

BEFORE THE IOWA BOARD OF NURSING

IN THE MATTER OF THE STATEMENT)	DIA No. 14NB025
OF CHARGES AGAINST)	Case No. 12-300
)	
ANTHONY SCHWENDINGER,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	DECISION, AND ORDER

On February 26, 2014, the Iowa Board of Nursing filed a Statement of Charges against Respondent Anthony B. Schwendinger, charging him with unethical conduct, in violation of Iowa Code section 147.55(3), as defined by 655 IAC 4.6(4)e, for committing an act or omission which may adversely affect the physical or psychosocial welfare of the patient or client.

On November 6-7, 2014, a contested case hearing was held before the following Board members: Gwen Suntken, R.N., Chair; Debra Larson, L.P.N.; LeRoy Strohman, D.D.S., public member; James Seymour, public member; Nancy Kramer, Ed.D., A.R.N.P., C.P.N.P., C.N.E.; and Chad Ware, M.S.N., R.N. The hearing was closed to the public at Schwendinger's request, pursuant to Iowa Code section 272C.6(1). The hearing was reported by a certified court reporter. Administrative Law Judge Heather Palmer assisted the Board in conducting the hearing. Assistant Attorney General Sara Scott represented the state of Iowa. Attorney Daniel Becka represented Schwendinger. Amy Berentes, R.N., Linda Hoppe, Elizabeth Macke, R.N., Stephen Jewell, C.R.N.A., James Babeshoff, C.R.N.A., Dr. Mark Leding, and Carla Tarrant appeared and testified on behalf of the state. Schwendinger appeared and testified. Schwendinger's spouse, Gail Schwendinger attended the hearing, but did not testify. Dr. John Dooley, Cindy Mangler, R.N., Cynthia Hoppe, R.N., Dr. Rodney Cody, Dr. Mona Alqulali, Dr. Xerxes Colah, Dr. Mark Feldman, and Dr. Benjamin Van Raalte appeared and testified on behalf of Schwendinger. Attorney Bob Slovak represented Berentes, Dr. Cody, Cynthia Hoppe, Linda Hoppe, Macke, Mangler, and Tarrant. Attorney Michael McDonough represented Jewell, Babeshoff, and Dr. Leding. The Board's Executive Director, Kathy Weinberg, also attended the hearing. Exhibits A through K and 1 through 28 were admitted into the record. Designated portions of the deposition of Dr. Surendra Kumar were also admitted into the record.

FINDINGS OF FACT

Schwendinger has held a Certified Registered Nurse Anesthetist ("C.R.N.A.") license in Iowa since November 1, 1978. Schwendinger has been an employee of Dr. Dooley since 2005.

Dr. Dooley's company, Pain Consultants, Inc. entered into a contract with Mercy Medical Center – Clinton ("Mercy") to provide anesthesia services to patients at Mercy. Mercy unanimously approved Schwendinger's provisional appointment to the ancillary staff as a member of the Surgery Department on December 18, 2009. Mercy reappointed Schwendinger to the ancillary staff on December 30, 2011 through December 31, 2013. Schwendinger worked 50 to 60 hours per week at Mercy. Schwendinger's coworkers, Babeshoff, Jewell, and Dr. Leding performed anesthesia services at Mercy under Dr. Dooley from 2008 through 2012.

I. Prior Issues Involving Alcohol

A. OWI

Schwendinger self-reported to the Board that he pleaded guilty to operating while intoxicated, first offense. On December 3, 2008, the Board issued a Notice of Hearing and Statement of Charges against Schwendinger, charging him with unethical conduct, in violation of Iowa Code section 147.55(3), as defined in 655 IAC 4.6(4)p for pleading guilty to or being convicted of a misdemeanor or felony related to the practice of nursing. Schwendinger entered into a Stipulation and Order with the Board in 2009. The Board placed Schwendinger on probation for 12 months, and ordered him to obtain case manager approval for each work environment, to attend a structured recovery support group, to abstain from alcohol and illicit drugs, to provide body fluid specimens when requested by the case manager, to attend personal issue counseling, and to submit to a medical and/or mental health exam when determined appropriate by the case manager.

Schwendinger completed urinalysis testing in 2009 and 2010. Schwendinger complied with the terms of his probation.

