

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

In re: Shirley Meier }
License No. 026-0008146 }
Docket No. NU 65-0505 }

**FINDINGS OF FACT
CONCLUSIONS OF LAW & ORDER**

Introduction:

On Monday 10 July 2006 the Board of Nursing (the "Board") heard this contested case of alleged unprofessional conduct brought by the State of Vermont against Respondent Shirley Meier. Board members Susan O. Farrell (Chairperson), Donarae Metcalf, Laurey M. Tyo, DeAnn Welch and Alan Weiss participated in the hearing of this matter. Board members Ellen Leff and Linda M. Y. Rice recused themselves from participation in this matter. The Respondent appeared with counsel Thomas C. Nuovo. Judith Cutler represented the State of Vermont. Board counsel Kevin F. Leahy presided.

Introduction:

The State brought a specification of charges (the "Charges") dated 26 October 2005 against the Respondent alleging unprofessional conduct for emailing confidential and personal health information to acquaintances of hers for purposes unrelated to patient care.

The Respondent worked at Chittenden Regional Correction Facility in South Burlington, Vermont (the "Facility") at the time of the alleged incident.

Specifically the State alleges in pertinent part that:

On 15 February 2005, Respondent sent an e-mail to a number of people containing confidential health and personal information about patient R.N. [an inmate at the Facility], ("R.N."). The e-mail revealed the patient's name, and specific details regarding the patient's medical conditions.

Charges at ¶ 4.

In her answer to the Charges, the Respondent states that the information in her email about R.N. did not contain "any confidential health or personal information about R.N. which was not public information or that she learned from documents in her job at the Correctional Facility."

Based on these allegations, the State brings three individual charges of unprofessional conduct against the Respondent claiming she violated:

- (i) 26 V.S.A. § 1582(a)(3) (is unable to practice nursing competently by reason of any cause);
- (ii) 26 V.S.A. § 1582(a)(7)(engaged in conduct likely to deceive, defraud or harm the public); and
- (iii) 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).

Charges at ¶5 (i) - (iii).

Prior to the hearing, the Respondent filed a motion to dismiss. The Board heard Respondent's argument on Monday 10 April 2006 and denied the requested relief. In applying the legal standard for a motion to dismiss under Vt. R. Civ. P. 12(b)(2) or (6), the Vermont Supreme Court requires that the Board only "test the law of the claim, not the facts which support it." *Powers v. Off. of Child Sup.*, 173 Vt. 390 (2002). Therefore, when considering a Respondent's motion to dismiss, the Board will "assume the factual allegations in the [State's charges] to be true." *Jones v. Keogh*, 137 Vt. 562 (1979).

The gravamen of the Respondent's argument in support of her motion to dismiss was the assertion that this Board does not have jurisdiction. Respondent's position is that she was not functioning in the capacity of a nurse at the time of the incident. The Respondent, as persuasive authority for her position, cited *Leggett v. Tenn. Bd. of Nursing*, 612 S.W.2d 476 (Tenn. App. 1980).

The Board denied the Respondent's motion for two reasons.

First, a person's job description or their work duties do not determine this Board's jurisdiction. A professional's actions determine jurisdiction.¹ At the time of the Respondent's alleged unprofessional conduct, she was working as mental health coordinator for the Department of Corrections. In that capacity, the State alleges that Respondent violated confidentiality standards by revealing information that the Respondent acknowledges she received "from documents in her job at the Correctional Facility."

The charges invoking this Board's jurisdiction go to the licensee's unprofessional conduct not to her job title. Furthermore, the scope of her employment duties is not a legal issue subject to a motion to dismiss. Whether her job as a "mental health

¹ Ultimately, the issue of the Respondent's job title is not relevant in this particular case. If a licensee's conduct involves an intentional or indifferent violation of a patient's safety or medical privacy rights and that conduct is facilitated by a professional license, then the Board has jurisdiction over their license.

coordinator” is outside of the nursing profession, as argued by the Respondent, is a factual issue reserved for a contested hearing.

