NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

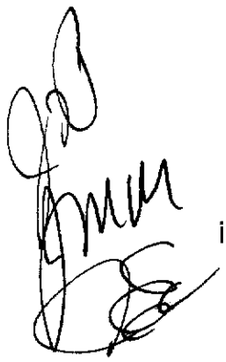
NO. 2012 CA 1831

PHILLIP W. RAINES, R.N.

VERSUS

LOUISIANA STATE NURSING BOARD

Judgment rendered June 7, 2013.



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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C598207
Honorable William A. Morvant, Judge

* * * * * *

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* * * * * *

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

PETTIGREW, J.

In this appeal, plaintiff, a registered nurse, challenges the decision of the Louisiana State Board of Nursing ("Board") to revoke his nursing license. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 1, 2000, Phillip W. Raines ("Mr. Raines") was licensed by endorsement by the Board to practice as a registered nurse in Louisiana. At all times pertinent hereto, Mr. Raines was employed at the Rapides Regional Medical Center ("Medical Center") in Alexandria, Louisiana. By letter dated June 15, 2009, the Board notified Mr. Raines that it had received information that he had been arrested by the Alexandria Police Department for sexual battery of a patient, Phillip Kotynia, who had been assigned to his care while he was working as a nurse in the post-anesthesia care unit ("PACU") of the Medical Center. It was alleged in the letter that Mr. Raines "on or about May 15, 2009, at about 4:15 A.M., while ... on duty, ... massag[ed] the patient's upper thigh and abdominal areas while the patient was in and out of sleep ... plac[ed] the patient's penis in [his] mouth ... and ... plac[ed] [his] finger in the patient's rectum while asking if the patient liked what [he] was doing. Subsequently the patient ran out of the hospital to get away from [him]." The Board determined that Mr. Raines' conduct was a threat to the "health, safety, and welfare of the citizens of Louisiana" and summarily suspended his license.

Thereafter, by letter dated June 23, 2009, the Board filed a formal complaint against Mr. Raines accusing him of patient abuse, along with other charges including incompetence by reason of negligence and moral turpitude. On September 16, 2009, the Board ratified the June 15, 2009 summary suspension of Mr. Raines' nursing license.

In a letter dated March 19, 2010, the Board notified Mr. Raines that it had information that he may have acted in violation of the Nurse Practice Act, La. R.S. 37:911, *et seq.* Particularly, the letter detailed that when caring for the same patient, Mr. Raines falsified physician's orders when he documented verbal orders without having received orders or authorization from the physician; failed to utilize the PACU protocol as required

for management and administration of medicine for acute pain, nausea, and other side effects of anesthesia and surgery; failed to use gloves when handling the penis of a patient who was attempting to use a urinal; and failed to assure the safety of an eloped patient when he did not timely or adequately search for the patient or notify the house supervisor that the patient was missing. By letter dated April 8, 2010, an amended and supplemental complaint was sent to Mr. Raines outlining these additional allegations as set forth in the March 19, 2010 letter.

Following a hearing on December 6, 2010, the Board found that Mr. Raines had violated the Nurse Practice Act and that the "evidence presented constitutes sufficient cause pursuant to La. R.S. 37:921 to revoke [Mr. Raines'] license to practice as a Registered Nurse in Louisiana." In a "Final Order" dated December 15, 2010, the Board ordered that Mr. Raines' license be permanently revoked and that he surrender his license to the Board staff, refrain from working in any capacity as a registered nurse, and pay a fine of $4,000.00 and costs of $6,000.00 within 12 months.

On January 12, 2011, Mr. Raines filed the instant petition for judicial review of the Board's decision, pursuant to the Administrative Procedure Act ("APA"), La. R.S. 49:950, *et seq.*, in the Nineteenth Judicial District Court. Following review by the district court, judgment was signed January 10, 2012, affirming the decision of the Board. Mr. Raines now appeals to this court, presenting the following issues for our review:

> 1. Whether the Board's vote for revocation for [Mr.] Raines' license was lawful and in accordance with full compliance with implementing legislation and the [APA].
>
> 2. Whether the Board improperly considered evidence resulting from a deprivation of [Mr.] Raines' constitutional rights (violations of his 5th and 6th amendment privileges).
>
> 3. Whether the Board should have applied an adverse presumption to testimony due to the intentional destruction of evidence (spoliation).
>
> 4. Whether the Board's action was arbitrary, capricious and contrary to the law and evidence.

