

Hyde Park

VERMONT SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
BOARD OF NURSING

In re: James L. Erwin }
License No. 026-0032135 }
Docket No. NU 92-0606 }

FINDINGS OF FACT
CONCLUSIONS OF LAW & ORDER

Introduction:

On Monday 18 December 2006 the Board heard this contested case of alleged unprofessional conduct brought by the State of Vermont against Respondent James Erwin. Board members Kenneth W. Bush, Donarae Metcalf, Holly Shaner-McRae *ad hoc*, Sandra J. Norton, Marilyn Rinker *ad hoc*, and Alan Weiss participated in the hearing of this matter. The Respondent did not appear at the hearing. Edward G. Adrian represented the State of Vermont. Board counsel Kevin F. Leahy presided.

The State brought a specification of charges (the "Charges," attached) dated 18 July 2006 against James Erwin (the "Respondent") alleging impaired practice due to substance abuse and possible diversion of opioids. The Respondent worked at Copley Hospital in Morrisville, Vermont at the time of the alleged incidents.

Summarized in pertinent part, the State's allegations are:

In June 2006, a nurse manager at Copley received reports that patients were not responding to anesthesia. On 14 June, Mirjam McCormack, M.D., an anesthesiologist at Copley Hospital noticed that injections given to patients were ineffective. David Kirch, M.D., also an anesthesiologist at Copley Hospital was alerted to potential tampering with fentanyl syringes sitting on the anesthesia medical cart. Respondent was seen near the anesthesia medical cart.

The same day, 14 June, Dr. Kirch left a fentanyl syringe unattended. He later found the syringe replaced with a different syringe. Two days later, Respondent volunteered to a toxicology screen on which he tested positively for the presence of fentanyl.

Charges at ¶¶ 4-7.

Based on these allegations, the State brings four separate charges of unprofessional conduct against the Respondent claiming he violated:

- (i) (3 V.S.A. § 129a (a)(3) (failing to comply with provisions of federal or state statutes or rules governing the practice of the profession);
- (ii) - (iii) 26 V.S.A. § 1582(a)(3) (is unable to practice nursing competently by reason of any cause);
- (iv) 26 V.S.A. § 1582(a)(5) (habitual intemperance); and
- (v) 26 V.S.A. § 1582(a)(7)(conduct of a character likely to deceive the public).

Charges at ¶10(i) - (iii).

The Respondent did not appear to testify. The State called Greg Kelley, an investigator with the Office of Professional Regulation, as its witness; and the Board accepted into evidence:

State's Exhibit 1 Answer dated 2 Sept. 2006 w/attached letter to Bd. of Nursing dated 20 July 2006.

Findings of Fact &
Conclusions of Law:

1. This Board licenses the Respondent and may exercise disciplinary authority for alleged acts of licensee unprofessional conduct. 26 V.S.A. Chapter 28; 3 V.S.A. §129(a); and Admin. Rules for the Bd. of Nursing and the Office of Prof. Reg.
2. Respondent holds a State of Vermont nursing license.
3. In a disciplinary hearing, the state has the burden of proof. To satisfy its evidentiary burden, it must "show by a preponderance of the evidence that [a licensee] has engaged in unprofessional conduct." 3 V.S.A. §129a(c).
4. The Respondent's answer does not deny the allegations contained in the State's Charges. *See* Respondent's Answer and State's Exhibit 1.
5. Although the State does not directly allege that Respondent diverted fentanyl or any other substance from Copley Hospital, Respondent does state in his Answer "I categorically deny taking the Fentanyl." *Id.*
6. Since the Respondent did not appear to testify, it is unclear to the Board whether the statement in his Answer ("I categorically deny taking the fentanyl") refers merely to the syringe identified in ¶6 or whether he means to say that he denies, in general, taking any fentanyl from the facility.
7. The Board accepts as proven all factual statements made by the State in its Charges. Vt. R. Civ. P. 8 (allegations made in specification of charges "are admitted when not denied in the [Respondent's Answer]"); *see also* Admin. R. Office of Prof. Reg. Part 2, 2.2.

8. The Respondent's Answer to the Charges also acknowledges that he is, or at least was at the time of his answer, undergoing a regimen for alcohol rehabilitation.

