

Before the
Administrative Hearing Commission
State of Missouri



STATE BOARD OF NURSING,)	
)	
Petitioner,)	
)	
vs.)	No. 12-1910 BN
)	
NIKKI LYN CLARK,)	
)	
Respondent.)	

DECISION

Nikki Lyn Clark is subject to discipline because she unlawfully possessed controlled substances and pled guilty to felony possession of controlled substances. She is not subject to discipline for misconduct, gross negligence, dishonesty, or violation of a professional trust or confidence.

Procedure

The State Board of Nursing (“Board”) filed a complaint on October 24, 2012, seeking this Commission’s determination that cause exists to discipline Clark’s license as a registered professional nurse (“RN”). While the Board failed to inform us when or how Clark was served or otherwise notified of its complaint against her,¹ Clark filed her answer to the complaint on February 26, 2013.

¹ After attempts to serve Clark by certified mail failed, the Board asked for, and we forwarded to it, our personal service packet. However, no return of service was ever filed.

This Commission convened a hearing on the complaint on April 11, 2013. Rodney P. Massman represented the Board. Clark appeared, *pro se*, by telephone.

The matter became ready for our decision on July 3, 2013, the date Clark's brief was due.

Findings of Fact

1. Clark is licensed by the Board as an RN. Her license was current and active at all times relevant to these findings.

2. At all relevant times until she was fired from her job on September 15, 2010, Clark was employed as an RN by Poplar Bluff Regional Medical Center ("PBRMC"), in Poplar Bluff, Missouri.

3. For an indeterminate period before August 27, 2010, Clark was carrying empty vials, bottles, syringes, and needles from PBRMC. She did this because, at times, she could not find or operate PBRMC's "carat"² system, which was intended to document such things as when medications were administered to patients and when medications were wasted. When Clark could not find a carat in order to waste the un-administered medication, she put the empty vial in her pocket or somewhere where she could remember to scan it later when a carat became available.

4. On occasion, Clark would not dispose of the items she should have wasted before she left work, so they stayed in her pocket when she left.

5. After carrying them out of PBRMC, Clark would transfer those items to a second purse, rather than keep them in the purse in which she carried her personal belongings.

² Noted by the court reporter as a phonetic spelling. Neither party gave any further information as to the system's actual name.

6. On the morning of August 27, 2010, Clark left home to drive to work at PBRMC. She did this even though previously that morning she had taken Soma³ and hydrocodone. Clark was going to work because a supervisor had called her several times that morning to ask her to come in to work, even though Clark informed the supervisor that she had taken a muscle relaxant and a pain medication.

7. Later that morning, Trooper N.L. Wheelles of the Missouri State Highway Patrol received a radio message that an erratic driver was spotted driving westbound on U.S. Highway 60 at Route T. He spotted the vehicle described in the message (which was being driven by Clark) and started following it. He noticed that Clark was driving in the grass as she drove on an exit ramp, returned to the road, but then started weaving from one edge of the road to the other. Clark approached a well-marked road construction zone that included a command to move to the left lane. However, Clark stayed in the right lane and began to accelerate. Clark swerved to the left at the last second, missing numerous construction signs by five to ten feet. There were construction workers working at the site, but most of them were working on the other side of the median.⁴

8. After Wheelles and Clark were clear of the construction site, Wheelles activated his emergency lights and siren, but Clark did not stop or slow down for over a minute, until she

³ Clark used the words “carisoprodol” and “Soma” interchangeably. Soma is a trademark for combination preparations of carisoprodol and aspirin. *Dorland’s Illustrated Medical Dictionary* 1734 (32nd ed. 2012). Carisoprodol is not a controlled substance under Missouri law. See § 195.017. Hydrocodone is a Schedule II controlled substance. Section 195.017.4(1)(a)j. Statutory references are to RSMo Supp. 2012 unless otherwise noted.