LAW AND ANALYSIS

Standard of Review

Judicial review of administrative decisions is governed by La. R.S. 49:964, which provides, in pertinent part:

> G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

When reviewing an administrative final decision, the district court functions as an appellate court. An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appropriate circuit court of appeal. On review of the district court's judgment, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. Consequently, this court will conduct its own independent review of the record and apply the standards of review provided by La. R.S. 49:964(G). **Doc's Clinic, APMC v. State ex rel. Dept. of Health and Hospitals**, 2007-0480, pp. 8-9 (La. App. 1 Cir. 11/2/07), 984 So.2d 711, 718-719, writ denied, 2007-2302 (La. 2/15/08), 974 So.2d 665. See also La. R.S. 49:965. An appellate court sitting in review of an administrative

agency reviews the findings and decision of the administrative agency, not the decision of the district court. **Smith v. State Dept. of Health and Hospitals**, 39,368, p. 4 (La. App. 2 Cir. 3/2/05), 895 So.2d 735, 739, writ denied, 2005-1103 (La. 6/17/05), 904 So.2d 701.

The grounds for disciplinary proceedings of registered nurses are set out in La. R.S. 37:921, which provides, in pertinent part:

> The board may deny, revoke, suspend, probate, limit, or restrict any license to practice as a registered nurse or an advanced practice registered nurse, impose fines, and assess costs, or otherwise discipline a licensee and the board may limit, restrict, delay, or deny a student nurse from entering or continuing the clinical phase of nursing education upon proof that the licensee or student nurse:
>
> . . . .
>
> (3) Is unfit or incompetent by reason of negligence, habit, or other cause.
>
> . . . .
>
> (8) Is guilty of moral turpitude.

"Other causes" that may render a registered nurse "unfit" or "incompetent" have been delineated by the Board in La. Admin. Code, Title 46, Part XLVII, § 3405(A), in pertinent part, as follows:

> *Other Causes*--includes, but is not limited to:
>
> a. failure to practice nursing in accordance with the legal standards of nursing practice;
>
> b. possessing a physical impairment or mental impairment which interferes with the judgment, skills or abilities required for the practice of nursing;
>
> c. failure to utilize appropriate judgment;
>
> d. failure to exercise technical competence in carrying out nursing care;
>
> e. violating the confidentiality of information or knowledge concerning the patient;
>
> f. performing procedures beyond the authorized scope of nursing or any specialty thereof;
>
> g. performing duties and assuming responsibilities within the scope of the definition of nursing practice when competency has not been achieved or maintained, or where competency has not been achieved or maintained in a particular specialty;

h. improper use of drugs, medical supplies or equipment, patient's records, or other items;

i. misappropriating items of an individual, agency, or entity;

j. falsifying records;

k. failure to act, or negligently or willfully committing any act that adversely affects the physical or psychosocial welfare of the patient ...;

l. delegating or assigning nursing care, functions, tasks, or responsibilities to others contrary to regulations;

m. leaving a nursing assignment without properly notifying appropriate personnel;

n. failing to report, through the proper channels, facts known regarding the incompetent, unethical, illegal practice or suspected impairment due to/from controlled or mood altering drugs; alcohol; or a mental or physical condition of any healthcare provider[;]

o. failing to report to the board one's status when one performs or participates in exposure-prone procedures and is known to be a carrier of the hepatitis B virus or human immunodeficiency virus, in accordance with LAC 46:XLVII.4005;

p. has violated a rule adopted by the board, an order of the board, or a state or federal law relating to the practice of professional nursing, or a state or federal narcotics or controlled substance law;

q. inappropriate, incomplete or improper documentation;

r. use of or being under the influence of alcoholic beverages, illegal drugs or drugs which impair judgment while on duty, to include making application for employment;

s. failure to cooperate with the board by:

i. not furnishing in writing a full and complete explanation covering a matter requested by the board; or

ii. not providing information, documents/records, reports, evidence or any other requested items within the designated time period to the board office as requested by the board/board staff;

iii. not responding to subpoenas issued by the board in connection with any investigation or hearing;

iv. not completing evaluations required by the board;

t. exceeds professional boundaries, including but not limited to sexual misconduct; ...

u. use of any advertisement or solicitation which is false, misleading, or deceptive to the general public or persons to whom the advertisement or solicitation is primarily directed[;]

v. attempted to or obtained a license (including renewals), permit or permission to practice as a registered nurse, nurse applicant, or student nurse by fraud, perjury, deceit or misrepresentation;

w. false statement on application;

x. failure to comply with an agreement with the board.