B. 2008 Work Concerns

Jewell was a colleague of Schwendinger's from 2006 through 2012. In 2008, Jewell went to relieve Schwendinger during a procedure. Jewell smelled a strong odor of alcohol on Schwendinger. Jewell told Dr. Leding and the Surgical Director of Nursing that he

smelled alcohol on Schwendinger. The Director of Nursing contacted Dr. Kumar, who was the Medical Director. Schwendinger was relieved of duty.

Mercy staff and Dr. Kumar confronted Schwendinger. Schwendinger admitted he had problems. Schwendinger enrolled in an alcohol treatment program in Texas and was gone from work for six weeks.

II. 2011 through 2012 Concerns

A. Sleeping at Work

1. Snoring in the Operating Room

Macke has been a registered nurse for 12 years. Macke worked with Schwendinger in the operating room at Mercy. Macke reported that during a procedure in 2012 Schwendinger was sleeping. She observed his head was down, his hands were folded, his eyes were closed, and he was snoring. Macke could not recall how long Schwendinger was snoring, but estimated it was 10 seconds.

Macke testified that when she heard Schwendinger snoring she said to him, "Tony you were sleeping," he replied, "no," and she responded, "you were snoring." Macke reported the drapes around the patient were high and she could not see Schwendinger's face. Macke testified there were other professions in the operating room who were closer to Schwendinger than she was. The other professionals did not suggest Schwendinger was sleeping.

Macke reported the incident to Tarrant, the Interim Director of Perioperative Services at Mercy. Tarrant has been a registered nurse for 35 years and worked at Mercy from October 2011 through August 2012.

Macke testified she had seen Schwendinger with his head down and arms folded before, but she could not confirm if Schwendinger was sleeping. Macke denied observing any other anesthesia providers sleeping in the operating room. She also denied smelling alcohol on Schwendinger.

Schwendinger testified the incident with Macke occurred in December 2011, or early 2012. Schwendinger testified that he had taken a lunch break and returned from lunch during a left rotator cuff repair surgery. Macke was on the other side of the drapes and spoke his name. When she spoke his name, Schwendinger responded. Schwendinger reported Macke accused him of sleeping and he replied, "no I'm not."

Schwendinger testified he often closes his eyes during anesthesia while he sits with his hand on the patient's carotid artery. Schwendinger reported this is an older anesthesia technique for monitoring the patient to detect changes in the patient's pulse.

2. Sleeping in the Lounge

Dr. Leding and Babeshoff, Schwendinger's coworkers, reported they saw Schwendinger sleeping at work. Babeshoff has been C.R.N.A. for the past 34 years and has known Schwendinger for 10 to 12 years. Dr. Leding worked with Schwendinger from July 2008 through February 2012. Dr. Leding became the lead anesthesiologist in September 2012 when Dr. Dooley's contract ended with Mercy.

Babeshoff testified he never saw Schwendinger sleeping in the operating room, but when he would enter the operating room Schwendinger would not acknowledge him. Schwendinger would be sitting on the anesthesia stool, not moving, and looked like he was asleep. Babeshoff reported he would tap Schwendinger and Schwendinger would respond. Babeshoff never heard Schwendinger snoring. Babeshoff never saw Schwendinger's face in the operating room. Babeshoff reported he noticed Schwendinger's charting was not complete when he relieved Schwendinger.

On February 14, 2012, Schwendinger was sitting at the computer after visiting with a patient. Dr. Leding approached him and accused him of sleeping. Schwendinger responded, "I was trying to take a nap and you are interrupting me."

Babeshoff also reported seeing Schwendinger sleeping when he was working at the computer. After speaking with his first patient, Babeshoff observed Schwendinger with his eyes closed at the computer.

Jewell, Babeshoff, and Dr. Leding testified they observed Schwendinger fall asleep in the middle of a conversation in the anesthesia lounge. Jewell and Dr. Leding reported that in late 2011 through early 2012, Schwendinger fell asleep more often during conversations.

Jewell also reported that when he relieved Schwendinger from a procedure, Schwendinger's charting was not complete even though the procedure had started 90 minutes before. Jewell testified he observed a sentence trailing off the edge of the paper. Jewell, Babeshoff, and Leding did not report Schwendinger's behavior to Mercy.