⁴ Probable cause statement of Trooper N.L. Wheelles, Board Exhibit A, Ex. 1, pp. 11-12. We note that this “Exhibit A” was filed as a business record of the Board, with the requisite affidavit of the Board’s Executive Director. However, Trooper Wheelles’s probable cause statement was not, as of itself, a record of the Board, and thus would be objectionable as hearsay. See *State v. Kreutzer*, 928 S.W.2d 854, 868 (Mo. banc 1996) (business records only non-hearsay if either based on business’ entrant’s observations or on information of others with business duty to transmit it to the entrant). The same could be said of several other documents included in the Board’s Exhibit A, such as the lab reports of the Highway Patrol’s crime lab and of LabCorp, which tested Clark’s urine on PBRMC’s behalf. However, § 536.070(8) requires us to consider any evidence of probative value if we receive it without objection, and Clark did not object to the evidence.

moved into a center left turn lane and came to a stop. Wheelles got out of his vehicle to approach Clark's vehicle, but Clark took off, turned left, and drove into a store parking lot, where she stopped. Wheelles had been behind Clark's vehicle with emergency equipment activated for two minutes before Clark finally stopped.

9. Wheelles had Clark step out of the vehicle, which she did. Clark was wobbling, unsteady, jittery, and appeared lethargic. Wheelles asked Clark what alcohol or drugs she had taken, and Clark said she had taken a Soma and hydrocodone. Wheelles then asked Clark if she was going to work. Clark initially denied that she was, but Wheelles later determined that she was going to work when she was stopped.

10. Wheelles gave several field sobriety tests to Clark, which she failed. She lost her balance easily while trying to perform the tests, and she swayed too much for Wheelles to see the nystagmus. After taking the tests, Clark admitted to Wheelles that she should not have been driving in her condition. Wheelles arrested and handcuffed Clark.

11. Wheelles asked Clark for permission to search her car. Her first response was to ask if Wheelles had a warrant (he did not), but then she gave her consent to the search. Wheelles found two purses on the passenger seat of Clark's car. One purse contained her driver's license and other common items, while the other purse contained ten syringes, three needles, nine vials labeled as containing morphine,⁵ three vials labeled as containing fentanyl,⁶ one vial labeled as containing lorazepam,⁷ one vial labeled as containing diazepam,⁸ one bottle labeled as containing morphine sulfate, and one saline flush.

12. When Wheelles asked Clark why she had left PBRMC with the items, she responded that she had just put the items in her pocket and accidentally left with the items. When Wheelles

⁵ Morphine is a Schedule II controlled substance. Section 195.017.4(1)(a)m.

⁶ Fentanyl is a Schedule II controlled substance. Section 195.017.4(2)(i).

⁷ Lorazepam is a Schedule IV controlled substance. Section 195.017.8(2)(n).

⁸ Lorazepam is a Schedule IV controlled substance. Section 195.017.8(2)(bb).

asked Clark why she did not return the items the next day, she said she did not want PBRMC personnel to think that she was stealing from them. She explained later that she had kept the items in the second purse so as not to mix them with her personal belongings, and that she had accumulated them over five or six shifts.

13. After arresting Clark, Wheelles took the vials, bottle, and other items to PBRMC, where an employee identified them as PBRMC's property. Then Wheelles took the vials and the bottle to the Highway Patrol's crime lab for testing.

14. After her arrest, but while in custody on August 27, 2010, Clark gave a urine sample.

15. On August 30, 2010, hospital officials met with Clark regarding discrepancies in her narcotic reports over the prior two months. A written report prepared by Denise Rushin that discussed the meeting referred to "numerous inconsistencies in Ms. Clark's report vs. her charting and drug administration."⁹ The report also quoted Clark as saying "she could not explain why she would pull Vicodin^[10] more than once for the same patient within 30 minutes but that she could assure us that she was not stealing drugs."¹¹ The report further stated that hospital personnel "repeatedly gave Ms. Clark the chance to tell us if she had taken any drugs from the facility," but that "she stated that she had only taken empty vials home in her pocket on accident and that all of those were returned and disposed of."¹² Also on August 30, 2010, Clark gave another urine sample while at PBRMC, which PBRMC had tested.

