State of Louisiana

OFFICE OF
STATE INSPECTOR GENERAL

BOARD OF EXAMINERS

OF PSYCHOLOGISTS

Report by

Inspector General Bill Lynch

Prepared for

Governor M. J. "Mike" Foster, Jr.

September 16, 2003

File No. 1-02-0071

State of Louisiana

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STATE INSPECTOR GENERAL

BOARD OF EXAMINERS

OF PSYCHOLOGISTS

Report by

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January 10, 2003

File No. 1-02-0071

Board of Examiners of Psychologists

The Louisiana State Board of Examiners of Psychologists improperly expunged a disciplinary action against its immediate past chairman.

This disciplinary action was formalized in 1993 when Dr. David Thomason, Monroe, signed a consent order and thereby acknowledged the allegations outlined in the order. One consequence of the order was that Dr. Thomason avoided a formal disciplinary hearing where all parties and evidence involving the full complaint would be openly heard. This hearing could have resulted in suspension or revocation of Dr. Thomason's license to practice psychology. A second consequence was the mandatory inclusion of the disciplinary action in the Board's data base allowed the public and potential patients to be informed.

The 2000 Board specifically identified La. R.S. 37:2353.D., as its authority to expunge the disciplinary action, based on error. The Board claims there was an error on one finding out of five in the consent order. However, the Board expunged all of the other findings to which Dr. Thomason had agreed he committed without citing how those findings were in error. The 2000 Board merely substituted its opinion for the opinion of the 1993 disciplining Board, without identifying all of the errors of the consent order.

The minutes related to this expungement did not identify the errors in the consent order, and the Board's files did not contain the necessary supporting documentation.

Background

The Psychology Licensing Act was passed in 1964 to regulate the practice of psychology in Louisiana. The Louisiana State Board of Examiners of Psychologists is responsible for the regulation of the practice of psychology, and the licensing of persons in Louisiana representing themselves to the public as psychologists, as well as accepting, reviewing and investigating complaints filed against licensed psychologists.

There are currently 540 licensed psychologists in Louisiana.

The Board is a member of the Association of State and Provincial Psychology Boards. The Association, formed in 1961, is not a governmental agency, but is an alliance of state, provincial, and territorial agencies responsible for licensing of psychologists in the United States and Canada.

The Board consists of five members that are appointed by the governor, who are residents of Louisiana serving staggered five-year terms. Appointees are selected from a list provided by the Louisiana Psychological Association, resulting from an election of nominated qualified psychologists. Robert Allen, Ph.D., is the current chairman.

Headquarters for the Board is in Baton Rouge, with a small staff consisting of an executive director and an administrative assistant who are both unclassified state employees. The Board is funded entirely by self-generated fees.

Expunged Disciplinary Action

The Louisiana State Board of Examiners of Psychologists improperly expunged a disciplinary action against its immediate past chairman when it applied its cited authority to correct errors to only one of numerous professional violations.

DISCIPLINARY ACTION

According to La. R.S. 37:2353.D, the Board has the authority to correct errors made in any of its activities. At issue here is whether the existence of an alleged error identified by the Board in one of the findings of the consent order, should negate the remaining findings of the consent order without citing specific errors in those findings.

In May, 1992, Dr. Thomason, a licensed psychologist practicing in Louisiana, was contracted by the Department of Social Services, Disability Determinations, to conduct a psychological evaluation. The evaluation would be used to determine an applicant's eligibility for Social Security disability benefits.

On Feb. 22, 1993, nine months after the evaluation was completed, the applicant filed a complaint with the Board after he was denied disability benefits. The applicant's major complaint was concerning a statement that was included in the evaluation report to Disability Determinations. While taking issue with that statement, the complainant also noted that Dr. Thomason's assistant had performed the entire evaluation. The applicant states three times in his complaint that he did not meet, see or talk to Dr. Thomason.

A case file was opened on the complaint and an investigation was conducted by the chairman of the Committee on Complaints, John Mendoza, Ph.D. The investigation yielded findings against Dr. Thomason and his practice that were beyond the allegations in the original complaint. The Committee found that the examination performed by Dr. Thomason was inadequate and that the conclusion (diagnosis) was unsubstantiated by the data presented. The Committee included an expression of serious concern about the apparent misuse of unlicensed clinical assistants. The Committee also found that Dr. Thomason was negligent in initially failing to meet with the complainant, and later, in failing to provide feedback to him when requested. As a result of these behaviors, Dr. Thomason was found to be in violation of La. R.S. 37:2359.B(2)(c) and (12), of the Louisiana Licensing Law for Psychologists, (incorrectly cited as 37:2369 in the order) and the Ethical Standards of Psychologists particularly Principle A: Competence, and Ethical Standards 1.06, 2.01, 2.05, 2.09, 7.02, and 7.04. He was also cited for "possible violations of Ethical Standards relating to improper use of unlicensed assistants, and possible subjection of the patient to undue harm." Additionally, Dr. Thomason was cited for failure to submit yearly registration forms for his unlicensed assistant, as required by the Board.

All the allegations along with the findings and conclusions of the Committee were formalized in a written consent order. However, there were no public notices or records that reflect where, when and how the Committee met and reached its conclusions. For one example, there is no record of who served on the committee besides Dr. Mendoza. The Committee on Complaints, as a subcommittee of a public body, is subject to requirements for open meetings, just as the full Board. Nevertheless, based upon the recommendation of the Committee, both the Board and Dr. Thomason agreed that Dr. Thomason should satisfy seven conditions listed in the consent order. Dr. Thomason was also informed that in place of the consent order the Board would proceed with a formal adjudicatory hearing. He was advised that such a hearing could result in suspension or revocation of his license and that he may be held responsible for all costs incurred by such a hearing.

When Dr. Thomason signed the consent order he agreed to a set of facts and avoided a disciplinary hearing that could have resulted in the suspension or revocation of his license after a determination of all the evidence.

