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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	FINAL DECISION AND ORDER
KEVIN GREENER, R.N., RESPONDENT.	:	LS0508151NUR

Division of Enforcement Case No. 02NUR089

The State of Wisconsin, Board of Nursing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Board of Nursing.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 1st day of March, 2007.

Marilyn Kaufmann
Member of the Board
Board of Nursing

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST KEVIN GREENER, R.N., RESPONDENT	:	Proposed Final Decision and Order Case No. LS 0508151 NUR

02 NUR 089

The parties to this action for purposes of Wis. Stats. § 227.53 are:

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An evidentiary hearing was held in the above entitled matter on February 22, 2006, before Administrative Law Judge William A. Black. Appearing were the respondent, Kevin Greener, R.N., represented by his attorney Robert T. Ruth, and Jim Polewski representing the Division of Enforcement. Based on the entire record in this case, the undersigned administrative law judge recommends that the Board of Nursing adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact

1. Kevin C. Greener, R.N., is licensed as a registered nurse in the state of Wisconsin, license number 134213, granted on February 14, 2000.

2. On March 26 and 27, 2002, Kevin Greener was employed by Upland Hills Health in Dodgeville, Wisconsin.

3. Kevin Greener was scheduled to work the night shift on March 26, 2002. He requested and received permission to leave early.

4. Kevin Greener charted a reassessment of patient J.H. in a note bearing the time, "0200", on March 27, 2002.

5. Kevin Greener did not falsely chart the "0200" reassessment of patient J.H on March 27, 2002.

Conclusions of Law

1. The Wisconsin Board of Nursing has jurisdiction over this matter, pursuant to Wis. Stat. § 441.07.

2. Kevin Greener's conduct as set forth in the Findings of Fact does not establish a violation of Wis. Admin. Code § N 7.04(6), by falsifying or inappropriately altering patient records.

Order

IT IS NOW THEREFORE ORDERED: that the Complaint is dismissed.

Applicable Law

N 7.04 Misconduct or unprofessional conduct. As used in s. 441.07 (1) (d), Stats., "misconduct or unprofessional conduct" means any practice or behavior which violates the minimum standards of the profession necessary for the protection of the health, safety, or welfare of a patient or the public. "Misconduct or unprofessional conduct" includes, but is not limited to, the following:

(6) Falsifying or inappropriately altering patient records;

Opinion

1. Introduction

Kevin Greener has been charged with falsifying a chart entry. The prosecution has not met its burden of proof to establish that this occurred. On the night of March 26, 2002, Mr. Greener asked his supervisor, Allison Phillipps, for permission to leave early. That permission was granted. Ms. Phillipps' testimony indicates that she didn't really know when Mr. Greener would be leaving nor did any other witness's testimony establish when management or other co-workers thought he would be leaving. No one saw him leave, neither his supervisor nor co-workers. No one other than Mr. Greener testified as to when he left the premises.

The Complaint is quite specific in alleging that Mr. Greener left by 1 a.m. on the morning of March 27, 2002:

> 4. Respondent was scheduled to work the night shift on March 26, 2001, [sic] and arrived over one hour late for his shift. He requested and received permission to leave early, and left the facility by 1 a.m. on March 27, 2001. [sic]

Despite this specific allegation in the complaint that Mr. Greener left the facility by one o'clock a.m., no substantial evidence was presented to support such a conclusion.

The allegation in this case is that Mr. Greener falsely charted a reassessment of a patient by the name of JH, and the alleged false charting in question was for a 2:00 a.m., assessment on the morning of March 27, 2002. It is alleged to be false charting because it is also alleged that Mr. Greener had actually left the facility on or about 1:00 a.m., on the morning of March 27, 2002. Ms. Phillipps testified that co-workers approached her and told the tale of this false charting.

No one saw Mr. Greener leave at a particular time. No one saw him falsely chart. The 'witnesses' merely assumed it to be so.

2. The evidence

Testimony of Allison Phillipps

Ms. Phillipps was employed at Upland Hills, ("Upland") from 1995 to 2004. She has been a registered nurse since 1996. She was employed at the time of the events alleged in the Complaint as the house supervisor on the evening shift at Upland. According to Ms. Phillipps, Greener was a nurse in Upland's ICU unit. However, at times he would be transferred to work in Upland's medical-surgical unit if Upland's ICU did not have patients. On the night of March 26, Greener was scheduled to work Upland's medical-surgical unit during the evening shift through to 7:00 a.m. in the morning of March 27.

