Before the
Administrative Hearing Commission
State of Missouri

JULIE K. FAULKNER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 12-1370 BN
	)	
STATE BOARD OF NURSING,	)	
	)	
Respondent.	)	

DECISION

We deny Julie K. Faulkner's application for licensure by examination to be a licensed practical nurse ("LPN").

Procedure

On July 31, 2012, Faulkner appealed the Board of Nursing's ("the Board") decision to deny her application. On August 14, 2012, the Board filed its answer. We held a hearing on the complaint on November 9, 2012. Faulkner represented herself. Angela S. Marmion represented the Board. The matter became ready for decision on January 10, 2013, the date written arguments were due.

Findings of Fact

1. Faulkner was previously licensed as an LPN by the Board.

2. Faulkner was employed as an LPN at NHC Healthcare ("NHC") in Desloge, Missouri.

3. On January 25, 2005, Faulkner was asked to submit to a random drug screen by NHC while at work pursuant to NHC policy. She tested positive for amphetamines, a controlled substance.[1] Faulkner did not have a valid prescription for amphetamines.

4. On February 20, 2009, Faulkner's license was placed on probation for two years, pursuant to a settlement agreement between Faulkner and the Board, which allowed her to keep her license as long as she complied with the provisions of the settlement agreement. In that settlement agreement, Faulkner stipulated that her license was subject to discipline as a result of a drug screen administered on January 25, 2005.

5. The settlement agreement required Faulkner to do, among several other things, the following:

a. submit employment evaluations, or notarized statements of unemployment, to the Board at least quarterly,

b. obey all federal, state, and local laws, and all rules and regulations governing the practice of nursing in Missouri,

c. undergo a thorough evaluation for chemical dependency and submit the results to the Board, and

d. contact the Board-approved, third-party administrator daily to see if she needed to provide a sample for random testing on that day.

5. On July 22, 2009, a probation violation complaint was filed with the Board against Faulkner, and the Board held a hearing on August 28, 2009.

[1] Amphetamines are a controlled substance under § 195.017.4(3)(a). Statutory references are to RSMo Supp. 2012, unless otherwise noted.

6. On September 9, 2009, the Board revoked Faulkner's license, citing failure to meet several stipulations in the settlement agreement, including:
    a. failing to submit employment evaluations, or notarized statements of unemployment, to the Board at least quarterly,
    b. failing to undergo a thorough evaluation for chemical dependency, and failing to submit the results to the Board, and
    c. failing to contact the Board-approved, third-party administrator daily to see if she needed to come in for random testing.
7. Faulkner reapplied for licensure by examination on May 15, 2012.[2]
8. The Board sent Faulkner a chemical dependency packet to complete. The chemical dependency packet asked questions regarding what treatment Faulkner had received and the last time she used any illegal substances or abused any substances.
9. Faulkner sent back an incomplete packet stating she had never completed a treatment program, a 12-step program, or any other sobriety programs. She also indicated that her sobriety date was in February 2009, but admitted that she relapsed for two weeks starting on October 20, 2011. Faulkner also admitted to failing to contact the third-party administrator on 75 days out of the 150 days she was on probation because she was using methamphetamine and was afraid she would be called in to provide a urine sample.
10. Her application was denied by a letter dated July 5, 2012.

[2] The Board received an application from Faulkner on February 6, 201. However, the license administrator, Angie Morice, sent Faulkner a letter on February 8, 2012, informing her that she needed to have her signature page notarized and that she needed to complete a chemical dependency packet, according to the application instructions. The Board received the completed, notarized application on May 15, 2012.

Conclusions of Law

We have jurisdiction to hear the complaint.[3] Faulkner, as the applicant, has the burden of proof to show she is entitled to a license.[4] We decide the issue that was before the Board,[5] which is whether the application for licensure by examination was properly denied. We exercise the same authority that has been granted to the Board.[6] Therefore, we simply decide the application *de novo*.[7]

The Board's answer to Faulkner's complaint provides notice of the grounds for denial of the application.[8] In its answer, the Board cites § 335.066.1 and .2(1), (5), (12), and (14), and § 324.024 as grounds for denial.

