

Before the  
Administrative Hearing Commission  
State of Missouri



MISSOURI STATE BOARD OF NURSING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 14-1787 BN
	)	
THERESA WALTER,	)	
	)	
Respondent.	)	

**DECISION**

We grant the Missouri State Board of Nursing’s (“Board”) motion for summary decision, which we deem to be a motion for decision on the pleadings, and find Theresa Walter is subject to discipline for unlawful possession of a controlled substance.

**Procedure**

On November 14, 2014, the Board filed a complaint seeking this Commission’s determination that Walter is subject to discipline. On November 17, 2014, Walter was served with a copy of the complaint and our notice of complaint/notice of hearing. On December 10, 2014, Walter filed her answer. On December 11, 2014, the Board filed a motion for summary decision, which we take to be a motion for decision on the pleadings because the Board provided no evidence and simply referred to Walter’s answer as the basis for granting its motion. We gave Walter until December 29, 2014 to respond to the motion, but she did not respond.

## Findings of Fact

1. Walter was licensed by the Board as a licensed practical nurse (“LPN”) at all relevant times.
2. On January 16, 2014, while on duty as an LPN, Walter submitted to a random drug screen administered by her employer.
3. Walter informed her employer that she might test positive for tetrahydrocannabinol (“THC”). Such a test result would indicate that Walter had consumed marijuana<sup>1</sup> sometime in the past.
4. Walter tested positive for THC.

## Conclusions of Law

We grant a motion for a decision on the pleadings when the adverse party’s pleadings establish facts that entitle any party to a favorable decision and no party raises a genuine issue as to such facts.<sup>2</sup> Walter admitted all of the factual allegations set forth in the complaint. But statutes and case law instruct that we must “separately and independently” determine whether such facts constitute cause for discipline.<sup>3</sup> Therefore, we independently assess whether the facts admitted allow discipline under the law cited. The Board argues 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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<sup>1</sup> Marijuana is a Schedule I controlled substance pursuant to § 195.017.2(4)(w). All statutory references are to the Revised Statutes of Missouri Cumulative Supplement 2013 unless otherwise noted.

<sup>2</sup> 1 CSR 15-3.446(4). All references to “CSR” are to the Missouri Code of State Regulations as current with amendments, included in the Missouri Register through the most recent update.

<sup>3</sup> *Kennedy v. Missouri Real Estate Commission*, 762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988).

(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;

\* \* \*

(6) Misconduct, fraud, misrepresentation, dishonesty, unethical conduct, or unprofessional conduct in the performance of the functions or duties of any profession licensed or regulated by this chapter[;]

\* \* \*

(13) Violation of any professional trust or confidence;

\* \* \*

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

Controlled Substances – Subdivisions (1) and (15)

Walter tested positive for THC, indicating she consumed marijuana at some point in time.

Section 195.202 provides:

Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.

Section 324.041 provides:

For the purpose of determining whether cause for discipline or denial exists under the statutes of any board, commission, or committee within the division of professional registration, any licensee, registrant, permittee, or applicant that tests\* positive for a controlled substance, as defined in chapter 195, is presumed to have unlawfully possessed the controlled substance in violation of the drug laws or rules and regulations of this state, any other state, or the federal government unless he or she has a valid prescription for the controlled substance. The burden of proof that the controlled substance was not unlawfully possessed in violation of the drug laws or rules and regulations of this state, any other state, or the federal government is upon the licensee, registrant, permittee, or applicant.

Walter tested positive for the controlled substance and did not provide proof of legal possession. We find that Walter unlawfully possessed marijuana in violation of § 195.202. Such unlawful possession is cause to discipline her license under § 335.066.2(1) and (15).

Professional Standards – Subdivision (6)

In its complaint, the Board limits its allegations under this subdivision to misconduct, misrepresentation, dishonesty, unethical conduct, and unprofessional conduct. Therefore, we limit our analysis under this subdivision to these issues.

Misconduct means “the willful doing of an act with a wrongful intention[;] intentional wrongdoing.”<sup>4</sup> We may infer the requisite mental state from the conduct of the licensee “in light of all surrounding circumstances.”<sup>5</sup> Also, direct evidence of intent is rarely susceptible to direct proof and therefore must generally be established by circumstantial evidence.<sup>6</sup> Walter, in her answer, asserts that she was not aware that marijuana was present in food she was served and subsequently consumed. We find this difficult to believe and deem she committed misconduct.

Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.<sup>7</sup> Walter made no false or untrue statements, and the Board does not allege that in the complaint. Therefore, Walter made no misrepresentations.

Dishonesty is a lack of integrity or a disposition to defraud or deceive.<sup>8</sup> Walter did not act in a manner to defraud or deceive, and the Board did not allege such conduct in the complaint. Walter did not act with dishonesty.

Unethical conduct and unprofessional conduct include “any conduct which by common opinion and fair judgment is determined to be unprofessional or dishonorable.”<sup>9</sup> “Ethical”

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<sup>4</sup>*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).

<sup>5</sup> *Duncan*, 744 S.W.2d at 533.

<sup>6</sup> *State v. Agee*, 37 S.W.3d 834, 837 (Mo. App., S.D. 2001)

<sup>7</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 794 (11<sup>th</sup> ed. 2004).

<sup>8</sup> *Id.* at 359.

<sup>9</sup> *Perez v. Missouri Bd. of Regis'n for the Healing Arts*, 803 S.W.2d 160, 164 (Mo. App., W.D. 1991).

relates to moral standards of professional conduct.<sup>10</sup> With respect to the definition of “unprofessional conduct,” the Missouri Supreme Court criticized that definition, calling it “circular,” and stated:

This Court interprets “unprofessional conduct” in this case to refer, first, to the specifications of the matters “including, but not limited to” these 17 grounds specified in as subparagraphs (a)-(q) of section 334.100.2(4).<sup>11]</sup>

The Board alleged no facts in its complaint, and did not provide evidence to support, that Walter failed to uphold the moral standards of an LPN in her professional conduct. Therefore, we do not find that Walter conducted herself unethically. The Board also failed to allege facts, or provide evidence to support, that Walter conducted herself unprofessionally.

While we find that Walter committed misconduct, this subdivision requires that such misconduct be “in the performance of the functions or duties of [an LPN].” The Board failed to allege facts, and provided no evidence to support, that Walter’s misconduct took place in the performance of her functions and duties as an LPN. There is no cause for discipline under § 335.066.2(6).

#### Professional Trust – Subdivision (13)

Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.<sup>12</sup> It may exist not only between the professional and her patients, but also between the professional and her employer and colleagues.<sup>13</sup> The Board alleged no facts, and provided no evidence to support, that Walter violated the reliance of others on her special knowledge or skills. She is not subject to discipline under § 335.066.2(13).

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<sup>10</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 429 (11<sup>th</sup> ed. 2004).

<sup>11</sup> *Albanna v. State Bd. of Regis’n for the Healing Arts*, 293 S.W.3d 423, 431 (Mo. banc 2009).

<sup>12</sup> *Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

<sup>13</sup> *Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App., E.D. 1989).

## Summary

Walter is subject to discipline under § 335.066.2(1) and (15). We cancel the hearing.

SO ORDERED on January 2, 2015.

*\s\ Sreenivasa Rao Dandamudi*  
SREENIVASA RAO DANDAMUDI  
Commissioner