B. Smell of Alcohol at Work

1. Babeshoff's Observations in 2011 and 2012

Babeshoff testified that after Schwendinger's OWI in 2007 and substance abuse treatment, Dr. Dooley told Babeshoff that Schwendinger should not be drinking and he should inform Dr. Dooley if he smelled alcohol on Schwendinger.

Babeshoff testified that over an eight-month period from 2011 through 2012 Schwendinger smelled of alcohol at work. Babeshoff reported he smelled alcohol on Schwendinger four or five times in the dressing room in the morning between 7:00 a.m. and 7:30 a.m. Babeshoff stated that when he was in the dressing room, he was approximately two feet from Schwendinger.

Babeshoff testified he asked Schwendinger once if he had taken cough medicine and Schwendinger responded he had. Babeshoff testified he did not think the smell was cough medicine. Babeshoff denied the smell could be cologne or aftershave. Babeshoff denied asking Schwendinger whether he had taken cough medicine on the other occasions.

Babeshoff reported his observations of Schwendinger to Dr. Dooley. Dr. Dooley responded that he would take care of it. Babeshoff testified he told Dr. Dooley Schwendinger did not seem impaired. Babeshoff did not report his concerns to anyone at Mercy or to Dr. Leding. Dr. Dooley acknowledged Babeshoff contacted him four or five times and reported he smelled the odor of alcohol coming from Schwendinger in 2012. Babeshoff never reported his observations to Mercy and never intervened to stop Schwendinger from treating patients.

2. Jewell's Observations on February 13, 2012

Jewell testified that on Monday, February 13, 2012, in the morning, Schwendinger saw him in the hallway and told him he had a complicated case and wanted a second opinion. Jewell observed the patient and agreed it was a difficult case. Jewell had received training in fiber optic intubations and agreed to assist Schwendinger.

Schwendinger sat next to Jewell during the procedure. Jewell reported that when he was sitting next to Schwendinger, he smelled the odor of alcohol on Schwendinger's breath. Jewell did not ask Schwendinger about the odor. Jewell denied that the smell could have been cough medicine or cologne. No one confronted Schwendinger about the smell on February 13, 2012.

After the intubation, Dr. Leding came into the operating room. Jewell told Dr. Leding he smelled the odor of alcohol on Schwendinger. Dr. Leding later approached Schwendinger, but did not smell the odor of alcohol on Schwendinger.

Jewell did not report his observations to Mercy or intervene that day and continued with his own work. On Thursday that week, Jewell reported the incident to Tarrant.

Schwendinger testified he had a few mixed drinks during a pork chop barbecue on February 12, 2012. Schwendinger reported he stopped drinking at 4:00 p.m. Schwendinger denied drinking after 10:00 p.m. the night before a shift, or when he was on call.

Jewell and Babeshoff noted that Schwendinger was coming into work late. Most of the anesthesia providers arrived at 7:00 a.m. to prepare for their first case, and Schwendinger was arriving at 7:30 a.m. Jewell reported Schwendinger had not been late a few months before and he looked disheveled when he arrived.

C. Surgeries February 14-16, 2012

In addition to Jewell's observations on February 13, 2012, Schwendinger's coworkers raised concerns about his competency during three surgeries February 14-16, 2012.

1. Child's Surgery on February 14, 2012

Dr. Cody, an otolaryngologist, performed an adenoidectomy on a child with chronic sinusitis and asthma. Dr. Cody left the operating room. During extubation the child

experienced a bronchospasm or laryngospasm. Schwendinger performed manual ventilation on the child, but the child's oxygen saturation level continued to drop.

Dr. Leding testified he walked by the operating room and saw the patient on a gurney. Dr. Leding went to Tarrant and reported a child was not waking up as anticipated.

Dr. Leding and Tarrant entered the room and saw Schwendinger was masking the patient. Dr. Leding listened to the child's lungs and heard a high-pitched squeak and determined the patient was experiencing a laryngospasm or bronchospasm. Dr. Leding was concerned because the patient's vital signs were low. Dr. Leding administered lidocaine, which did not have any effect on the child. Dr. Leding told Schwendinger to reintubate the patient. The patient was reintubated and suctioned. Copious amounts of blood were removed during suctioning. The child was later extubated and transferred to recovery. Dr. Leding testified Schwendinger was slow and not functioning at the critical speed needed for the situation.