16. On September 9, 2010, an assistant prosecuting attorney for Butler County filed a complaint against Clark, charging her with possession of a controlled substance in violation of

⁹ Ex. A, Ex. 3. See subheading below, "...lying to hospital officials about the existence of such stolen medications when she was initially confronted about it[.]" in our conclusions of law, regarding the Board's failure to present any further evidence on this matter, or to make any argument based on it.

¹⁰ Vicodin is a trademark for combination preparations of hydrocodone bitartrate and acetaminophen. Dorland's Illustrated Medical Dictionary 2055 (32nd ed. 2012).

¹¹ Ex. A., Ex. 3.

¹² *Id.*

§ 195.202. The complaint further alleged that, on or about August 27, 2010, Clark possessed morphine, knowing of its presence and nature.

17. On September 15, 2010, Clark was terminated from employment with PBRMC.

18. On November 16, 2010, the Highway Patrol's crime lab issued a report, showing that Clark's urine had tested positive for carisoprodol, meprobamate, hydrocodone, and dihydrocodeine. All except carisoprodol are controlled substances.¹³

19. On November 23, 2010, the prosecuting attorney of Butler County filed an information against Clark, charging her with possession of a controlled substance in violation of § 195.202, further alleging that on August 27, 2010, Clark possessed morphine, knowing of its presence and nature.

20. On an unknown date,¹⁴ a company named LabCorp issued a report of its findings of substances found in Clark's urine sample that she gave on August 30, 2010. The copy of the report as provided to us consists of only one page, but the words "Page 1 of 2" are typed on the bottom of that page. That page reported that Clark's urine had tested positive for Oxazepam (which was identified as a benzodiazepine) and Propoxyphene. It also reported that Clark's urine had tested negative for opiates that included codeine, morphine, hydromorphone, and hydrocodone.

21. On December 7, 2010, the Highway Patrol's crime lab issued a report regarding the vials and bottle seized by Trooper Wheelles. The report states that the vials and bottle were "labeled to contain" morphine, diazepam, and lorazepam, that they were "commercially sealed and not confirmed," and that some of them were empty, while the others contained either residue

¹³ Sections 195.017.4(1)(aj) (Hydrocodone); 195.017.4(2)(e) (dihydrocodeine); 195.017.8(2)(ff) (Meprobamate).

¹⁴ All the dates on the document are illegible.

or liquid residue. The report said nothing about what substance(s) the residue might have been and did not mention fentanyl.

22. On December 7, 2010, Clark pled guilty to the charge of possession of a controlled substance and received a sentence of three years' supervised probation, with the imposition of sentence being suspended. Neither the judgment of conviction nor any of the other documentation provided to us contained any information regarding whether Clark admitted, or whether the sentencing court otherwise found, precisely what controlled substance Clark had possessed.

Conclusions of Law

We have jurisdiction to hear the case.¹⁵ The Board has the burden of proving that Clark has committed an act for which the law allows discipline.¹⁶ The Board alleges that there is cause for discipline under the following provisions of § 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 use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

(2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution pursuant to the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated pursuant to sections 335.011 to 335.096, for any offense an essential element of which is fraud, dishonesty or an act of violence, or for

¹⁵ Section 621.045. Statutory references are to RSMo Supp. 2012 unless otherwise indicated.

¹⁶ *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

any offense involving moral turpitude, whether or not sentence is imposed;

* * *

(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;

* * *

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

Controlled Substances – Subdivisions (1) and (14)

What controlled substance(s) did Clark possess?

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.

