STATE OF VERMONT
BOARD OF NURSING

In re: Thomas Namaya	}	
License No. 101-0022347	}	Docket No. 2008-469
	}	

Decision on
UNPROFESSIONAL CONDUCT CHARGE

Participating Board Members:
Ellen W. Leff, RN, Chair
Jeanine Carr, RN, Vice Chair
Alan Weiss
Sandra Norton, LNA
Donarae Metcalf, LPN
De-Ann Welch, LPN
William G. White Jr.
Deborah Robinson, RN
John Todd, ARPN

Decision on Unprofessional Conduct Charges

Appearances:
for Petitioner, State of Vermont: Edward G. Adrian
for Respondent: Peter Langrock

Presiding Officer: Larry S. Novins

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Vermont Board of Nursing held a hearing in the above matter on March 15, 2010 at the Capital Plaza Montpelier, Vermont.

The prosecution has the burden of proof in this matter. To prevail on any unprofessional conduct charge, it must prove the charge by a preponderance of the evidence.

Background

The prosecution alleges in its Specification of Charges that Mr. Namaya in violation of Vermont unprofessional conduct statutes Mr. Namaya improperly identified himself as a physician and improperly prescribed drugs for use by an immediate family member, his spouse. Before the hearing began the prosecutor indicated he would only proceed on the charge against Mr. Namaya for improper writing of prescriptions to his wife. The parties agreed that Mr.

Namaya wrote prescriptions for his wife. Mr. Namaya's position was that writing the prescriptions he did was not illegal and justified by exigencies existing at the time.

Findings of Fact

Based on the evidence presented, the Board finds as follows:

1. At all times relevant Mr. Namaya was licensed as an advanced practice registered nurse and is therefore subject to the regulatory authority of this Board. 3 V.S.A. §§ 129, 3 V.S.A. § 814(d), 129a, 26 V.S.A. § 1582(a), the Administrative Rules of the Board of Nursing, and the Rules of the Office of Professional Regulation.
2. An APRN is permitted under Vermont law to prescribe drugs. At all times relevant Mr. Namaya was permitted to prescribe drugs. The question, as set forth by the parties at the start of the hearing was whether Mr. Namaya's writing prescriptions to his wife constituted a failure to conform to the essential standards of acceptable and prevailing practice.
3. The State's position as it indicated in paragraph 10 of its Specification of Charges is that the December 2007 Board Position Statement "APRN Prescribing to Immediate Family Member" sets the standard of acceptable and prevailing practice.
4. In December 2007 the Board approved a position statement which states that "It is the opinion of the Board of Nursing that prescribing controlled substances listed in DEA Schedules II, III, and IV for his or her own use or for that of an immediate family member is inappropriate and unacceptable practice." The State offered Exhibit #3 the statement as evidence of the standard of care to be applied in this case. We note that the position statement says it is not "legally binding." We do not take this position statement as conclusive legal proof of the standard of care to be applied in this case.
5. Mr. Namaya's position was that the written standard which "represents the Board's current thinking" and which, as adopted was "not legally binding" was insufficient evidence upon which Mr. Namaya could be found to have committed unprofessional conduct. Mr. Namaya further argued that the prescriptions which he admitted writing for his wife were written under exigencies existing at the time.
6. The question for the Board to resolve is: Did Mr. Namaya violate the essential standards of acceptable and prevailing practice by writing the prescriptions he did for his spouse?
7. The prosecution called on Mr. Namaya to testify. Mr. Namaya denied that he had acted improperly.
8. Mr. Namaya was responsive to questions that elicited testimony helpful to his case. At other times, he was evasive and refused to other questions. For example, when Mr. Namaya was asked if he had any psychiatric certification as an APRN, he repeatedly answered that what he did was within his scope of practice. When asked if he could be disinterested when treating his wife, he testified that with his practice experience since 1974, and having seen his wife not respond to other treatments for her toothache, he was able to assess her pain. He felt the question about his being disinterested in treating his wife was "inappropriate."
9. Since 1995 Mr. Namaya has been the primary care provider for his wife, S.K. S.K. works for a drug company and frequently travels long distances and is frequently away from

home on business. Mr. Namaya testified that because of her employment, his wife had been otherwise unable to find a "suitable" provider. In addition, he testified, he was the provider with whom his wife is most comfortable.

