares were owned by Karen Anderson. (5) Ms. Anderson and the licensee were both involved in the development of the program at Milestones. (6) Ms. Anderson has a Master's degree in counseling, but had little practical experience in dealing with drug and alcohol dependency. (7) When Milestones opened, the licensee was to be in charge of the administration of the programs. He was not to work as a counselor, except as needed because of staffing. Ms. Anderson was to work on the business side, dealing with accounting and billing. She also did some counseling work. (8) Over time, the business expanded. A second corporation was created. Ms. Anderson held more than 50% of the shares in one of the corporations. She had 40% of the equity shares in the other corporation. (9) The corporations operated four separate facilities,
each meeting different needs within the community. The corporations employed over 40 employees, which included 12 to 15 counselors. (10) In approximately 1991, Ms. Anderson resigned as an employee of the corporation. (11) By that time, Ms. Anderson and the licensee had many differences of opinion about the operation of the facilities. The licensee considered Ms. Anderson to be solely profit motivated, and considered this to be detrimental to the facility. There was personal animosity between the two. (12) The licensee had been a Board member since the inception of the corporations. (13) In April, 1993, there was a Board meeting. Ms. Anderson made some inquiries of the licensee about the financial reports. She found the licensee to be unresponsive. (14) The licensee asked that he be bought out or, in the alternative, that he be given an opportunity to buy Ms. Anderson's shares. (15) There were other shareholders of the corporation. Some were relatives of each of the principals. (16) Negotiations about the licensee's proposal began. (17) During the period of negotiations, Ms. Anderson came to the facility and sought access to the financial information. She was not given access. (18) There was a corporate attorney, and both the licensee and Ms. Anderson hired counsel. (19) The negotiations progressed, but an agreement on all terms was never reached. (20) Mr. Langenberg had resigned on more than one occasion. Several years earlier, the licensee had left after he had a disagreement with the woman (Sally) who was later to become his wife. He said he would not return unless she was discharged. He was gone for one week and returned. (21) In the fall of 1993, the licensee twice spoke with one of the program managers and asked her if she would quit her job in support of him in case the sale of the business fell through. He indicated that he could "break" Ms. Anderson if there was a walkout. Although the program manager did not know Ms. Anderson, she had been given the impression by the licensee that she was a monster, and that no one could ever work with her. (22) In December, 1993, the licensee wrote a letter to Ms. Anderson indicating that he would be leaving the business. He indicated in that letter that he knew many staff would leave if he left the business, and that he would encourage them to sit down and talk with her, and others, before resigning.

(23) The licensee called the annual shareholders meeting for Thursday, February 10, 1994. This was earlier than normal for such a meeting. The

meeting was held at an accountant's office, next door to one of the facilities. (24) Ms. Anderson decided that she could not continue to work with the licensee, and because the negotiations had failed she should take over control of the Board. She obtained enough votes, through proxies, to do this. (25) Ms. Anderson anticipated that this change would cause concerns to the licensee. She anticipated a strong reaction, and considered the possibility that he might resign. (26) Ms. Anderson contacted one of the shareholders, Dr. Lathan, who lives in another country, and let him know of these possibilities. (27) Dr. Lathan was to arrive in Oregon soon after the Board meeting to try to deal with any fall-out as a result of the Board changes.

(28) Ms. Anderson also knew that it was likely that some of the staff would leave if the licensee quit. She anticipated that they would give advance notice of departure, as she expected any professional to do. (29) Prior to the meeting, Ms. Anderson contacted Becky, one of the counselors, and asked her if she would stay with the corporation if Mr. Langenberg were no longer there. Becky said that she would probably leave, too. Ms. Anderson asked her how much notice she would give, and she was not given a definite response. (30) Becky contacted the licensee and told him about the conversation. He suggested that maybe Ms. Anderson was going to fire him.