The Board's Findings

The Board, after holding a trial in this matter, found Mr. Raines to have violated the Nurse Practice Act in five respects: (1) that he was unfit or incompetent by reason of negligence, habit, or other cause (La. R.S. 37:921(3)); (2) that he was guilty of moral turpitude (La. R.S. 37:921(8)); (3) that he had failed to practice nursing in accordance with the legal standards of nursing practice (LAC 46:XLVII.3405(a)); (4) that he had failed to act, or negligently or willfully committed an act that adversely affects the physical or psychosocial welfare of the patient (LAC 46:XLVII.3405(k)); and (5) that he had exceeded professional boundaries, including but not limited to sexual misconduct (LAC 46:XLVII.3405(t)). Barbara L. Morvant, Executive Director of the Board, issued findings of fact and conclusions of law, in pertinent part, as follows:

FINDINGS OF FACT

. . . .

On or about the night shift of May 14, 2009, through May 15, 2009, for Patient PK, a post-operative emergency appendectomy patient, Respondent:

A. Deviated from hospital protocol when Respondent documented verbal orders as follows:

-At 0230 documented administration of Fentanyl 50 mcg per verbal order;
-At 0235 documented administration of Fentanyl 50 mcg per verbal order;
-At 0255 documented administration of Demerol 25 mg per verbal order;
-At 0255 documented administration of Phenergan 12.5 mg per verbal order;
-At 0315 documented administration of Fentanyl 50 mcg per verbal order;
-At 0320 documented administration of Fentanyl 50 mcg per verbal order;
-At 0330 documented administration of Fentanyl 50 mcg per verbal order; and
-At 0335 documented administration of Fentanyl 50 mcg per verbal order.

B. Failed to utilize the PACU protocol as required for management of, and medication administration for, acute pain, nausea and other side effects of anesthesia and surgery as follows:

Although the protocol called for Morphine to be used prior to using Demerol and to administer "Demorol 10 mg IV x one, may repeat every 3 minutes x 4, titrated to response":
-At 0233 removed Demerol 25 mgm IV (from Pysis machine 5-B) out of protocol sequence and at more than double of the protocol dose; at 0255 documented administration of the Demerol without first attempting the use of Morphine Sulfate and failed to document justification for using Demerol; and

C. At 0342 removed Fentanyl 50 mcg (from Pyxis machine 3.13-1) and at 0335 documented administration of the medication, although the maximum limit of 250 mcq of Fentanyl administration per protocol had already been met and failed to obtain a physician's order as required for the additional Fentanyl 50 mcg administered at 0335.

D. By Respondent's own admission, failed to administer 0335 dose yet documented status of relief at 0355.

E. By Respondent's own admission, failed to use universal precautions when Respondent handled the patient's penis without gloves.

F. Failed to assure the safety of an eloped patient when Respondent failed to timely and adequately search for the patient or to timely notify the house nursing supervisor or security personnel of the patient's elopement.

G. On or about May 15, 2009, in the early morning at about 4:15 A.M., while on duty at Rapides Regional Medical Center in Alexandria, Louisiana, and assigned to a patient recovering from emergency surgery, Respondent committed patient sexual abuse by:

- Massaging the patient's upper thigh and abdominal area while the patient was still in and out of sleep;
- Placing the patient's penis in Respondent's mouth and Respondent's finger in the patient's rectum;
- Asking the patient if the patient liked what Respondent was doing to the patient.

Subsequent to Respondent's actions listed above, the patient fled the nursing unit in response to the abuse. On the same morning Respondent was arrested for Sexual Battery (Fondling) by the Alexandria Police Department.

On December 6, 2010, an administrative board hearing was held. The Board heard testimony and reviewed documents and evidence.

CONCLUSIONS OF LAW

1. That pursuant to La. R.S. 37:911, et seq., the [Board] has jurisdiction over this matter.

2. That Respondent was properly notified of the charges and date of hearing.

3. That based on the foregoing Findings of Fact, Respondent did violate La. R.S. 37:921 as follows:

- Respondent is unfit or incompetent by reason of negligence, habit, or other cause; La. R.S. 37:921(3);

- Respondent is guilty of moral turpitude[;] La. R.S. 37:921(8);

- Respondent failed to practice nursing in accordance with the legal standards of nursing practice; LAC 46:XLVII.3405(a);

- Respondent failed to act, or negligently or willfully committed an act that adversely affects the physical or psychosocial welfare of the patient[;] LAC 46:XLVII.3405(k); and

- Respondent exceeded professional boundaries, including but not limited to sexual misconduct; LAC 46:XLVII.3405(t).