9. Based on the facts contained in the Charges as admitted by the Respondent, his Answer acknowledging his substance abuse and all the inferences reasonably taken from the facts established by the hearing in this matter, the Board finds the Respondent is responsible for the disappearance of the fentanyl syringe on 14 June 2006.

10. The Board also finds that the Respondent is habitually intemperate.

11. The Board also finds that he is unsafe to practice nursing and his continued practice will put patients at risk of harm.

12. For these reasons, it is the Board's opinion, that the Respondent's intemperance warrants indefinite suspension.

13. Viewing the four individual charges brought by the State in light of these findings, the Board rules as follows:

A. Re: (i) 3 V.S.A. § 129a(a)(3) (failing to comply with provisions of federal or state statutes or rules governing the practice of the profession).

The Board does not need to consider this charge. The Specification of Charges does not make any factual allegations that Respondent violated statutes or administrative rules.

B. Re: (ii - iii) 26 V.S.A. § 1582(a)(3) (is unable to practice nursing competently by reason of any cause).

The Board concludes that the State did meet its burden of proof. The Respondent is unable to practice nursing competently as shown by his admitted behavior. His intemperance is incompatible with safe nursing.

C. Re: (iv) 26 V.S.A. § 1582(a)(5) (habitual intemperance).

The Board concludes that the State did meet its burden of proof and finds for the State based on the Respondent's admissions.

D. Re: (v) 26 V.S.A. § 1582(a)(7) (Engages in conduct of a character likely to deceive, defraud or harm the public).

The Board concludes that the State did meet its burden of proof. Based on Respondent's failure to deny, his lack of meaningful participation in these proceedings and the totality of circumstances, the Board finds by a preponderance of the evidence that Respondent is responsible for the disappearance of the fentanyl from Copley hospital.

14. The Board therefore finds that the State met its burden of proof relative to the Charges contained in ¶13 (ii - iii), (iv) and (v).

ORDER

Based on the findings of facts set forth above, the Board of Nursing SUSPENDS INDEFINITELY Respondent's license for the violation of 26 V.S.A. §1582(a)(3), (5) and (7).

- END -

Vermont Board of Nursing:

By: Alan Weiss
Alan Weiss
Board Chairperson *pro tempore*

Date: 10 January 07

OFFICE OF PROFESSIONAL REGULATION
DATE OF ENTRY: 1/17/07

STATE OF VERMONT
SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
BOARD OF NURSING

IN RE:
JAMES L. ERWIN
License No. 026-0032135

)
) DOCKET No. NU92-0606
)

SPECIFICATION OF CHARGES

NOW COMES the State of Vermont and makes the following Charges against the Respondent, James L. Erwin, R.N.:

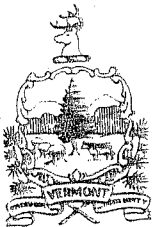
Board Authority

1. The Vermont State Board of Nursing (the "Board") has authority to issue warnings or reprimands, suspend, revoke, limit, condition current licenses, or prevent the renewal of lapsed licenses if, after disciplinary hearing, the Board finds that the Respondent has engaged in unprofessional conduct. 3 V.S.A. §129(a); 3 V.S.A. 129a; 3 V.S.A. §814(d); 26 V.S.A. §1582; the Administrative Rules of the Board of Nursing ("ARBN"); and the Rules of the Office of Professional Regulation.

Statement of Facts

2. James L. Erwin (the "Respondent") of Stowe, Vermont is a licensed registered nurse holding license number 026-0032135, issued by the State of Vermont. This license was originally issued on or about November 28, 2005 and is set to expire on March 31, 2007.
3. At all times relevant the Respondent was employed as a nurse at Copley Hospital (the "Facility") located in Morrisville, Vermont.
4. On or about the weeks of June 5th and June 12th 2006 Keith Zoller, a Nurse Manager at the Facility, received reports that some patients were not responding to the anesthesia. On or about June 14, 2006 Dr. Mirjam McCormack, an anesthesiologist at the Facility, noticed that several of her patients that day were not receiving the desired effects of the Fentanyl injections that she was providing. Joan Fox, a CRNA at the Facility, noticed that on two different days there may have been questions about the effectiveness of the narcotics that she was providing to patients. The Respondent had asked Ms. Fox a lot of questions about narcotics and had questions about Fentanyl in particular.
5. Dr. David Kirch, an anesthesiologist at the Facility, was alerted that "someone" was touching the syringes on the medication cart that the anesthetic needles were placed on. The medication cart was sometimes left unattended with syringes of Fentanyl placed on it. On or around June 2006 the Respondent was seen around the medication cart and a syringe fell out of his pocket.

