

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kristine Smith Spence, R.N.,	:	
Petitioner	:	
	:	
v.	:	No. 1692 C.D. 2009
	:	
Bureau of Professional and	:	Submitted: January 22, 2010
Occupational Affairs,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: March 22, 2010

Kristine Smith Spence, R.N. (Nurse Spence) petitions for review of the July 30, 2009 order of the State Board of Nursing (Board), which imposed a three-year suspension of her license to practice professional nursing followed by a probationary period of two years pursuant to section 14(a)(5) of The Professional Nursing Law (Law).¹ We affirm.

Nurse Spence has been employed as a registered nurse for thirteen years by Lancaster General Hospital, and she currently works in the Hospital's operating room. Nurse Spence is the primary financial provider for her family.

While serving as Treasurer of the Farmdale Elementary School Parent Teachers Organization (PTO), Nurse Spence unlawfully appropriated approximately \$10,000 in PTO funds over a period of approximately one year.

¹ Act of May 22, 1951, P.L. 317, *as amended*, 63 P.S. §224(a)(5).

(Finding of Fact No. 8.) The PTO became aware of the missing funds and reported the theft to the police. An investigation ensued and, on April 20, 2006, Nurse Spence was charged with one count of Theft by Unlawful Taking—Movable Property, section 3921(a) of the Crimes Code, 18 Pa. C.S. §3921(a).² This offense is classified as a third degree felony.³

On April 21, 2008, Nurse Spence was accepted into the Accelerated Rehabilitative Disposition (ARD) program, subject to the following conditions: (1) placement in the ARD program for one year; (2) payment of the costs of prosecution and a processing fee; (3) performing 50 hours of community service; (4) submitting to a psychological examination; (5) payment of restitution in the amount of \$3,000; and (6) an agreement to revoke ARD and reinstate the criminal charges in the event Nurse Spence should attempt to terminate her participation in the program. Nurse Spence did not violate the conditions of her ARD.⁴

On July 14, 2008, the Board issued a rule to show cause, alleging that Nurse Spence was subject to disciplinary action as a result of the criminal

² Section 3921(a) of the Crimes Code provides as follows:

(a) **Movable Property.** --A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.

18 Pa. C.S. §3921(a)

³ The crime of theft by unlawful taking is classified as a felony of the third degree, when, among other things, the amount involved exceeds \$2,000. Section 3903 of the Crimes Code, 18 Pa. C.S. §3903. A third degree felony carries a maximum prison sentence of seven years. Section 1103(3) of the Crimes Code, 18 Pa. C.S. §1103(3).

⁴ Nurse Spence had satisfied many, but not all, of the conditions of the ARD program by the time the Board issued its decision in this matter. She asserts in her brief that she has now completed all of the requirements of the ARD program and is in the process of expunging her criminal record. (Brief of Appellant, p. 6.)

proceedings and her acceptance into the ARD program. The rule to show cause was predicated on section 14(a)(5) of the Law, which provides as follows:

(a) The Board may refuse, suspend or revoke any license in any case where the Board shall find that---

....

(5) The licensee has been convicted, or has pleaded guilty, or entered a plea of nolo contendere, or has been found guilty by a judge or jury, of a felony or a crime of moral turpitude, or has received probation without verdict, disposition in lieu of trial or *an Accelerated Rehabilitative Disposition in the disposition of felony charges*, in the courts of this Commonwealth, the United States or any other state, territory, possession or country.

63 P.S. §224(a)(5) (emphasis added).

The Board assigned the matter to a hearing examiner, who conducted a formal hearing on February 2, 2009. Nurse Spence testified that she took \$10,000 from the PTO and used that money to pay her mortgage and other bills. (Reproduced Record (R.R.) at 86a.) Nurse Spence explained that she was behind on her bills because she was only working part-time and her husband was barely working at all. (R.R. at 86a-87a.) Nurse Spence testified that she made a bad decision, had learned from her mistakes, and was complying with the conditions of the ARD program. (R.R. at 77a-78a, 82a-83a, 93a.) Furthermore, Nurse Spence testified that she was the primary financial provider for her family and, in the event she was unable to work as a nurse, she would need to sell the family home. (R.R. at 81a.)

After reviewing the evidence, the hearing examiner issued a proposed adjudication and order in which he concluded that Nurse Spence was subject to

disciplinary action under section 14(a)(5) of the Law. The hearing examiner recommended that Nurse Spence's license be suspended for one year with the suspension stayed in favor of probation.