4. That the evidence presented constitutes sufficient cause pursuant to La. R.S. 37:921 to revoke Respondent's license to practice as a Registered Nurse in Louisiana.

Was the Board's Vote Unlawful?

Mr. Raines argues that because the Board's rules do not contain "the required number of votes to revoke or otherwise discipline a nurse licensee following the conduct of a disciplinary hearing," the Board's vote to revoke his license was unlawful and contrary to law. Mr. Raines maintains that because the APA "compels the Board to enact rules and regulations pursuant to its provisions, the absence of any statement as to the requisite vote for disciplinary actions is a violation" of the APA. The Board counters that neither the APA nor the Nurse Practice Act imposes an affirmative duty upon the Board to promulgate rules regarding the number of votes needed to discipline a licensee. We agree with the Board.

There are nine voting members of the Board. See La. R.S. 37:914(B)(1). With regard to hearings by the Board, La. R.S. 37:922 provides, in pertinent part, as follows:

> A. Upon the filing of a sworn complaint with the board charging the violation of any of the provisions of this Part, the executive director of the board shall fix a time and place for hearing and send by registered mail a

> copy of the charges together with a notice of the time and place for hearing to the individual accused at least ten days prior to the date set for the hearing. The notice shall be mailed to the last known address of the individual accused as it appears on the records of the board. The executive director may appoint a panel consisting of three or more board members to hear the charges. If no panel has been appointed, the charges shall be heard by no less than a quorum of the board members.

Pursuant to LAC 46:XLVII.3307(D), "[f]ive members, including one officer, shall constitute a quorum of the board for the purpose of conducting business."

According to the record herein, there was no panel appointed to hear Mr. Raines' case. Thus, a quorum was required. The transcript of Mr. Raines' December 6, 2010 Board hearing reflects that, in fact, eight of the nine voting members were present, clearly a quorum. The actual vote on Mr. Raines' case took place at a December 8, 2010 Board meeting. According to the minutes from that meeting, seven of the eight Board members (more than the five necessary to constitute a quorum) who had heard Mr. Raines' case were present and voted on the action. Four of the seven (a clear majority of the Board members voting) voted in favor of revoking Mr. Raines' nursing license. We find this action by the majority of the seven voting Board members to be lawful.

Did the Board Err in Denying Mr. Raines' Motion in Limine?

Prior to the December 6, 2010 hearing, Mr. Raines filed a motion in limine seeking to exclude the testimony and written statement of Clyde Carmouche, an investigator with the Rapides Parish District Attorney's Office. The Board denied the motion.

On appeal, Mr. Raines alleges that any statement he made to Mr. Carmouche, a former co-worker and fellow church member of his, should not have been considered by the Board because Mr. Carmouche failed to advise him of his constitutional rights before any purported confession occurred. The Board maintains that it did not err in denying the motion in limine because the applicable law does not extend the exclusionary rule to administrative actions such as this and because the evidence reveals that it was Mr. Raines who initiated the phone call to Mr. Carmouche and sought his advice. We agree with the Board's decision on the motion in limine.

In **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. **Miranda**, 384 U.S. at 469-473, 86 S.Ct. at 1625-1627. The Fifth Amendment right identified in **Miranda** is the right to have counsel present at any custodial interrogation. **Edwards v. Arizona**, 451 U.S. 477, 485-486, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981). Of importance to the present case, the Supreme Court in **Miranda** explained what is meant by custodial interrogation: "[b]y custodial interrogation, we mean **questioning** initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." **Rhode Island v. Innis**, 446 U.S. 291, 298, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 (1980) (citing **Miranda**, 384 U.S. at 444, 86 S.Ct. at 1612) (emphasis added). The concern of the Court in **Miranda** was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. **Rhode Island**, 446 U.S. at 299, 100 S.Ct. at 1688 (citing **Miranda**, 384 U.S. at 457-458, 86 S.Ct. at 1619).

