

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
STATE BOARD OF PSYCHOLOGICAL EXAMINERS
OAL DOCKET NO. BDS 08602-17

IN THE MATTER OF THE SUSPENSION
OR REVOCATION OF THE LICENSE OF

L. BARRY HELFMANN, PSY.D.
LICENSE NO: 35SI100124500

TO PRACTICE PSYCHOLOGY IN THE
STATE OF NEW JERSEY

ORDER DENYING STAY
AND ASSESSING COSTS
AND ATTORNEY FEES
(SUPPLEMENTING
AUGUST 15, 2018
FINAL DECISION AND ORDER)

The Board of Psychological Examiners ("Board") previously filed a Final Order in the matter of L. Barry Helfmann, Psy. D. ("Dr. Helfmann" or "Respondent") on August 15, 2018, wherein the Board ordered, *inter alia*, that Respondent's New Jersey license to practice psychology was to be suspended for a period of two years, one year of which was to be active and the remainder to be stayed and served as a period of probation. We noted in that Order (see footnote 1 of the August 15, 2018 Order) that we decided, following a supplemental hearing held on August 6, 2018, to deny Respondent's application for a stay of the Board's Order and to assess an aggregate total of \$110,542.08 in costs and attorneys' fees.¹ This

¹ The \$110,542.08 assessment included all expert fee costs, transcript costs and enforcement bureau costs, and 60% of the total amount of attorneys' fees which were sought by the Attorney General. Costs and attorney fees are recoverable under N.J.S.A. 45:1-25(d), and are typically assessed against individual licensees following successful administrative prosecutions, as

Order supplements our August 15, 2018 Order by memorializing those two specific determinations, summarizing the arguments made by the parties, and setting forth the rationale supporting both determinations.

Assessment of Costs and Attorney Fees

In her Initial Decision, A.L.J. Cohen recommended that Dr. Helfmann should be "responsible for the payment of expert fees which were related to the issue of confidentiality and the failure to take notes" and that he should be held "responsible for the costs of Board and OAL transcripts, which were necessitated by the investigation and prosecuting of this matter." (ID59). As for attorneys' fees and enforcement bureau costs, however, ALJ Cohen concluded that Respondent "should be responsible to pay two-fifths of the amount of attorney and enforcement fees, which would amount to \$6675.22." It is clear that A.L.J. Cohen's recommendation is predicated, in large measure if not in its entirety, on her recognition that the Attorney General prevailed only on two of the five counts of the complaint, and the corollary proposition that any award of attorneys' fees or Enforcement Bureau costs should be limited to 40% of the aggregate total amounts sought.²

otherwise those expenses would be incurred by the Board and would need to be passed on to all licensees in licensure fees.

² The fee application submitted to ALJ Cohen contained a mathematical error, which caused the total amount of attorneys' fees to be dramatically understated to be \$16,688.05. In actuality, the total amount of attorneys' fees which the Attorney General is seeking in this matter is \$154,942.50. While the calculation

The Attorney General submitted an amended certification of fees dated June 26, 2018. The amended Certification of S.D.A.G. Gelber details that the Attorney General seeks a total cost award of \$172,519.08, which includes attorney fees of \$154,942.50, transcript costs aggregating \$4435.05 (for Dr. Helfmann's appearance before the Board and for four days of OAL hearings), Enforcement Bureau investigative costs (\$597.78), and expert witness fees of \$12,543.75.

In his written papers and in oral arguments, all of which focused almost exclusively on Respondent's objections to the Attorney General's attorneys' fee application, Respondent's counsel, Scott Piekarsky, Esq., urged the Board to accept A.L.J. Cohen's recommendation that only 40% of the attorneys' fees should be awarded, based on the limited degree of success that the Attorney General achieved in the action. He suggested that the number of hours billed in this matter was excessive given that the case involved no depositions and four hearing days, and argued that the State was improperly seeking to be awarded fees related to other cases. Mr. Piekarsky also argued that the State failed to

error should have been apparent to the parties below, it was only first recognized by the Board at the time that this matter was returned for consideration of exceptions on June 25, 2018. Given the magnitude of the error, the Board tabled making any final decision upon the amount of costs and attorneys' fees that would be assessed, and instead requested that the Attorney General submit an amended certification of fees. Respondent was afforded an opportunity to submit opposition to the amended application for fees. Oral arguments of counsel on the fee application (along with Respondent's application for a stay) were heard by the Board on August 6, 2018.

adequately justify its hourly rate and failed to submit a properly detailed fee application.

