STATE OF VERMONT
SECRETARY OF STATE, OFFICE OF PROFESSIONAL REGULATION

In re: Eileen L. Tapper **Dkt. No. 2009-228**

License No. 025-7653

Appeal from Findings of Fact, Conclusions of Law & Order of the Board of Nursing

DECISION ON APPEAL

This is an appeal from an order of the Vermont Board of Nursing ["Board"] entered on October 15, 2010 after notice and hearing. The Board's findings of fact, conclusions of law and order ["Order"] determined that the Appellant, Ms. Eileen L. Tapper ["appellant" or Ms. Tapper"],[1] a licensed practical nurse, had committed unprofessional conduct by refusing to reweigh certain nursing home patients when ordered to do so, and by failing to ask a licensed nursing assistant on the staff to weigh those patients. The Board concluded that her refusal and failure constituted failure to practice competently in that she performed unsafe or unacceptable patient care, and failed to conform to the essential standards of acceptable and prevailing practice. In the Board's view, these were violations of 3 V.S.A. §§129a(b)(1) and (2) and 15 V.S.A. §1582(a)(3). The Board conditioned appellant's license for a minimum

[1] Ms. Tapper married during the pendency of this case and is now known as Eileen L. Tapper-McKelvey.

period of one year of supervised practice and imposed other specified conditions. It did not impose any other discipline.

Ms. Tapper noted her appeal from the Board's order on November 15, 2010. Appellant and the State Prosecuting Attorney submitted briefs between that date and March 11, 2011. I heard oral argument from the parties on April 29, 2011. I have reviewed the record and the parties' briefs and render my decision herein.

I am required under 3 V.S.A. §130a to follow certain standards of review in judging appeals from the Board's decisions:

> (b) The appellate officer shall not substitute his or her judgment for that of the board as to the weight of the evidence on questions of fact. The appellate officer may affirm the decision, or may reverse and remand the matter with recommendations if substantial rights of the appellant have been prejudiced because the board's finding, inferences, conclusions or decisions are:
>
> (1) in violation of constitutional or statutory provisions;
> (2) in excess of the statutory authority of the board;
> (3) made upon unlawful procedure;
> (4) affected by other error of law;
> (5) clearly erroneous in view of the evidence on the record as a whole;
> (6) arbitrary or capricious; or
> (7) characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In judging the sufficiency of the evidence to sustain the Board's findings, I am to apply a deferential standard of review, as put by the Vermont Supreme Court:

> on appeal, we will not set aside an administrative agency's findings unless clearly

> erroneous. (Citations omitted) We view the evidence in the light most favorable to the prevailing party and exclude any modifying evidence. (Citations omitted). So long as the findings are supported by credible evidence we will not disturb them.

Bigelow v. The Department of Taxes, 163 VT. 33, 35 (1994).

In this kind of case, especially, considerable deference "is owed ... because the action arose out of an administrative proceeding in which a professional's conduct was evaluated by a group of his [or her] peers ... this court [or an appellate officer] may not substitute its own judgment for that of the Board." Braun v. Board of Dental Examiners, 167 VT. 110, 114 (1997).

Respondent asks me here to reconsider the judgments of a board whose members (with the exception of lay members) are trained and licensed nurses who have considerable experience in Vermont. Such a board is capable of evaluating the professional conduct of a peer without expert testimony, in my view, and may use its "experience, technical competence, and specialized knowledge ... in the evaluation of the evidence" (3 V.S.A. §810(4)).

I am persuaded by the State that the Board's decision must be upheld. Appellant argues that the Board's finding that Ms. Tapper's failure to reweigh the patients or direct other staff to do so did not comport with the essential and prevailing standards of nursing was without evidentiary support. To the contrary, the State adduced testimony from several nursing witnesses that she had refused to do so

when clocked in to her shift, and that the reason for reweighing such patients was to determine whether significant weight changes might signal the onset of a health issue that could be detrimental to patients. Order at 3, ¶12, 13. Whether or not there was a specified time frame within which reweighing was mandated, her refusal to comply with the request or to request others to do so had the potential to impair her patients' health. Id.