10. Mr. Namaya has several colleagues who he could turn to when needed for prescriptions for his wife.
11. On January 4, 2008, a Friday night Mr. Namaya wrote a prescription for Percocet for S.K. who had a seriously painful tooth ache. S.K. had been under dental care. Mr. Namaya earlier had tried using ice and analgesics to no avail. Neither Mr. Namaya nor his wife called a dentist or another treatment provider. Mr. Namaya recalled this as being a Sunday night. He wrote the prescription because he was the most convenient one to do it. There was no other reason to not call a dentist or other provider.
12. Mr. Namaya testified that normally he is loath to write a prescription for his wife.
13. On January 4, 2008 Mr. Namaya did not try to contact a dentist or other health care provider.
14. There was no exigency preventing Mr. Namaya from contacting other medical providers to respond to S.K.'s need for pain medication.
15. On March 24, 2008 Mr. Namaya wrote a prescription for Ambien for his wife, S.K.. S.K. was going to fly to Europe and the Ambien was to help her sleep on the plane on the trips over and back. Mr. Namaya claimed that he could not remember how long before the trip he was aware that she might need the prescription. That claim was not credible. In any event, no exigency made it imperative for him to write an Ambien prescription for his wife.
16. Mr. Namaya had prescribed Ambien to his wife before. There was no emergency or other exigency for Mr. Namaya to write that prescription. Mr. Namaya didn't try to have anyone else prescribe the Ambien for his wife.
17. S.K. had experienced problems concentrating. Mr. Namaya was trying to help determine whether she had some sort of attention deficit disorder. He wanted to learn whether Adderall would affect her in a positive way. Rather than give her a full adult dose, Mr. Namaya prescribed half of a pediatric dose of Adderall for his wife, essentially for diagnostic purposes. Adderall is a schedule II drug.
18. Mr. Namaya testified that if his wife responded to the drug, he would refer her to another medical provider for further ADD treatment. Although he claimed that such treatment was within his scope of practice, this statement indicates that he had harbored doubts about the legitimacy of treating her by prescribing her drugs.
19. On November 30, 2008 L.M. the pharmacist who would fill the Adderall prescription called S.K.'s home.
20. The pharmacist did not have a sufficient stock of the Adderall and did not want to give Mr. Namaya's wife a partial fill on a prescription. Mr. Namaya told the pharmacist that he had prescribed the drug for his wife and said he would issue a new prescription for his wife. The pharmacist L.M. refused to fill the a prescription for S.K. as she believed it to be was improper or illegal for Mr. Namaya to write one for his wife. She told him she wouldn't not fill the prescription. As a question he said words to the effect of "I can't write a prescription for my wife?" The pharmacist said "no."
21. There was no apparent reason that S.K. could not have gone to another health care provider for the Adderall Mr. Namaya prescribed for her. There was no emergency or

exigency requiring Mr. Namaya to write that prescription. Mr. Namaya's description of his treatment of his wife and her travels necessitating his provision of care to her as an exigency is not credible.

22. Mr. Namaya was the primary treatment provider for his wife. He claimed he took that role because she couldn't not find acceptable or suitable medical treatment for the fifteen years he has been an APRN. Mr. Namaya's testimony on this point was less than persuasive.

23. Mr. Namaya's justification for writing each of the prescriptions for his wife was that there was an emergency or some justification making use of other practitioner/prescribers impractical or inconvenient. He implied that but for those exigencies he would not have written the prescriptions for his wife. We compare his testimony about whether he had any certification in psychiatric nursing against his testimony about the individual prescriptions he filled. In the former, Mr. Namaya was unapologetic and bold in his claim that treating psychiatric conditions was well within his training and scope of practice. In the latter, he was defensive. Not once did he claim, "I wrote the prescription because I am allowed to." He did not claim that the essential standards of acceptable and prevailing APRN practice allow writing prescriptions for a spouse, only that the Board position statement was not sufficient evidence of the standard.

