

Before the
Administrative Hearing Commission
State of Missouri



MISSOURI DENTAL BOARD,)	
)	
Petitioner,)	
)	
vs.)	No. 12-0909 DB
)	
KENNETH P. WEBB, D.M.D.,)	
)	
Respondent.)	

DECISION

Kenneth P. Webb is subject to discipline because the Missouri Dental Board (“the Board”) issued a license to him without knowing that discipline against his Illinois license was pending at the time.

Procedure

The Missouri Dental Board (“the Board”) filed a complaint seeking to discipline the license of Kenneth P. Webb on May 25, 2012. Webb was served by certified mail with a copy of the Board’s complaint and our notice of complaint/notice of hearing on June 1, 2012. Because he had not filed an answer, we issued a default decision, in accordance with § 621.100.2,¹ on July 10, 2012.

Webb filed an answer and a motion to set aside our default decision on August 8, 2012. We granted the motion and set the case for hearing. The Board filed an amended complaint on

¹ Statutory citations are to the RSMo Supp. 2012, unless otherwise indicated.

May 29, 2013, which Webb did not answer. After numerous continuances, the parties filed a joint stipulation of facts on November 26, 2013.

Findings of Fact

1. On March 1, 2010, Webb applied for licensure as a dentist in Missouri. The Board granted him a license on March 26, 2010. At the time, Webb was also licensed by the Illinois state board of dental licensing (“the Illinois dental board”)² as a dentist.
2. On October 7, 2010, Webb completed the 2010-12 application to renew his Missouri license online.
3. When Webb completed his Missouri renewal application, he did not disclose the fact that he had been visited by an investigator for the Illinois dental board at one point in the past. He believed that the Illinois case was over, and he did not intend to misrepresent or fail to disclose the pending Illinois disciplinary proceedings to the Board.
4. The Board did not know of the pending disciplinary proceedings against Webb in Illinois when it renewed Webb’s license.
5. Webb’s Illinois dentist’s license was revoked on October 26, 2010 for engaging in dishonorable, unethical, or unprofessional conduct.

Conclusions of Law

We have jurisdiction pursuant to §§ 332.321 and 621.045.1. The Board has the burden of proving by a preponderance of the evidence that Webb has committed acts for which the law allows discipline. *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

² The record does not contain the Illinois dental board’s official name.

Although the parties’ “stipulated facts” include conclusions of law, they do not specifically request a consent order as provided by 1 CSR 15-3.446(5)³. We may issue a decision based on stipulated facts. 1 CSR 15-3.446(3); § 536.073.3, RSMo 2000. However, certain of the parties’ “stipulated facts” are not facts at all, as discussed further below.

However, the joint stipulation clearly represents the parties’ effort to resolve this case without a hearing. Settlements are favored in the law, *Superior Ins. Co. v. Universal Underwriters Ins. Co.*, 62 S.W.3d 110, 114 (Mo.App. S.D., 2001), and “stipulations are to be ‘interpreted in view of the result which the parties were attempting to accomplish.’ ” *Randolph v. Missouri Highways and Transp. Comm’n*, 224 S.W.3d 615, 621 n.8 (Mo.App. W.D. 2007). Therefore, we determine from the joint stipulation what facts have been established, or that we can reasonably infer, and independently assess whether the facts admitted allow discipline under the law cited. We then “separately and independently” determine whether such facts constitute cause for discipline. *Kennedy v. Missouri Real Estate Commission*, 762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988).

In its amended complaint, the Board alleges there is cause to discipline Webb’s license under § 332.321, which states in relevant part:

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 permit or license required by this chapter or any person who has failed to renew or has surrendered his or her permit or license for any one of any combination of the following causes:

* * *

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of, or relating

³ All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

to one's ability to perform, the functions or duties of any profession licensed or regulated by this chapter;

(6) Violation or, or assisting or enabling any person to violate, any provision of this chapter, or any lawful rule or regulation adopted pursuant to this chapter;

* * *

(8) Disciplinary action against the holder of a license or other right to practice any profession regulated by this chapter imposed by another state, province, territory, federal agency or country upon grounds for which discipline is authorized in this state;

* * *

(11) Issuance of a permit or licensed based upon a material mistake of fact;

* * *

(13) Violation of any professional trust or confidence[.]

The parties' joint stipulation contains few paragraphs in which facts are clearly stated.