(31) The licensee hoped to discuss the stock sale at the Board meeting. There had been a possibility that the purchase would be made through the corporation. (32) At the shareholders meeting a new Board was elected. Ms. Anderson returned to the Board. Both the licensee and his wife were not given positions on the Board. (33) There was a break, and then the Board meeting was held. (34) During the interim, one of the accountants in the office took the licensee aside and told him that he had overheard that another individual would be coming to town the following week, and that the licensee would not be needed after that. The accountant told the licensee that he understood the licensee would not be needed after the other individual arrived. (35) The licensee went to the Board meeting. He was asked information about finances. The Board indicated the desire to review the licensee's employment contract. (36) The licensee indicated that he would be willing to work for $500,000 per year. (37) He was advised that the sum was out of line. (38) The licensee said that he resigned and would be out by Friday afternoon. (39) Ms. Anderson indicated that Friday would be all right. (40) The licensee then asked who would be in charge. Ms. Anderson advised him to call Jeff Lindner. (41) Ms. Anderson had asked Mr. Lindner to act as a liaison during any necessary transition. (42) The licensee was advised to not write any more checks. (43) Licensee, his wife, and his attorney left the Board meeting. (44) They went out to lunch with Becky and June Bigler, an office manager and shareholder. During the lunch, they discussed unemployment benefits. The licensee called a staff meeting of all staff for that afternoon at 3:00 p.m. (45) There had never been an all-staff meeting before. Generally, each facility had separate meetings. (46) Sally Langenberg canceled an afternoon counseling session because she was too upset to handle the group. (47) At that meeting, the licensee announced that he had been forced out, and that he would be leaving at the end of the week. (48) The licensee turned the meeting over to his attorney, who explained the shareholders meeting and the Board meeting. He handed out information

about unemployment benefits. (49) Some of the employees were very emotional. There were expressions of support. They were given the impression that the licensee had been forced out of his position as executive director. (50) Some individuals at the meeting indicated that they would resign. The licensee did not respond to these comments to the entire group. (51) The licensee did tell one employee, Mark, that he should not quit. This was a personal conversation between the two of them. They discussed Mark's personal family and financial commitments. Mark had been through drug and alcohol treatment, and the licensee had been one of his counselors.

(52) Several counseling sessions were canceled on February 10, 1994, because the counselors were upset and not able to handle the groups. (53) The licensee phoned Mr. Lindner to discuss the transition. Mr. Lindner, a pastor, had been asked to work as a liaison in the event there were problems after the Board meeting. (54) Mr. Lindner, an acquaintance of Ms. Anderson, had been advised that there would be a change in Board membership and that it was possible that the licensee would react negatively to the action. (55) Ms. Anderson had explained to Mr. Lindner that she anticipated the possibility that the licensee would resign, and she asked him to assist in the transition in the event of a resignation. (56) When the licensee and Mr. Lindner finally spoke, the licensee made an attempt to determine Mr. Lindner's credentials. He understood that Mr. Lindner would be taking over the program. Once Mr. Lindner explained his role, the licensee became less aggressive. (57) The licensee was asked to provide a schedule of sessions. It was agreed that he would leave the schedule at the office. (58) The licensee indicated that there was a session at 6:00 p.m., within a few minutes of the conversation, and that there was no one to handle the session. He indicated that some staff had resigned. Mr. Lindner asked the licensee about "client abandonment", and the licensee responded that he was not abandoning the clients, that Ms. Anderson was.

(59) The counseling schedules were posted as agreed upon. (60) At about 5:15 p.m., the licensee left a message with Ms. Anderson's mother that the building would be left unattended. (61) The Thursday evening session was canceled because of the lack of staff. There was a later session that evening that was handled by a counselor who had previously done some work at the clinic. (62) On Friday morning, Ms. Anderson had some of her friends and family members staffing the facility. There were desperate attempts to ensure that the counseling sessions, and needs of clients, were being met. (63) On Friday morning, February 11, 1994, the licensee went to the outpatient building and packed his belongings. (64) He received a call from an employee, Sophia, that her husband, Steven, another employee, had been fired. (65) Steven had made several attempts to incite the remaining staff to quit. He was discharged for creating a scene in front of clients, seeking resignation by the remainder of the house staff. Steven continued to attempt to incite some individuals to quit for some time after February 11, 1994. (66) Kathy, an accounting clerk, called the licensee and complained that Ms. Anderson was disturbing her. (67) Licensee's wife informed him that Dr. Weimer, a clinical psychologist and a friend of Ms. Anderson, was doing sessions. There were also others at the site. (68) Licensee went to the facility. Several members of Ms. Anderson were working there. Licensee found a letter in his mailbox indicating that

his resignation had been accepted effective the previous day. (69) Licensee took his personal possessions and left. (70) Becky, one of the counselors, indicated that she was not able to work. She asked for approved leave. She resigned effective the end of her leave, two weeks into the future. The licensee approved Becky's leave slip after he had resigned. (71) Within day, the licensee, his wife, and at least seven other employees resigned. At least six of the employees were involved in direct client care.

(72) Becky had been advised by either the licensee or his attorney that Ms. Anderson had people to handle the counselors' caseloads. (73) Ms. Anderson had indicated to the licensee that Mr. Lindner had been asked to handle the transition. There had been no mention that other employees were to be replaced. Ms. Anderson had indicated that there was an able and competent staff.