Appellant also appears to contend that the Board's decision imposed discipline upon her notwithstanding that her refusal was the product of a diagnosed disabling condition, namely PTSD, and that her employer's actions on the occasion in question denied her reasonable accommodation. However, the Board found based upon the credible evidence that she had not fully revealed to her employer at the time she interviewed for the position all the PTSD "triggers" she testified to at the hearing, and that there was no written documentation of any particular accommodation that her employer had agreed to provide. In particular, the Board made no finding that her disability amounted to a failure to competently practice, but certainly the Board correctly opined that her PTSD "may affect her ability to practice competently in the future." Order at 4. It may reasonably be assumed that the Board recognized that with proper and reasonable accommodations, based upon full disclosure of her disabling condition, Ms. Tapper will be capable in the future of pursuing her profession with care and competence.

I cannot conclude in this case that the Board's findings or conclusions prejudiced the substantial rights of the appellant.

For the foregoing reasons, the Board of Nursing's Order of October 15, 2010 is **AFFIRMED**.

May 17, 2011

Michael H. Lipson
Appellate Officer

DATE ENTERED 5/18/11

APPEAL RIGHTS

This is a final administrative determination by the Appellate Officer of the Office of Professional Regulation.

A party aggrieved by a final decision of the Appellate Officer may appeal the decision to the Superior Court in Washington County by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, National Life Building, North, FL 2, One National Life Drive, Montpelier, Vermont 05620-3402 within 30 days of the entry of the order. A filing fee of $262.50 ($250.00 filing fee plus a $12.50 surcharge), payable to Washington County Superior Court, must accompany the notice of appeal.

For more information about the procedure for filing an appeal, please see the Administrative Rules for the Office of Professional Regulation, which you can find at: http://www.vtprofessionals.org/opr1/opr/admnrule.pdf, and the Rules are also available at the Office of Professional Regulation.

Ex. F

STATE OF VERMONT
BOARD OF NURSING

In re: Eileen Tapper	}	Docket No. 2009-228
License No. 025-7653	}	Preliminary Denial of
	}	Application for Licensure

Motion to Modify Conditions
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Participating Board Members:
Jeanine Carr, RN, Vice Chair
Alan Weiss
Donarae Metcalf, LPN
William G. White Jr.
John Todd, APRN

Appearances:
State of Vermont: Lauren Hibbert
Applicant: James LaMonda

Presiding Officer: Larry S. Novins

The Vermont Board of Nursing held a hearing in the above matter on February 14, 2011 at the National Life Building in Montpelier, Vermont. Ms. Tapper asked that conditions imposed in October be modified. At the hearing she asked that the Board redact from its October Decision and Order all mentions of her post traumatic stress disorder.

Ms. Tapper bears the burden to show why the conditions imposed on her license should be modified.

Background

By Order dated October 14, 2010 this Board conditioned Ms. Tapper's license following findings of unprofessional conduct. Ms. Tapper has appealed that Decision and Order. Pending resolution of her appeal she requested that the Board modify the condition #7 requiring practice under supervision and condition #8 prohibiting certain types of work.

Findings of Fact

Based on the evidence presented at the hearing and review of the file, the Board finds as follows:

1. Ms. Tapper is licensed as a practical nurse and is therefore subject to the regulatory

authority of this Board. 3 V.S.A. §§ 129, 129a, 26 V.S.A. §§ 1574, 1575, the Administrative Rules of the Board of Nursing, and the Rules of the Office of Professional Regulation.

2. As part of an October 2010 Order following a finding of unprofessional conduct Ms. Tapper was required to submit to an evaluation from a psychologist or psychiatrist who would make recommendations as to how and under what circumstances, or with what accommodations Ms. Tapper may safely practice as an LPN.
3. William R. Cote, R.N.C.S. recommended that Ms. Tapper continue in therapy and continue using techniques she has for PTSD. He wrote, "She should be able to safely practice nursing but should be in a supportive environment if she is to be in an acute care setting with clear and supportive supervision. It would be best if she had one supervisor that she could depend upon and would reliably there for her. Ms. Tapper could be expected to function safely in a non-acute setting such as a flu shot clinic. She identifies a need for her employer to be aware of her history of PTSD and to be sensitive to her need to recover from episodes of triggered symptoms."
4. The report submitted does not diminish the need for on-site supervision that we identified in our October Order. One year of supervision remains necessary to assure that Ms. Tapper can practice safely.