In **McNeil v. Wisconsin**, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), the Supreme Court described the **Miranda-Edwards** right to counsel as follows: "The purpose of the **Miranda-Edwards** guarantee ... is to protect a quite different interest: the suspect's 'desire to deal with the police only through counsel.'" **McNeil**, 501 U.S. at 178, 111 S.Ct. at 2209. The Court went on to say that the invocation of that guarantee "... requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney **in dealing with custodial interrogation by the police**." *Id.* Because the presence of **both** a custodial setting and official interrogation is required to trigger the **Miranda** right-to-counsel prophylactic, absent one or the other, **Miranda** is not implicated. See **Miranda**, 384 U.S. at 477-478, 86 S.Ct. at 1629-1630; **Illinois v.**

Perkins, 496 U.S. 292, 297, 110 S.Ct. 2394, 2397, 110 L.Ed.2d 243 (1990). ("It is the premise of **Miranda** that the danger of coercion results from the interaction of custody and official interrogation.")

In this instant case, **Miranda** was clearly not implicated. Mr. Carmouche testified that he received a phone call at his home initiated by Mr. Raines on May 7, 2009, at around 6:30 a.m., at which time Mr. Raines freely discussed, in detail, his arrest and the allegations against him. After sharing the facts of the incident in question, Mr. Raines indicated to Mr. Carmouche that when he had been questioned by the police, he had said that "nothing happened." He then asked Mr. Carmouche's advice about whether he should go to the police and tell them what had actually happened. In response, Mr. Carmouche told Mr. Raines, "I'm not going to give you any advice on that. You need to get you an attorney and let him advise you what to do." Mr. Raines then asked Mr. Carmouche if he could recommend an attorney to him. Mr. Carmouche gave Mr. Raines the name of an attorney, and that was the extent of their conversation.

Contrary to Mr. Raines' arguments on appeal, the statements he made to Mr. Carmouche were given freely and voluntarily in a phone call that he initiated. There was no "custodial setting" and certainly no "official interrogation" that would have triggered the need for **Miranda** warnings given these facts and circumstances. Accordingly, the Board did not err in denying the motion in limine.

Adverse Presumption Based on Spoliation of Evidence

Mr. Raines argues that the Board should have applied an adverse presumption to the testimony of Mr. Carmouche based on the doctrine of spoliation. We note at the outset that during the hearing before the Board, counsel for Mr. Raines never requested that an adverse presumption be given because of this alleged spoliation of evidence. As a general rule, appellate courts may not address issues raised for the first time on appeal. **Jackson v. Home Depot, Inc.**, 2004-1653, pp. 6-7 (La. App. 1 Cir. 6/10/05), 906 So.2d 721, 725. Accordingly, we conclude that this issue is not properly before this court.

However, even assuming this issue was preserved for appellate review, we find no error by the Board in not applying an adverse presumption to Mr. Carmouche's testimony. Under the theory of spoliation of evidence, an adverse evidentiary presumption may arise when there is an intentional destruction of evidence for the purpose of depriving an opposing party of its use. **Lewis v. Albertson's Inc.**, 41,234, p. 5 (La. App. 2 Cir. 6/28/06), 935 So.2d 771, 774, writ denied, 2006-1943 (La. 11/09/06), 941 So.2d 42. Generally, a litigant's failure to produce evidence that is available to him raises a presumption that the evidence would have been detrimental to his case. However, when the failure to produce the evidence is adequately explained, the presumption is not applicable. **Wilhite v. Thompson**, 42,395, pp. 6-7 (La. App. 2 Cir. 8/15/07), 962 So.2d 493, 498, writ denied, 2007-2025 (La. 2/15/08), 976 So.2d 175.

Mr. Carmouche testified that after his phone conversation with Mr. Raines, he discussed the call with his boss, James Downs, the District Attorney for Rapides Parish. Mr. Downs advised him to make some notes "in case anything is needed later down the road, in case [he's] called for anything, in case anything happens." Mr. Carmouche stated that he "made a few notes" on a tablet and "put them up." He further indicated that approximately one month later, he took those notes and handwrote a three-page statement about the conversation with Mr. Raines, which was introduced into evidence by the Board at the hearing. Mr. Carmouche was thoroughly questioned during the hearing by Mr. Raines' counsel about his notes, his handwritten statement, and his decision to throw his original notes away. Mr. Carmouche testified that after he used his original notes to write his statement, he threw the notes away. When asked if he "felt the need" to hold onto those notes, Mr. Carmouche replied, "No. I know what he told me."