For example, paragraphs 4 and 5 read:

4. Based on information and belief Licensee's Illinois dental and controlled substance licenses were revoked for a minimum period of five (5) years on October 26, 2010.
5. Based on information and belief, Licensee's license was revoked due to dishonorable, unethical, or unprofessional conduct when Licensee employed, procured, induced, aided or abetted persons not licensed or registered as a dentist to engage in the practice of dentistry.

“In the normal sense of the word a fact is ‘[a] thing done; an action performed or an accident transpiring; an event or circumstance; an actual occurrence. An actual happening in time or space or an event mental or physical.’” *State v. Nunley*, 341 S.W.3d 611, 627 n.3 (Mo. banc 2011) (citing Black's Law Dictionary, Revised Fourth Edition, 1968.) The prefatory words, “based on information and belief,” indicate that the following statements are not “facts” in the sense of

actual occurrences. But even if we disregarded that preface, the rest of paragraph 5 contains conclusions of law rather than facts. *See Westphal v. Lake Lotawana Ass'n, Inc.*, 95 S.W.3d 144, 152 (Mo. App. W.D., 2003) (pleading that Association “at all times relevant hereto acted under color of the statutes, laws, customs, ordinances, and usage of the State of Missouri” did not state a fact but a legal conclusion).

In a similar vein, paragraph 6 states that “Licensee is required to disclose information about the status of any license held in other states when filling out an application for licensure in Missouri under § 332.321.2, RSMo[.]” Again, this appears to be a legal conclusion. Even if we accept as a fact that there was such a requirement, the stipulated facts do not state that Webb did not disclose the pending discipline. Paragraph 7 states that “he answered ‘no’ to questions 1-14 of Section V on the application for dental licensure,” but there is no other information regarding the content of those questions. We infer, however, from paragraph 9, which states that “it was not Licensee’s intent to misrepresent or fail to disclose,” and paragraph 13, which begins, “By failing to disclose the pending disciplinary action against his Illinois Dental license,” that Webb did not disclose any pending investigation or discipline to the Board.

As a final example, paragraph 12 states that: “On or about November 16, 2010, Licensee was found guilty by a stipulated bench trial and placed on twenty-four months court probation for the offense of official misconduct based upon Counts 18 and 22 of the Information . . . Licensee’s conviction subjects him to discipline pursuant to 332.321.2(2), RSMo.” The stipulated facts contain no other information regarding the Information. Other than the description “official misconduct,” we have no knowledge of Webb’s alleged criminal offense.

Subdivision (2) – Criminal Offense

The parties stipulated that Webb’s license is subject to discipline under § 332.321.2(2), which allows discipline when:

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 this chapter, for any offense an essential element of which is fraud, dishonesty or an act of violence, or any offense involving moral turpitude, whether or not sentence is imposed[.]

But, as previously remarked, we do not know what criminal offense Webb was found guilty of, so we cannot determine whether it was “reasonably related” to the qualifications, functions, or duties of dentistry, or whether it involved moral turpitude, or whether an essential element was fraud, dishonesty, or an act of violence. In addition, neither the Board’s original complaint nor its amended complaint alleges cause to discipline under this subsection. We cannot find discipline for uncharged conduct. *Dental Bd. v. Cohen*, 867 S.W.2d 295, 297 (Mo. App., W.D. 1993). We find no cause to discipline Webb under § 332.321.2(2).

Subdivision (5) – Professional Standards

Paragraph 13 of the joint stipulation states that “[b]y failing to disclose the pending disciplinary action against his Illinois Dental license, Licensee engaged in fraud, misrepresentation and dishonesty in violation of § 332.321.2(5), RSM[o].” We infer from the fact that Webb’s Illinois license was revoked less than three weeks after he renewed his Missouri license in October 2010 that a disciplinary action was pending in Illinois at the time the Board renewed his Missouri license. We have also inferred that Webb failed to disclose the pending disciplinary action to the Board. Finally, we infer that the Board did not know of the pending Illinois disciplinary investigation when it renewed Webb’s license.

However, the causes for discipline agreed to here – fraud, misrepresentation, and dishonesty – all require specific mental states. Fraud is an intentional perversion of truth to

induce another, in reliance on it, to part with some valuable thing belonging to him. *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910). It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 359 (11th ed. 2004). Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit. *Id.* at 794 (11th ed. 2004). Paragraph 9 of the joint stipulation expressly states that Webb lacked the mental state to establish these causes for discipline: "It was not Licensee's intent to misrepresent or fail to disclose." Thus, we find no cause for discipline under § 332.321.2(5).

