Before the
Administrative Hearing Commission
State of Missouri

STATE BOARD OF NURSING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11-0608 BN
	)	
GAIL LERNER-CONNAGHAN,	)	
	)	
Respondent.	)	

DECISION

Gail Lerner-Connaghan is not subject to discipline.

Procedure

On April 8, 2011, the State Board of Nursing ("Board") filed a complaint seeking this Commission's decision that cause exists to discipline Lerner-Connaghan's license as a registered nurse ("RN"). On April 15, 2011, Lerner-Connaghan was served with a copy of the complaint and our notice of complaint/notice of hearing by certified mail. On May 2, 2011, Lerner-Connaghan filed her answer.

On March 28, 2013, we held a hearing on the complaint. Lara Underwood of Cotton Walker & Associates represented the Board. David R. Bohm of Danna McKitrick, PC represented Lerner-Connaghan. This matter became ready for our decision on July 11, 2013, when the last written argument was filed.

Findings of Fact

1. Lerner-Connaghan is licensed by the Board as an RN and was so at all times relevant to these findings.

2. Lerner-Connaghan is recognized by the Board as an advanced practice registered nurse ("APN") and was so at all times relevant to these findings.

3. Lerner-Connaghan is certified by the American Nurse Credentialing Center ("ANCC") as an adult psychiatric/mental health nurse practitioner and was so at all times relevant to these findings. ANCC is recognized by the Board as an acceptable certifying body and was so at all times relevant to these findings.

4. Lerner-Connaghan did not have a collaborative practice arrangement with a licensed physician at any time relevant to these findings.

5. In 1998, Patient V.S. was referred to Lerner-Connaghan by a licensed physician for regressive therapy treatment.

6. In 2006, Lerner-Connaghan made the decision to end regressive therapy treatment for Patient V.S. She made the decision to continue to provide other treatment, including psychotherapy, for this patient until 2008. Lerner-Connaghan did not diagnose Patient V.S. Instead, she simply changed treatment based on the initial diagnosis by a licensed physician.

7. The treatment performed by Lerner-Connaghan fell within the professional scope of an adult psychiatric/mental health nurse practitioner under ANCC certification.

8. The treatment performed by Lerner-Connaghan is within the scope of practice of an APN when in a collaborative practice arrangement with a licensed physician.

9. Lerner-Connaghan believed at all times that her treatment of Patient V.S. fell within the scope of practice for an APN.

Conclusions of Law

We have jurisdiction to hear the case.[1] The Board has the burden of proving that Lerner-Connaghan has committed an act for which the law allows discipline.[2] The Board alleges that there is cause for discipline under § 335.066:

> 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:
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> * * *
>
> (5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;
>
> * * *
>
> (12) Violation of any professional trust or confidence[.]

Lerner-Connaghan provided treatment to Patient V.S. without a collaborative practice arrangement. The Board claims that Lerner-Connaghan violated 20 CSR 2200-4.200(3)(F)[3] by treating V.S. without a collaborative practice arrangement. Lerner-Connaghan counters that she was not required to be in a collaborative practice arrangement because she practiced within the scope of an adult psychiatric/mental health nurse practitioner under ANCC certification. She further argues that such conduct is allowed by 20 CSR 2200-4.100(5)(A)2.

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[1]Section 621.045. Statutory references are to RSMo. Supp. 2012 unless otherwise noted.

[2]***Missouri Real Estate Comm'n v. Berger***, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

[3] All references to "CSR" are to the code of state regulations current as of March 30, 2007. These were the regulations in effect at all times relevant to the findings of this decision.

Regulations 20 CSR 2200-4.100 and 20 CSR 2200-4.200 provide:

> **20 CSR 2200-4.100 Advanced Practice Nurse**
>
> (5) Scope of Practice.
>
> (A) Registered professional nurses recognized by the Missouri State Board of Nursing as being eligible to practice as advanced practice nurses shall function clinically—
>
> * * *
>
> 2. Within the professional scope and standards of their advanced practice nursing clinical specialty area and consistent with their formal advanced nursing education and national certification, if applicable, or within their education, training, knowledge, judgment, skill, and competence as registered professional nurses.
>
> **20 CSR 2200-4.200 Collaborative Practice**
>
> (3) Methods of Treatment.
>
> * * *
>
> (F) The methods of treatment, including any authority to administer or dispense drugs, delegated in a collaborative practice arrangement between a collaborating physician and a collaborating registered professional nurse shall be delivered only pursuant to a written agreement, jointly agreed-upon protocols, or standing orders that shall describe a specific sequence of orders, steps, or procedures to be followed in providing patient care in specified clinical situations.

Lerner-Connaghan asks that we find 20 CSR 2200-4.100(5)(A)2 applies in this situation rather than 20 CSR 2200-4.200(3)(F). However, all consistent laws relating to the same subject are *in pari materia*; that is, they are construed together and are intended to be read consistently and harmoniously.[4] Therefore, we conclude that both 20 CSR 2200-4.100(5)(A)2 and 20 CSR 2200-4.200(3)(F) apply here. While 20 CSR 2200-4.100(5)(A)2 allows Lerner-Connaghan to

[4] ***In re C.A.D.***, 995 S.W.2d 21, 29 (Mo. App., W.D. 1999).

provide regressive therapy treatment, psychotherapy treatment, and other treatments to Patient V.S. because such practice falls within the professional scope of an adult psychiatric/mental health nurse practitioner under ANCC certification, 20 CSR 2200-4.200(3)(F) requires that she perform such treatment under a collaborative practice arrangement with a licensed physician.