Phillipps was approached by Greener between 11:00 and 11:30 p.m., on the night of March 26 requesting permission to leave work early. (RT p. 18) Phillipps, after checking with two other nurses working the shift that night, told Greener, "I said that the other two nurses felt it was fine on the census and with the overall flow of the hospital that he could leave." (RT p. 19, ln 4-6) When questioned whether she approved his request to leave early, Phillipps described what she *would* have done, not affirmatively stating that is what she *did* do. When reviewed closely, Phillipps' answer provides the *earliest* time Greener was approved to leave, but no testimony is presented regarding Phillipps' personal knowledge of when he *actually* left:

> Q Did you tell him when he could leave?
> A Just our general flow would be between 11 and 11:30. The oncoming nurses for med-surg would have been receiving the report, and then they go, and the nurses then do assessments of their patients that they are assigned. So I would have asked that he had done the midnight assessment and give any updates to the other two nurses that were working, and he was able to leave. (RT p. 19, ln 7-16)

Phillipps added that it appeared that Greener was upset, and described generally that Greener was having a relationship problem with another nurse at Upland, and that Greener's request to leave early was related to that personal matter. (RT pp. 19-20) Phillipps did not recall any other interaction with Greener that night. The time when Greener actually left Upland is the critical issue of this case. Phillipps testified that, "It was brought to my attention approximately between 2 and 2:15 [the morning of March 27, 2002] that there was discrepancies within his documentation." (RT p.20, ln 15-17)

The post operative flow sheet for patient JH, contained an entry at 0200 a.m., presumably made by Greener. (Exh. 1 p. 84) At that time, (between 2:00 and 2:15 a.m. on the morning of March 27), Phillipps spoke with Mr. Greener's co-workers, Leah Nankey (Friederick) or Amber Price, the two other nurses on the medical surgical unit. (RT p. 24) She didn't recall which of these two nurses she spoke with. (RT p. 25) Therefore, this testimony gets off to a bad start owing to the fact that a fact finder cannot determine who the actual hearsay declarant is. The basis for Phillipps' assumption that Greener left at 1:00 a.m., is as follows:

> Q What did you do or find when you got there?
> A They showed me the discrepancies in the documentation, presuming -- we had believed that Kevin had left at approximately 1 o'clock in the morning on the shift, and there were notations in the chart after the time he had left. (RT p. 25, ln 1-6)[i]

Ms. Phillipps thereafter reviewed patient J.H.'s chart and the notation for 0200:

> Q Why did you look at the chart?
> A Because I -- trying to think how to word it --thought that Kevin had left prior to 2 o'clock.
> Q Did you have any information that would lead you to question that Kevin Greener had left the hospital before 2:00 a.m.?
> A When he had asked me previously in the shift, between 11 and 11:30, to leave early and I said he could once his assessments were completed, then I had thought he had left. (RT p. 25, ln 22-25, p. 26 ln 1-6)

Therefore, Phillipps' evidence regarding when Greener left Upland is *only her assumption*.

On page 57 of patient JH's records, (Exh 1, Multidisciplinary Progress Notes), there is a notation on March 27, at 0115, by Lea Friederick who observed patient JH "Resting quietly in bed with eyes closed..." From this, Phillipps concluded in her testimony that nurse Friederick was 'taking care' of patient JH at 1:15 a.m., in the morning. (RT p. 52) The difficulty with Phillipps' assumption, is that if Lea Friederick really was 'taking care' of patient JH at 1:15 a.m., page 57, also *does not* indicate that Lea Friederick was 'taking care', ie.., observing patient JH at 0200, on March 27, the time in question regarding Greener. Lea Friederick's next notation on this chart is 0415 a.m., on the Morning of March 27, 2002. (Exh. 1, Multidisciplinary Progress Notes, p. 57-58) Conspicuously absent is any notation that Ms. Friederick was 'taking care' of patient JH at 0200 a.m.[ii] The record doesn't show that Ms. Friederick took the patient's vital signs at 0200 a.m.

In the final analysis, Lea Friederick's 1:15 a.m., notation does not provide a basis to indicate that any particular nurse scheduling could be divined from this portion of the chart. Her notations do raise the intriguing prospect that based on charting evidence alone, she failed to take patient JH's vital signs at 0200 a.m., in the face of accusations that Mr. Greener's notations at 0200 a.m. were false.

