

**STATE OF VERMONT
BOARD OF NURSING**

In re: Kimberlee Moyer
License No. 101-173331

}
} Docket No. 2013-443(APRN)
}

**Decision on
Respondent's Request for Determination of Legal Interpretation and
Motion to Strike Amended Specification of Charges**

Participating Board Members:

Jeanine Carr, RN, Chair
Alan Weiss, Public Member
William G. White, Jr., Public Member
Deborah Swartz, RN
Douglas Sutton, RN
Sheila Davis, LPN
Virginia Hudson, RN
Luana Tredwell, LPN
Jennifer Laurent, APRN

Appearances:

Prosecuting the case: S. Lauren Hibbert
for Respondent: John Paul Faignant

Presiding Officer: Larry S. Novins

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

The Vermont Board of Nursing reviewed both the Ms. Moyer's pleadings and the Prosecution's responses in a deliberative session held at its May 12, 2014 meeting at the Office of Professional Regulation Conference Room in Montpelier, Vermont.

Background

On December 13, 2013 the prosecution filed a Specification of Charges charging Ms. Moyer with working as an APRN while her license "had unintentionally lapsed" for almost four months. Ms. Moyer admitted the allegations in her answer. At a pre-hearing conference on March 7, 2014, Ms. Moyer raised the question of whether a decision or stipulation entered in the case had to be made public. The Presiding Officer invited Ms. Moyer to file any motions by March 18. Ms. Moyer complied. The prosecution responded on April 4, 2014. On that date it filed an Amended Specification of Charges. It amended the charges and alleged that by practicing after her license lapsed, Ms. Moyer violated 26 V.S.A. § 1582(a)(7) i.e., that she

engaged in conduct likely to deceive, defraud, or harm the public.

This matter was to be considered by the Board at its April meeting, but the Board was not presented with the motion and the response at that time. After another pre-hearing conference on April 17, Ms. Moyer filed a Motion to Strike the Amended Specification of Charges.

Discussion

Ms. Moyer is a licensed Advanced Practice Registered Nurse and is therefore subject to the regulatory authority of this Board. 3 V.S.A. §§ 129, 129a, 26 V.S.A. § 1582(a), the Administrative Rules of the Board of Nursing, and the Rules of the Office of Professional Regulation.

The State's original Specification of Charges alleged that Ms. Moyer practiced from April 1, 2013 until July 19, 2013 while her license had lapsed. Ms. Moyer admitted the factual allegations. The charges sought an administrative penalty with no finding of unprofessional conduct. Its Amended Specification of Charges still alleges that Ms. Moyer unintentionally worked after her license lapsed. However, the Amended Specification of Charges now asks simply that Ms. Moyer's license "be revoked, suspended, reprimanded, conditioned, or otherwise disciplined." The State now advocates a finding of unprofessional conduct. The State's Amended Specification of Charges deliberately seeks to make moot Ms. Moyer's argument that imposition of an administrative penalty should not be publicly available.¹ The Prosecution's new charge, if successful, will ensure that Ms. Moyer's violation is posted on the OPR web site.

OPR Administrative Rule of Practice 3.6(f) provides:

(F) Amendments. Proposed amendments to any filing may be made at any time. If unobjected to by the other party within ten days of filing or at the commencement of any hearing in which the amended matter is at issue, whichever is earlier, such amendments shall be deemed effective, except that a hearing authority may at any time dismiss any proposed amendments which it finds to have the effect of unreasonably delaying any proceeding or unreasonably adversely affecting the rights of a party. Where objection is made, amendments shall not be allowed unless a hearing authority finds (a) that they will not unreasonably delay any proceeding or (b) unreasonably adversely affect the rights of a party. A hearing authority may condition the acceptance of any amendment as justice may require. An amendment which is allowed over objection shall be deemed effective as of the date it is approved, unless for good cause, a hearing authority orders that it shall be effective as of a different date. Proposed amendments shall be clearly identified as such and shall clearly indicate the changes they effect. In the event an amendment makes a substantial change in a filing, a hearing authority may order such additional notice to the other party as justice may require.

We note that the Amended Specification of Charges alleges no facts beyond those set out in the original Specification of Charges. Ms. Moyer objects to the Amended Specification of Charges. She filed a timely Answer to the Amended Specification of Charges denying that her

¹ "With the State's amended charges Respondent's arguments are moot." Prosecution's April 4, 2014 Memorandum of Law.

acts constituted unprofessional conduct. Now, rather than having an undisputed case where the only question is whether the "administrative penalty" is to be publicly disseminated, Ms. Moyer is now forced to litigate whether her almost four months of unlicensed practice was "conduct of a character likely to deceive, defraud, or harm the public." The Amended Specification of Charges is an impediment to resolution of this case. It unreasonably affects Ms. Moyer's rights. Pursuant to OPR Administrative Rule of Practice 3.6(F), Ms. Moyer's motion to strike the Amended Specification of Charges is **granted**. This case will proceed on the original charge.

In cases like this the Board may be presented with a Stipulation and Consent Order, or it may conduct a hearing and conclude that a statutory violation has occurred. When a statutory violation is found, the Board is not obligated to conclude that unprofessional conduct has occurred. "In a case involving noncompliance with a statute or rule relating to administrative duties not related to patient, client, or customer care, a board or hearing officer may determine that ordering a monetary civil penalty does not constitute a finding of unprofessional conduct." 3 V.S.A. § 129(a)(3).

The ultimate decision of a Board is a public record. 1 V.S.A. § 313(b). A decision is not exempted from disclosure to the public. It is reflected in the Board's minutes which are public. 3 V.S.A. § 131 requires disclosure of decisions where "disciplinary action" has been taken. 3 V.S.A. § 129(a)(3) gives a board the means to avoid a finding of "unprofessional conduct." When § 131 was enacted, finding a violation without finding unprofessional conduct was not an option. Section 131 is therefore silent regarding cases where a Board imposes a simple administrative penalty for a statutory violation. Reading the statutes as a whole, we conclude that nothing in § 131 recasts a board decision as being exempt from public scrutiny. A Board decision remains a public record or public document subject to release or dissemination to the public.

The Office of Professional Regulation, through the Director, assists the Board in the administrative conduct of its affairs. 3 V.S.A. §§ 123, 129. The Director determines how the Boards' decisions, which are public documents, are publicized or made available to the public. The Board declines Ms. Moyer's invitation to decide how the Director should disseminate the Board's decisions.

Order

For the reasons set forth above:

Ms. Moyer's Motion to Strike the Amended Specification of Charges is **granted**.

Respondent's Motion that the Board determine that a Board decision imposing an administrative penalty with no finding of unprofessional conduct should not be publicized is **denied**.

This matter is set for hearing at the Board's June 9, 2014 meeting.

Vermont Board of Nursing

By:

Jeanine Carr
Jeanine Carr, RN, Chair

Date: May 12, 2014

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 5/13/14