

Before the
Administrative Hearing Commission
State of Missouri



STATE BOARD OF NURSING,)	
)	
Petitioner,)	
)	
vs.)	No. 13-1886 BN
)	
SUSAN D. BROWN,)	
)	
Respondent.)	

DECISION

Susan D. Brown is subject to discipline because she tested positive for alcohol while at work.

Procedure

On November 1, 2013, the State Board of Nursing (“the Board”) filed a complaint seeking to discipline Brown. Brown was served with a copy of the complaint and our notice of complaint/notice of hearing by certified mail on November 9, 2013. She filed an answer on December 3, 2013.

We held a hearing on June 25, 2014. Rodney P. Massman represented the Board. David F. Barrett represented Brown, who also appeared in person. The case became ready for our decision on October 3, 2014, the date the last written argument was due.

Findings of Fact

1. Brown is licensed as a registered professional nurse (RN). Her license was current and active at all times relevant herein.
2. On February 15, 2012, Brown was working for Pathways Community Hospice in Chesterfield, Missouri (Pathways) as an RN case manager.
3. RN case managers working for Pathways were responsible for the care of 8 to 10 patients that were seen by the case manager in the patient's residential setting (home or a nursing facility) 2 or 3 times per week.
4. On February 15, 2012, Brown was in the Pathways office at approximately 10:00 a.m. for a meeting, having already seen a hospice patient earlier in the morning, in the ordinary course of her work day.
5. At the time, Leah Dobrynski worked at Pathways as the director of clinical services. Dobrynski was not Brown's immediate supervisor, but she was the director of the department in which Brown worked.
6. While she was interacting with Brown, at around 10:00 a.m., Dobrynski smelled the strong odor of what Dobrynski described as "minty alcohol" on Brown's breath and observed that Brown's face had a ruddy appearance and her nose was red.
7. Another staff member at Pathways contacted Concentra, which dispatched Randy Meoli, a drug screen breath technician from Guardian Medical. Guardian Medical was the subcontractor for Concentra responsible for on-site breath testing of employees of various organizations.
8. When Meoli arrived at the Pathways office, Brown was removed from the staff meeting and asked to consent to a breath test, which she did.
9. Meoli administered two breath tests to Brown, 15 minutes apart.

10. Between the first and second breath tests, Brown admitted to Dobrynski that she had consumed mouthwash.

11. The instrument used to test Brown's breath was assigned to Meoli for his use by Guardian Medical. Nothing unusual had happened to the machine around the time Meoli tested Brown's breath; the machine had been calibrated on February 13, 2012, and it was functioning properly on the date the tests were administered to Brown.

12. According to Brown's breath tests on Meoli's machine, her blood alcohol level was .231 on the first blow and .224 on the second blow 15 minutes later.

13. Brown drove away from the Pathways office after the testing, but returned later that day, and she was terminated.

14. In a notarized statement Brown made to the Board, dated March 16, 2012, Brown admitted to drinking mouthwash to control her anxiety and depression and to help her sleep and that she had been hospitalized for several days after her termination from Pathways.

Conclusions of Law

We have jurisdiction to hear the case.¹ The Board has the burden of proving that Brown 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:

(1) Use or unlawful possession of any controlled substance, as defined in chapter 195, or alcoholic beverage to an extent that such

¹Section 621.045. Statutory references are to RSMo Supp. 2011.

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

use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

* * *

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance or 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[.]

Alcohol – Subdivision (1)

Brown tested positive for the presence of alcohol in her blood and admitted to the ingestion of mouthwash on the morning that she was terminated from Pathways. While the Board did not supply us with much in the way of admissible evidence of Brown's behavior leading up to termination, we find the conclusion that Brown was too impaired to ably carry on the work of an RN to be inescapable.

Brown admitted in her sworn statement to the Board that she was using the mouthwash a couple of times during the day to control her anxiety and at night in order to sleep. According to her statement, after she left Pathways on the day of her termination, she was admitted to the hospital for several days. As the Board points out, the legal limit for blood alcohol content while operating a motor vehicle in this state is eight hundredths of a percent,³ after having been reduced from ten hundredths of a percent in 2001 as a matter of public safety. On February 15, 2011, while she was at work, Brown's breath test showed that the content of alcohol in her blood was 22 to 23 hundredths of a percent, or nearly three times the legal limit for driving. We find this to be sufficient evidence of impairment.⁴ Brown was certainly well over the legal limit to

³ Section 577.037.

⁴ In a prior decision, with similar facts, *State Board of Respiratory Care v. Ross Samples* (No. 11-1941 RC), we did not find cause for discipline. However, we distinguish this case from *Samples* by the severity of the intoxication in this case, .224 rather than .087.

drive a car, which was part of her duties as a residence-based hospice nurse, and we believe her to have been in no condition to give and take information in the context of a staff meeting, the duty she was performing when removed and administered the chemical breath test.

Regardless of the form in which Brown ingested it, she used alcohol to the extent of impairment of her ability to be an effective and competent part of any nursing staff.

There is cause to discipline Brown under § 335.066.2(1).

Misconduct/Dishonesty – Subdivision (5)

The Board's complaint couched its allegation of cause for discipline against Brown under § 335.066.2(5) as being due to dishonesty in the performance, functions or duties of her profession. But in the post-hearing written argument, the Board took a different approach, arguing that Brown was subject to discipline under this subdivision on the basis of misconduct in the performance of her job. We find that neither of these theories applies to Brown's behavior on the record we have before us.

We note that dishonesty, by definition, is a disposition to defraud, deceive or betray.⁵ Although Brown did not testify at the hearing, we discern from her statements to Pathways personnel and to the Board about the events of February 15, 2012 that she was forthcoming about her consumption of mouthwash to help her cope with anxiety and insomnia. We do not find that Brown was dishonest in her performance at work.

As for the argument that the facts demonstrate that Brown engaged in misconduct, we note that misconduct means "the willful doing of an act with a wrongful intention[;] intentional wrongdoing."⁶ We cannot say that there is a preponderance of evidence that Brown engaged in intentional wrongdoing. While we find it extremely troubling that Brown was so oblivious to the fact that drinking mouthwash produces intoxication and impairment, we cannot find that the

⁵ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 650 (unabr. 1986).

⁶ *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).

Board has presented evidence that Brown was intentionally engaging in wrongdoing at the time she was asked to submit to the breath test at the office at Pathways. Therefore, we find no cause to discipline Brown under § 335.066.2(5).

Professional Trust – Subdivision (12)

Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.⁷ It may exist not only between the professional and her clients, but also between the professional and her employer and colleagues.⁸ Brown’s employer, colleagues, and patients relied on Brown to be free of the influence of alcohol while at work. While there is no evidence of actual harm arising from this instance of Brown’s impairment at work, the potential for impairment and disaster exists when one is intoxicated while providing health care. We believe that licensure as an RN evidences a level of training, specialized knowledge and skills that would permit Brown’s patients, employer and colleagues to rely on her not to consume intoxicants and become impaired while performing the functions and duties of her profession. Therefore, Brown failed to uphold a professional trust when she tested positive for alcohol while on duty as an RN.

She is subject to discipline under § 335.066.2(12).

Summary

Brown is subject to discipline under § 335.066.2(1) and (12).

SO ORDERED on December 23, 2014.

\\ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner

⁷*Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

⁸*Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App., E.D. 1989).