Phillipps testified that she wasn't sure why two nurses would be documenting care, and generally two nurses would not be

assigned in this manner. (RT pp. 52-53) However, the chart cannot prove one way or another that Greener didn't perform an assessment at 0200 a.m. Lea Friederick's notations also do not serve the purpose of demonstrating that one nurse was 'taking care' of a patient to the exclusion of all other nurses.[iii]

Therefore, the following interchange between the prosecutor and Ms. Phillipps wrongly assumes that care has been "taken over" by Lea Friederick, and to the exclusion of all other nurses then on shift. However, none of these factual preconditions of the question were established in the record, and the question is left begging as to why Ms. Friederick didn't take the 0200 a.m. vital signs.

> Q Ma'am, would you kindly turn to page 84. Referring your attention to the 0200 entry and asking you to bear in mind the entry by Leah Friederick at page 57 at 1:15. Is there, in your experience as a nurse and a supervisor in Upland Hills Hospital and Health Care, any excuse for entering a time of 0200 when a previous nurse -- from Mr. Greener at the time of 0200 for a reassessment when another nurse has already taken over the care of the patient at 1:15?
> A No.
> Q Thank you. (RT p. 63)

This is an assumption based solely on Ms. Phillipps' say so and the phraseology of the prosecutor's question. Ms. Phillipps' actually only testified that 'generally', two nurses would not be co-assigned in this manner. Therefore, before the leap can be made that Mr. Greener was no longer providing care, the record needs more evidence to establish this. The chart alone does not suffice.

The patient's record itself also does not support the testimony of Ms. Phillipps. The progress notes record that more than one nurse may provide care throughout a scheduled shift. (Exh. 1, pp 62-66) Therefore Ms. Phillipps' testimony is simply wrong, impeached by the record in this case. The prosecution's question has merely assumed that a nurse had taken over patient JH's care, to the exclusion of any other nurse. But this assumption reads into a chart a conclusion that cannot be determined by looking at the chart. To the contrary, the chart evidence is not conclusive enough to make any definite assumptions about when Mr. Greener left his shift.

Further undercutting the prosecution's view of the evidence, on cross examination Ms. Phillipps admitted that from looking at the assessment chart she could only tell that Ms. Friederick was taking care of patient JH at 1:15 a.m. She couldn't tell if Mr. Greener was involved. (RT p. 80) Reliance on the patient's chart without the availability of Ms. Friederick's testimony only results in speculation if one were to try to infer that Mr. Greener was no longer present at some time between 1:15 a.m. and 2:00 a.m.

Ms. Phillipps further impeached herself by agreeing that the chart alone isn't conclusive evidence of whether a nurse has 'taken over' care to the exclusion of all other nurses on a shift.

> Q It's not uncommon for the nurse who's taking over the patient to make the type of notation that Leah allegedly made at 1:15 on 3/27 before the prior nurse has fully completed the prior nurse's duties with that patient, correct?
> A Correct. (RT p. 83)

> Q But just based on the record, it's possible that Kevin Greener was still active with that patient after 1:15 a.m., correct?
> A Correct. (RT p. 130)

The foray into chart evidence to discern Mr. Greener's whereabouts is a futile exercise in this case.

Regarding timekeeping, Ms. Phillipps stated that it was common nursing practice, including for herself, when making a time entry in the chart, to round to the nearest five minutes. (RT p. 86-87) This testimony is at odds with her previous testimony, where she testified that it is not a common practice, and not an acceptable practice to make an entry in a record before the time of the event noted. (RT p. 54) However, for purposes of proof, it adds yet another layer of uncertainty as to the 1:15 a.m., Ms. Friederick time notation and Mr. Greener's 2:00 a.m., notation at issue.

Ms. Friederick's notation could arguably have been made at 1:10 or 1:20 a.m. and Mr. Greener's at 1:55 a.m. The alleged charting discrepancy was brought to Ms. Phillips' attention between 2:00 a.m. and 2:15 a.m. What this means is that Mr. Greener, after having done a proper assessment, could have already been absent for approximately 20 minutes from the facility prior to Ms. Phillips being contacted by the other nurses. This time window in Mr. Greener's favor is huge and Ms. Phillips and the co-workers present no valid reason why they can assume he wasn't there during that time. Four years after the fact relying on chart entries as a basis for inferences of falsity simply asks too much of the chart evidence.

Ms. Phillipps never saw Mr. Greener leave and doesn't otherwise know what time Mr. Greener left the facility on the morning of March 27, 2002. (RT pp. 97-98) She also did not recall whether Mr. Greener asked to leave the facility at 1:00 a.m., or that he stated any particular time to her when he requested to leave early. (RT p. 99)

Mr. Greener's allegedly fraudulent entry was made on the patient's 'post-op' flow sheet. Ms. Phillipps testified that it was important for the information on the post-op flow sheet to be accurate because people relied on that information.