Section 335.066 provides:

> 1. The board may refuse to issue . . . any . . . license required pursuant to chapter 335 for one or any combination of causes stated in subsection 2 of this section…
>
> 2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:
>
> (1) Use or unlawful possession of any controlled substance, as defined in chapter 195, or alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;
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> * * *
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> (5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the

[3] Section 621.045.
[4] Section 621.120, RSMo 2000.
[5] *Department of Soc. Servs. v. Mellas*, 220 S.W.3d 778 (Mo. App., W.D. 2007).
[6] *J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20 (Mo. banc 1990).
[7] *State Bd. of Regis'n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App., K.C.D. 1974).
[8] *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App., E.D. 1984).

functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;

* * *

(12) Violation of any professional trust or confidence;

* * *

(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

Section 335.066.2(1) and (14)—Violation of drug laws

Faulkner admitted to using, and tested positive for, amphetamines, a controlled substance. She did not have a valid prescription for amphetamines. Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess, or to have under his or her control, a controlled substance. Because Faulkner did not having a valid prescription for amphetamines, she unlawfully possessed a controlled substance in violation of § 195.202. Such unlawful possession is cause to deny her application for licensure pursuant to §§ 335.066.1 and 335.066.2(1) and (14).

Section 335.066.2(5)—Incompetency, Misconduct, and Gross Negligence

The Board argues that Faulkner's positive drug screen and her admissions on the application constitute incompetency, misconduct, and gross negligence. We agree as to incompetency and misconduct.

Incompetency is "a general lack of present ability or lack of disposition to use a present ability to perform a given duty."[9] It is not based on a single incident, or a series of incidents, but "is a state of being," showing that a professional is unable or unwilling to function properly in the profession.[10] Faulkner detailed her history with methamphetamine at the hearing, stating that she had been using the controlled substance off and on from 2004 until 2011. She tested positive for amphetamines while on duty as an LPN. She also failed to satisfy her probation

[9] *Tendai v. Missouri State Bd. of Registration for Healing Arts*, 161 S.W.3d 358, 369 (Mo. 2005) (overruled on other grounds by *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423 (Mo. 2009)).

[10] *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 436 (Mo. 2009).

requirements, including failing to contact the third-party administrator 75 days out of the 150 days she was on probation. Those facts show that her incompetency "is a state of being," rather than a single incident.

Misconduct means "the willful doing of an act with a wrongful intention[;] intentional wrongdoing."[11] Faulkner was illegally under the influence of a controlled substance while on duty as an LPN. She admits she made a mistake and was wrong. Faulkner also admits that the reason she did not call the third-party representative, as required by the settlement agreement, was because she had been using drugs recently and would have tested positive. We find that her actions of unlawfully possessing a controlled substance and violating her probation requirements were intentional and wrongful acts. Therefore, there is cause to deny her application for misconduct.

Gross Negligence is a deviation from professional standards so egregious that it "demonstrates a conscious indifference to a professional duty."[12] Ordinary negligence and gross negligence are not the same thing: "not every deviation from a profession's standard of care is gross negligence—professionals make mistakes that neither show conscious indifference to their duties nor gross deviations from their profession's standards."[13] Expert testimony is required to establish there has been a gross deviation from the standard of care.[14] The Board did not present any expert testimony regarding the standard of care, and we therefore find there is no cause to deny Faulkner's application for gross negligence.

There is cause to deny Faulkner's application for licensure pursuant to §§ 335.066.1 and 335.066.2(5) for incompetency and misconduct.

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[11] *Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm'n Nov. 15, 1985) at 125, *aff'd*, 744 S.W.2d 524 (Mo. App., E.D. 1988).

[12] *Duncan v. Missouri Bd. for Architects, Prof'l Engineers & Land Surveyors*, 744 S.W.2d 524, 533 (Mo. Ct. App. 1988).

[13] *Tendai*, 161 S.W.3d at 367.

[14] *Id.* at 368.