The Board issued a final adjudication on July 30, 2009. The Board adopted the hearing examiner's findings of fact and agreed with his conclusion that Nurse Spence is subject to discipline under the Law. However, the Board disagreed with the hearing examiner's recommended sanction, reasoning as follows:

The Board views [Nurse Spence's] actions as egregious and go against the high standards of the nursing profession. Nurses must be trustworthy and must possess good moral character and the integrity intrinsic to the practice of professional nursing. [Nurse Spence's] conduct demonstrates a complete lack of morals. Under professional licensing statutes ... the Board is charged with the responsibility and authority to oversee the profession and to regulate and license professionals to protect the public health and safety. Barran v. State Board of Medicine, 670 A.2d 765, 767 (Pa. Cmwlth. 1996), appeal denied 679 A.2d 230 (Pa. 1996). Given [Nurse Spence's] conduct and the large amount of money involved, the Board has determined that the protection of the public warrants an active suspension for three years followed by two years of probation.

(R.R. at 145a.)

Accordingly, the Board ordered that Nurse Spence's nursing license be suspended for a period three years followed by a period of two years of probation.

On appeal to this Court, Nurse Spence contends that the Board abused its discretion by imposing an excessively harsh sanction.⁵

An abuse of discretion is generally defined as a misapplication of the law, a manifestly unreasonable exercise in judgment, or a final result that evidences partiality, prejudice, bias, or ill-will. Allegheny County v. Golf Resort, Inc., 974 A.2d 1242 (Pa. Cmwlth. 2009); Pastorius v. State Real Estate Commission, 466 A.2d 780 (Pa. Cmwlth. 1983). When reviewing the exercise of discretion by an administrative agency, this Court may not, in the absence of bad faith, fraud, capricious action or abuse of power, inquire into the wisdom of the agency's action or into the details or manner of executing agency action. Slawek v. State Board of Medical Education and Licensure, 526 Pa. 316, 586 A.2d 362 (1990); Blumenschein v. Pittsburgh Housing Authority, 379 Pa. 566, 109 A.2d 331 (1954). We may interfere in an agency decision only when there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. Slawek. Although the Commonwealth Court is required to correct abuses of discretion involving penalties and sanctions imposed by a licensing board, we may not substitute our discretion for that of the board, which is an administrative body endowed with expertise in matters subject to its jurisdiction. Burnworth v. State Board of Vehicle Manufacturers, Dealers, and Salespersons, 589 A.2d 294 (Pa. Cmwlth. 1991); Pastorius.

Nurse Spence first argues that the penalty imposed by the Board was an abuse of discretion because her ARD involved conduct that is wholly unrelated to the practice of nursing. She points out her nursing duties do not include the

⁵ Our scope of review is limited to determining whether the Board committed constitutional violations, errors of law or whether any necessary findings of fact are unsupported by substantial evidence. Wittorf v. State Board of Nursing, 913 A.2d 956 (Pa. Cmwlth. 2006).

handling of funds or the belongings of patients, and asserts that the theft did not affect her ability to perform her duties as a nurse.

However, Nurse Spence was placed into the ARD program for the crime of Theft by Unlawful Taking, a third degree felony. Section 14(a)(5) of the Law authorizes the Board to suspend the license of a nurse who is placed into an ARD program for the disposition of felony charges, and the statute does not distinguish between felonies that relate to the practice of nursing and those that do not.

Furthermore, the Board's regulations recognize the importance of trustworthiness in the nursing profession. For example, the regulation at 49 Pa. Code §21.18 provides that nurses may not misappropriate equipment, materials, property, drugs or money from an employer or patient, and may not falsify or knowingly make incorrect entries into the patient's record or other related documents.

Nurse Spence confirmed that honesty and trustworthiness are essential to the practice of nursing:

You have to be trustworthy as a nurse because you have to be honest when you're documenting your procedures that you have done on your patients. You have to be honest in medications you have given to your patients. You have to be honest when it comes to answering patients' questions concerning--in my case concerning--they always ask like what the procedure involves, what their outcomes can be. When patients are in the hospital, they place a lot of trust in a nurse, in the care, that they are going to get the correct care, the proper care, that we are going to do all in our power to give the best possible care and do what we can to make them feel better, feel safe, feel comfortable in their situations. And I can see where a event like this--would look at me and say, well,

if you can't--if I can't trust you in finances--how do I know that someone that is untrustworthy enough to take money is going to be trustworthy enough to tend to me.

(R.R. at 91a.) Therefore, we conclude that the Board did not abuse its discretion by suspending Nurse Spence's license pursuant to section 14(a)(5) of the Law based on her unlawful conduct and admission to the ARD program.

Next, Nurse Spence argues that the Board abused its discretion when it rejected the hearing examiner's decision and imposed a harsher penalty based on its subjective view that Nurse Spence was a person with a "complete lack of morals." However, section 14(a) of the Law specifically authorizes *the Board* to refuse, suspend or revoke a nursing license. Here, the hearing examiner was an appointed designee of the Board, charged with the responsibility to conduct a hearing and submit to the Board a proposed decision. 1 Pa. Code §§35.185, 35.187. The hearing examiner discharged that responsibility and the Board, as the ultimate fact finder, made the final decision in this case. *See Barran v. State Board of Medicine*, 670 A.2d 765 (Pa. Cmwlth. 1996) (observing that State Board of Medicine is ultimate fact finder); *McDermond v. Foster*, 561 A.2d 70 (Pa. Cmwlth. 1989) (holding that absent a requirement that the agency is bound by the decision of a hearing examiner, the agency is free to make its own findings of fact). The Board was not bound by the hearing examiner's proposed decision and recommended sanction.