We agree with the Board that Lerner-Connaghan practiced without a collaborative practice arrangement in violation of 20 CSR 2200-4.200(3)(F). As such, we would have found a cause to discipline Lerner-Connaghan under § 335.066.2(6). However, the Board failed to allege that there was cause for discipline under this subsection in its complaint.

Professional Standards – Subdivision (5)

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation.[5] We follow the analysis of incompetency in a disciplinary case from the Supreme Court, ***Albanna v. State Bd. of Reg'n for the Healing Arts***.[6] Incompetency is a "state of being."[7] The disciplinary statute does not state that licensees may be subject to discipline for "incompetent" acts. Lerner-Connaghan treated Patient V.S. for ten years. She began this treatment on the referral of a physician and she believed that she was practicing within the scope of an APN. Despite her belief, she violated 20 CSR 2200-4.200(3)(F) by providing this treatment without entering into a collaborative practice arrangement with a licensed physician. While her conduct is a violation of a regulation, no evidence was provided to demonstrate that Lerner-Connaghan lacked professional ability as an APN in her actual treatment of Patient V.S. We do not find that Lerner-Connaghan acted with incompetency.

[5] ***Tendai v. Missouri State Bd. of Reg'n for the Healing Arts***, 161 S.W.3d 358, 369 (Mo. banc 2005).
[6] 293 S.W.3d 423 (Mo. banc 2009).
[7] *Id*. at 435.

Misconduct means "the willful doing of an act with a wrongful intention[;] intentional wrongdoing."[8] Lerner-Connaghan's violation of 20 CSR 2200-4.200(3)(F) was not willful because she believed she practiced within the scope of an APN. She did not commit misconduct.

Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty.[9] Gross negligence requires the licensee's conscious indifference to a professional duty or standard of care. Before determining whether there was gross negligence, we examine whether there was negligence. [10] Negligence is defined as "the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of [the] . . . profession."[11] The Board provided no evidence that Lerner-Connaghan failed to use the degree of skill and learning ordinarily used by an APN in her treatment of Patient V.S. Therefore, Lerner-Connaghan's conduct is not negligent. Accordingly, we do not find Lerner-Connaghan committed gross negligence.

Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him.[12] It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive.[13] Lerner-Connaghan's violation of 20 CSR 2200-4.200(3)(F) was not intentional or committed with a disposition to defraud or deceive because she believed she practiced within the scope of an APN. She did not commit fraud or act with dishonesty.

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[8] ***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).

[9] *Id*.

[10] Although this is not a separate cause for discipline, we consider the "negligence" standard to compare it with the "gross negligence" standard.

[11] ***Hickman v. Branson Ear, Nose & Throat, Inc.***, 256 S.W.3d 120, 122 (Mo. banc 2008).

[12] ***State ex rel. Williams v. Purl***, 128 S.W. 196, 201 (Mo. 1910).

[13] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.[14] Lerner-Connaghan's violation of 20 CSR 2200-4.200(3)(F) was not a falsehood or untruth. She did not make a misrepresentation.

Lerner-Connaghan is not subject to discipline under § 335.066.2(5).

Professional Trust – Subdivision (12)

The phrase "professional trust or confidence" is not defined in Chapter 335. Nor has the phrase been defined in case law (which we will discuss below). Absent a statutory definition, the plain meaning of words used in a statute, as found in the dictionary, is typically relied on.[15] The dictionary definition of "professional" is:

> of, relating to, or characteristic of a profession or calling…[;]… engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency…[; and]…characterized or conforming to the technical or ethical standards of a profession or an occupation….[[16]]

The dictionary definition of "Trust" is:

> assured reliance on some person or thing [;] a confident dependence on the character, ability, strength, or truth of someone or something…[.][[17]]

"Confidence" is a synonym for "trust."[18] Trust "implies an assured attitude toward another which may rest on blended evidence of experience and more subjective grounds such as knowledge, affection, admiration, respect, or reverence[.]"[19] Confidence "may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the

[14] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY at 794.
[15] ***E&B Granite, Inc. v. Director of Revenue***, 331 S.W.3d 314, 318 (Mo. banc 2011).
[16] WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 1811 (1986).
[17] *Id.* at 2456.
[18] *Id.* at 475 and 2456.
[19] *Id.* at 2456.

subjective[.]"[20] The Board did not present evidence as to how Lerner-Connaghan failed to uphold this assured reliance in her treatment of Patient V.S. Accordingly, we do not find that Lerner-Connaghan violated a professional trust. She is not subject to discipline under § 335.066.2(12).

Summary

Lerner-Connaghan is not subject to discipline under § 335.066.2(5) or (12).

SO ORDERED on September 20, 2013.

\s\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner

[20] WEBSTER'S THIRD NEW INT'L DICTIONARY UNABRIDGED 2456.