Section 335.066.2(12)—Professional Trust or Confidence

This Commission has previously cited two cases to define professional trust, *Trieseler v. Helmbacher*[15] and *Cooper v. Missouri Bd. of Pharmacy*.[16] However, these two cases do not specifically address professional trust or confidence. *Triesler* discussed general fiduciary relationships. *Cooper* stated that submission of false Medicaid claims supports a finding of a violation of professional trust. In *Cooper*, the Missouri Eastern District Court of Appeals did not provide a definition or standard for professional trust. Accordingly, *Trieseler* and *Cooper* have no precedential value here. The Missouri Western District Court of Appeals has also only held that certain actions violate professional trust.[17] In *Hill v. Missouri Dental Board*,[18] the Western District held that a dentist violated the professional trust imposed upon him by members of his profession, so we know that professional trust includes not only clients and patients, but also other members of the profession. Most recently, in *Luscombe v. Missouri State Bd. of Nursing*,[19] the Western District held the following:

> [W]hen a violation of professional trust is dependent upon proof of "special knowledge and skills" that are indistinguishable from the professional standards/standard of care necessary to establish "gross negligence," then said "special knowledge and skills," and the fact that deviation therefrom violates 'professional trust," must be established by expert testimony.[[[20]]

In this case, the Board has not distinguished "special knowledge and skills" from the professional standards necessary to establish "gross negligence." According to *Luscombe*, the Board must establish that the "special knowledge and skills" deviated from a standard of care

[15] 168 S.W.2d 1030 (Mo. 1943).

[16] 774 S.W.2d 501 (Mo. App., E.D. 1989).

[17] See *Kerwin v. Missouri Dental Bd.*, 375 S.W.3d 219 (Mo App. W.D. 2012) (holding dentist violated relationship of professional trust and confidence he formed with the parents of a child when he was only licensed in dentistry, but told the parents that he practived osteopathic medicine as well.); *Holdredge v. Missouri Dental Bd.*, 261 S.W.3d 690 (Mo. App. W.D. 2008) (violation of a professional trust can be based on discipline from another state).

[18] 726 S.W.2d 370 (Mo. App. W.D. 1987).

[19] 2013 WL 68899 (Mo. Ct. App. Jan. 8, 2013)

[20] Id. at 12.

through expert testimony. No expert was introduced in this case. Therefore, we do not find cause to deny Faulkner's application by examination under §§ 335.066.1 and 335.066.2(12).

Section 324.042

Section 324.042 provides:

> Any board, commission, or committee within the division of professional registration may impose additional discipline when it finds after hearing that a licensee, registrant, or permittee has violated any disciplinary terms previously imposed or agreed to pursuant to settlement. The board, commission, or committee may impose as additional discipline any discipline it would be authorized to impose in an initial disciplinary hearing.

We do not address § 324.042 today because it concerns discipline of a current license, rather than denial of a new license.

Discretion

Because Faulkner violated drug laws, and was incompetent and committed misconduct in her duties as an LPN, we may deny her application. "May" means an option, not a mandate.[21] The appeal vests in this Commission the same degree of discretion as the Board, and we need not exercise it in the same way.[22] The primary purpose of professional licensing is to protect the public.[23] But "the license granted places the seal of the state's approval upon the licen[see.]"[24] In applying our discretion, we evaluate all of the relevant facts and circumstances surrounding the disqualifying events, the responsibilities of the profession in question, the risk presented to consumers, and any rehabilitation of the applicant.

Faulkner has had a recurring issue with methamphetamine. At the hearing, Faulkner admitted that she relapsed and used methamphetamine for two weeks starting October 20, 2011.

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[21] *S.J.V. ex rel. Blank v. Voshage*, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993).
[22] *State Bd. of Regis'n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App., K.C.D. 1974).
[23] *Lane v. State Comm. of Psychologists*, 954 S.W.2d 23, 25 (Mo. App., E.D. 1997).
[24] *State ex rel. Lentine v. State Bd. of Health*, 65 S.W.2d 943, 950 (Mo. 1933).

She has not completed any drug treatment program and has not shown that she has been rehabilitated; therefore, we deny her application.

Summary

There is cause to deny Faulkner's application pursuant to §§ 335.066.1 and 335.066.2(1), (5), and (14). We exercise our discretion and deny her license.

SO ORDERED on April 12, 2013.

/s/ Nimrod T. Chapel, Jr.
NIMROD T. CHAPEL, JR.
Commissioner