

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1673**

In the Matter of Barbara L. Judnick,
R. N. License No. 135260-5

**Filed July 8, 2013
Affirmed
Ross, Judge**

Minnesota Board of Nursing
License No. 135260-5

Peter B. Knapp, Kirsten A. Mickelson (certified student attorney), William Mitchell Law Clinic, St. Paul, Minnesota (for relator)

Lori Swanson, Attorney General, Geoffrey S. Karls, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Registered nurse Barbara Judnick and the Minnesota Board of Nursing entered into a Stipulation and Order to resolve various allegations bearing on Judnick's fitness to serve as a nurse. The board suspended Judnick's nursing license indefinitely after she violated the terms of that stipulation in multiple ways. Judnick appeals this suspension by writ of certiorari, arguing that the Minnesota Board of Nursing violated her procedural

due process rights and that the board's legal conclusions were not supported by substantial evidence. Because the board afforded Judnick adequate process and because substantial evidence supports its decision to suspend Judnick's license indefinitely, we affirm.

FACTS

Barbara Judnick is a registered nurse who tested positive for unprescribed morphine and was terminated from her job. Soon afterward, the Health Professionals Services Program (HPSP), a statutorily authorized monitoring agency, contacted Judnick to inform her that she may require monitoring to continue practicing as a nurse. Judnick failed to respond to HPSP, and HPSP reported the failure to the Minnesota Board of Nursing.

Judnick met with the board of nursing review panel in April 2009. The panel evaluates complaints against nurses and settles them or commences contested-case hearings. The panel considered Judnick's behavior: she had failed to respond to HPSP's letters; been found to have engaged in child maltreatment; been convicted of driving while intoxicated; tested positive for unprescribed morphine; been twice discharged from nursing jobs; and engaged in nursing-practice deficiencies. Judnick told the panel that she suffered from anxiety and panic attacks and that these conditions had caused some of the misconduct and resulted in her receiving therapy and medication.

The panel continued the proceeding so that Judnick could undergo drug testing (for which Judnick tested negative) and provide waivers for her health and employment records (which Judnick was slow to provide). Judnick acknowledged difficulties

communicating at work and asserted that she had been diagnosed with depression. The panel determined that the concerns about Judnick could be resolved through HPSP mental-health monitoring.

Judnick entered into a participation agreement with HPSP that outlined her monitoring plan and treatment requirements. This agreement required her to meet with a therapist and psychiatrist and to sign and return releases by December 2, 2010, allowing HPSP to receive reports from her employer and medical-care providers. She was also obligated to find a worksite monitor who would send these reports to HPSP.

Four days after the December deadline, HPSP had not received the required employer and medical releases. Judnick claimed that she was struggling to get an appointment with a mental-health professional. Judnick's HPSP case manager extended her deadline but soon learned that Judnick had resigned from her job the previous month. HPSP discharged Judnick from the program for failing to report the resignation and for failing to comply with the HPSP requirements. HPSP reported Judnick's discharge to the board of nursing review panel.

The panel sent Judnick a letter asking her to explain her conduct. Judnick alleged that she had phone problems and could not access mental-health providers. She assured the panel that she would obtain health insurance, return to HPSP, and comply with the participation agreement. To avoid prosecuting a contested-case proceeding against Judnick's nursing license, the panel proposed a Stipulation and Consent Order that would condition her continued licensure on her future compliance with an HPSP treatment program.

Judnick agreed in August 2011. The Stipulation and Consent Order that she signed outlined her past alleged misconduct, admitted the misconduct, and acknowledged that the misconduct constituted a violation of Minnesota Statutes section 148.261, subdivision 1(9) (2012), indicating an inability to practice nursing safely. The order expressly waived some of Judnick's due process rights, including her right to a hearing before an administrative law judge, the right to a contested-case hearing, and the right to an attorney. It required Judnick to enroll in HPSP within 14 days, enter into an HPSP participation agreement and comply with its terms, abstain from mood-altering chemicals, and provide copies of the stipulated order to her nursing supervisors. The stipulated order also specified that Judnick would maintain her nursing license conditioned on her participating with HPSP until the terms of her participation agreement were completed.