STATE OF VERMONT



Prosecuting Attorney
Office of
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6. On or about June 14, 2006 Dr. Kirch marked a Fentanyl syringe by placing a label exactly vertical "length-wise" along the syringe between the 1 ½ and 3 cc lines. Dr. Kirch then left the room where the Fentanyl syringe was located. When he returned, he found that the label was secured on "haphazardly" and it was not the same Fentanyl syringe that he had placed on the cart. This syringe was sent to the hospital lab for analysis and found not to contain any Fentanyl.

7. On or about June 16, 2006 the Respondent voluntarily offered to take a drug test at the facility. The drug test analysis was performed by Dominion Diagnostics and came back as a positive for Fentanyl. A special toxicology confirmatory test was run which confirmed 2.3 ng/ml of Fentanyl. On information and belief, the Respondent had no legitimate therapeutic purpose to have Fentanyl in his system.

8. On or about the week of June 12, 2006 Dr. Kirch overheard the Respondent discussing in the operating room that he was trying to "dry out" and cut back on his consumption of alcohol. On or about June 28, 2006 the respondent informed Investigator Greg Kelly that he has a problem with alcohol and that he probably drinks more then he should. At the time of the interview Investigator Kelly noticed an odor of intoxicants on the Respondent's breath.

9. As an operating room nurse, the Respondent had access to the operating room medication carts and the medications on those carts.

10. The Respondent is a traveling nurse. He was contracted to the Facility through Nursing Options. The Respondent is no longer contracted with Nursing Options and is not eligible to contract with them in the future.

11. The Respondent denied taking the Fentanyl to Investigator Kelly and stated "had I had the shit in my system, I wouldn't have submitted to the urine test voluntarily."

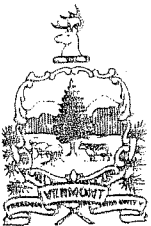
12. The Respondent's license was summarily suspended by the Board on or about July 10, 2006.

Charges

13. The acts, omissions and/or circumstances described above constitute grounds for discipline because Respondent violated:

- i. 3 V.S.A. § 129a(a)(3) (failing to comply with provisions of federal or state statutes or rules governing the practice of the profession);
- ii. 26 V.S.A. § 1582(a)(3)(is unable to practice nursing competently by reason of any cause);

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iii. Vermont Board of Nursing Administrative Rules Chapter 4, Rule IV, II, C ("Any cause" includes, but is not limited to, reasons of physical or mental disability or use of drugs, narcotics, chemicals or any other type of materials);

iv. 26 V.S.A. § 1582(a)(5) (is habitually intemperate or is addicted to the use of habit forming drugs); and

v. 26 V.S.A. § 1582(a)(7)(engages in conduct of a character likely to deceive, defraud or harm the public).

Relief Requested

WHEREFORE, the license of James L. Erwin should be revoked, suspended, reprimanded, conditioned or otherwise disciplined.

DATED at Montpelier, Vermont this 18th day of July, 2006.

STATE OF VERMONT
SECRETARY OF STATE

By: _____

Edward G. Adrian
State Prosecuting Attorney

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**VERMONT SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
STATE BOARD OF NURSING**

IN RE: James Erwin }
License No. 026-0032135 } Docket No. NU92-0606

SUMMARY SUSPENSION ORDER

On 10 July 2006, this matter came before the Vermont State Board of Nursing on the prosecution's Request for Summary Suspension pursuant to 3 V.S.A. § 814(c). The hearing took place at the Heritage Building, 81 River Street in Montpelier, Vermont.