24. Mr. Namaya was very careful to confine his comments to a lack of legal prohibitions on spousal prescriptions. Mr. Namaya testified that he did not normally prescribe drugs to family members, that doing so was the exception, not the rule for him. When asked if he could be objective in treating his wife, he did not answer the question directly. He did say that after over 20 years of practice he could objectively determine whether a person was experiencing real treatable pain.

25. By his own testimony, Mr. Namaya showed that he knew that spousal prescriptions are not generally allowed. Mr. Namaya's counsel's questions to him focused on the scope of practice of APRN's in general and the need for Mr. Namaya to write the prescriptions for his wife when he did. By outlining the exigencies justifying the prescriptions he wrote, Mr. Namaya tacitly admitted that he understood that such prescriptions, if allowed at all, are the exceptions to, and not the general rule. He consistently justified writing the prescriptions as exigencies.

26. Mr. Namaya had multiple opportunities during the hearing to say that he could write prescriptions when there were no exigencies. He did not. From this we find that Mr. Namaya knew that spousal prescriptions, in non exigent situations, are not consistent with accepted standards of practice for APRN's. The Board's December 2009 position statement is merely a reflection of that understanding.

27. The pharmacist testified that she knew Mr. Namaya could not write prescriptions for family members. She was aware of the standard. She told him so.

28. Mr. Namaya made it very clear that after learning of the Board's position statement, he would not write prescriptions for his wife again.

29. The State offered no evidence in support of its charge that Mr. Namaya identified himself as a doctor. We make no findings regarding that charge.

Conclusions of Law

Based on the evidence presented and Facts found above we conclude as follows:

1. **Re: Alleged Violation of 26 V.S.A. § 1582(a)(3):** The State has not proved by a preponderance of the evidence that Mr. Namaya is unable to practice nursing competently by reason of any cause. This charge is dismissed.

2. **Re: Alleged Violation of 3 V.S.A. § 129a(a)(13)**: The State has not proved by a preponderance of the evidence that Mr. Namaya performed treatments or provided services which he was not qualified to perform or which are beyond the scope of his education, training, capabilities, experience, or scope of practice. This charge is dismissed.

3. **Re: Alleged Violation of 3 V.S.A. § 129a(b)(1) and (2)**: The State has proved by a preponderance of the evidence that Mr. Namaya failed to practice competently. We find that Mr. Namaya's conduct, writing prescriptions for his wife, as found above constitute a failure to conform to the essential standards of acceptable and prevailing practice. This is unprofessional conduct.

4. **Re: Alleged Violation of 26 V.S.A. § 129a(a)(3):** 3 V.S.A. § 129a(a)(3) defines unprofessional conduct to include failing to comply with provisions of federal or state statutes or rules governing the practice of the profession. Any allegation of failure to comply with statutes or rules has been addressed above. This statute does not provide an independent grounds for discipline. There is no violation of this statute. This charge is dismissed.

Discussion

Mr. Namaya's position at the hearing was that no statutes or rules proscribe writing prescriptions for one's spouse. Statutes and rules cannot specify every act that constitutes a "failure to conform to the essential standards of acceptable and prevailing practice." 3 V.S.A. 129a(b)(2). In this case Mr. Namaya wrote non emergency prescriptions for his spouse, a practice commonly understood by at least one pharmacist, and even apparently by him, to not conform to acceptable and prevailing standards.

Order

For the violations above, to protect the public, health, safety and welfare, the following sanction is necessary.

Mr. Namaya's license is hereby **warned.**

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 this decision by filing a written Notice of

Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, Office of Professional Regulation, National Life Bldg., North, FL2, Montpelier, Vermont 05620-3402 within 30 days of the entry of this Order.

If an appeal is filed, the Director of the Office of Professional Regulation shall assign the case to an appellate officer. The review shall be conducted on the basis of the record created before the board. In cases of alleged irregularities in procedure before the board, not shown in the record, proof on that issue may be taken by the appellate officer. 3 V.S.A. §§ 129(d) and 130a.

To request a stay of the Board's decision, please refer to the attached stay instructions.

Vermont Board of Nursing

By: Ellen Leff
Ellen Leff, RN, Chair

Date March 22, 2010

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 3/30/10