Dr. Cody testified when he returned to the operating room Schwendinger was masking the patient. The oxygen monitor was making an auditory signal that the patient's oxygen saturation was dropping. Dr. Cody observed Schwendinger had the situation under control. He was uncertain why Dr. Leding had come into the room. Dr. Cody reported it is common for the staff to work as a team when problems arise. Dr. Cody observed Schwendinger reintubate the patient and the patient improved. Dr. Cody did not report Schwendinger was slow to react. He testified Schwendinger was reacting as expected. Dr. Cody does not believe Schwendinger did anything improper.

Schwendinger denies he was acting slower than normal and avers he had perfect control over the situation. Schwendinger reported he has provided anesthesia to thousands of children over his career.

Mangler has been a registered nurse at Mercy for 14 years and six months. Mangler worked with Schwendinger at Mercy until he left in 2012, on hundreds of cases. Mangler reported Schwendinger provided excellent care and she had him perform anesthesia on her son. Mangler testified she would use Schwendinger herself.

Mangler was working with Schwendinger during the incident with the child. Mangler reported the child developed a bronchospasm, and many people came into the operating room. Mangler noted Schwendinger had everything under control and Dr. Leding rushed in and moved Schwendinger out of the way, and another nurse came in and moved Mangler out of the way.

Mangler denied Schwendinger was slow to respond to the patient's needs. Mangler denied ever observing Schwendinger impaired, sleeping, or smelling of alcohol.

Dr. Leding contacted Dr. Dooley after the incident and told him he was concerned Schwendinger was drinking because he was sleeping and work and Jewell had smelled the odor of alcohol on Schwendinger.

Dr. Dooley testified it is not uncommon for individuals having upper airway surgeries to have pulmonary problems, including respiratory distress, and bleeding or obstructions in the airway, including bronchospasms and laryngospasms. Dr. Cody noted patients with upper airway procedures experience laryngospasms or bronchospasms approximately 25% of the time. Dr. Dooley noted Leding was there to assist and provided therapy to the patient.

Dr. Cody testified no one at Mercy asked him about the case. Dr. Cody denied Schwendinger generally had problems with airways.

Tarrant reported the incident, Jewell's report, and the sleeping incident Macke relayed to her to Berentes, the Vice President of Patient Care and Chief Nursing Officer for Mercy on February 14, 2012. Tarrant told Berentes she was concerned about Schwendinger's slow response to the situation with the child and she believed Schwendinger placed the patient at risk.

2. Additional Cases

Tarrant testified Schwendinger was involved with two additional orthopedic cases that concerned her that week. The two patients developed respiratory problems and infiltrates after anesthesia, requiring a higher level of care. Jewell testified he could not attribute the patients' conditions to Schwendinger.

Dr. Dooley testified he reviewed the charts involving the two additional cases. The patients had multiple problems that affected their responses to anesthesia. Dr. Dooley reported it was appropriate to move the patients to a more controlled environment to monitor their recovery. Dr. Dooley did not conclude Schwendinger's care was substandard.

Berentes called Dr. Dooley on February 17, 2012, and told Dr. Dooley Schwendinger was not welcome to return to Mercy.

III. Ad Hoc Committee

Mercy formed an ad hoc committee ("Committee") to investigate the allegations Schwendinger smelled of alcohol and was sleeping at work. Dr. Dooley testified Linda Hoppe, the Vice President of Quality and Risk Management at Mercy asked him to participate. The Committee included Dr. Dooley, Linda Hoppe, and Dr. Kumar, Mercy's part-time Medical Director. The Committee did not review any medical records.

The Committee interviewed Babeshoff, Dr. Leding, Mackie, Tarrant, Jewell, and Schwendinger. The witnesses confirmed their earlier observations. Dr. Dooley testified none of the witnesses reported Schwendinger was impaired while he was working at Mercy. The Committee did not interview Dr. Cody or any of the other medical, ancillary, or nursing staff who worked with Schwendinger the week of February 13, 2014. Following the interviews, Mercy confirmed Schwendinger would not be allowed to return to work at Mercy. Mercy did not follow the procedures listed in the Bylaws with respect to Schwendinger's alleged impairment or dismissal.