The Board has authority to summarily suspend a license pending further proceedings if it determines that public health, safety or welfare imperatively require emergency action.

Findings of Fact & Conclusions of Law:

Based on a review of the evidence presented to the Board at the hearing on this matter, the Board finds:

1. The Respondent is licensed by and subject to the disciplinary authority of this Board. 26 V.S.A. Chapter 28, 3 V.S.A. § 129(a), and the Administrative Rules of the Office of Professional Regulation.
2. The State filed a "Request for Summary Suspension" dated 6 July 2006 (attached), alleging that Respondent had tested positively for the presence of fentanyl for no known therapeutically legitimate reason. The State further alleges that the Respondent's employer, Copley Hospital, suspected fentanyl inventory irregularities.
3. The State argues that public health, safety or welfare imperatively requires emergency action, and the state asks this Board to suspend summarily the Respondent's license prior to a full hearing on the merits.
4. The Board has considered the evidence related to the allegations in the State's Request for Summary Suspension.
5. The Board finds that the State has, in its presentation of evidence, met its burden to the necessary degree of showing the need for emergency action to protect the public health, safety and welfare.

Order:

Pursuant to 3 V.S.A. § 814(c), the Board issues the following temporary order which shall remain in effect until further action by the Board.

The Board of Nursing GRANTS the State of Vermont's Request for Summary Suspension.

The Respondent's license is SUMMARILY SUSPENDED pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

Vermont Board of Nursing

By: Susan O. Farrell Dated at Montpelier: 10 July 2006
Susan O. Farrell, RN, Chairperson

OFFICE OF PROFESSIONAL REGULATION

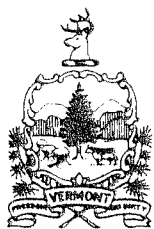
DATE OF ENTRY: 7/11/06

IN RE: JAMES L. ERWIN) DOCKET No. NU92-0606
License No. 026-0032135)

Board Authority

- ## Statement of Facts

- STATE OF VERMONT



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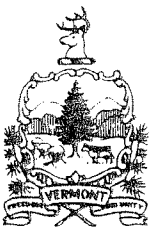
exactly vertical "length-wise" along the syringe between the 1 ½ and 3 cc lines. Dr. Kirch then left the room where the Fentanyl syringe was located. When he returned he found that the label was such on "haphazardly" and it was not the same Fentanyl syringe that he had placed on the cart. This syringe was sent to the hospital lab for analysis and found not to contain any Fentanyl.

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10. As an operating room nurse the Respondent had access to the operating room medication carts and the medications on those carts.
11. The Respondent is a traveling nurse. He was contracted to the Facility through Nursing Options. The Respondent is no longer contracted with Nursing Options and is not eligible to contract with them in the future.
12. The Respondent denied taking the Fentanyl to Investigator Kelly and stated "had I had the shit in my system, I wouldn't have submitted to the urine test voluntarily."

Request for Relief

13. The facts as set out above establish that in order to protect the public health, safety or welfare of the people of the State of Vermont emergency action is imperative.
14. The above acts and circumstances, alone or in combination, violate: 3 V.S.A. § 129a(a) (3) (failing to comply with provisions of federal or state statutes or rules governing the practice of the profession); 26 V.S.A. § 1582(a)(3)(is unable to practice nursing competently by reason of any cause); Vermont Board of Nursing Administrative Rules Chapter 4, Rule IV, II, C ("Any cause" includes, but is not limited to, reasons of physical or mental disability or use of drugs, narcotics, chemicals or any other type of materials). 26 V.S.A. § 1582(a)(5) (is habitually intemperate or is addicted to the use of habit forming drugs); and 26 V.S.A. § 1582(a)(7)(engages in conduct of a character likely to deceive, defraud or harm the public).

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WHEREFORE, the State of Vermont respectfully requests that pursuant to 3 V.S.A. § 814(c), the Respondent's nursing license number 026-0032135 be summarily suspended, pending a hearing on the merits.

DATED at Montpelier, Vermont this 6th day of July, 2006.

STATE OF VERMONT
SECRETARY OF STATE

By: _____

Edward G. Adrian
State Prosecuting Attorney

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