In asserting grounds for discipline under subdivisions (1) and (14), which when read together require only that a nurse possess a controlled substance, the Board's brief only overtly asserts that Clark possessed morphine. In doing so, the Board appears to pass up the low-hanging fruit of the five controlled substances actually found in Clark's urine over the four-day period of August 27-30, 2010. We shall return to those other substances later.

Clark's possession of morphine

The objective (scientific, documentary, and first-person observation) evidence presented to us makes, at best, a dubious case for morphine possession. That evidence is:

- Clark possessed nine vials labeled to contain morphine and a bottle labeled to contain morphine sulfate on the morning of August 27, 2010. The Highway Patrol crime lab's

report describes those containers as follows: they were commercially sealed and “not confirmed;” (b) they were labeled to contain morphine; (c) three of the vials were empty; and (d) the other vials and the bottle contained liquid residue;

- Clark was charged in the circuit court of Butler County with possession of a controlled substance (morphine), by complaint filed September 9, 2010 and by information filed November 23, 2010;
- Clark pled guilty to the charge on December 7, 2010, but the judgment of conviction says nothing about the substance Clark possessed, and if Clark allocuted to the offense, we have no record of it;
- Clark’s urine was tested twice, on August 27 and August 30, 2010, and while she tested positive for carisoprodol, meprobamate, hydrocodone, dihydrocodeine, Oxazepam, and Propoxyphene in those tests, the only reference to morphine in the reports of those tests was in the August 30 test, which specifically reported no morphine in her urine.

Were we to stop here, we would have difficulty finding that Clark did not possess morphine, based on the objective evidence. But the Board points us to what Clark said at the hearing, which we reproduce here:

Q (Mr. Massman) So you were represented by an attorney in your Butler County possession case, right?

A (Clark) Yes, absolutely. I misquoted earlier that the actual possession charge, it's for the vials in my purse. When he pulled me over for the swerving and stuff, that was the Soma. You or the other gentleman had asked me earlier what the charge was for. The charge was actually for the morphine and other vials being in my purse. But the one he actually pulled me over for was swerving related to the Soma and the hydrocodone.

Q The possession that it was referring to were the items in your purse?

A Right. The items in -- the vials.

Q And one of which was the morphine that you had taken from the hospital, right?

A Correct.[¹⁷]

¹⁷ Tr. 24.

The Board asserts that this testimony constitutes two admissions—that she pled guilty to possession, specifically, of *morphine*, and that she had taken morphine from the hospital. We consider the second one first.

An admission against interest has three characteristics: (1) the party-opponent gave a conscious and voluntary acknowledgement to the existence of certain facts; (2) the facts acknowledged are relevant to the cause presented by the offering party; and (3) the facts acknowledged are either unfavorable to or inconsistent with the position taken at trial by the party-opponent.¹⁸ Clark’s statement regarding possession meets all three criteria: she offered it freely, the facts acknowledged are relevant to the Board’s cause, and they are unfavorable to Clark. The fact that they *could* be logically inconsistent with the objective evidence presented does not defeat the effect of the admission, which is that it is binding and conclusive in the absence of contradiction or reasonable explanation by the admitting party.¹⁹

We are less certain as to the Board’s assertion that Clark admitted that she pled guilty to possession of a controlled substance and therefore admitted all the facts in the charging instruments. There is authority stating that a defendant’s guilty plea constitute a judicial admission of the facts charged.²⁰ However, in the case where we found that authority, the statement of law was only *dicta* because the issue was not reached. But we need neither agree nor disagree with the Board’s assertion on this matter because we find that, based on a totality of the evidence, particularly Clark’s admission at the hearing, Clark possessed morphine.

The Board also cites § 324.041, which 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

¹⁸ *Hemphill v. Pollina*, 400 S.W.3d 409, 415 (Mo. App., W.D. 2013).

¹⁹ *Brunswick Corp. v. Briscoe*, 523 S.W.2d 115, 121 (Mo. App., St.L. D. 1975).