Mr. Carmouche explained that he had reasons for not writing out a statement when he first received the phone call from Mr. Raines. Mr. Carmouche stated:

> Like I said, Mr. Raines and I used to attend church together. To me this came out to be more of a moral issue with me, not a legal issue between me and my job. This was a moral issue.

Certain things came about. Things were being said, that I was told. And that's why I decided to write this and come forward with it.

. . . .

It was my understanding that Mr. Raines was telling people that he was set up, that these were false accusations and other things.

He was still being involved in a lot of things in our Sunday school class and different things. And I was uncomfortable with it.

In that capacity I just felt that some people were being snowballed. And it's something I did a lot of praying about and everything else before I ever wrote this.

. . . .

And it was -- like I said, it was a moral and spiritual issue to me. It was never nothing, to do anything harmful to Mr. Raines or anything. It was a moral issue with me.

. . . .

And I felt an obligation to the victim in this, too.

Initially, we note that Mr. Carmouche is not a litigant in this proceeding, but rather simply a witness. In that vein, it can be argued that the doctrine of spoliation would not even apply to him. Nonetheless, there is nothing in the record to suggest that he destroyed his original notes with any untoward intent. Rather, he only threw them away after replacing the notes with a more detailed statement, which was made available to Mr. Raines by the Board. Furthermore, there is no evidence in the record to support a finding that Mr. Carmouche was acting on the Board's behalf when he threw away his notes after writing out his three-page statement. Finally, Mr. Carmouche was present at the hearing, testified at great length about the conversation he had with Mr. Raines and his written statement regarding same, and was thoroughly cross-examined by counsel for Mr. Raines. Thus, the record supports a finding that the absence of Mr. Carmouche's original notes does not warrant the application of an adverse presumption under the doctrine of spoliation.

Was The Board's Action Arbitrary, Capricious, and Contrary to the Law and Evidence?

On appeal, Mr. Raines argues that the charges against him are not supportable by the evidence in the record, that no harm came to the patient, and that the charges are not justification for the revocation of his nursing license. We find no merit to Mr. Raines' arguments in this regard.

As the district court correctly noted below, a reviewing court's role in a judicial review of an adjudication is limited by La. R.S. 49:964(G):

> Again, 964(G), my limits, I can't substitute my opinion for that of the board when the decision of the board is based on the credibility of witnesses who testify before it. And the evidence and testimony in this record, as well as the conflicting testimony of Nurse Raines and the patient, all revolve around a credibility call which the board resolved against Nurse Raines in this particular case. And I cannot say, after reviewing this record, that the decision of the board in revoking Nurse Raines' license was arbitrary and capricious or that it was contrary to the law and evidence because I think that the record was replete with evidence, which if accepted as true by the board, would support its decision in revoking the license. ... And I think that there is ample evidence in the record that supports that decision. I have no idea what did or what did not transpire on that day and I'm not called at this point to make that determination. My role is to look at this record under 964(G) and make sure that it is supported by evidence, testimony, and that, 964(G), the factors have been complied with. And again, based on this record, I don't find a basis to modify, to reverse, or to change in any way the decision of the board.

Mr. Raines' argument on appeal with regard to the charges against him is focused on the credibility calls made by the Board after hearing the evidence presented to it. As correctly pointed out by the Board in its appellate brief, "[t]he procedure set forth in [La. R.S. 49:964(G)] specifically does not envision that credibility calls be reversed on a cold record by a reviewing court[,]" but rather "mandates that due regard must be given to the agency's determination of credibility." After a thorough review of the testimony and evidence presented to the Board in this case, we are unable to say the Board erred in either its findings of fact, decision, or the action taken. There is a reasonable basis in the record for concluding that Mr. Raines: on numerous occasions, falsified physician's orders by documenting verbal orders without having received orders or authorization from the physician; failed to utilize PACU protocol for the management of, and medication administration for, acute pain, nausea, and other side effects of anesthesia and surgery;

failed to use universal precautions when providing assistance to a patient, who was attempting to use a urinal, without wearing gloves; failed to assure the safety of an eloped patient; and committed sexual abuse of a patient. The Board's decision to revoke Mr. Raines' nursing license was neither arbitrary nor capricious and was fully supported by the evidence and the law.

DECREE

For the above and foregoing reasons, we affirm the January 10, 2012 judgment of the district court and assess all costs associated with this appeal against plaintiff, Phillip W. Raines.

AFFIRMED.