Then Board chairman, Dr. Mark Vigen, executed the consent order on June 25, 1993, and Dr. Thomason signed the order on July 1, 1993. At its September, 1993, meeting, the Board met with Dr. Thomason to review compliance with the consent order. The Board was satisfied that all the conditions had been met and unanimously approved a motion to close the complaint file.

EXPUNGED ACTION

According to the Board, Louisiana has only expunged the disciplinary record of one other psychologist, and that was when the consent order specifically outlined expungement, if and when set conditions were met.

On Aug. 23, 1995, more than two years after the consent order was signed, Dr. Thomason submitted a letter to Dr. Kenneth Bouillion, chairman of the Committee on Complaints, regarding the intent and spirit of the consent order. Dr. Thomason stated that his legal counsel advised of the need to have the record sealed, therefore, the last paragraph of the consent order was added as a negotiation between his attorney and the attorney for the Board. However, the last paragraph of the consent order is merely an acknowledgment by the Board that the complaint filed against Dr. Thomason has been addressed and that no further actions will be taken against him. Dr. Thomason went on to write that he was of the further understanding that the Board "lifted the consent order" at its September, 1993 board meeting. Yet, the board minutes of that meeting only report "the Board was satisfied that all requirements of the consent order had been satisfactorily completed. The Board unanimously approved a motion to close complaint case P92-93-17C."

Dr. Thomason stated that he was of the belief that his record would remain confidential and further action would not be taken which would include placing the consent order on permanent record or reporting the action to professional organizations. Dr. Thomason concluded his letter by requesting that the consent order be amended to include a statement that his disciplinary record be expunged when the mandates in the order were met. Dr. Thomason's August, 1995, letter was placed in his disciplinary file with no record of action taken by the Board, and no follow-up request by Dr. Thomason.

La. R.S. 37:2359.G, requires the Board to notify all licensed psychologists of any disciplinary action taken against a licensed psychologist. According to Brenda Ward, the executive director of the Board, this notification is given through the pages of the Board's newsletter, and was done for Dr. Thomason's disciplinary action. Ms. Ward also said that as standard procedure, information on all disciplinary actions is classified as a public record.

Subsequently, Dr. Thomason ran for election to the Board and was appointed to serve a four-year term from Sept. 18, 1996, to June 30, 2000. No rule prohibits a psychologist who has been disciplined from being appointed to serve on the Board. The disciplinary action taken against Dr. Thomason was never submitted to the governor during the appointment process. In March, 1997, after Dr. Thomason was appointed, the Board began disclosing the licensure status of nominees, which includes whether or not a nominee has been disciplined.

On July 31, 2000, one month after the end of his term, Dr. Thomason requested that his Aug. 23, 1995, letter be reconsidered. He cited factual errors, but he failed to state what the specific errors were. Dr. Thomason cited no such errors in his first letter requesting expungement. The Board then placed this matter on the agenda for its August, 2000 meeting, labeling it "P92-93-17C (DT)", on the agenda, which we do not believe is adequate notification to the public.

The Board then took up Dr. Thomason's request at its August, 2000 meeting. The Board specifically identified La. R.S. 37:2353.D as its authority to expunge the disciplinary action, defining the entire disciplinary action as an error. The minutes of the Board reflect that, "after the Board reviewed the entire complaint file, it was determined that the complaint did not rise to the level to which it was taken in 1993, and that no disciplinary action should have been taken against Dr. Thomason." The Board cited what it claimed was an error on one finding, but also expunged all of the other findings to which Dr. Thomason had agreed he committed without citing how those findings were in error. Without identifying within the minutes of that meeting the errors of the consent order, the 2000 Board merely substituted its opinion for the opinion of the 1993 disciplining Board.

The law requires that the minutes should include the substance of all matters decided and then be made available to the public in a reasonable time. The minutes should contain reasonable explanations of the errors found for each of the five findings.

Moreover, there was no specific reversal of the Committee's finding that Dr. Thomason had violated La. R.S. 37:2359 B(2)(c), and (12), as well as Principle A: Competence, of the Ethical Standards of Psychologists, and Ethical Standards 1.06, 2.01, 2.05, 2.09, 7.02, and 7.04.

In an interview, Dr. Allen explained that one of the primary reasons the Board felt an error had been made was the existence of a letter from Wayne Parker, the Area Manager for Disability Determinations, to Dr. Thomason. The letter was dated July 1, 1993, and was received by Dr. Thomason after the consent order was executed; therefore, the current Board assumed that the disciplining Board did not know about that letter. According to Dr. Allen, the current Board believes that had the information contained in that letter been available to the disciplining Board the consent order would not have happened.

Mr. Parker's letter did not discuss the allegations filed by the complainant and investigated by the Committee, and would not have shed any new light for the Board. The Parker letter states, "Disability Determinations Services has a procedure for investigating complaints about doctors or psychologists who do Consultative Examinations for our Agency. I suggested that you allow us to follow our normal procedures for investigating this complaint." This letter does not say that Dr. Thomason should not meet with the complainant or provide requested feedback. The letter merely states that the Agency has its own investigation procedures.

The second issue cited by Dr. Allen as the Board's reason for expunging the disciplinary order is related to the conclusions about the examination and subsequent diagnosis of Dr. Thomason's client. According to Dr. Allen, when he and his fellow Board members reviewed the complaint file, they did not agree with the conclusions of the previous Board that the examination done by Dr. Thomason was inadequate and that the diagnosis was unsubstantiated by the data presented. No new documentation or data was examined to support the Board's position that an error was made by the disciplining Board in its findings of an inadequate examination or unsubstantiated diagnosis. Again, the only new information reviewed by the Board to support its opinion was Mr. Parker's letter, which did not contain any information on Dr. Thomason's examination and diagnosis of the complainant.