On September 10, 2012, Mercy sent Schwendinger a letter advising him that the contract Mercy had with Pain Consultants, P.C. terminated on September 9, 2012, and pursuant to Section 9.2 of the Agreement, the clinical privileges of the physicians and allied health professionals rendering anesthesiology services on behalf of Pain Consultants automatically terminated, without the right to a hearing or appeal under the Medical Staff Bylaws.

IV. Board Complaint

On March 22, 2012, Berentes filed a Complaint with the Board as follows:

On Tuesday, February 14th, 2012, the OR Director at Mercy Medical Center informed me of a "near miss" with a patient that was not adequately breathing immediately post-op, deoxygenated, and if it had not been for the intervention of the Director of Anesthesia, Dr. Leding, may have had a different outcome. The OR Director, who was present for the event, the nurse involved, and Dr. Leding, all reported that Tony was slow to respond to the situation and required direction to assist with the resuscitation. By Thursday, the OR Director came to me with two more instances of concern involving Tony's care. At this point, I met with the OR Director and Dr. Leding and we discussed the possibility of impairment. He stated that he suspected this might be the case as one of

the nurses was reporting she was at a party with Tony (a known alcoholic) where he was drinking. After further investigation, the other two anesthesia providers also stated that they suspected Tony was drinking and both stated they thought they could smell alcohol on his breath. They also had witnessed Tony falling asleep at the computer more than once. Since I felt patients were in immediate danger, I asked Dr. Leding to contact Dr. Dooley, the owner of the group, and ask that Tony be removed from practice until further investigation is completed. The next day the CEO and I both spoke with Dr. Dooley over the phone and formally asked for this to occur. The Executive Director of Quality/Risk Management, and CMO, and Dr. Dooley all interviewed Tony, the Director of the OR, the other anesthesia providers in the group, and one nurse. After these interviews were conducted, it was the consensus of all involved that Tony was likely working impaired and should not return to work at Mercy. Dr. Dooley agreed to this decision and he has not returned.

(Exhibit 2). Berentes reported Dr. Leding, Jewell, Babeshoff, Tarrant, Macke, Linda Hoppe, Dr. Kumar, and Dr. Dooley were involved.

V. Observations from Other Surgical Staff

Dr. Dooley testified Schwendinger has good interactions with patients, nurses, and surgeons. Dr. Dooley he has never questioned Schwendinger's competency. Dr. Dooley has never seen Schwendinger fall asleep or observed him to be impaired.

Cynthia Hoppe has been a registered nurse at Mercy for 34 years and has worked with Schwendinger for many years, on hundreds of cases. Cynthia Hoppe testified she has never seen Schwendinger impaired. She reported she had never heard Schwendinger was an alcoholic until the day he was released from Mercy. She has seen his head bob during surgeries, but has never observed him sleeping. Cynthia Hoppe testified she has recommended Schwendinger as an anesthesia provider to her family and has also used Schwendinger as an anesthesia provider for herself. Cynthia Hoppe testified Schwendinger was well-regarded by the nursing staff at Mercy and reported many of the nurses requested him for anesthesia services.

Cynthia Hoppe reported the week Schwendinger left the hospital Tarrant called her into her office. Berentes, Tarrant, and Dr. Leding were there. Tarrant asked Cynthia Hoppe if she knew Schwendinger was an alcoholic and whether she had seen him drinking. Cynthia Hoppe reported she said she had seen Schwendinger drinking

during a couple of hunting parties. Cynthia Hoppe denied ever seeing Schwendinger drinking at work. Since his departure from Mercy Cynthia Hoppe has not attended any social events with Schwendinger.

Dr. Mark Feldman is an obstetrician and gynecologist who worked at Mercy from September 2008 through April 2013. Dr. Feldman reported he performed at least 175 procedures with Schwendinger during the time he worked with Schwendinger at Mercy. Dr. Feldman described Schwendinger as outstanding, and one of the most gifted anesthesia providers he has ever worked with. He reported Schwendinger has never exhibited any concerning behavior and he has never seen him dozing or sleeping.

