

SUMMARY

_____Maia Michael appeals the Delaware Board of Nursing's suspension of her licenses to practice nursing. The Board's decision is supported by substantial evidence and is free from legal error. The decision below is **AFFIRMED**.

FACTS

_____Maia Michael (Appellant) is a registered nurse and a licensed practical nurse in Delaware. Appellant was employed by Christina Health Care System. Between October 21, 2008 and November 17, 2008, Appellant impersonated a physician, using that physician's name and DEA number, in an attempt to fill five Xanax prescriptions at local pharmacies. Appellant filled four of the five prescriptions successfully.

On December 9, 2008, Appellant was arrested and charged with one count of obtaining a controlled substance by deception and one count of criminal impersonation. Following her arrest, Appellant's employer placed her on a leave of absence while her criminal matter was pending.

On February 12, 2009, Appellant pled guilty to one count of obtaining a controlled substance by deception. She was enrolled in a drug diversion program, but her conviction became effective when she failed to comply with the terms thereof.

As a result of the foregoing, the State of Delaware (the State) lodged a complaint with the Delaware Board of Nursing (the Board) seeking to revoke Appellant's nursing licenses. A hearing on the matter was scheduled for February 9, 2011. Appellant received notice of the hearing. That notice included an explanation that Appellant would be entitled to representation by counsel, an opportunity to examine and cross examine witnesses, and an opportunity to present evidence to the

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Board.

Appellant failed to appear for the February 9, 2011 hearing. The hearing was conducted in her absence. The State read and entered the criminal complaint against Appellant into evidence. Subsequently, the State presented two witnesses: Sandra Wagner, an administrative specialist with the Division of Professional Regulation for the Board, and Agent Raymond Handcock, a Delaware State Police officer. Ms. Wagner testified, briefly, that she had mailed notice of the hearing to Appellant, and had received, in return, confirmation that Appellant would be in attendance. Documentation confirming her testimony was entered into evidence. Agent Handcock testified to the facts surrounding Appellant's arrest and conviction for the above referenced crimes.

The Board voted to revoke Appellant's licenses. The Board did not prepare a written order. Rather, the Board granted Appellant's March 3, 2011 request to reopen the hearing so that she might appear to testify on her own behalf.

Appellant was sent notice of the second hearing identical to that for the first. The second hearing was held on April 13, 2011. The Deputy Attorney General assigned to represent the Board entered into evidence Appellant's letter requesting reopening as well as the initial complaint to the Board. The Deputy summarized the previous hearing on the record, then turning the matter over to the parties. At that point, the State rested on the record established at the previous hearing.

Appellant testified to having committed the crimes of which she was accused. She described her actions with particularity, apologized and took responsibility. She explained that she was abusing Xanax to cope with issues in her personal life. She

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explained that she had been improving. Moreover, she admitted to having failed to comply with the terms of her probation.

The Board decided to suspend Appellant's licenses. On May 12, 2011, the Board issued a written order explaining that, pursuant to 24 *Del. C.* § 1922, Appellant was convicted of a crime substantially related to nursing, is unfit or incompetent by reason of negligence, habit or other cause, and was guilty of unprofessional conduct. Appellant's licenses were suspended for five years beginning on the date of the order. Appellant may apply for probationary status after two years.

STANDARD OF REVIEW

_____An appeal from an administrative board's final order to this Court is restricted to a determination of whether the Board's decision is free from legal errors, and whether the Board's findings of fact and conclusions of law are supported by substantial evidence in the record.¹ Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."² It is more than a scintilla, but less than a preponderance of the evidence.³ It is a low standard to affirm and a high standard to overturn. If the record contains substantial evidence, then the Court is prohibited from re-weighing the evidence or substituting its judgment for that of

¹ 29 *Del. C.* §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

³ *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988) (citing *DiFilippo v. Beck*, 567 F. Supp. 110 (D. Del. 1983)).

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the agency.⁴ Questions of law are reviewed *de novo*.⁵

DISCUSSION

Appellant has filed the instant appeal of the Board's order. Although there is some controversy regarding the timeliness of the appeal, the Court will consider the appeal on the merits. The Court will address each of Appellant's five arguments *seriatim*:

1) the State's closing argument in the first hearing placed the burden of proof upon Appellant to prove her innocence;

_____ 2) there was no written decision from the Board's first hearing;

3) the Board, at the second hearing, relied upon testimony taken during the first hearing;

4) Appellant was not informed, at the second hearing, that her right to counsel was accompanied by her right to examine and cross examine any evidence; and

5) the suspension should begin to run from the time at which Appellant was suspended from work by her employer.