The Board failed to avoid the appearance of impropriety as its action involved the immediate past chairman and four Board members he served with only one month earlier. The Board could have explored referring this matter to a more independent tribunal such as seeking a recommendation from an ad hoc committee formed along the lines of their complaint committees.

EFFECTS OF DISCIPLINARY ACTION

The disciplinary action taken by the Board prohibits Dr. Thomason from receiving a certificate of professional qualification from the Association of State and Provincial Psychology Boards. He is required to inform insurance companies and hospitals or clinics about the violation and disciplinary action.

The Association maintains a disciplinary data bank, and issues a certificate of professional qualification in psychology. The certificate program promotes mobility for licensed doctoral psychologists by ensuring the completion of core requirements recognized by Association member boards. Possession of the certificate also verifies that the holder has been licensed based upon a doctoral degree for at least five years, and has never had disciplinary action taken against his or her license. Once the disciplinary action is listed with the Association it immediately affects the ability of the psychologist to obtain or keep his certificate.

Whenever a licensed psychologist is found to be in violation of any of the laws, regulations, or standards relative to the practice of psychology in Louisiana, the violation and resulting disciplinary action becomes a matter of public record. The Board automatically lists the disciplinary action in its database and also reports it to the Association.

Furthermore, the Council for the National Register of Health Service Providers in Psychology, which is an association with voluntary membership for psychologists, issued Dr. Thomason a confidential reprimand related to the complaint and its subsequent consent order. Dr. Judy Hall, the executive officer of the Register, stated that the reason more severe action was not taken was because of Dr. Thomason's compliance with the conditions of the consent order as reported in a letter from the Board. Continued listing in the National Register has always been contingent upon the maintenance of an active-status, unrestricted psychology license, according to Dr. Hall. After compliance with the conditions of the consent order was confirmed at the September, 1993 Board meeting, Dr. Thomason was allowed to resume his normal practice without restrictions.

While the complainant was notified in writing of the findings of the Committee on Complaints against Dr. Thomason, the complainant was not notified by the Board about its subsequent decision to expunge the Consent Order. According to the complainant, he only learned of the expungement after the fact.

Conclusion:

1. When the current Board voted to expunge a 1993 disciplinary action taken against Dr. Thomason, the Board:

    - Abused its authority under state law by finding error was made by the prior Board under R.S. 37:2353.D., without conclusively finding the consent order to be in error and delineating the nature of those errors.

    - Ignored other matters of substance in the Consent Order and substituted its opinion for the former Board without a finding of errors.

    - Failed to avoid the appearance of impropriety by referral of the matter to a more independent tribunal for its recommendation.

2. Both the Committee on Complaints and the 2000 Board failed to keep adequate records of its meetings.

Recommendation:

The Board should rescind the expungement of Dr. Thomason's disciplinary consent order, or find error by the former Board with respect to all findings of the consent order.

Management Response:

See attached.

IG Comment:

Counsel for the Board characterizes the allegations of wrongdoing to which Dr. Thomason consented are divided into one central and the rest ancillary allegations, which disappear if the central charge, in this case, Dr. Thomason's failure to meet with the client, is in error. Significantly, we do not agree that the finding of error on the so-called "central" allegation is correct. And more significantly, we do not agree with the "ancillary" characterization. Certainly, in our judgment, the allegation that Dr. Thomason misdiagnosed the client's case is certainly of equal if not more importance that the "central" allegation. We likewise gave equal status to the other allegations – all of which Dr. Thomason signed off on. That is why we conclude that the Board should address all of the issues in a formal hearing.

It should also be noted that we based our interpretation of Mr. Parker's letter to Dr. Thomason on an interview with Mr. Parker. The Board had the same opportunity, but did not.

BL/PCW/rp
File No. 1-02-0071

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RE: File No. 1-02-0071; Response to Draft I.G. Report of December 4, 2002

Dear Mr. Lynch:

I. INTRODUCTION

We represent the Louisiana State Board of Examiners of Psychologists ("LSBEP" or "Board"). It has asked us to assist it in the preparation of this Response to your revised draft Report of December 4, 2002 which, after review and approval by our client, we are authorized to submit on its behalf. Although your prior September 30, 2002 draft Report has been substantially revised following submission of our October 10, 2002 Response, your December 4, 2002 draft still contains basic and numerous factual and legal errors. For the reasons set forth below, we strongly recommend that the December 4, 2002 draft be withdrawn.

The December 4, 2002 draft Report rightly acknowledges that Louisiana law grants to the Board the authority to correct errors made, but then wrongly states that, "At issue here is whether the existence of an alleged error identified by the Board in one of the findings of the Consent Order should negate the remaining findings of the Consent Order without citing specific errors of those findings". This statement of the issue mischaracterizes what the 2000 Board did. It has not negated the remaining findings of the June 25, 1993 Consent Order. Instead, it determined that, absent the

central finding which was negated by demonstrable error, the remaining ancillary findings were not of sufficient weight to warrant a Consent Order. Given the underlying facts, the ancillary findings were instead of a secondary nature which should have been resolved informally by letter of instruction or private admonishment.

The question of whether given violations are nominal and should be resolved informally or whether they are sufficiently substantial as to warrant a Consent Order is a quintessential professional judgment call. It requires expert opinion and the exercise of professional discretion. Accordingly, such judgment calls are purposefully left by law to the LSBEP to make. Your draft Report complains that the 2000 Board "merely substituted its judgment" for that of the 1993 Board, but this is incorrect. The 2000 Board considered additional evidence not available to the 1993 Board. The 2000 Board had a different set of facts presented to it which demonstrated, as explained below, that the central finding of the 1993 Consent Order was in error.