²⁰ *Sullivan v. Spears*, 871 S.W.2d 75, 76 (Mo.App. W.D. 1994).

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.

We must invoke this statutory presumption because there is some confusion as to what other controlled substances Clark possessed during the period of August 27-30, 2010. Compared with the matter of the morphine possession, this issue is simple. The two urine samples submitted by Clark tested positive for meprobamate, hydrocodone, dihydrocodeine, Oxazepam, and Propoxyphene—all controlled substances.

But because § 324.041 creates a presumption (and not a conclusive one), Clark is allowed to defeat it. She tries to do so by attacking the second test, asserting that the results could not be accurate because she had taken carisoprodol and hydrocodone at some point prior to the test, and the test did not show a positive result for either drug. The problem with Clark’s argument is that while it is true that the portion of the report submitted by the Board showed no positive result for either drug, it also showed no negative result. Furthermore, that portion was only the first page of a two-page report, if we are to believe the notation at the bottom of the page saying, “Page 1 of 2.” Therefore, Clark’s argument fails, and the presumption of § 324.041 applies.

Therefore, we conclude that Clark violated a drug law of this state (§ 195.202), and her license is subject to discipline under § 335.066.2(1) and (14).

The Board draws its own conclusion from its assertions that Clark not only possessed morphine, but that she removed vials of morphine from PBRMC on multiple occasions. We consider that conclusion under “Professional standards- subdivision (5)” below.

Criminal Conviction or Guilty Plea – Subdivision (2)

Clark pled guilty to § 195.202, which provides in relevant part as follows:

1. 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.
2. Any person who violates this section with respect to any controlled substance except thirty-five grams or less of marijuana or any synthetic cannabinoid is guilty of a class C felony.

In its complaint, the Board limits its allegations to whether the offense was reasonably related to the qualifications, functions, or duties of a nurse, and whether the offense of which she was convicted involved moral turpitude.

Drug possession's (reasonable) relationship to nursing

As to whether the offense was reasonably related to nursing, we first note that “reasonable relation” is a low threshold. To relate is to have a logical connection.²¹ An RN is required to follow controlled substance laws. It is essential that an RN can be trusted to properly handle and administer controlled substances. Clark’s crime of possession of a controlled substance is therefore reasonably related to the functions and duties of an RN.

Drug possession as a crime of moral turpitude

Moral turpitude is:

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything ‘done contrary to justice, honesty, modesty, and good morals.’^[22]

²¹MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1050 (11th ed. 2004).

²²*In re Frick*, 694 S.W.2d 473, 479 (Mo. banc 1985) (quoting *In re Wallace*, 19 S.W.2d 625 (Mo. banc 1929)).

In *Brehe v. Missouri Dep't of Elementary and Secondary Education*,²³ a case that involved discipline of a teacher's certificate under § 168.071 for committing a crime involving moral turpitude, the court referred to three classifications of crimes:²⁴

- (1) crimes that necessarily involve moral turpitude, such as frauds (Category 1 crimes);
- (2) crimes "so obviously petty that conviction carries no suggestion of moral turpitude," such as illegal parking (Category 2 crimes); and
- (3) crimes that "may be saturated with moral turpitude," yet do not involve it necessarily, such as willful failure to pay income tax or refusal to answer questions before a congressional committee (Category 3 crimes).

Brehe stated that Category 3 crimes require consideration of "the related factual circumstances" of the offense to determine whether moral turpitude is involved.²⁵ We determine that the crime of possession of a controlled substance is a Category 3 crime. Clark's explanation for her haphazard driving and inability to control her motor functions was that she had taken Carisoprodol before driving, but the issue of her driving while impaired is not the basis for the Board's allegation that her license should be subject to discipline. While the precipitating incident that led to her being stopped, arrested, searched, and drug-tested was her being summoned to work, Clark clearly broke the law by her evident use of multiple controlled substances. Furthermore, while she claimed to have prescriptions for carisoprodol and hydrocodone, we gave her ample opportunity to furnish evidence of those prescriptions, but she did not do so; and in any case, those prescriptions would not have explained her possession of meprobamate, dihydrocodeine, Oxazepam, and Propoxyphene. As a result, we find that Clark's felony conviction for possession of controlled substances was an offense involving moral turpitude.