Conclusions of Law

Ms. Tapper has not shown that her request to modify the conditions on her license should be granted. With regard to her request to redact references in our October Decision and Order to her PTSD, we note that she raised PTSD evidence in her defense.

Order

Ms. Tapper's Motion to Modify Conditions is **denied.** Ms. Tapper's request to strike mention of PTSD from our October Decision and Order is **denied.**

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, National Life Bldg., North, FL2, Montpelier, VT 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.

BOARD OF NURSING

By: Jeanine Carr
Jeanine Carr, RN, Vice Chair

Dated: February 15, 2011

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 2-18-11

STATE OF VERMONT
BOARD OF NURSING

In re: Eileen Tapper License No. 025-7653	}	Docket No. 2009-228

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.
John Todd, APRN

Appearances:
for Petitioner, State of Vermont: Betsy Ann Wrask
for Respondent: James M. LaMonda

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 October 11, 2010 at the National Life Building in 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 in violation of Vermont Unprofessional Conduct Statutes Ms. Tapper (now known as Eileen Katherine Tapper-McElvey) refused to re-weigh patients when ordered to do so, and failed to ask an LNA to weigh the patients.

Findings of Fact

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

1. Ms. Tapper-McElvey is licensed as a practical 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.
2. At all times relevant Ms. Tapper-McElvey worked at the Bel-Aire Nursing Home in Newport, Vermont.
3. Ms. Tapper-McElvey suffers from post traumatic stress disorder. She testified that when her daughter, who did not have health insurance, went into premature labor, Ms. Tapper-McElvey delivered the baby who died in her hands. Ms. Tapper-McElvey has PTSD from that incident. The PTSD is now triggered by deaths. She testified that she also has PTSD from abuse she suffered at her own mother's hands, and that one of her PTSD "triggers" is bossy, angry women.
4. When Ms. Tapper-McElvey interviewed before being hired at Bel-Aire, she spoke with her employers about the fact that she had post traumatic stress disorder. She did not fully reveal all the PTSD "triggers" that affect her work as completely as she described them at the hearing.
5. Ms. Tapper-McElvey understood from her Bel-Aire employers was that she would not have to work without an RN supervisor. The supervisor might be on site, or if not on site, would be available by telephone.
6. Ms. Tapper-McElvey's works with acute care patients. Patient deaths are not unexpected. They represent an on-going challenge for Ms. Tapper-McElvey.
7. Ms. Tapper-McElvey understood that when there were deaths at work, she would be permitted to take some time at work, or time off from work, to deal with the emotional impact those deaths have on her and the memories and emotions those deaths trigger. Employees at Bel-Aire understood that Ms. Tapper-McElvey might need ten or fifteen minutes to compose herself at difficult times. There was no written documentation of any particular accommodation that Bel-aire would provide Ms. Tapper-McElvey.
8. On February 18, 2008 when Ms. Tapper-McElvey arrived that day, she discovered a medication error had occurred in her absence. She wrote a medication error report. A patient at Bel-Aire died that evening. During the course of the evening Ms. Tapper-McElvey called her nurse supervisor several times. That shift was particularly stressful for Ms. Tapper-McElvey.
9. Ms. Tapper-McElvey's memory of the evening of the 18th was not complete. She could not recall who "pronounced" the death of the resident. The Director of Nursing performed that task.
10. When Ms. Tapper-McElvey reported for work on February 19, 2008, she "clocked in" and prepared for her shift.
11. Ms. Tapper-McElvey learned that she would have no on-site RN supervisor for her 3-11 o'clock shift. Two of Ms. Tapper-McElvey's other patients were dying, and two others were "critical." This was an extremely stressful situation for Ms. Tapper-McElvey. She learned she would be short-handed, that one LNA would not be coming in for the entire shift.
12. On February 19, 2009 one of the out-going staff told Ms. Tapper-McElvey that she would need to re-weigh 3 residents. The patients had weight changes of over five pounds since the last time they were weighed. For these particular patients who had serious medical

conditions a significant unexplained weight change could be a clue to a very serious threat to their health. Re-weighing was imperative to verify the change and permit further examination. Delay in re-weighing a patient whose weight has fluctuated more than five pounds could have devastating results. The personnel on the previous shift were unable to complete the weighings. The essential and prevailing standards of nursing required that these patients be re-weighed as Ms. Tapper-McElvey was asked to do.