(74) As a result of the loss of several counselors and direct care staff, some clients were deprived of services. (75) Some clients left the facility. Some were transferred to other facilities. (76) These changes were likely to impact the recovery of these clients. (77) Several of the employees who resigned went to work for the licensee at another drug and alcohol rehabilitation facility within months of resigning from Milestones. (79) Some of the employees of Milestones had been through drug and alcohol rehabilitation. Some of them had been counselled by the licensee during that process.

(80) Prior to the events of February, 1994, the licensee had confided in a friend and peer that the licensee and his wife were contemplating starting an outpatient facility. He had indicated he was not sure that he would be able to buy Milestones and that he wanted to be his own boss. (81) Ultimately, the licensee did start his own facility in April, 1994. He hired several of the employees who had resigned from Milestones.

<u>Credibility Discussion</u>: At the very beginning of the hearing. Mr. Langenberg testified that he was totally taken by surprise when he heard from the accountant that he was to be replaced the following week. This is ridiculous. The licensee had resigned on several occasions. The purchase of the stock from Ms. Anderson had not been successfully completed, and Becky had advised him only a day or two before that Ms. Anderson had asked what would happen if the licensee was gone from the facility. While the licensee may not have expected the Board meeting to proceed as it did, it is not credible that he had not considered the possibility of not being able to complete a purchase of the business. He had made it clear to many that he was not willing to work with Ms. Anderson in the long term. He had discussed the desire to start his own business to a friend. While the timing may have been a surprise, the result was not.

<u>Conclusion and Reasons</u>: The licensee violated OAR 833-60-001 and 833-60-002, and is subject to discipline by the Board.

OAR 833-60-001 sets forth the ethical standards of the profession.

Subsection (1) provides:

> "A licensee's primary professional responsibility is to the client. A licensee must make every reasonable effort to advance the welfare and best interests of families and individuals. A licensee must respect the rights of those persons seeking assistance and make * * * reasonable efforts to ensure that the licensee's services are used appropriately.
>
> > (a) A licensee must recognize that there are other professional, technical, and administrative resources available to clients. The licensee must make a reasonable effort to provide referrals to those resources when it is in the best interest of clients to be provided with alternative or complementary services or when the client requests referral.
> >
> > (b) A licensee must seek appropriate professional assistance for the licensee's own personal problems or conflicts that are likely to impair the licensee's work performance and clinical judgment."

Subsection (2)(a) provides:

> A licensee must act in accordance with the highest standards of professional integrity and competence. A licensee must be honest in dealing * * * with clients, students, trainees, colleagues and related third parties, and the public:

A licensee must recognize the potentially influential position the licensee may have with respect to students, employees, supervisees and clients and must avoid exploiting the trust and dependency of these persons. A licensee must make every effort to avoid dual relationships that could impair the licensee's professional judgment or increase the risk of exploitation * * *."

Counsel for the licensee asserts that there are no facts in dispute in this case. He argues that the evidence indicates that the licensee discouraged resignation at the staff meeting, and that he made every effort to maintain client care. The record clearly indicates otherwise.

Almost every witness to the staff meeting has a different story to tell. The range of perspective reaches from the licensee not speaking a work, to his speaking in detail about the impact his resignation would have on the services provided to clients. What is clear from the evidence is that although the licensee specifically discouraged one individual from resigning, he did not do so to the entire group. Neither did his attorney.

Even if the most generous interpretation of the remarks was given to the licensee, it is clear that he did not, nor did his attorney, indicate any need to consider the needs of the clients. The comments made related to the needs of the employees. <u>No one</u> discussed the effect that a counselor's resignation would have on the clients.

What is also clear is that the licensee's attorney, acting as the mouthpiece for the licensee, provided some information to the staff about unemployment insurance benefits. It is also evident from the record that the licensee had reason to believe that other's would resign with him. He wrote a letter to that effect to Ms. Anderson long before the Board meeting. He had asked at least one employee whether she would resign in support of him. He had his attorney present information about unemployment benefits to his staff at the meeting.

While it may have been appropriate to call a staff meeting to notify staff of his resignation, it is clear that the presentation at the meeting, as well as the offering of information about unemployment benefits encouraged employees to resign. The licensee, both directly and through his attorney, told the staff that he was forced to resign. There had not been a forced resignation. While the licensee may have thought that his career with Milestones was short-lived, there was no basis for inferring that the resignation had been forced.

The licensee called a meeting with the intent to incite the employees, and to create an atmosphere whereby it was unlikely that they would have been able to provide services to the clients in the immediate future, and whereby it was also likely that some would resign.