Second, the *Leggett* Court found the State nursing board to be absent jurisdiction over the professional licensee/appellant where the unprofessional conduct allegedly occurred while practicing midwifery. Tennessee statutes define midwifery as a legally distinct profession, and there was no question that the Respondent was acting exclusively as a midwife at the time of the alleged conduct.

Further weighing against the Respondent in the *Leggett* case is the fact that the Tennessee legislature had expressly exempted the very activities performed by the Respondent from any licensure requirements. *Leggett* 612 S.W.2d at 479-480. *Leggett* may therefore be instructive in situations involving licensees practicing professions other than nursing. However, *Leggett* is unhelpful where, as here, a Respondent asserts as a matter of law that her “mental health coordinator” job description is proof sufficient to remove her from the strictures of the laws and rules applicable to nurse practice. Whether the Respondent was practicing under her nursing license and whether that is even relevant to the charges is, nonetheless, a factual inquiry.

Finally, the Board notes that Respondent’s motion was styled as a “motion to dismiss,” which is a motion the Board will entertain pursuant to the Admin. Procedure Act and OPR rules. Where the Board does not have jurisdiction or a specification of charges fails to state a legally cognizable cause of action, a motion to dismiss will assist the Board and the parties in bringing a swift resolution to a contested case. However, in hearing the Respondent’s “motion to dismiss,” it became obvious the Respondent was in fact arguing a motion for summary judgment.

The Respondent’s motion sought a legal determination based on disputed facts submitted by the Respondent rather than resting on the facts alleged in the State’s Charges. As with other licensing agencies governed by the Office of Professional Regulation’s Administrative Rules (“OPR Rules”), the Board does not recognize summary judgment motions. Vermont’s licensing agencies are bound by the Vt. Rules of Civil Procedure but only to the extent adopted by the governing OPR Rules. These Rules expressly reject summary judgment motion practice. ORP Rule 2.4 (Part 2).

Styling what is in substance a motion for summary judgment as a “motion to dismiss” does circumvent the OPR Admin. Rules. Thus even if the Respondent’s motion did not fail on its legal merits, the motion was procedurally non-cognizable as well.

Because the Board has jurisdiction over the allegations made by the State of Vermont, and because the Respondent sought what is in essence a summary judgment order, the Respondent’s motion to dismiss was denied at the hearing.

The Board accepted into evidence:

- State's Exhibit 1. Email dated 15 Feb. 2005 re: patient with signature line Shirley Meier, R.N., M.Ed., CRCF Mental Health
- Resp'd Exhibit 1. 11 Feb. 2005 letter to editor from daughter of deceased patient/inmate
- Resp'd Exhibit 2. 18 June 2005 Burl. Free Press article re: inmate lacked medical care and supervision before death.
- Resp'd Exhibit 3. Investigation/Report into Dep't of Corrections treatment of inmates with physical and mental health problems.
- Resp'd Exhibit 4. Investigative report into death of "R.N." at Facility
- Resp'd Exhibit 5. 15 Feb 2005 email from Shirley Meier with attached letter regarding inmate R.N.'s death

The Board heard testimony from:

The Respondent;

Deborah Moore, District Administrator, Prison Health Services; and

Robert Begley, district manager for Prison Health Services.

Findings of Fact &

Conclusions of Law:

1. Respondent holds a State of Vermont nursing license.
2. 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); Bd. Nursing Admin. Rules and OPR Rules.
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 salient fact is that the Respondent emailed information on 15 February 2005 about an inmate, R.N., who died while in state custody. The inmate died on 5 February 2005.
5. Shortly after R.N.'s death, his fourteen-year-old daughter wrote a letter to the editor that was published in the Rutland Herald.
6. The letter asked "[w]hate if for the last hours of your life you begged for medical help and no one would help you in a facility where it was mandatory? . . . What if for the last hours of your life you went through excruciating pain until you finally passed away? What if it was you in [R.N.'s] place?"