Clark's license is subject to discipline under § 335.066.2(2) for committing an offense that is reasonably related to the nursing profession and also involves moral turpitude.

²³ 213 S.W.3d 720 (Mo. App., W.D. 2007).

²⁴ *Id.* at 725 (quoting *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954)).

²⁵ *Brehe*, 213 S.W.3d at 725.

Professional Standards – Subdivision (5)

The Board makes a forceful case against Clark that her behavior violated professional standards by committing misconduct, gross negligence, and dishonesty. Before we can get to whether Clark’s actions constituted misconduct, gross negligence, or dishonesty, we further analyze the Board’s allegations.

“Clark took controlled substances out of PBRMC over a lengthy period of time while being fully aware that it was not permitted[.]”

We discussed above why we found that Clark possessed morphine—primarily because she made an admission to that effect in the hearing. And to be sure, she also admitted at the hearing that she was aware that it was a violation of hospital policy to “bring medicine home.”²⁶ But the standard of subdivision (5) is not whether Clark violated hospital policy, but whether the conduct constituted misconduct, gross negligence, or dishonesty. Furthermore, as stated in our findings of fact above, we believe Clark’s reason for carrying the vials (and the syringes, and the needles) out of PBRMC—she stuck those used items in her pocket when the hospital’s drug tracking system would not let her waste these items properly. As to the Board’s accusation that Clark “took controlled substances out of PBRMC *over a lengthy period of time*,” the Board would appear to have a point, since Clark testified that she had been leaving the hospital with the items in her pockets for “probably several months.”²⁷ Again, if we stopped there, Clark’s behavior would look worse than we think it was, but she continued: “...because there was a lot of days when we didn’t have carats that worked correctly.”²⁸ Then, when asked why she continued with this pattern of behavior, she explained, “I didn’t feel like I had any other option at the time. I mean[,] what am I supposed to do when my equipment is not working properly. I

²⁶ Tr. 18. Her precise answer was, “Probably, yes, I’m sure it is.”

²⁷ Tr. 23.

²⁸ *Id.*

mean I never intended on leaving the hospital with it in my pocket.” The Board omits any mention of Clark’s explanation.

“[Clark] placed [the items taken from the hospital] in a second purse used only for that purpose[.]”

Here, the Board mischaracterizes Clark’s testimony, which is best understood when the entire colloquy between her and the Board’s lawyer is read:

Q When the trooper found them, you actually had two different purses in your car; is that right?

A I had my purse with my personal possessions in it and then a purse that had the stuff from the hospital in it. Is that what you mean?

Q Yeah, that is correct you had two separate purses. Why did you do that? Why did you put them in a separate purse?

A I wasn't going to put them in the purse with my personal belongings.

Q And why not?

A *Because they weren't mine. They weren't my personal belongings. They needed to go back to the hospital and be disposed of.* It's not like I put them in the same purse with like my chapstick, my personal things.^[29]

(Emphasis added.) The Board apparently wants us to infer that Clark’s placing the waste materials in a second purse had a dishonest purpose, but we read her testimony as establishing that her reason for both taking the materials and segregating them from her personal items was consistent with her assertion that she took the materials because, while at work, she had no place else to put them.

²⁹ Tr. 23-24.

“...lying to hospital officials about the existence of such stolen medications when she was initially confronted about it[.]”