In addition, although Nurse Spence complains that the Board characterized her as a person with a complete lack of morals, this Court has recognized that theft is a crime of moral turpitude. *Krystal Jeep Eagle, Inc. v. Bureau of Professional and Occupational Affairs*, 725 A.2d 846 (Pa. Cmwlth. 1999), appeal denied, 559 Pa. 723, 740 A.2d 1150 (1999) (holding that theft by

deception and theft by failure to make required disposition of funds are crimes of moral turpitude). Moral turpitude is defined as anything done knowingly that is contrary to justice, honesty, or *good morals*. Id. In light of the foregoing, the Board could reasonably determine that Nurse Spence's theft demonstrated a lack of moral character.

Nurse Spence also argues that the Board's penalty constitutes an abuse of discretion because she substantially completed the requirements of the ARD program. We commend Nurse Spence for complying with the ARD program and taking the difficult steps necessary to achieve dismissal of criminal charges and the expungement of her record. Nevertheless, this Court has recognized that even where criminal charges are resolved in favor of a defendant, an agency may initiate administrative proceedings against the person concerning the same underlying misconduct. Spence v. Pennsylvania Game Commission, 850 A.2d 821 (Pa. Cmwlth. 2004). Hence, Nurse Spence's compliance with the terms and conditions of her ARD did not limit the Board's discretion in this matter.

Nurse Spence further argues that her license suspension is exponentially more severe than her criminal sanctions and that this lack of proportionality demonstrates a flagrant abuse of the Board's discretion. She relies upon Ake v. Bureau of Professional and Occupational Affairs, 974 A.2d 514 (Pa. Cmwlth. 2009), where this Court concluded that the Board of Accountancy abused its discretion by imposing an excessive penalty. In that case, the board revoked Ake's license to practice as a certified public accountant, the maximum allowable penalty, based on a 2002 harassment conviction in the State of Illinois. In vacating that decision, the Court stated that the board imposed the most severe possible punishment for criminal acts that occurred in 2002 and would not have constituted

a felony in Pennsylvania. The Court stated the conviction did not involve conduct central to holding an accounting certificate, and indicated that Ake's civil sanction should not have exceeded the criminal sanction imposed in Illinois.

In contrast to Ake, the Board did not revoke Nurse Spence's license to practice nursing, but rather imposed a lengthy suspension followed by a probationary period. The Board sanctioned Nurse Spence for conduct that is classified as a felony in Pennsylvania and conflicts with the requirement of honesty and trust reflected in 49 Pa. Code §21.18. Therefore, we conclude that Ake is not controlling in this appeal.

Nurse Spence further argues that the Board's license suspension constitutes an abuse of discretion because it will cause her family and the community undue hardship. However, the record shows that the Board considered these facts, but nonetheless found that a long suspension was warranted. The Board specifically found that Nurse Spence was the primary financial provider for her family, (Finding of Fact No. 17), and the Board obviously was aware that the suspension of Nurse Spence's professional nursing license would prevent her from continuing to earn her living as a nurse. Although this Court might weigh the equities differently, we have previously held that economic hardship resulting from a suspension is not sufficient to show an abuse of discretion in imposing that sanction. Plant v. Commonwealth, 434 A.2d 1334 (Pa. Cmwlth. 1981); Department of Transportation, Bureau of Traffic Safety v. Vairo, 308 A.2d 159 (Pa. Cmwlth. 1973).

Finally, Nurse Spence contends that the Board's decision is inconsistent with its prior disciplinary decisions and, therefore, is arbitrary and capricious. We previously have held that, although an administrative agency is not

bound by the rule of stare decisis, an agency does have an obligation to render consistent opinions and should either follow, distinguish, or override its own precedent. Standard Fire Insurance Company v. Insurance Department, 611 A.2d 356 (Pa. Cmwlth. 1992). Here, however, Nurse Spence bases this argument solely upon information taken from the Department of State's website regarding the Board's prior disciplinary actions, which are not part of the record in this case. The Board's discretion is to be judged based on the facts and circumstances of the instant case and not on those of other matters which are not before us.

Accordingly, we affirm the Board's decision.

PATRICIA A. McCULLOUGH, Judge

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Occupational Affairs,	:	
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ORDER

AND NOW, this 22nd day of March, 2010, the order of the State Board of Nursing, dated July 30, 2009, is hereby AFFIRMED.

PATRICIA A. McCULLOUGH, Judge