7. In response to the young girl's letter, Respondent sent an email to approximately thirty (30) people, with the girl's letter attached, in which she stated that "to blame the officers in the facility for the death of [the girl's] step-dad is not fair or accurate so I would like to present a 'true' picture." Resp'd Ex. 5.

8. The Respondent testified that she felt a responsibility to advocate for the correctional officers with whom she worked.

9. To present what the Respondent believed was a "true picture" and what the Respondent believed was the necessary response to RN's daughter, she explained to the list of email recipients that R.N.:

had not visited a doctor for many years for if he had, it would have been explained to him that his overweight condition, his addiction to heroin, his lack of physical exercise and, his enlarged heart made him a perfect candidate for a massive heart attack. . . As for the stated pain he was experiencing, . . . [m]edications are carefully used . . . to make the patient as comfortable as possible during a very difficult transition.

It is truly sad that R.N. did not love himself as much as his family did.

10. At the hearing, when questioned about her email, Respondent stated that she did not believe that R.N.'s daughter wrote the letter but that someone had written it for her.

11. She also stated that she sent the email because she felt she needed to defend her co-workers at the Facility from the impression left by R.N.'s daughter.

12. Regardless of the content of the email, the Respondent's rationale for sending the email is disturbing. While in possession of someone else's medical information, the only recognizable duty the Respondent had was to protect that information.

13. However, rather than protecting the medical information, the Respondent instead chose to use it, as she described, to advocate for the benefit of her coworkers. Regardless of what the Respondent believes is her personal duty to her friends at work, it does not supersede her professional duty to safeguard patient information.

14. The Respondent acknowledged that she obtained information about RN through her employment.

15. Her employment allowed her access to R.N.'s Intake Medical History form, which contained much of the information that she then put in the email.

16. Respondent testified that the Intake Medical History form contained information about RN's addiction and the medications he was supposed to receive while going through a detoxification protocol.

17. In her defense, the Respondent testified that she did not intend for anyone to take what she wrote in her email "as a complete statement of fact."

18. Although the Respondent now says she did not want people to take what she wrote as fact, the Board has trouble reconciling this explanation with the Respondent's

written assertion that her intent was to "present a 'true' picture" in light of the letter to the editor, which she described as "not fair or accurate."

19. The Respondent took time to allow colleagues at the Facility to review her email prior to sending it. The Respondent placed facts in the email that were on RN's medical intake sheet available to her and others at the Facility. In this light, it is difficult to believe the Respondent intended the recipients to think she was merely asserting non-factual assumptions.

20. The Respondent stated to the recipients of her email that she was presenting a "true picture," and the choice and source of the facts she put into the email suggests that was her intent as well.

21. The Board finds that the Respondent had access to information about R.N.'s medical history due to her status as a licensed registered nurse and as the mental health coordinator for the facility.

22. The Respondent improperly placed that information in an email and sent it to members of the public to whom she had no reason to send it.

Individual Charges:

23. In light of the findings made by the Board, we rule as follows on the individual charges set forth in ¶5 (i-iii):

Re: 5(i) 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 not meet its burden of proof. The issue before the Board related to the Respondent's failure to respect her duty to protect medical care information learned as a result of her profession. The issue of whether she is "unable to practice nursing" was not raised by the State.

Re: 5(ii) 26 V.S.A. § 1582(a)(7) (engaged in conduct likely to deceive, defraud or harm the public):

Activities the Board considers harmful to the public under §1582(a)(7) include "violating confidentiality by inappropriately revealing information or knowledge about a patient or client." Vt. Bd. Nursing Admin. Rules Chap. 4, subchapter. 4, II, D (explanatory definition of §1582(a)(7) unprofessional conduct language). The Board holds that the State met its burden of proof on this charge. The Board finds and rules that the Respondent engaged in unprofessional conduct by inappropriately revealing information or knowledge about a patient.