We believe the Board is referring to its assertion, stated in its brief, that Clark “maintained to hospital officials that in regard to the vials found by the trooper in her possession, that she took home only empty vials.”³⁰ We found support in the record for this statement in Denise Rushin’s typewritten statement, where she says that “[Clark] stated that she had only taken empty vials home in her pocket on (sic) accident and that all of those were returned and properly disposed of.”³¹ Furthermore, while Rushin’s written statement also refers to “numerous inconsistencies in Ms. Clark’s report vs. her charting and drug administration,” the Board presented no evidence regarding those inconsistencies.

However, we do not believe that Clark was lying. We believe that she was pocketing the wasted drug vials, bottles, syringes, and needles because the hospital system for keeping track of, and disposing, those items malfunctioned. To be sure, had Clark taken away only drug vials and bottles, we would be less inclined to believe her; but she was taking syringes and needles away as well. If Clark had been lying about the malfunctioning system, the Board could have obtained testimony from hospital officials or employees to disprove Clark’s claim, but it did not.

“Clark [drove and attempted] to report for duty when under the influence of powerful controlled substances in which she admitted that she was not in a condition to drive[.]”

We agree with the Board, but shall consider whether Clark’s conduct merits a finding of misconduct, gross negligence, or dishonesty. We consider the Board’s statement in the next paragraph of its brief – that Clark’s statements to the trooper when arrested reinforces that she knew she was in no condition to drive – as part of this sub-argument.

³⁰ Board’s brief, at 5.

³¹ Ex. A, Ex. 3, 1st page.

“[Clark’s] testimony is extremely suspect in that she testified...[that] she was called by the hospital 24 times [on August 27, 2010].... This would mean [that], even if the calls began at midnight, the hospital would have been calling every 28 minutes or so....”

We consider Clark’s statement to be hyperbole, intended to get Clark’s point across—that PBRMC’s management really wanted her to come into work that morning. The precise number of times its management called Clark is irrelevant, so Clark would have no reason to lie about the number.

“[Clark’s] statements that she simply decided to bring back all the vials to the hospital that morning are dubious....”

The Board did not inform us of the basis for its claim that Clark said this, and we cannot find it in an independent search of the record.

We consider the Board’s other factual allegations as they arose in the context of the three grounds for discipline it alleges.

Misconduct

Misconduct means “the willful doing of an act *with a wrongful intention[;] intentional wrongdoing.*”³² We think the most serious allegation of Clark’s misconduct pertains to her admitted and proven drug use. While we dispute the Board’s assertion that the drugs Clark used were taken from PBRMC, illegal drug use is nonetheless a serious matter. We know from the drug tests that Clark tested positive for controlled substances over a four-day period. The offense to which she pled guilty, § 195.202, states as follows:

1. 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.
2. Any person who violates this section with respect to any controlled substance except thirty-five grams or less of marijuana or any synthetic cannabinoid is guilty of a class C felony.

³²*Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, 744 S.W.2d 524 (Mo. App., E.D. 1988) (emphasis added).

3. Any person who violates this section with respect to not more than thirty-five grams of marijuana or any synthetic cannabinoid is guilty of a class A misdemeanor.

On its face, § 195.202 carries no element of mental state. However, § 195.010(34) defines “possession” as follows:

“Possessed” or “possessing a controlled substance”, a person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possession may also be sole or joint. If one person alone has possession of a substance possession is sole. If two or more persons share possession of a substance, possession is joint[.]

We think it self-evident that Clark had actual possession of the drugs she had ingested, and we found, above, that she knew what she had taken. Therefore, the mental state associated with her violation of § 195.202 is *knowledge*, not *intent*; therefore, in the absence of any other evidence associated with her taking those drugs, we cannot find that she was guilty of misconduct, which requires wrongful *intention*.

Also, while the Board alleges that the purportedly false statements we set out above are evidence of Clark’s misconduct as well as her dishonesty, we disagree. First, as we set out under each allegation above that Clark lied, we disagree with the allegation that the statements were lies.