Q And it's important that the information on this post-op flow sheet be accurate, correct?
A Yes.
Q And this is information people rely on in the medical field with respect to this particular patient, right?
A Right. (RT p. 94)

If Lea Friederick took over care even as of 0200 a.m., and on into the morning of March 27 , the post op chart on p. 84, and graphic record, p. 192, certainly don't reveal it. This reading of the charts was confirmed by Ms. Phillipps. (RT pp. 103-105) Ms. Phillipps confirmed that Ms. Friederick's signature and initials do not appear on the graphic record chart in Exhibit 1 at page 192. (RT p. 104) My review of the post op chart Exhibit 1, page 84 similarly does not show Ms. Fredierick's initials there.

The chart evidence falls far short of being substantial evidence with which to support meeting the prosecution's burden of proof against Mr. Greener. Further, Ms. Phillipps has not adequately testified as to what she was told and by whom in the early morning of March 27, 2002, to constitute substantial evidence against Mr. Greener.

Testimony of Colleen Watters

At the time of the events in question Ms. Watters was the director of the ICU at Upland. She was a supervisor of Mr. Greener. Ms. Phillips brought to Ms. Watters' attention that there may have been an issue with false charting involving Mr. Greener.

Ms. Watters provided testimony which essentially characterized the 'gist' of a conversation with Ms. Phillips about the conversations that Ms. Phillips had with other nurses.

Q Basically how did Allison -- did you ask Allison Philipps how she had learned of it?
A Yes.
Q What did she tell you?
A She had been notified by the other nurses who were working on the floor at the time that when they assumed the care of patients that Kevin had been caring for that night, that entries had already been made into the chart for times after the time that he had left work. (RT pp. 150-151)

This testimony doesn't even contain the statements of these complaining nurses; it contains merely an after-the-fact summation. This is not substantial evidence.

Ms. Watters testified that she had a conversation with Ms. Friederick wherein Ms. Friederick told her that she, Ms. Friederick, had taken over the care of the patient in question at 1:00 a.m. on the morning of March 27. (RT p. 152) Ms. Watters stated that both Ms. Friederick, and another nurse, Amber Price, told her that they had last seen Mr. Greener at 1:00 a.m. (RT p. 158) The problem with this testimony is that if it in fact was what Ms. Friederick said, the issue again arises that it does not mean that Mr. Greener left, or that Mr. Greener did not perform the 0200 assessment. As Ms. Friederick did not

testify, the actual specifics of the conversation can not be further explored. Nor can Ms. Friederick explain why she didn't take the "real" 0200 vital signs of the patient and perform the assessment, which would have been her duty.

Ms. Watters discussed the charting issue with Mr. Greener. (RT pp. 172-173)

> Q What conversation did you have with Mr. Greener about the entry at 2 o'clock -- rather about the 2 o'clock entry?
> A That I had been informed by staff working with him on that shift that he had left before the time of that entry.
> Q Did Mr. Greener deny that he had left before the time of that entry?
> A No.
> Q Did you ask Mr. Greener if he had left before the time of that entry?
> A Not specifically, no. (RT pp. 175-176)

At this point, Ms. Watters has therefore testified that a witness who cannot be cross examined, Ms. Friederick, told her, Ms. Watters, that she took over care of the patient at 1:00 a.m. of the morning in question, and that Ms. Friederick and Amber Price, who did not testify and cannot be cross examined, said that they last *saw* Mr. Greener at 1:00 a.m. Following all of this background, then when Ms. Watters talked to Mr. Greener about the incident which she was investigating, she didn't ask him if he left before the time of the 2:00 a.m. entry.

Ms. Watters further testified that Mr. Greener apparently never "argued" with the assertions laid against him:

> Q Did you tell Mr. Greener that Allison Philipps or some other person had told you that he had left work before the time entered on the record?
> A Yes, I did.
> Q What was his response to that?
> A There was no argument, no argument that I recall.
> Q Did Mr. Greener tell you that he had made the 2 o'clock entry at 2?
> A No. (RT p. 177)

Exhibit 3 was presented to Ms. Watters. It was Mr. Greener's timesheet for the week. Ms. Watters admitted that she filled out his timecard, and entered the time in question that he left the facility as "0100". She did this because Ms. Phillips told her that was the time when he left. Mr. Greener did not tell her when he left Upland. (RT pp. 191-192)