Re: 5(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 factual allegations in the specification of charges do not reference any statutes or rules governing the practice of the profession. The two statutes, which the State alleges the Respondent violated, were set forth as separate charges, ¶5 (i) & (2). The Board has already ruled on those two charges.

ORDER

Based on the findings of facts set forth above, the Board of Nursing therefore REPRIMANDS the Respondent's license for inappropriately revealing information or knowledge about a patient.

- END -

(signature page to follow)

Vermont Board of Nursing:

By: Susan O. Farrell
Susan O. Farrell, RN
Board Chairperson

Date: Feb. 14, 2007

OFFICE OF PROFESSIONAL REGULATION
DATE OF ENTRY: 2/26/07

APPEAL RIGHTS

This is a final administrative determination by the Vermont Board of Nursing.

A party aggrieved by a final decision of a Board may appeal the decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, 26 Terrace Street, Montpelier, Vermont 05609-1101 within 30 days of the entry of the order.

If you file an appeal, the Director of the Office of Professional Regulation assigns the case to an appellate officer. The appellate officer reviews the order based on the record created before the board. In cases of alleged irregularities in procedure before the board, not shown in the record, the appellate officer may take proof on that issue. See 3 V.S.A. §§ 129(d) and 130a.

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

IN RE:)
SHIRLEY MEIER) Docket No: NU 65-0505
License No. 026-0008146)

SPECIFICATION OF CHARGES

NOW COMES the State of Vermont and makes the following Charges against the Respondent, Shirley Meier, 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. The Respondent, Shirley Meier, is licensed in the State of Vermont as a registered nurse under license number 026-0008146. This license is currently set to expire on March 31, 2007.

3. At all times relevant, the Respondent was employed as the Mental Health Coordinator for the Department of Corrections located in Waterbury, Vermont.

4. On or about February 15, 2005, Respondent sent an e-mail to a number of people containing confidential health and personal information about patient R.N. The e-mail revealed the patient's name and specific details regarding the patient's medical condition. Several of the people that the Respondent sent this information to had neither the right, privilege, nor authority to receive this information.

Charges

5. The acts, omissions and/or circumstances described above constitute grounds for discipline because the Respondent has committed unprofessional conduct in violation of:

- (i) 26 V.S.A. § 1582(a)(3) (is unable to practice nursing competently by reason of any cause) which includes, but is not limited to, failing to conform to the

STATE OF VERMONT



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essential standards of acceptable and prevailing nursing practice pursuant to ARBN Chapter 4, Rule IV(II)(B)(2);

(ii) 26 V.S.A. § 1582(a)(7) (engages in conduct of a character likely to deceive, defraud or harm the public) which includes, but is not limited to, violating confidentiality by inappropriately revealing information or knowledge about a patient or client pursuant to ARBN Chapter 4, Rule IV(II)(D)(7); and

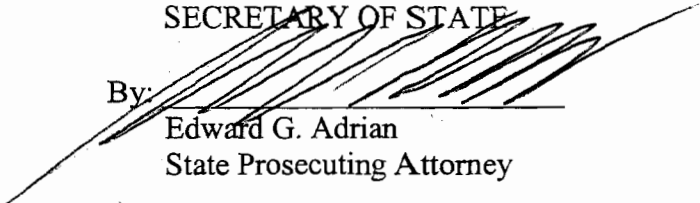
(iii) 3 V.S.A. § 129a(a)(3) (failing to comply with the provisions of state statutes or rules governing the practice of the profession).

Relief Requested

WHEREFORE, the license of Shirley Meier should be revoked, suspended, reprimanded, conditioned or otherwise disciplined.

Dated at Montpelier, Vermont this 29th day of October 2005.

STATE OF VERMONT
SECRETARY OF STATE

By: 

Edward G. Adrian
State Prosecuting Attorney

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