I. The State's Closing Argument In The First Hearing Did Not Place The Burden Of Proof Upon Appellant.

_____ Appellant argues that the State, in closing argument, made an impermissible remark that shifted the burden of proof to Appellant to prove her innocence. Appellant does not argue that the Board placed the burden of proof upon her. The

⁴ *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 42 (Del. Super. 1976).

⁵ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154 (Del. 1998).

pertinent comment is as follows: “Miss Michael did not come here to explain what’s going on. We don’t know whether or not she has a drug problem. It certainly, unfortunately looks like she may, but she’s not here to answer to that.”

The comment was presented in closing argument. It was couched between other comments in which the State summarized the evidence that it presented to satisfy its burden of proof. It did not, as Appellant suggests, shift the burden of proof. Nothing shows that the Board erred in its application of the law. Appellant presents no authority to suggest that the comment was impermissible. Moreover, of course, Appellant did not object to the comment when it was made. The Board did not commit legal error by permitting the comment.

II. The Board Was Not Required To Issue A Written Order After The First Hearing Because The Hearing Process Was Reopened To Expand The Record.

Next, Appellant asserts that the Board erred because it did not issue a final, written order following the first hearing. “Upon reaching its conclusion of law and determining an appropriate disciplinary action, if any, the Board shall issue a written decision and order in accordance with § 10128 of Title 29.”⁶

In this case, the Board reached a decision at the conclusion of the first hearing based upon the evidence presented therein. Soon thereafter, Appellant contacted the State to request that the hearing be reopened so that she may present evidence on her behalf. The State acquiesced, and the Board reopened the matter. There was no final order from the first hearing, because the decision from the first hearing was not final.

⁶ 24 *Del. C.* § 1922(c)(3)g.

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The Board did not issue a final decision until it had opportunity to consider any mitigating circumstances presented by Appellant. Appellant cites no authority to indicate that this practice was impermissible. Appellant's argument does not provide any basis for relief.

III. Substantial Evidence Exists, Independent Of That Which Was Presented At The First Hearing, To Support The Board's Decision.

Appellant maintains that the Board in the second hearing should not have considered the testimony presented by the State in the first hearing. Specifically, Appellant challenges the testimony of Agent Handcock. Appellant argues that, because different Board members were present at the first hearing than at the second hearing, consideration of Agent Handcock's testimony, somehow, was in error. Again, Appellant cites no authority to support her argument. It is not apparent that the Board committed error. The evidence from the first hearing was memorialized in the record. Even if Agent Handcock's testimony were never presented, Appellant admitted to each allegation on the record. Accordingly, there is substantial evidence, independent of Agent Handcock's testimony, to support the Board's decision.

IV. Appellant Was Informed Of Her Right To Examine And Cross Examine Evidence Prior To Commencement Of The Hearings.

Next, Appellant claims that she should have been informed of her right to examine and cross examine witnesses at the beginning of the second hearing. Although she was asked at the beginning of the hearing if she wished to proceed without counsel, Appellant argues that this inquiry was insufficient.

Appellant, once again, cites no authority to support her position. In its

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response, the State argues that the letters Appellant received providing notice of the hearing and explaining her rights at the hearing were sufficient.⁷ In *Seymour*, the Superior Court held that an individual before the Delaware Real Estate Commission waived her right to counsel at a hearing when she elected to proceed *pro se*. The individual had been informed of her right to counsel and her right to examine and cross examine witnesses in a letter, prior to the hearing, providing her notice of the hearing.

Appellant herein was provided notice of the initial hearing and the second hearing in the mail. Each notice informed Appellant of her right to counsel and her rights regarding presentation of evidence. She was informed, in the letters, of her right to challenge the evidence presented against her. She was reminded of her right to counsel at the outset of the second hearing. Moreover, at the second hearing, she acknowledged that she did not have any evidence or witnesses to present other than her own testimony. Appellant's argument is not supported by the facts.

V. Appellant's 2009 Suspension From Employment Was Not A Suspension Of Her Licenses To Practice.

Finally, Appellant contends that, because her employer suspended her from work in January 2009, the Board's suspension of her licenses should be considered to have run concurrent to that suspension. On that theory, Appellant takes the position that she would be eligible to apply for probationary status now.

Appellant's unsupported argument does not address an action by the Board.

⁷ See *Seymour v. Del. Real Estate Comm'n*, 1998 WL 283398 (Del. Super. Mar. 23, 1998).

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Rather, it addresses only an action taken by her employer. Although she was suspended from work in 2009, the Board did not suspend her licenses to practice until 2011. Accordingly, she is not entitled to apply for probationary status at this time.

CONCLUSION

The decision below is **AFFIRMED**.

SO ORDERED this 16th day of February, 2012.

/s/ Robert B. Young
J.

RBY/sal
oc: Prothonotary
cc: Opinion Distribution
File