Ms. Watters talked to Mr. Greener about the daily patient assessment chart. (Exhibit 1, p. 96) He had written "0400" on the form. Mr. Greener explained to her that that was how he organized. (RT p. 195) Ms. Watters questioned Mr. Greener about the 0200 chart entry at issue. (Exhibit 1, p. 84) Mr. Greener never indicated to Ms. Watters that he put down the wrong time. Rather, he indicated to her that he was, "using 2400 time." This is what she wrote down in her notes and considers it a full and accurate record of her conversation with Mr. Greener. (RT p. 196)

It appears that Ms. Watters and Mr. Greener were having two different conversations. What is lacking here is that Ms. Watters apparently never asked, but should have, Ie.. "What time did you leave?" Instead, there is a backdrop in Watters' testimony regarding her mistaken impression that there was something about "midnight." Yet, Mr. Greener leaving at 12:00 o'clock midnight isn't even at issue.

> Q But did you understand him to be telling you that he was using military time in his charting?
> A When he was telling me in this, I thought he was telling me that he was talking about midnight.
> Q Well, but he said to you that he thought he was writing 2400 time, correct?
> A Right, because he was writing 2400 time when he went around to make his rounds.
> Q You didn't ask him to clarify that, did you?
> A No.
> Q 2400 times could also be a way of referring to military time, right?
> A It could be.
> Q In fact, he did use military time throughout the charting of John Harris, correct?
> A That is correct. (RT pp. 198-199)

It is clear that Mr. Greener did use military time in his charting. What isn't clear is what Ms. Watters was trying to determine in her conversation with Mr. Greener. The substance of the conversation fails to constitute any admission by Mr. Greener regarding when he left the facility.

The most that Ms. Watters' testimony stands for is the proposition that Mr. Greener never indicated to her that he thought he did something inappropriate:

> Q Mr. Greener in your interview with him after this 3/27/02 incident was first brought to your attention, Mr. Greener never indicated to you that he thought he did something inappropriate, correct?
> A That is correct. (RT p. 202)

Ms. Watters' testimony does not assist a finder of fact in determining when Mr. Greener left the Upland facility and whether he falsified a patient chart.

3. Testimony of Kevin Greener

Mr. Greener admitted talking to Ms. Watters about the alleged charting discrepancy. However, he only recalled that they talked about a '0400' entry that he had made on the patient's chart. (Exh. 1, p. 96) (RT pp. 232-233) He stated that he told Ms. Watters that there were no assessments indicated on the chart for that time.[iv] Mr. Greener didn't remember that they discussed anything else. (RT p. 234) Mr. Greener didn't specifically recall what time he asked to leave early, or whom he asked, but assumed it was Ms. Phillips. (RT p. 235) He did recall getting home about 3:30 a.m., that morning and it is approximately a forty five minute trip from the facility to his home. (RT p. 235) He did not specifically recall making the '0200' entry at issue, but it was his handwriting. (RT p. 237)

> Q And do you have any reason to believe based on your recollection of events that you made this entry at any time other than 0200?
> A No. If I made it at 2 o'clock, that's when I made the assessment.
> Q By 0200, are you using 2400 time?
> A Right, that would be, yeah, 24, military time.
> Q What does 0200 mean?
> A 2 o'clock in the morning, a.m. (RT p. 237)

> Q Mr. Greener, when you wrote down 0200 on page 84,were you trying to be accurate?
> A Yes.
> Q Were you trying to misstate anything?
> A No. (RT p. 240)

Conclusion

The evidence presented at the hearing does not constitute substantial evidence of a violation and I therefore recommend that the complaint be dismissed.

Dated: January 2, 2007

William Anderson Black
Administrative Law Judge

[i] The Respondent's attorney objected to the question as non responsive, and the objection was sustained. However, the answer is relevant to demonstrate that Ms. Phillipps', testimony does not amount to substantial evidence as no hearsay declarant is identified and Ms. Phillips candidly states that all parties involved *presumed* when Mr. Greener left. This testimony is circular and not credible.

[ii] The prosecution's reliance on this charting therefore proves too much. It proves that Lea Friederick was not taking care of the patient at 0200, a.m., But according to Ms. Phillips, Lea Friederick not only should have been taking care of the patient at 0200, a.m, but to the exclusion of any other nurse. Ms. Friederick was not available to testify to address these intriguing issues.

[iii] However, Lea Friederick's notation does prompt the question, if she was 'taking care' of patient JH at 1:15 a.m., and she and her co-worker discovered Greener's supposedly fraudulent entry at or about 0200, why didn't Friederick perform the required 0200 assessment of patient JH at that time?

[iv] This is not an issue regarding false charting. The staff knew he was not at the facility at that time, and no assessments were indicated.