Subdivision (6) – Violating any Law or Rule Under Chapter 332

The joint stipulation states that Webb's failure to disclose the pending disciplinary action against his Illinois dental license and the pending criminal action in Illinois, and the criminal conviction, are cause to discipline his license under § 332.321.2(6). But neither the complaint nor the joint stipulation specifies what law or regulation such failure to disclose might have violated. This is tantamount to asking us to find discipline for uncharged conduct, which we cannot do. There is no cause for discipline under § 332.321.2(6).

Subdivision (8) – Discipline by Another State

Although never stated directly, we infer from the stipulated facts that the State of Illinois revoked Webb's license. We also have found that his license was revoked for "dishonorable, unethical, or unprofessional conduct." The only description of that conduct in the joint stipulation, however, is found in a paragraph that begins, "upon information and belief." While a revocation is a final disciplinary action, *see Bhuket v. State ex rel. Missouri Bd. of Regis'n for the Healing Arts*, 787 S.W.2d 882, 885 (Mo. App., W.D. 1990) (interpreting "disciplinary action" in § 334.100.2(8), RSMo Supp. 1984), the joint stipulations do not establish the factual basis for Illinois' revocation of Webb's license. We cannot find, therefore, that it was revoked

for “grounds for which discipline is authorized in this state.” We find no cause for discipline under § 332.321.2(8).

Subdivision (11) – Material Mistake of Fact

The joint stipulation provides that “by failing to disclose the pending disciplinary action against his Illinois dental license,” and “by failing to disclose the pending criminal action in Illinois and by his criminal conviction,” Webb “violated” § 332.321.2(11), under which there is cause to discipline a license issued based upon a material mistake of fact. Because we know nothing about Webb’s criminal conviction other than that it related to “official misconduct,” we draw no conclusions about his disclosure or nondisclosure of it to the Board.

We have previously inferred that the Board was unaware of the pending disciplinary action against Webb in Illinois. A mistake of fact is “an erroneous belief not in accord with the facts.” *In re Estate of Hysinger*, 785 S.W.2d 619, 624 (Mo. App., E.D. 1990). The dictionary definition of “material” is “of real importance or great consequence: SUBSTANTIAL ... ESSENTIAL ... requiring serious consideration by reason of having a certain or probable bearing[.]” WEBSTER’S THIRD NEW INT’L DICTIONARY 1392 (unabr. 1986). A pending disciplinary action in another state would be a material fact for the Board to consider in deciding whether to renew a license. We conclude that Webb is subject to discipline under § 332.321.2(11).

Subdivision (13) – Professional Trust or Confidence

In the joint stipulation, the parties agree that “By failing to disclose the pending disciplinary action against his Illinois Dental license and the pending criminal case, Licensee violated the professional trust between himself and the Board in violation of § 332.321.2(13).” The phrase “professional trust or confidence” is not defined in Chapter 332, nor has the phrase been defined in the case law. Absent a statutory definition, the plain meaning of words used in a

statute, as found in the dictionary, is typically relied on. *E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011). 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 occupation....

WEBSTER'S THIRD NEW INT'L DICTIONARY 1811 (unabr. 1986). “Trust” is

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

Id. at 2456. “Confidence” is a synonym for “trust.” *Id.* at 475 and 2456. 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[.]” *Id.* at 2456. Confidence “may indicate a feeling of sureness about another that is based on experience and evidence without strong effect of the subjective[.]” *Id.* Therefore, we define professional trust or confidence to mean reliance on the special knowledge and skills that professional licensure evidences. It may exist not only between the professional and his clients, but also between the professional and her employer and colleagues. *See Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo App. E.D., 1989).

Through inferences we have been able to draw, we have found that Webb did not disclose Illinois’ pending disciplinary action to the Board. Assuming, *arguendo*, that a dentist has a relationship of professional trust and confidence with the state board that licenses him, we nonetheless decline to find that Webb violated this trust given that the parties stipulated that he believed the Illinois case against him had closed without disciplinary action at the time he renewed his Missouri license. We find no cause to discipline Webb under § 332.321.2(13).

Summary

Webb is subject to discipline under § 332.321.2(11). We do not find cause for discipline under § 332.321.2(2) or (6) because Webb did not have notice of these causes for discipline. The stipulated facts do not support a finding of cause for discipline under § 332.321.2(5), (8), or (13).

SO ORDERED on December 11, 2013.

\s\ Karen A. Winn

KAREN A. WINN

Commissioner