SDAG Gelber argued that all of the costs sought by the State should be awarded in full. She argued that her attorneys' fee application was reasonable, and pointed out that many hours of her time were attributable to Dr. Helfmann's actions, to include his delay in stipulating to records and extensive motion practice at the OAL.³ S.D.A.G. Gelber also suggested that the only billings that might seemingly relate to other matters would have been for time spent reviewing depositions of Respondent, P.D.F. and collection attorneys, all of which she maintained was necessary to fully develop and prepare for this matter (all of those transcripts were also admitted into evidence below). Addressing A.L.J. Cohen's recommendation that only 40% of attorneys' fees and investigative costs should be assessed, SDAG Gelber urged the Board to reject that recommendation and to instead recognize that the full amount of fees and costs should be awarded because the Attorney General prevailed on the two most significant and critical charges in this matter - Dr. Helfmann's disclosure of confidential and protected

³ Those motions included a motion to challenge the Board's authority to subpoena corporate records of the Respondent, a motion to disqualify SDAG Gelber, a motion to disqualify the State's expert, and a motion to preclude patient P.D.S from testifying. Additionally, S.D.A.G. Gelber needed to file a motion to quash subpoenas served by Respondent on the Executive Director of the Board and all Board members.

health information, and his failure to maintain accurate and appropriate records.

We conclude that Dr. Helfmann should be assessed all of the enforcement bureau costs, transcript costs and expert witness fees that were incurred in the investigation and prosecution of this matter, but limit the attorneys' fee award to 60% of the total amount of fees detailed in S.D.A.G. Gelber's supplemental certification.

As we explained in our August 15, 2018 Order, we found Dr. Helfmann committed serious violations in this case, both by failing to protect the confidentiality of the diagnoses and treatment methods of many patients, and by failing to appropriately prepare patient records documenting multiple treatment sessions. The prosecution of this case was clearly justified to promote important state interests, and to ultimately protect the public by assuring that licensed psychologists practice in a manner consistent with basic standards of care. Given that recognition, the findings made in this case warrant the imposition of the full amount of all costs (other than attorneys' fees, as we will explain below) against Respondent.

We are satisfied that the investigative, transcript and expert witness costs are all fully documented, and were all reasonably and appropriately incurred to support the prosecution of the case. The basis for the investigative costs sought in this matter, which

total only \$597.78, are fully detailed in the record below (see P-32).⁴ The transcript costs are supported by actual invoices, and those fees appear to be in line with ordinary fees for preparation of transcripts. Finally, review of the State's expert witness' testimony and written report demonstrate that her principal role in the case was to review and opine upon the core issues of patient confidentiality and recordkeeping, both of which the State prevailed upon. Dr. Jeffers addressed in detail the confidential nature of both treatment codes and a diagnosis, and the importance and value of accurate record keeping by psychologists. Her input and time was essential to the State's development of its case against Dr. Helfmann and its ultimate success in proving that Dr. Helfmann violated confidentiality and record keeping requirements, and on balance we are satisfied that Respondent should be assessed the full amount of those expert witness fees given the findings that we have made.