It also bears emphasizing that the LSBEP exists for the purpose of making the sort of professional judgment call at issue here. Ironically, the Inspector General's Office is itself seeking to substitute its lay opinion even though the Inspector General's Office, unlike the LSBEP, lacks the requisite professional expertise in the practice of psychology. [Presumably, the Office of Inspector General would not regard itself qualified to determine whether, on the merits, a violation occurred in the first instance.] In the absence of any evidence of impropriety, and consistent with the limited scope of judicial review of agency determinations as set forth at La. R.S. 49:964.G[1], it is submitted that the Inspector General's Office should follow the example of the courts[2] and limit the scope of its review. It should defer, in the absence of malice, to the Board's judgment.

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[1] R.S. 49:964 provides in relevant part:

G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court.

[2] See Smith v. Our Lade of the Lake Hosp., 639 So.2d 730 at 742 (La. 1994) and the cases cited therein. Making a similar point is the body of case law which restricts judicial review of academic evaluations. See e.g., University of Michigan v. Ewing, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985); Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978); Kraft v. William Alanson White Psychiatry Foundation, 498 A.2d 1145 (D.C. App. 1985).

In the present case, after exhaustive investigation, the December 4, 2002 draft Report finds no evidence of improper motive animating or determining the Board's decision to expunge. None whatsoever. The Board members who voted to expunge received nothing of value in consideration of their vote. No evidence was found of improper ex parte communications between Dr. Thomason and the Board members who voted to expunge. No evidence of malice or bias against Mr. Malta (Dr. Thomason's client whose complaint led to the Consent Order), or against Dr. Mendoza (the former Board member who served as the Complaint officer who investigated Mr. Malta's complaint and who prepared the Consent Order for presentation to the Board), or against anyone else was found. No economic motive for acting to expunge was found. To the extent that the Report states that the decision to expunge was an abuse of discretion and not sustainable by the record, such findings are demonstrably incorrect. Discussion of the error which negated the central finding of the Consent Order, and review of the facts underlying the remaining ancillary findings of the Consent Order, will make this evident.

II. THE 2000 BOARD PROPERLY EXERCISED ITS DISCRETION

A) ERROR NEGATED THE CENTRAL FINDING OF THE CONSENT ORDER

In its previous draft Report, the Inspector General's Office acknowledged that the "primary issue" in the initial complaint that resulted in the Consent Order was Dr. Thomason's alleged failure to meet with the original complainant, Mr. Malta, and provide requested feedback. Everyone agrees, past and present Board members alike, that this was the heart of the matter and the fulcrum on which the June 25, 1993 Consent Order hinged. Subsequent to the issuance of that Consent Order, though, the July 1, 1993 "Parker letter"[3] arrived. It is directly relevant to this central issue and demonstrates that paragraph 4 of the June 25, 1993 Consent Order was incomplete and erroneous.

Mr. Parker's July letter to Dr. Thomason confirmed a February 19, 1993 phone conversation between them in which Dr. Thomason was clearly encouraged by Mr. Parker not to meet with Mr. Malta. Instead, Dr. Thomason was advised to defer to the Office of Disability Determinations for further handling of the matter.[4] Mr. Parker's letter acknowledges that Dr. Thomason had informed Mr. Parker that Mr. Malta was seeking an audience with Dr. Thomason. In response, Mr. Parker "informed" Dr. Thomason that Disability Determinations had a procedure for handling the matter at this stage and "suggested" that Dr. Thomason "allow" Disability Determinations to follow its normal procedures from that point forward. Dr. Thomason got the message. It was from an official agency of the state of Louisiana, and it clearly was to demure and let Disability Determinations

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[3] Wayne L. Parker, Area Manager, Office of Family Support/Disability Determinations, Department of Social Services, State of Louisiana.

[4] That February 19, 1993 phone conversation was confirmed by a letter Dr. Thomason wrote to Mr. Parker on the same day. Mr. Parker's belated July 1, 1993 letter confirmed Dr. Thomason's understanding of Mr. Parker's earlier statements.

handle things. It was the professional judgment of 2000 Board that Dr. Thomason could reasonably have understood Mr. Parker to advise him not to meet with Mr. Malta at that juncture but instead to defer to the Office of Disability Determinations.

To this writer's astonishment the Inspector General's Office reads the Parker letter differently. [Should this matter go forward to the Governor's office the Parker letter should be provided. It speaks for itself.] It was the professional determination of the Board, however, that Dr. Thomason's understanding of the Parker letter was not unreasonable. It most assuredly is not an abuse of discretion by the Board to have so found, and to have concluded that the Parker letter was evidence that paragraph 4 of the Consent Order was, at a minimum, misleading. Absent the Parker letter, it was a swearing contest. Dr. Mendoza chose to believe what he thought he had understood Mr. Parker to say rather than to believe Dr. Thomason. The subsequent arrival, however, of Mr. Parker's July 1, 1993 letter casts paragraph 4 of the June 25, 1993 Consent Order in a very different light.

The Consent Order was signed by Dr. Mark Vigen (then-LSBEP chair) on behalf of the Board on June 25, 1993. If the disciplining Board was aware that a letter from Mr. Parker was imminent, it would have (or should have) first waited to receive and consider that letter before determining whether or not a Consent Order was warranted by the totality of circumstances. The date of the Parker letter, however, July 1, 1993, indicates that it could not possibly have arrived until after Dr. Vigen had executed the Consent Order on June 25, 1993. The 1993 disciplining Board therefore could not have weighed the letter's evidentiary value before deciding whether to require discipline via a Consent Order or to instead resolve the matter informally.[5] The 2000 expunging Board considered all of the evidence, including the evidence which was not, and could not, have been considered by the disciplining Board in June of 1993. After such consideration, the 2000 Board deemed the central finding in the 1993 Consent Order (that Dr. Thomason was without justification in failing to meet with Mr. Malta) to have been in error.