13. Ms. Tapper-McElvey's testimony and memory of the verbal exchange about re-weighing the patients differed from the other Bel-Aire employees' testimony. Ms. Tapper-McElvey was clearly upset that afternoon. She testified that she declined to re-weigh the patients because she had decided that she would be unable to work that entire shift and was declining to take responsibility for the entire shift's duties. Her declining to re-weigh the three patients was just a part of her overall decision to decline to work the entire shift and assume all responsibilities that went with it. If that was her intent, her emotions left her unable to communicate it clearly. Other witnesses testified that Ms. Tapper-McElvey simply refused the order to re-weigh the three patients, that she did not indicate she could not or would not work that shift.

14. The more credible testimony shows that Ms. Tapper-McElvey did in fact refuse to re-weigh the patients. She did not delegate that task to anyone else. She did not communicate that she would not be able to work that shift.

15. The Director of Nursing, D.V., spoke with Ms. Tapper-McElvey.

16. D.V. asked if Ms. Tapper-McElvey was going to do the re-weighing. Ms. Tapper-McElvey stated "no." D.V. ordered her to leave the building.

17. Ms. Tapper-McElvey-McElvey testified that because she had not formally taken possession of the keys or control of the narcotic drugs on February 19, she was not on duty, had not assumed the responsibilities of her shift, and cannot be held accountable for her refusal to re-weigh the patients. Given our findings above, we need not make specific findings on this point.

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 proved by a preponderance of the evidence that on February 19, 2009 Ms. Tapper-McElvey was unable to practice nursing competently by reason of any cause. This is unprofessional conduct. 3 V.S.A. § 129a(a)(3).

2. **Re: Alleged Violation of 3 V.S.A. § 129a(b)(1) and (2)**: The State has proved by a preponderance of the evidence that Ms. Tapper-McElvey failed to practice competently. We find that Ms. Tapper-McElvey's conduct as found above constitutes: (1) performance of unsafe or unacceptable patient or client care, 3 V.S.A. § 129a(b)(1) and is (2) a failure to conform to the essential standards of acceptable and prevailing practice. This is unprofessional conduct. We consider violation of this statute and 26 V.S.A. § 1582(a)(3) as one violation for purposes of determining an appropriate sanction.

3. **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

Ms. Tapper-McElvey's defense raised the issue of her post traumatic stress disorder and how various stressors rendered her unable to meet her assigned responsibilities. It is abundantly clear that Ms. Tapper-McElvey's ability to recall events and communicate her feelings were compromised by her PTSD.

Nursing is a stressful profession. A nurse may reasonably expect that bossy or angry individuals, of either gender, will be encountered at the work place. Depending on the job site, encountering death can be expected. There is every indication that Ms. Tapper-McElvey's PTSD may affect her ability to practice competently in the future. In this case, there were other people available to meet the needs of the three patients who needed re-weighing. We cannot predict that in all situations Ms. Tapper-McElvey will be able to practice safely.

The unprofessional conduct found above is intimately related to Ms. Tapper-McElvey's PTSD, a disability which she acknowledges. Conditions on Ms. Tapper-McElvey's license are necessary to protect the public health, safety and welfare.

Order

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

Ms. Tapper-McElvey's license is **conditioned,** effective the date of this decision as set forth in the attached appendix.