The licensee argues that he did all that he could do under the circumstances. He was terminated after he submitted his resignation. He could do no more. There is no question that the licensee was no longer able to provide services to clients, or to his staff. However, he was not generally a direct care provider and his absence from the facility did not necessarily require any disruption of the counseling sessions.

Licensee created a climate of distress with his staff by virtue of his last minute, emotionally charged staff meeting. Licensee had ever reason to expect this reaction, and to realize that the reaction might make servicing the clients difficult. He put his personal needs before those of the clients by making the presentation and failing to encourage the employees to discuss the situation with management. In doing this he violated OAR 833-60-001(1)(a) and OAR 833-60-002(a).

While there was conflicting expert testimony about what would have been expected of a licensed practitioner in such a situation, the licensee's letter to Ms. Anderson of December, 1994, clearly indicated what the licensee thought would be appropriate in the event of a resignation. The licensee in that letter said that he expected some individuals might want to quit, but that he would encourage them to discuss the matter with management, including Ms. Anderson. Licensee himself established the standard. Licensee violated that standard when he finally resigned in February.

There was absolutely no evidence that the licensee either directly, or through his attorney, encouraged such communication during the staff meeting. It was implied to the staff that resignation had been contemplated and that client care would continue smoothly without their participation. They were not advised to consider the impact on the clients, or the effect on the program. The meeting created an atmosphere of fear and confusion. The employees were taken by surprise. Many had strong emotional reactions, which may explain the inconsistencies in testimony about the events.

The employees were given the impression that Ms. Anderson would be taking over as director. Some of the employees had worked with Ms. Anderson years before. Some had never met her. They were all given an indication that any such change in management would have a negative impact on the program. There was no basis for this. Ms. Anderson had been out of the picture for years. She had never said she was going to run the operation. Her desire to have a new executive director, if there was such a desire, does not indicate that she would take charge and change what had previously been a successful program. In fact, the licensee testified that he believed that Dr. Lathan would be in town the following Monday to take over. Based on this, he had no expectation that Ms. Anderson would be operating the facility for any extended period of time.

In creating this atmosphere the licensee exploited the trust of his employees, some of whom had been counseled by the licensee during a period of drug or alcohol dependency. This was a violation of the ethics of his profession as specified in OAR 833-60-001(2)(a).

There is no reason for this action to be dismissed for lack of evidence as suggested by counsel. On the contrary, this was a charge with a strong basis in fact. The licensee used his influence with his employees to cause chaos to his business opponent in violation of OAR 833-60-002(a).

The licensee did not seek professional assistance in an attempt to resolve the conflict which intensified on that day in February. However, to construe the language of OAR 833-60-001(1)(b) to require the assistance of another professional whenever one has even a momentary, or short term conflict would create such a burden that it would be untenable. Clearly, the only reasonable meaning of the rule would be to require that someone get assistance when there was a problem which can be resolved within a longer period of time. Licensee had a conflict after he resigned. There was no reasonable time or opportunity for him to meet with a counselor in a professional setting and try to go through the resolution. If he was going to have a meeting with his employees, he knew that it would have to be within a day. Under the circumstances, it cannot be said that he violated OAR 833-60-001(1)(b).

At the hearing, the allegations in regard to a violation of OAR 833-60-001(4) were withdrawn.

The Sanction

There is no evidence in this record about the Board's precedent in imposing sanctions on an individual. The Board has the authority to reprimand, suspend or revoke a license. It had been proposed that the licensee's action in this case was so egregious as to require revocation.

Licensee did act inappropriately. He had knowledge of the appropriate way to handle the situation, but failed to do so. Still, his actions were taken during a period of turmoil and uncertainly. There was a very emotionally charged situation. There is no evidence in this record that the licensee had previously violated any ethical standard, or that such a situation is likely to arise again.

On November 22, 1995, the Board issued a Final Order imposing a five-month suspension in this matter. Langenberg appealed the November 22, 1995 Final Order to the Oregon Court of Appeals.

Upon stipulation of the parties, the Board hereby amends the penalty in this matter to a formal Reprimand for Langenberg's action as described above.

FINAL ORDER

The Licensee violated OAR 833-60-001 and 833-60-002, and is hereby Reprimanded.

[redacted]

Carol F. Fleming
Administrator
Board of License Professional
Counselors and Therapists

Dated this 22nd day of March, 1996

NOTICE: You are entitled to judicial review of the Final Order. Judicial review is by the Court of Appeals pursuant to the provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the State Court Administrator, Supreme Court Building, Salem, Oregon 97310, within 60 days from the service of the Final Order.

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