B. THE ANCILLARY FINDINGS ARE OF INSUFFICIENT WEIGHT TO WARRANT A CONSENT ORDER; THEY SHOULD HAVE BEEN RESOLVED INFORMALLY

This leads to consideration of the remaining, ancillary violations found in the Consent Order. Some background about the Board's operating procedures first needs to be understood. R.S. 37:2359G imposes a duty on the Board to give public notice of any disciplinary action taken against any licensee. Accordingly, it has been necessary for the Board to define the term "discipline". It has long followed the practice of publicizing in its quarterly newsletter any board action which in some fashion restricts or places limitations or conditions upon a licensee which are not likewise imposed

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[5] When Dr. Vigen was subsequently made aware of the Parker letter he sent a letter, dated December 12, 2000, stating that had he been aware of the Parker letter in 1993, he would not have executed the Consent Order on behalf of the Board.

upon all licensees. An Order following an adjudicatory hearing or a Consent Order (which moots need for a hearing) are both examples of "discipline". By contrast, on many occasions following investigation of a complaint the concerns the Board may have may turn out to be nominal and best resolved informally. If violations are deemed secondary, the Board has customarily opted for a private informational meeting or letter which gives advice or admonishment but which does not impose any restrictions or conditions upon a licensee. Whether the facts in a given complaint rise to the level of warranting "discipline" (either in the form of a Consent Order or an Order following an adjudicatory hearing) is a professional judgment call the Board is statutorily created to make.

With this background in mind, we turn now to the remainder of the June 25, 1993 Consent Order. It is important to first note what it did not include. The Consent Order did not find any violation of the rules governing the use of supervisees. Dr. Thomason met with the supervisee (Mr. Lafleur) weekly, was on site for consultation, and had discussed the supervisee evaluation of Mr. Malta with the supervisee, all in accordance with Board rules. The Consent Order did fault Dr. Thomason, however, for failure to keep a registration card for the supervisee on file with the LSBEP updated annually. This requirement, however, did not have the force of a promulgated rule, but was an in-house policy informally adopted by the LSBEP. The supervisee involved had initially been registered with the LSBEP but no annual renewal card had been filed because the initial registration card stated "indefinite" and this had been thought to be sufficient. The failure to keep the registration card current annually was a technical departure from an informal procedure (of which probably dozens of licensed psychologists were guilty). Significantly, the informal policy of annual re-registration proved administratively burdensome and was eliminated in 1999.

More importantly, the Consent Order did not conclude that the diagnosis was incorrect or that the client had been harmed.[6] Admittedly, the Consent Order concluded that the May 4, 1992 evaluation of Mr. Malta was inadequate (a corollary to a second disputed issue, whether sufficient reservation was placed on the evaluation). However, the Consent Order's nebulous finding of an asserted failure to acknowledge the limits of the evaluation's conclusions or otherwise indicate significant reservations about evaluative interpretations *was a very close question.* A review of the May 4, 1992 evaluation of Mr. Malta indicates that it in fact did set forth the basis for its conclusions (such as medical history and personal interview), and did specifically list the testing instruments utilized. Immediately following the conclusion on page 5 of the May 4, 1992 evaluation (diagnosing Somatiform Pain Disorder), it is clearly stated that, "at a minimum, results of a prior psychological evaluation should be reviewed for assistance with differential diagnosis." To this important limitation and caveat it was further added that in the event prior psychological evaluations are not available for review, "referral for further psychological testing. . . should be considered."

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[6] The Consent Order's language turns fuzzy on these points. Rather than clearly stating that "X was found to be in violation" of something, Dr. Mendoza interjected ambiguous phrasing like. "questioned possible violations . . ." and ". . . there is also the belief that . . .". This language is not customary in Consent Orders, and was not reviewed and approved by counsel, as the Consent Order incorrectly implies (see discussion under II.C. infra).

Given these underlying facts, the 2000 Board, while not negating the ancillary findings of the Consent Order, determined that those findings were of insufficient weight to warrant a Consent Order. Because of the close questions presented by the underlying facts, and the technical nature of the registration card issue, these ancillary findings should have been resolved informally by a letter of instruction or private meeting. That the 2000 Board so concluded was not an abuse of discretion but was consistent with the customary exercise of professional judgment by the Board. This writer has served as legal counsel to the Board since 1985 and can personally attest to the fact that, absent the central finding that Dr. Thomason was without justification for not meeting with Mr. Malta, a Consent Order would ordinarily not have issued. The ancillary findings in the 1993 Consent Order are akin to those which the Board over the years has customarily resolved without a Consent Order or noticing adjudicatory hearing. Rather, such secondary findings have customarily been resolved through letters of instruction or face to face counseling between the Board and the licensee. From 1993 to date, for example, the Board has received 169 complaints against licensees. Of those, 1 proceeded to a full blown hearing and only 9 resulted in Consent Orders being entered. The remainder, 159, were resolved by letter, counseling or dismissal.

C. ADDITIONAL ERROR PERMEATED THE ENTIRE 1993 CONSENT ORDER

A very important additional point should be made concerning the Consent Order. In addition to incorrectly concluding that Dr. Thomason was without a reasonable basis for not meeting with Mr. Malta, the Consent Order incorrectly states, in paragraph 5, that all members of the Complaints Committee concurred in finding substantive violations of the Louisiana Licensing Law for Psychologists and/or The Ethical Standards for Psychologists. This statement is false. The opinions in the Consent Order presented to the Board were only those of Dr. Mendoza. The Consent Order erroneously states that both members of the Committee concurred in all its findings and recommendations, but in actuality they represented Dr. Mendoza's views only.

Undersigned counsel has sometimes been referred to as an ad hoc "member" of the "Complaints Committee", but this writer's role is confined to offering advice on legal issues concerning procedure and due process only. Legal counsel never offers opinions on whether some substantive matter of professional psychological practice was or was not appropriate. The first time, for example, undersigned counsel ever saw the May 9, 1992 evaluation report, which was the subject of Mr. Malta's underlying complaint, was when counsel asked that it be provided in aid to preparing a December 11, 2000 letter to the Association of State and Provincial Psychology Boards. This writer has gone on record as stating that had opportunity been provided in 1993 to review the full text of the final draft Consent Order before it was presented by Dr. Mendoza to Dr. Thomason and then to the Board, he would not have recommended its approval as written. And it has been this writer's experience in other matters with the Board that it has heeded the advice of its counsel, that amendments first be made or some alternative resolution be pursued.