Judnick failed to contact HPSP by October 27, 2011, as required, waiting until November 7, 2011. She also had not by then told her employer about the order, as required. The HPSP directed Judnick on November 28, 2011, to complete a chemical-dependency assessment by December 15, 2011, and ensure that the chemical-dependency assessor contact two collateral sources and review the order. Judnick completed the chemical dependency evaluation, but she failed to provide the evaluator with a copy of the order or identify any collateral contact.

Judnick's struggles to meet deadlines and follow her treatment plan continued. She provided her participation agreement to HPSP after the sixty-day deadline. The plan required her to submit to random toxicology testing, but Judnick did not attend testing on

January 19, January 27, or February 22, 2012. HPSP again discharged Judnick and referred her to the board of nursing.

The board's review panel filed a notice for a hearing on Judnick's alleged failure to comply with the order. The notice claimed that Judnick violated her Stipulation and Consent Order by failing to enroll with HPSP within 14 days of the order, sign her participation agreement within 60 days of the order, comply with the participation agreement, and provide her employer with the order within 10 days. The notice informed Judnick that a hearing would be held before the board of nursing on June 7, 2012, and that she could respond to the allegations with affidavits and oral and written argument.

Judnick's hearing was continued until August 2, 2012, so she could retain an attorney. At the hearing, both parties presented oral argument and affidavit evidence. Judnick's attorney questioned the validity of the Stipulation and Consent Order and argued that grounds did not exist to justify suspending Judnick's nursing license. Judnick testified that she "was led to believe at that time if I didn't sign it I would lose my license." The board concluded that Judnick had violated Minnesota Statutes section 148.261, subdivision 1(18), and the terms of her Stipulation and Consent Order, and it therefore suspended her license indefinitely.

This appeal by writ of certiorari follows.

DECISION

I

Judnick argues that the board of nursing violated her procedural due process rights and that her agreement to the Stipulation and Consent Order was involuntary,

unknowing, and not intelligently made. The United States and Minnesota Constitutions prohibit the state from depriving any person of property without due process of law. *See* U.S. Const. amend. XIV, Minn. Const. Art. I, § 7. We review Judnick's challenges under the federal and state constitutions at once because the due process guarantees under the two constitutions are identical. *See Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988). Professional licensure is a property right entitled to protection under the due process clause. *See Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 1411 (1959) (holding that the right to private employment in a chosen profession free from unreasonable government interference falls under the protections of the due process clause).

Health professionals are regulated under the state's police power and have no absolute right to practice. *Humenanskyv. Minn. Bd. of Med. Exam's*, 525 N.W.2d. 559, 566 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995). Judnick asserts that this regulation required the board of nursing to conduct a hearing or other process to vindicate her due process rights. She provides no legal authority in support. Judnick agreed to forego a formal hearing process to settle the complaint against her by entering into the stipulated order. In consideration, she kept her license on the specified conditions. By stipulating to the order, she waived several constitutional procedural rights, including the right to counsel, the right to a hearing before an administrative law judge, and the right to a contested-case hearing.

Judnick nevertheless received a significant amount of process after her alleged violation of the consent order. She was notified of her hearing more than a month before

the hearing date. This notice included details of her alleged noncompliance and the hearing procedure. The board agreed to continue the hearing to allow her counsel time to prepare. Judnick submitted both affidavits and written arguments and her counsel made oral arguments at the August 2 hearing. This was the process she agreed to in her consent order.

Judnick argues that her waiver of additional due process rights was invalid because she did not enter into the consent order voluntarily, knowingly, and intelligently. Due process rights are subject to waiver in civil proceedings. *Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 92 S. Ct. 775, 782 (1972). But the waiver of due process rights must be voluntary, knowing, and intelligently made. *Majestic Inc. v. Berry*, 593 N.W.2d 251, 255 (Minn. App. 1999). Judnick first argues that her waiver was not voluntary because she signed the Stipulation and Consent Order only in fear after some unidentified person allegedly told her she would otherwise probably lose the case and her license. In essence, the argument implies that mere apprehension of the likely negative consequences of a contested-case hearing renders involuntary an agreement to forego the hearing (and its likely result) in exchange for a period of administrative probation. Judnick offers no caselaw to support this premise and it is facially implausible. Judnick's fear does not constitute an involuntary waiver.