Dr. Feldman reported Schwendinger had a different way of working than Dr. Leding, Babeshoff, and Jewell. Dr. Feldman described Schwendinger as methodical, caring, and gentle with patients. Dr. Feldman reported that patients often requested Schwendinger as an anesthesia provider because of his reputation of being kind, slow, and methodical.

Dr. Alqulali is an obstetrician and gynecologist. She is the Vice President of the Medical Staff at Mercy, a member of the Mercy Executive Committee, and a member of the Mercy Credentialing Committee. Dr. Alqulali testified she has performed at least 500 procedures with Schwendinger. Dr. Alqulali denied observing Schwendinger sleeping, smelling of alcohol, or appearing impaired at work.

Dr. Alqulali testified that many anesthesia providers read books and use the internet while watching monitors during anesthesia. Dr. Alqulali denied seeing an anesthesia provider sleeping at Mercy.

Dr. Colah is an orthopedic surgeon in Clinton who performs surgery at Mercy. Dr. Colah was the Chief of the Mercy Medical Staff in 2012. Dr. Colah learned Schwendinger was no longer working at Mercy through rumor. Dr. Colah testified he has performed hundreds of surgeries with Schwendinger. He reported he has never observed Schwendinger sleeping while performing anesthesia or smelling of alcohol. Dr. Colah testified he has observed anesthesia providers dose off and be inattentive during surgery by reading books, and using the internet. Dr. Colah testified the inattentive behavior does not concern him because the monitoring equipment is sophisticated and alerts anesthesia providers when a patient falls out of acceptable parameters. Dr. Colah has seen Schwendinger drink at the Christmas party, but has not observed him to be drunk or impaired.

Dr. Van Raalte has been a board certified plastics and reconstruction surgeon for 25 years. Dr. Van Raalte worked with Schwendinger from 2005 through 2007, and 2012 through the present. Dr. Van Raalte testified he has performed 500 cases with

Schwendinger and reported Schwendinger is as good as Dr. Dooley and any of the other seven nurse anesthetists he has worked with. Dr. Van Raalte testified he has never observed Schwendinger impaired and has often observed Schwendinger interviewing his first patient of the day. Some of the procedures Schwendinger has assisted Dr. Van Raalte with were five hours.

Dr. Van Raalte testified that if an anesthesia provider nodded off he does not believe the patient would be at risk given modern anesthesia technology. Anesthesia equipment monitors patients closely and has audible sounds and alarms, which has resulted in a decrease in malpractice insurance for anesthesia providers. Dr. Van Raalte reported seven years ago he saw Schwendinger close his eyes during a single procedure, but has not observed that in the last two years. He has never observed Schwendinger fall asleep in the middle of a conversation. Dr. Van Raalte has observed other anesthesia providers reading the newspaper or a book, and using the internet, but he has not observed Schwendinger engaging in those activities.

Dr. Cody has performed surgical procedures at Mercy for 12 to 13 years. Dr. Cody believes he has performed hundreds, if not more than 1,000 cases with Schwendinger at Mercy. Dr. Cody testified he has no concerns about Schwendinger's anesthesia skills with pediatric or adult patients.

Dr. Cody prepared a reference for Schwendinger on March 27, 2012, reporting Schwendinger was the best nurse anesthetist he has ever worked with. Dr. Cody noted Schwendinger seeks consultation from others when necessary and he works well with other professionals. Dr. Cody testified he particularly enjoyed working with Schwendinger on complicated procedures. Dr. Cody reported Schwendinger has a wide range of interests and skills as compared to Babeshoff, who was not experienced with complex cases.

CONCLUSIONS OF LAW

The Board oversees the licensure and discipline of nurses in Iowa.¹ The Board may issue an order to discipline any licensee for a ground set forth in Iowa Code chapter 272 C, or Iowa Code sections 147.55 or 152.10.²

On February 26, 2014, the Board charged Schwendinger with unethical conduct, in violation of Iowa Code section 147.55(3), as defined by 655 IAC 4.6(4)*e*, for committing an act or omission which may adversely affect the physical or psychosocial welfare of the patient or client. The Board alleged that between the end of 2011 and February 14, 2012, Schwendinger had been observed by multiple witnesses sleeping and snoring during a surgical procedure and smelling of alcohol.