Turning to the issue of attorneys' fees, the Board is guided by the general principles established in Rendine v. Pantzer, 141 N.J. 292 (1995) and reaffirmed in Walker v. Giuffre, 209 N.J. 124, 130 (2012). Specifically, the Board is required to establish a "lodestar" fee by multiplying the number of hours reasonably

⁴ As detailed therein, hourly rates for enforcement activities are based on salaries, overhead and costs of State employees. We find those rates, and the number of hours of Investigator time that were necessitated in this matter, to be reasonable.

expended on the litigation by a reasonable hourly rate. In evaluating the reasonableness of hours, the Board is to "carefully and critically" evaluate the aggregate hours claimed, and eliminate duplicative or nonproductive time. See also Poritz v. Stang, 288 N.J. Super. 217, 221 (App. Div. 1996) (in evaluating reasonableness of actual hours expended, one must be mindful that "actual time expended does not necessarily equate with reasonable time."). An attorney seeking a fee award must prepare and provide a certification of services that is sufficiently detailed to allow for an accurate calculation of a lodestar. While "exactitude" is not required, the submission needs to include "fairly definite information as to the hours devoted to various general activities." Rendine, 141 N.J. at 337.

Starting with the lodestar, we conclude that the Attorney General has fully documented and supported all hours claimed, and we find that the hourly rates for services (\$300/hour for S.D.A.G. Gelber's time and \$75/hour for the time of a paralegal) are reasonable. S.D.A.G. Gelber has submitted timesheets showing the amount of time that was spent to complete specific tasks and to attend meetings and hearings. The entries on those time sheets include adequate descriptive detail to enable us to understand the general nature of the legal work which was done on specific days. Additional details regarding the specific tasks that she engaged in are set forth in her certification. We are satisfied that the

aggregate total of 528.1 hours of attorney and/or paralegal time that were spent on this matter were reasonable and necessary to enable S.D.A.G. Gelber not only to prepare and present the case against Respondent, but also to respond to Dr. Helfmann's myriad motions, some of which were withdrawn only after SDAG Gelber needed to expend significant time and resources to respond.⁵

We also find the \$300/hour rate that is sought for S.D.A.G. Gelber's legal work to be reasonable. S.D.A.G. Gelber has been in practice for more than 20 years and has a wealth of experience in prosecuting actions involving professional board licensees. The hourly rate of \$300 is consistent with the rates established in a directive of Michelle Miller, then Acting Director (now Director) of the Division of Law (the "Miller Directive") that became effective September 1, 2015.⁶ The Board accepts and finds that the hourly rate of \$300 for an attorney with more than 20 years of legal experience is reasonable and is, in all likelihood, well below prevailing market rates for attorneys with comparable expertise and experience. Similarly, we find the hourly rate of

⁵ S.D.A.G. Gelber's bills total 512.6 hours; an additional 15.5 hours were billed by a paralegal.

⁶ Government workers are salaried and not hourly wage employees. The Miller Directive specifies that the rate schedule was "... developed by first determining the general market rates in New Jersey for comparable legal services, which were derived from multiple sources of data. The resulting market rates were then reduced to ensure a conservative increase in the Division of Law's hourly rates and also to ensure that those rates are defensible as reasonable." As of September 2015, the hourly rate for attorneys in the Division of Law range from \$200 per hour for those with 0-5 years of legal experience to \$300 for those attorneys with more than 20 years of experience.

\$75 for the 15.5 hours of paralegal time billed to this matter to be reasonable.

Having established the lodestar, we next consider whether there is a basis to reduce the lodestar calculation based on the degree of success which was achieved by the Attorney General. A.L.J. Cohen recommended that any fee award be limited to 40%, because the Attorney General prevailed on only two of five Counts in the Administrative Complaint. We reject that analysis, as we find it blithely focuses on the manner in which charges were "packaged" into Counts of a Complaint, and eschews a critical examination of the relative seriousness of the misconduct alleged in the various Counts. The essence of the case against Dr. Helfmann is in the two counts on which the Attorney General prevailed, and the charges that were ultimately dismissed in Counts 3-5 were -- simply put -- not of the same magnitude as those sustained in Counts 1 and 2. While we do agree with A.L.J. Cohen that the lodestar should properly be reduced, in some measure, because the Attorney General did not prevail on the charges in Counts 3-5, we are not persuaded that the award should be reduced to the degree proposed in the Initial Decision. Rather, on balance, we have determined that an award of 60% of the lodestar amount is fair and reasonable and is more fully supported based on the findings made and the overall degree of success achieved by the Attorney General in this case.

