FILE NO. CX-00-2204

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against JAMES M. BURSETH, an Attorney at Law of the State of Minnesota.	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION FOR DISCIPLINE**

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The above-entitled matter came on for hearing on March 8, 2001, before the undersigned, acting as referee by appointment of the Minnesota Supreme Court. Betty M. Shaw, Senior Assistant Director, appeared for the petitioner, the Director of the Office of Lawyers Professional Responsibility (hereinafter "Director"). Richard F. Koch, Esq., appeared for respondent, who was personally present throughout and testified during the proceedings.

The proceedings were conducted on the Director's October 25, 2000, petition for revocation of probation and for further disciplinary action, which alleges that respondent violated his stipulation for private probation requiring him to remain abstinent from alcohol and other mood-altering chemicals.

The Director presented the live testimony of respondent, Julie Kloss, as an expert in toxicology, and Alison Marie Hoy, respondent's Ramsey County probation officer. The respondent testified on his own behalf and called Elizabeth

Hughes, Esq., for testimony. Director's Exhibits 1 through 19 and Respondent's Exhibits A, B, C, D, G, H, I, J, K and L were received into evidence.

The findings and conclusions made below are based upon respondent's admissions, the parties' exhibits, the testimony presented, including that of respondent, the demeanor and credibility of respondent as determined by the undersigned, and the reasonable inferences to be drawn from the exhibits and testimony.

Based upon the evidence as outlined above, and upon all of the files, records and proceedings herein, the referee makes the following:

FINDINGS OF FACT

1. Respondent was admitted to practice law in Minnesota on September 16, 1974, and currently practices as a public defender in Minneapolis, Minnesota.

2. Respondent's disciplinary history includes a January 14, 2000, stipulation for private probation for repeated alcohol related criminal misdemeanor violations in violation of Rule 8.4(b), Minnesota Rules of Professional Conduct (MRPC) (Exhibit 1).

3. Under the terms of his January 14, 2000, private probation, respondent was required to maintain abstinence from alcohol and other mood-altering chemicals, except that respondent could use prescription drugs in accordance with the directions of a prescribing physician who is fully advised of

respondent's chemical dependency before issuing the prescription (Exhibit 1, p. 3).

4. To ensure compliance with the probationary terms respondent was required to cooperate with random urinalysis (UA) testing (Exhibit 1, pp. 3-4).

5. Respondent's UA program screens for concentrations of THC (Cannabinoids) exceeding 0.50 nanograms per milliliter. This cut off level was selected to detect infrequent marijuana users, but to avoid false positives due to "second hand" or passive inhalation of marijuana smoke. To detect passive inhalation of marijuana smoke, Hennepin County Medical Center (HCMC) must lower the concentrations of THC to 0.25 nanograms per milliliter (Kloss test.).

6. During the probation, respondent tested positive for THC four times - February 28, 2000, June 28, 2000, July 17, 2000, and August 7, 2000 (Exhibits 3 and 4).

7. When respondent produced urine specimens that tested positive for THC (Cannabinoids) on February 28, 2000, June 28, 2000, July 5, 2000, and August 7, 2000, HCMC performed a more specific confirming test, gas chromatography/mass spectrometry, to verify the positive test results (Kloss test.).

8. Respondent did not provide a reasonable explanation for the February 28, 2000, positive test result until May 9, 2000, despite earlier requests that he do so. The Director's Office then accepted respondent's explanation that the February 28, 2000, test result may have been caused by cannabis oil placed in his herbal tea (Exhibits 7, 8).

9. Respondent denied using marijuana on June 28, 2000 (Resp. test.). Respondent did not provide a reasonable explanation for the positive test results.

10. Respondent first denied (Resp. Ans., ¶ 4) but later admitted (Resp. test.) that he used marijuana on July 17, 2000.

11. Respondent admits using marijuana on August 7, 2000.

12. On 11 occasions, respondent provided dilute urine specimens to the testing lab at HCMC (Exhibits 3 and 4). Dilute specimens do not provide assurance that drugs are not present in respondent's system. Dilute specimens can produce false negative reports (Kloss test.). When respondent provided dilute specimens, HCMC did no further testing (Kloss test.).

13. Respondent was aware that the Director was concerned about the frequency of dilute urine specimens that he produced (Resp. test.). Despite requests by the Director's Office that respondent avoid dilute specimens, he continued to provide dilute specimens up to and including February 16, 2001 (Exhibits 3, 4, and 9). While one or two dilute specimens may be explainable, 11 dilute specimens are suspiciously unusual.

14. Respondent failed to appear for testing according to the random call in schedule on two occasions. On one occasion he was ill, went home from work and slept through the call and/or testing. Respondent was asked to provide medical verification of his illness. Respondent did not provide medical verification or any other verification of his illness other than

his own report. On the other occasion respondent asked to be excused from testing while on vacation. Respondent inadvertently provided the Director's Office with incorrect vacation dates and later provided the correct dates.

Aggravating Factors

15. At the time of his private probation, respondent was also on criminal probation for an alcohol related conviction, which required that he remain free from alcohol, drugs and chemicals (Resp. and Hoy test.).

Mitigating Factors

16. There is no evidence that respondent's work as a public defender has been adversely affected by his failure to remain free of mood altering drugs or chemicals.

17. Respondent has complied with the probationary condition that he attend weekly meetings of Alcoholics Anonymous and has increased his attendance from one to two AA meetings per week.

CONCLUSIONS

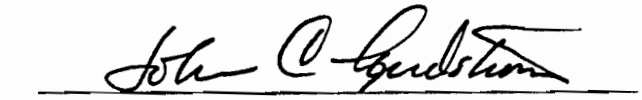
18. Respondent's conduct in failing to maintain abstinence from nonprescription mood altering drugs violated the terms of respondent's January 14, 2000, stipulation for private probation and Rule 8.4(d), MRPC.

RECOMMENDATION FOR DISCIPLINE

The undersigned referee recommends that respondent be publicly reprimanded and placed on public probation through the later of January 14, 2002, or until respondent can produce six

consecutive months of negative urinalysis test results. Respondent shall also comply with all other terms of his January 14, 2000, private probation.

Dated: May 2, 2001



JOHN C. LINDSTROM
REFEREE

MEMORANDUM

Mr. Burseth's admitted use of marijuana on two separate occasions in July and August 2000 clearly violated the no-use provision of the January 14, 2000, private probation agreement. While his work as a public defender is admirable and his efforts to maintain sobriety are sincere, the integrity of the disciplinary process would be jeopardized if there were no consequences for the probation violations. Furthermore, while there is no evidence the violations jeopardized his public defender clients, certainly continued violations may substantially impair his ability to effectively represent his clients. Thus, a public reprimand is appropriate.

JCL