I. Sleeping in the Operating Room

The state presented one witness, Macke, who reported she heard Schwendinger snoring in the operating room. Macke testified that when she heard Schwendinger snoring she said to him, "Tony you were sleeping," he replied, "no," and she responded, "you were snoring." Macke reported the drapes around the patient were high and she could not see Schwendinger's face. She stated there were other professions in the operating room who were closer to Schwendinger than she was. The other professionals did not suggest Schwendinger was sleeping. Macke reported the snoring lasted approximately 10 seconds.

Schwendinger testified that after he returned from lunch during a left rotator cuff repair surgery Macke was on the other side of the drapes and spoke his name. When she spoke his name, Schwendinger responded. Macke accused him of sleeping. Schwendinger replied, "no I'm not."

There are many factors used when considering the credibility of witness testimony. Some of the most common standards are as follows:

1. Whether the testimony is reasonable and consistent with other evidence you believe.
2. Whether a witness has made inconsistent statements.
3. The witness' appearance, conduct, age, intelligence, memory and knowledge of facts.

¹ Iowa Code chapters 147, 152, and 272C (2013).

² *Id.* § 152.10.

4. The witness' interest in the trial, their motive, candor, bias and prejudice.³

The Board finds the testimony of Macke and Schwendinger credible. Macke believed Schwendinger was sleeping. She testified she heard him snoring for 10 seconds. Macke acknowledged she could not see his face.

The state did not present evidence Schwendinger fell asleep in the operating room. Several nurses and physicians reported they performed hundreds of surgeries with Schwendinger over many years and never observed him snoring, sleeping, or impaired in any way. The state has not proven Schwendinger engaged in unethical conduct by sleeping in the operating room.

II. Smelling of Alcohol while Working

Jewell and Babeshoff testified they smelled the odor of alcohol coming from Schwendinger early in the morning in 2012. Jewell testified he reported the odor to Dr. Leding and Babeshoff testified he reported the odor four or five times to Dr. Dooley. Dr. Leding later observed Schwendinger and did not detect the odor of alcohol.

Neither Jewell nor Babeshoff intervened or reported they thought Schwendinger was impaired. Babeshoff testified he asked Schwendinger once about the odor and Schwendinger responded he had taken cough medicine. Jewell did not ask Schwendinger whether he had been drinking. Babeshoff did not ask Schwendinger whether he had been drinking on the other occasions. Babeshoff and Jewell did not alert Mercy administration or the nursing staff of their observations or stop Schwendinger from working with patients when they allegedly smelled the odor of alcohol on Schwendinger.

Schwendinger had a prior incident at work in 2008. Following the incident he attended treatment and engaged in regular urinalysis testing. When Mercy administration learned of the allegations in 2012, Mercy did not request urinalysis screening from Schwendinger or any other intervention.

The Board finds Jewell and Babeshoff's testimony not credible. If they were concerned Schwendinger had been drinking, they should have intervened. Instead, they reported their observations to Dr. Leding and Dr. Dooley.

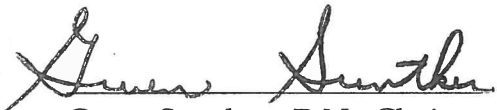
³ *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996).

Several nurses and physicians reported they performed hundreds of surgeries with Schwendinger over many years and never detected the odor of alcohol on Schwendinger or observed that he was impaired in any way. The state has not established Schwendinger engaged in unethical conduct. The Statement of Charges should be dismissed.

DECISION AND ORDER

The state of Iowa has not proven Schwendinger engaged in unethical conduct in violation of Iowa Code section 147.55(3), as defined by 655 IAC 4.6(4)e. The Statement of Charges is DISMISSED.

Dated this 10th day of December, 2014.



Gwen Suntken, R.N., Chair
Iowa Board of Nursing

cc: Sara Scott – Assistant Attorney General
Dan Becka – Attorney for Respondent



Iowa Board of Nursing

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Name _____

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ACCEPTANCE OF SERVICE

I Daniel Becka, acknowledge that I personally received the following documents on this

_____ day of _____, 20____

1. Cover letter
2. Findings of Fact, Conclusions of Law, Decision and Order

Signature