IV. RECORD KEEPING AND SUNSHINE LAWS

This leads to discussion of the "Committee" on Complaints itself and the December 4, 2002 draft Report's statements concerning a purported failure by the Committee and the Board to observe the requirements of the Louisiana sunshine laws. As you will recall, it was previously pointed out that, in the present context, the word "Committee" is a misnomer. The word "officer" would be more appropriate. The Complaints "Committee" really only consists of a single individual. Dr. Mendoza would make phone calls. Dr. Mendoza would write letters. Dr. Mendoza would meet individually to interview this or that participant. On occasion Dr. Mendoza would phone this writer to seek advice of a legal or procedural nature. Dr. Mendoza acting alone does not meet the definition of a "public body" set forth at R.S. 42:4.2A(2), so as to trigger the application of the Open Meetings law to his individual activities.

Your draft Report also faults the Board for insufficiently describing the expungement matter in the notice of its August 2000 meeting and then faults the Board for insufficiently describing the matter in the subsequent minutes of its 2000 meeting. Your Report expresses the view that the notice on the 2000 agenda, "P92-93-17C(DT)", was not adequate notification to the public. However, the noticed subject matter pertained to the character or competence of an individual and thus qualified for an executive session pursuant to R.S. 42:6.1A(1). A fully descriptive notice would have been inconsistent with this statutory exemption. The noticed agenda item did give indication by its format, though, that the matter pertained to a complaint, and the subject of the complaint, Dr. Thomason, had been made aware of placement of the item on the agenda. It should also be noted that the matter presented constitutional privacy rights the Board was obliged to observe.

As for whether the minutes were sufficiently detailed, all of the requirements of R.S. 42:7.1A(1) through (4), as well as R.S. 42:7.1B, were observed. It was not incumbent upon the Board to include in its minutes errors found for each of the five findings in the Consent Order because, as explained above, this was not the basis of expungement. It is true that the minutes did not elaborate, but that is the nature of minutes. The minimum requirements of R.S. 42:7.1A(1) through (3) were observed; as a matter of law subpart (4) leaves to the discretion of the public body what, if any, additional information is to be included or reflected in minutes.

V. THE "APPEARANCE OF IMPROPRIETY"

The December 4, 2002 draft Report faults the 2000 Board for failing "to avoid the appearance of impropriety" by neglecting to either recuse itself and refer the matter to an independent tribunal or by not advising the party seeking expungement to "seek judicial review . . . pursuant to R.S. 37:2353.E". When one turns to the text of the Part E, however, it states that judicial review shall be "in accordance with Louisiana Administrative Procedure Act." When that Act is consulted it states that a petition in the district court must be filed "within 30 days after mailing of notice of the final decision by the agency . . .". R.S. 49:964.B. In the present case, Dr. Thomason was seeking Board

review of a decision made seven years earlier, in the summer of 1993. Had he sought judicial review in 2000 serious questions of prescription would have been presented.

The public body, itself, however, was not time-barred from correcting one of its own mistakes. It is statutorily authorized under R.S. 37:2353.D to do so — and upon a showing of demonstrable error it has an obligation to do so. As for delegating responsibility to an independent tribunal so as to avoid an appearance of impropriety, there is no statutory basis for the Board to delegate its responsibilities, a fact noted in the February 6, 2002 memorandum by Frank H. Perez, DHH General Counsel, to Charles F. Casteel, Undersecretary, DHH. To its credit, the Board did not punt. It stepped up to the plate and faced its responsibility. And for this the Inspector General's office finds fault.

Most significantly, the so-called "appearance of impropriety" evaporates when all of the facts are considered. The Inspector General's office looks to the term of Dr. Thomason's service on the Board and the fact that members of the expunging Board had served with Dr. Thomason, and ends its inquiry there. The appropriate test though, is whether a reasonable man, having knowledge of all of the facts, would harbor doubts about the tribunal's impartiality. And so a fuller consideration of the facts should be made. Dr. Thomason's initial request for the Board to expunge the Consent Order was made prior to his nomination to become a member of the Board. During the pendency of his nomination, and during his subsequent five year service on the Board, Dr. Thomason dropped the matter. At no time did Dr. Thomason discuss this subject of expungement with fellow Board members or seek to influence them on that matter. He let the matter lay fallow precisely to *avoid* any appearance of impropriety (to his own detriment, given the prescriptive period of R.S. 49:964(B)). Dr. Thomason had no social relationship with the other Board members with whom he had served. Board members live and work all over the state and only assemble in Baton Rouge 1 day a month. Nor were there any economic relationships, such as lines of referral, that might have improperly influenced the Board. Dr. Thomason deferred his request until his five year term had concluded and he had rotated off the Board. Only then, in 2000, did he raise his request anew. No ex parte communications occurred and, after exhaustive investigation, no evidence whatsoever of favoritism has been found. As previously stated, the Board members who voted to expunge received nothing of value in consideration of their vote. And all of these facts are supported by sworn, uncontradicted deposition testimony.