Gross negligence

Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty.³³ Before determining whether

³³ 744 S.W.2d at 533.

there was gross negligence, we examine whether there was negligence. 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.”³⁴ First, we find no negligence, and therefore no gross negligence, associated with Clark’s drug use. As we discuss above under “misconduct,” the requisite mental state for illegal possession of controlled substances is knowledge, which is distinct from negligence.

The Board also made this allegation: “It was also clear that [Clark’s] refusal to abide by the hospital’s rules in taking medications home over the period of many months, amounted to gross negligence.” However, as we discuss above, we find that Clark was unable to waste the empty and near-empty vials and bottles, as well as the syringes and needles. Therefore, we find no negligence, nevermind gross negligence.

As to Clark’s taking the vials, bottle, saline flush, syringes, and needles from PBRMC, we accept Clark’s reason for taking them, because her reason makes the most sense. Two contemporaneous drug tests showed no presence of any morphine, lorazepam, or diazepam in her body and, given her drug usage at the time, we believe her when she testified that she was afraid that if she brought them back to PBRMC, she would have been suspected of theft. Furthermore, the fact that she took syringes, needles, and saline flush along with the empty to mostly-empty containers of drugs supports her story. In any case, while we think it was negligent, it was not such an egregious deviation from the professional standards of a nurse to demonstrate a conscious indifference to a professional duty.

Finally, we agree that it was negligent for Clark to try to drive to work when she was obviously impaired. However, subdivision (5) requires us to find not only that Clark was grossly

³⁴ *Hickman v. Branson Ear, Nose & Throat, Inc.*, 256 S.W.3d 120, 122 (Mo. banc 2008).

negligent, but was grossly negligent in the performance of the functions or duties of being a nurse. She was driving to work, not working.

Dishonesty

Dishonesty is a lack of integrity or a disposition to defraud or deceive.³⁵ We have previously discussed the Board's allegations of dishonesty, and do not accept them.

Conclusion

Clark is not subject to discipline under § 335.066.2(5) for misconduct, gross negligence, or dishonesty.

Professional Trust – Subdivision (12)

Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.³⁶ It may exist not only between the professional and his clients, but also between the professional and his employer and colleagues.³⁷ The Board asserts that Clark had a duty to “not [take] medications from the hospital and ensure that the medications were used for the patients under her care, and properly recorded.”³⁸ As we have discussed above, the only medications Clark took *from the hospital* were residual amounts of morphine, lorazepam, and diazepam. There is absolutely no evidence that she diverted drugs from patients, and the Board puts its credibility at risk by making such an unsupported allegation.

The more credible allegation is that Clark violated her duty of professional trust and confidence by trying to go to work while in an impaired state. According to Clark (and the Board presented no contradictory evidence), she informed the supervisor who called her on the morning of August 27, 2010 that she had taken a muscle relaxant and a pain medication. However, the supervisor insisted that the hospital was “shorthanded.” While Clark did not

³⁵ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

³⁶ *Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

³⁷ *Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App., E.D. 1989).

³⁸ Board brief p. 15.

present more than a bare recount of that conversation, the Board failed to contradict Clark’s testimony in any way—and the Board had the burden of proof, which includes the burden of persuasion.³⁹ The Board, however, offers no argument that driving in an impaired state, even when driving to work, constitutes a violation of the professional trust and confidence placed in a nurse by her patients, coworkers, or anyone else. She obviously violated the duty of a motorist to not drive in an impaired state, but that is a personal, not professional, duty. Clark is therefore not subject to discipline under § 335.066.2(12).

Summary

Clark is subject to discipline under § 335.066.2(1), (2), and (14). She is not subject to discipline under § 335.066.2(5) or (12).

SO ORDERED on August 26, 2013.

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

³⁹ *Kitzenbaw v. Director of Revenue*, 62 S.W.3d 49, 53, 54 (Mo. banc 2001).