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 October 12, 2010

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 10/15/10

Vermont Board of Nursing
Disciplinary Decision
Conditions Imposed

In re: Eileen Tapper-McElvey
Docket No. 2009-228 Hearing Date: October 11, 2010

As part of the Order issued this date, Ms. Tapper-McElvey's license shall be conditioned as follows:

Special Condition: Within 90 days of this Order, Ms. Tapper-McElvey shall submit an independent evaluation to the Board from a psychiatrist or psychologist pre-approved by the Board or its designee. The evaluation shall examine how Ms. Tapper-McElvey's PTSD affects her ability to handle job stress. The evaluation should make recommendations as to whether or how, or in what circumstances, or with what accommodations Ms. Tapper-McElvey may effectively and safely practice as an LPN.

When the Board has received the independent evaluation, it may, upon proper notice and opportunity to respond, consider modifying or amending the conditions on Ms. Tapper-McElvey's license.

1. **Re-issuance of license:** Ms. Tapper-McElvey's license shall be reissued labeled "conditioned." The conditions shall remain in place until Ms. Tapper-McElvey completes all requirements ordered and meets each condition.

2. **Duration:** Ms. Tapper-McElvey shall be subject to these conditions until Ms. Tapper-McElvey completes a **minimum of one year** of supervised practice in which Ms. Tapper-McElvey works at least forty (40) hours every two (2) weeks as a licensed practical nurse.

3. **Part time work:** Part-time work of less than forty (40) hours every two (2) weeks shall be credited on a prorated basis.

4. **Notification to Employers**: Ms. Tapper-McElvey shall provide a copy of this Order to all employers in any current or future setting in which Ms. Tapper-McElvey practices as a licensed practical nurse and inform them of the conditional license status. Within ten (10) days of the date of entry of this Order or of any subsequent employment, Ms. Tapper-McElvey shall cause Ms. Tapper-McElvey's immediate supervisor to write on the employer's letterhead to the Vermont Board of Nursing, Attn: Executive Director, acknowledging receipt of this Order and acknowledging the employer's ability to comply with the conditions required by this Order.

5. **Reports from Employers**: Within one (1) month of the date of entry of this Order and monthly thereafter, Ms. Tapper-McElvey shall cause every employer Ms. Tapper-McElvey has worked for during the relevant period as a licensed practical nurse to submit

to the Board an evaluation of Ms. Tapper-McElvey's performance during that period. This report shall be on forms issued by the Board.

6. **Nursing Programs:** In the event Ms. Tapper-McElvey is attending a nursing program, Ms. Tapper-McElvey shall cause the Program Director to write to the Board, on school letterhead, acknowledging receipt of this Order and ability of the program to comply with the conditions in the Order during clinical experience.

7. **Practice Under Supervision:** Ms. Tapper-McElvey shall practice only in a setting where Ms. Tapper-McElvey has "on-site supervision" for the entire shift by a licensed registered nurse in good standing.

8. **Types of Employment Prohibited:** Ms. Tapper-McElvey shall not work for a nurse registry, traveling nurse agency, float-pool, home health care agency, temporary nursing employment agency or as a personal care provider during the effective period of this Order.

9. **Out-of-State Practice** Out-of-state practice can be credited toward fulfillment of this Order only if Ms. Tapper-McElvey shall first obtain prior approval from this Board for out-of-state practice. If Ms. Tapper-McElvey fails to obtain prior approval before practicing out-of-state, none of the out of state practice time will be credited toward fulfillment of this terms of this Order. The Board will approve out-of-state practice so long as Ms. Tapper-McElvey can still comply with the provisions of this Order.

10. **License Renewal:** The Board's Order, and these conditions, do not affect Ms. Tapper-McElvey's license renewal responsibilities. Ms. Tapper-McElvey must timely apply for and otherwise comply with the requirements for license renewal.

11. **Remedial Course: None required.**

12. **Completion of Conditional License Period:** After the conditional license period, Ms. Tapper-McElvey may petition the Board to remove any and all license conditions. Ms. Tapper-McElvey must present proof that all terms of this Order have been met. Once Ms. Tapper-McElvey has shown that all conditions of this Order have been met, and the Board is satisfied that continuation of the conditions is no longer necessary, the Board will remove the conditions on Ms. Tapper-McElvey's license and restore Ms. Tapper-McElvey's licensure privileges.

Vermont Board of Nursing, by

Ellen W. Leff, RN, Chair

October 12, 2010
Date