The December 4, 2002 draft Report, like its predecessor draft, unfairly implies that there must be something untoward about the expungement granted because expungements are so rare. However, this is not a situation where 10 requests for expungement were denied but for Dr. Thomason's request was granted. To the contrary, expungements are rare because they are rarely sought. Expungement can, and should, be granted, however, when new evidence comes to light which indicates the Board made a significant error. Indeed, the draft Report acknowledges the Board's statutory authority to correct errors. To the credit of past and present Board members alike, though, the Board has rarely committed demonstrable error. Here, however, the June 25, 1993

Consent Order's central finding, the licensee's failure to consult, was necessarily entered without considering the exonerating July 1, 1993 Parker letter. The 2000 Board considered this additional evidence and reasonably concluded that the Consent Order was substantially in error. Accordingly, the Board had a responsibility to expunge the Consent Order if, in its judgment, it determined that the remaining ancillary findings would ordinarily have been resolved informally without need of a Consent Order.

VI. MATERIAL OMISSIONS

Like the earlier September 30, 2002 draft, the December 4, 2002 Draft Report continues to be characterized by several material omissions of fact:

- The Consent Order whose expungement is at issue centered on Dr. Thomason's purported refusal to meet with Mr. Malta. The Report omits mention, though, that Mr. Malta refused to meet with Dr. Thomason. When all the dust settled, and upon receipt of a letter from Mr. Malta on July 27, 1993 clarifying that he still wanted an appointment, Dr. Thomason promptly called Mr. Malta and scheduled an appointment with him on July 30, 1993 (risking the disapproval of the State Office of Disability Determinations). Mr. Malta, however, canceled the appointment. See August 2, 1993 letter from Dr. Thomason to Mr. Malta.

- Mr. Malta has not filed any complaint about the Board's decision to expunge the Consent Order, nor complained about not receiving notice of the Board's decision to expunge. [Mr. Malta, it should be noted, also did not receive notice, insofar as it can be documented, of the 1993 Consent Order. He has not complained about that either.] The present controversy is instead being driven by a former Board member, Dr. Mendoza, who was the Complaint officer who prepared the Consent Order approved by the 1993 Board. Dr. Mendoza is unhappy with the fact that he was not consulted by the 2000 Board before it decided to expunge. That is understandable. The 2000 Board has apologized to Dr. Mendoza for its failure to extend this professional courtesy. Wisdom counsels that this matter be left there.

- The Association of State and Provincial Psychology Boards initially agreed to support the Board's decision to expunge, by expunging from its own databank its previously entered notation of the Consent Order. [See contemporaneously prepared memo to the file by undersigned counsel, confirming a December 20, 2000 telephone conversation with counsel to the ASPPB, Mr. Randy Reaves, and contemporaneously prepared notes of the same date by Brenda Ward, Board executive director, previously furnished to the staff.] The ASPPB has no governmental authority. It does not authorize individuals to practice psychology. It issues no licenses. Nor does it

have any regulatory authority to suspend, revoke, or place limitations upon a licensee's practice.

- When the ASPPB later broke its agreement to conform its records to the Louisiana expungement, Dr. Thomason filed suit against the ASPPB (suit number 01-2392, Division G, 4th Judicial District Court, Parish of Quachita). While that suit is pending, the ASPPB has agreed to honor the propriety of the Board's expungement — by deleting reference in its national databank to the Consent Order. This litigation presents the same issue here presented, the propriety of the Board's decision to expunge. It is respectfully suggested that the Inspector General's office adopt the same prudent policy followed by the Attorney General's office, and refrain from issuing opinions on matters in which litigation is pending. Trial of the matter has been continued to January, 2003.

VII. CONCLUSION

For the reasons set forth above, the conclusions on page 8 of the December 4, 2002 draft Report are in error and should be set aside.

The recommendation on page 8 of the December 4, 2002 draft Report asks the Board to "rescind" its expungement of the 1993 Consent Order. In other words, the Board is being asked to expunge an expungement. This is akin to unringing a bell, and is an impossibility. Alternatively, the Report recommends that, as a condition for expungement, the Board find error with respect to all findings of the Consent Order and not just the central finding. This recommendation, however, overlooks the fact that the 1993 Consent Order is already defective in its entirety. It incorrectly represented that its findings were those of "both members" of the Committee when in fact they were Dr. Mendoza's only. Moreover, this recommendation reflects a basic failure by the Inspector General's office to understand that LSBEP Consent Orders are properly and customarily not entered for every violation. Many violations the Board investigates are of a de minimus nature and are handled informally, without limitations placed upon a licensee. It is only when the nature of a violation is deemed sufficiently severe, or the combined weight of various violations aggregate to such level, that a matter is either noticed for hearing or, alternatively, a Consent Order is entered into. Here, the central finding was found to be in error, and it was unanimously determined that absent this central finding the remaining ancillary findings would properly have been resolved informally.

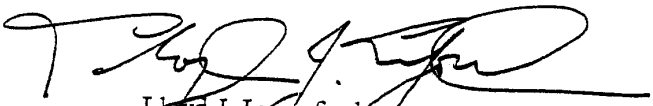
As has been stated, where the line is drawn between matters warranting an adjudicatory hearing or Consent Order or, on the other hand, matters which are properly resolved informally, is a matter of judgment — professional judgment — which the State of Louisiana has statutorily left to the LSBEP. Its members have the requisite degree of professional expertise in the practice of psychology which fit them to make such evaluative determinations. Recognizing this, courts defer to those determinations in the absence of malice. The Inspector General's Office, however, in recommending that the Consent Order should somehow be un-expunged if the Board cannot find

errors with respect to all findings, is seeking to substitute its lay opinion for that of the professional regulatory Board.

In conclusion, it must be emphasized that the members of the LSBEP, in acting both to enter the Consent Order in 1993 and in subsequently acting in 2000 to expunge, proceeded in good faith. Its members are private citizens who have volunteered to perform a public duty, often at great financial sacrifice. They are to be commended for their service. The LSBEP is a model of efficiency to many other regulatory boards in the state who rightly admire its professionalism. Its members are very conscientious of their responsibilities, and they perform a valuable service to the public at no cost to the state. It is hoped that the Inspector General's office will gain some perspective on this matter and determine that submission of a Report to the Governor's Office is not warranted.