Judnick next argues that her waiver of due process rights was not intelligent or knowing because the Stipulation and Consent Order required her to follow HPSP's *future* participation agreement without specifying the terms in the then-written agreement. This argument would have some merit except that Judnick tacitly accepts the board's

representation that the violated participation agreement has substantially the same provisions as her previous participation agreements with HPSP. She does not claim that she did not expect any of the terms. And she also told the panel that she was willing to go back into treatment and comply with HPSP's terms to keep her license before the order had even been sent to her. This indicates that Judnick's agreement with the Stipulation and Consent Order was neither unknowingly nor unintelligently entered into.

Judnick finally argues that her waiver of procedural rights in her Stipulation and Consent Order is invalid because she was under stress, afflicted with depression and anxiety, and lacked the skill to understand what she signed. We are not persuaded. We presume competence in contract formation. *Fischer v. Schefers*, 656 N.W.2d 592, 595 (Minn. App. 2003). Contracts are upheld if the contracting party has the reasonable capacity to understand the nature of what she is doing. *Id.* at 595–96. Judnick identifies no basis for us to conclude that she did not understand the stipulation.

II

Judnick next argues that the Minnesota Board of Nursing violated Minnesota Statutes section 14.69(e) (2012) because its legal conclusions are “unsupported by substantial evidence in view of the entire record as submitted.” Although this provision governs only our review of contested cases under the Administrative Procedure Act, *In re Mostrum*, 390 N.W.2d 893, 895 (Minn. App. 1986), and Judnick waived any right to a contested-case hearing, we review the board's action as a quasi-judicial decision and we will reverse it only if the decision “reflect[s] an error of law, the findings are arbitrary or capricious, or the findings are unsupported by substantial evidence,” *id.* (quotation

omitted). Substantial evidence is evidence a reasonable mind might accept as adequate to support a conclusion, more than a scintilla of evidence, more than some evidence, and more than any evidence and evidence considered in its entirety. *Cable Comm'ns Bd. v. Nor-west Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. App. 1984). Agency decisions have a “presumption of correctness” and we defer to agency expertise. *Id.*

Disciplinary action by the board of nursing can arise from violations of the board's orders. Minn. Stat § 148.261, subd. 1 (18) (2012). The board of nursing found that Judnick violated the statute and her Stipulation and Consent Order in several ways. It found that the order required Judnick to contact HPSP by November 15, 2011, but she did not do so until November 22, 2011. It found that the order required her to provide signed releases by December 12, 2011, but she did not do so until December 16, 2011. It found that Judnick failed to obey the order's directive to provide her chemical-dependency evaluator with collateral sources to attest to her sobriety and to give her evaluator a copy of the Stipulation and Consent Order. And it found that she missed three required toxicology tests in January and February 2012.

Judnick does not deny any of these breaches. Instead she claims that substantial evidence of violations is lacking because the participation agreement is not part of the record and because the evidence of her violations is hearsay. Although Judnick's participation agreement is not in the record, her violation of the agreement is not in dispute. Judnick did not argue at her hearing, in her briefs, or at oral argument to the board, that she complied with the participation agreement, only that its terms were onerous. The affidavits of Mary Olympia, Judnick's HPSP case manager, and Mary

Squires, the nursing regulations analyst, provided substantial evidence that Judnick violated specific terms of the participation agreement and the Stipulation and Consent Order. And the state accurately emphasizes that the Stipulation and Consent Order established that the hearing before the board on any noncompliance allegations would rest on affidavit evidence and any stipulated evidence that may be considered by the trier of fact. *See Abendroth v. Nat'l Farmers Union Prop & Cas. Co.*, 363 N.W.2d. 785, 787 (Minn. App. 1985). Judnick agreed to these procedures and does not claim that the board failed to follow them. Judnick also provided evidence in the hearsay form that she now claims to be insubstantial.

Judnick finally asserts that the board's decision to suspend her license indefinitely is not supported by substantial evidence because mitigating factors—her lack of financial resources and her emotional difficulties—were not properly considered. HPSP is required to consider each participant's "financial resources" and "specific needs." Minn. Stat. 214.32, subs. 2(a)(1), 3 (2012). The evidence indicates that HPSP and the board took these factors into account. We will not reweigh their significance on appeal.

We hold that substantial evidence supports the board's decision.

Affirmed.