In sum, we herein find good cause to support the assessment of the following costs and fees in this matter:

Attorney's Fees	\$92,965.50
Investigative Costs	\$597.78
Expert Costs	\$12,543.75
Court Reporter and Transcription	\$4435.05
TOTAL	<u>\$110,542.08</u>

Application for Stay Pending Appeal

The Final Decision and Order of the Board suspended Dr. Helfmann's license for a period of two years, the first year of which is to be served as an active suspension, and the second year as a period of practice under supervision. That order also assessed a civil penalty of \$10,000, costs and fees, and required that respondent take an ethics course.

The Board's decision to order the suspension of Dr. Helfmann's license was announced on June 25, 2018. In order to provide Dr. Helfmann with an opportunity to make full arrangements for the transfer of care of his patients to other mental health care providers, and thereby assure that the patient's interests were not compromised by any abrupt cessation of care by Dr. Helfmann, we specifically postponed the commencement of the active portion of the suspension for 90 days, through September 24, 2018.

Dr. Helfmann argues that he is entitled to a stay pending appeal as he believes he is likely to succeed on the merits and he

and his patients and colleagues will be irreparably harmed if he is actively suspended from practice for a year. Through his counsel, Dr. Helfmann continues to assert that he violated no laws and that the punishment announced by the Board is disproportionate to the offense.

SDAG Gelber urged the Board not to stay its action. She suggested that the one year period of suspension and other sanctions ordered by the Board reflected a fair exercise of the Board's responsibility to determine the appropriate sanction for violations of Board laws and regulations and the standards of the profession. She further noted that Dr. Helfmann has several partners and associates in his practice who presumably would be able to ensure continued care for his patients while he serves his suspension.

We reject Respondent's application for a stay. We are satisfied that the record developed in this matter fully supports the findings made and the sanctions imposed. The Board has crafted a sanction that reflects a fair and reasoned assessment of Dr. Helfmann's conduct in light of the harm and/or potential for harm to his patients, and the public interest in assuring that psychologists not divulge their patients' confidential information and that psychologists prepare records which adequately reflect the nature of any treatments rendered. While we recognize that Respondent may incur loss of income resulting from his suspension,

and expense from the penalty and cost assessments made, those consequences do not constitute irreparable harm. Nor will respondent's patients be irreparably harmed, particularly given that Dr. Helfmann was given a full ninety day period during which he could continue to provide care for those patients while making appropriate arrangements to allow for the transfer of their care to other mental health care providers. In sum, Dr. Helfmann has failed to demonstrate any reasonable basis to stay this Board's Order or to further delay the September 24, 2018, starting date for his active suspension.

IT IS THEREFORE ON THIS 23 DAY OF AUGUST, 2018

AS ANNOUNCED ON THE RECORD ON AUGUST 6, 2018

ORDERED:

1. Respondent's application for a stay pending appeal is denied.
2. Respondent is assessed investigative costs of \$597.78, expert witness costs of \$12,543.75, and transcript costs of \$4,435.05, for a total cost assessment of \$17,566.58.
3. Respondent is assessed attorneys' fees in an amount of \$92,965.50.
4. The full amount of costs and attorneys' fees assessed herein, along with the previously ordered civil penalty in the amount of \$10,000, total \$120,542.08. That full amount shall be paid by certified check, bank check or

money order, payable to the State of New Jersey and forwarded to the attention of Susan Rischawy, Acting Executive Director, Board of Psychological Examiners, P.O. Box 45017, Newark, New Jersey, 07101, and shall be paid in full no later than October 24, 2018.

New Jersey State Board
of Psychological Examiners

By: 

Alan Groveman, Ph.D.
Board Chair