Respectfully submitted,

TAYLOR, PORTER, BROOKS & PHILLIPS, L.L.P.



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December 30, 2002

Mr. Bill Lynch, State Inspector General
State of Louisiana
Division of Administration
224 Florida Street, Suite 303
Baton Rouge, LA 70804-9095

Via Certified Mail

Re: File No. 1-02-0071
Response to Draft of
Report of December 4, 2002

Dear Mr. Lynch

I represent Dr. Thomason and have been requested to respond to your December 4, 2002 draft report concerning the Board of Examiners of Psychologists ("the Board") on his behalf. Your report indicated that the Louisiana State Board of Examiners of Psychologist improperly expunged a disciplinary action against Dr. Thomason; however, this is a legal conclusion which is not supported by any evidence. The Board's expungement is clearly authorized by La. R.S. 37:2353(D).

The third paragraph of your report seems to indicate that the Board could not expunge the entire record because it only found an error on one finding out of five findings in the consent order. There is no legal requirement that would require the Board to find an error in each and every finding in order to conclude that there is an error in the Consent Agreement. Additionally, your report states that the minutes do not precisely express the errors in the consent order. There is also no legal requirement that the minutes of the Board precisely express the errors in the consent order.

It is clear that the consent order was entered prior to the Board's receipt of evidence which should have been considered prior to the entry of the consent agreement. The July 1, 1993, letter of Wayne Parker, the Area Manager for Disability Determination, was not even written until Dr. Vigen signed the Consent Agreement on behalf of the Board. Mr. Parker's letter indicates that the findings of the Consent Agreement are erroneous.

Page 6 of your report indicates that the "Board failed to avoid the appearance of impropriety" in expunging the Consent Agreement involving its immediate past chairman and suggests that the Board could have referred the matter to an independent tribunal to seek remedy through judicial

review pursuant to R.S. 37:2353(E). There is no legal basis for seeking an independent tribunal. Further, R.S. 37:2353(E) does not provide for judicial review of the matter which was presented to the Board. The Board clearly is charged with the responsibility of regulating those persons who practice psychology in the state of Louisiana and had the responsibility of acting upon Dr. Thomason's request. All of the members of the Board who expunged Dr. Thomason's record testified under oath, in depositions which were furnished to your office, that they had no personal relationship with Dr. Thomason which would affect their ability to participate in the decision of the matter involving his disciplinary action.

The actions taken by the Board were taken in good faith performance of their duties and should not be second guessed by your agency. The conclusions reached by your agency is clearly based upon misinterpretations of R.S. 37:2353 and other relevant laws. I hope that the foregoing information assists your agency in determining that your draft report of December 4, 2002 should not be submitted to the Governor's Office.

Should you require any additional information regarding this matter, please do not hesitate to contact me.

Very truly yours,

SHOWS, CALI & BERTHELOT, L.L.P.

Sheri M. Morris

Sheri M. Morris

January 8, 2003

2129 E. Kirkland Lane #1
Tempe, Arizona 85281

Mr. Bill Lynch, State Inspector General
State of Louisiana
Division of Administration
224 Florida Street, Suite 303
Baton Rouge, LA 70804-9095

Re: File No.: 1-02-0071
Response to Draft of Report of December 4, 2002

Dear Mr. Lynch:

Thank you for giving me the opportunity to present an addendum to the letter submitted by my attorney on December 20, 2000. When I read the report and compare the description of events to my experience, the report reads as biased and subjective. These are suggestions that I believe are important for the public's understanding of these events.

I appreciate that on page 3 your report indicates Dr. Mendoza was the sole member of the Committee on Complaints. Therefore, rather than make use of the term Committee on Complaints throughout your report, I believe it would be more informative to the public that the reference be changed to Dr. Mendoza. It seems misleading when I read your report that the Committee made findings and determinations when my experience was in dealing with a single person. This would be an objective manner of informing the public that these were the conclusions reached by a sole psychologist.

In the last paragraph which begins on page 3, you describe my signing the consent order as a means of avoiding a hearing. I think it is important to inform the public of the following information concerning my signing of the consent order:

1. Dr. Thomason signed the consent order believing that this was an informal resolution to the complaint, that such resolution was not a public document, and not reportable as disciplinary action.
2. Prior to signing the consent, Dr. Thomason denied violating any Louisiana statues or ethical codes in the practice of psychology.
3. The Louisiana Administrative Code allows informal disposition of matters involving licensees where the disposition is not reported.
4. The Consent Agreement signed by Dr. Thomason does not disclose that it constitutes formal discipline.

On page 4, the first paragraph under the heading EXPUNGED ACTION you make the statement that the ASPPB has never received or granted a request for expungement of a disciplinary action prior to this case. A review of ASPPB's records indicates that at least ten requests have been received and ten records have been deleted from the ASPPB disciplinary database. If necessary, my attorney, E. Wade Shows can provide you with documentation which indicates that ASPPB has in the past expunged records at the request of a state board.

In the second paragraph ON PAGE 4 under the heading EXPUNGED ACTION you refer to the last paragraph of the consent order as merely an acknowledgement by the Board that the complaint filed against Dr. Thomason has been addressed and that no further actions will be taken against him. This is an important part of the consent order since it demonstrates that the consent agreement was never intended to become a public record of formal disciplinary action. By having a statement in the consent order indicating that upon compliance with the terms no further action would be taken by the board, I understood that the matter would be closed and the record sealed.

On page 8 under the section entitled CONCLUSIONS, I believe it is important to point out that the 1993 Board, particularly Dr. Mendoza, failed to disclose to Dr. Thomason that the consent order constituted formal disciplinary action and failed to disclose that by signing the consent order Dr. Thomason acknowledged the information would be disseminated to the public.

Thank you for allowing me to express my concerns regarding these issues.

Sincerely,

David D. Thomason / BT

David D. Thomason, Psy.D.