

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

DAVID DANE RYER, *Plaintiff/Appellant*,

v.

ARIZONA STATE BOARD OF NURSING, *Defendant/Appellee*.

No. 1 CA-CV 17-0105
FILED 4-3-2018

Appeal from the Superior Court in Maricopa County
No. LC2015-000528-001
The Honorable Patricia A. Starr, Judge

AFFIRMED

COUNSEL

David Dane Ryer, North Andover, MA
Plaintiff/Appellant

Arizona Attorney General's Office, Phoenix, AZ
By Elizabeth A. Campbell
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge James B. Morse Jr., delivered the decision of the Court, in which
Presiding Judge Randall M. Howe and Judge Kenton D. Jones joined.

RYER v. ASBN
Decision of the Court

M O R S E, Judge:

¶1 David Dane Ryer appeals the superior court's order affirming the decision of the Arizona State Board of Nursing ("Board") to revoke his nursing license and advanced practice certificate. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Ryer was an Arizona-licensed nurse who held an advanced practice certificate in adult psychiatry and mental health. In 2011, the Board received a patient complaint against Ryer and opened an investigation. Although the Board did not find evidence to substantiate the underlying patient complaint, it uncovered evidence reflecting unprofessional conduct by Ryer. *See* Ariz. Admin. Code ("A.A.C.") R4-19-403 (defining unprofessional conduct).

¶3 Following its investigation, the Board filed a complaint and notice of appeal requesting that the Office of Administrative Hearings conduct a formal hearing to determine whether grounds existed for the Board to discipline Ryer. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 32-1606(B)(10), -1663(D), -1664(I). Ryer received notice and participated in a three-day hearing. After the hearing, the Administrative Law Judge ("ALJ") issued findings of fact and conclusions of law in a decision recommending that Ryer's license and advanced practice certificate be revoked. *See* A.R.S. § 41-1092.08(A) (providing that ALJs shall issue written decisions with findings of fact and conclusions of law). Specifically, the ALJ found that Ryer's "unprofessional conduct furnishes cause for the Board to discipline his licenses."

¶4 The Board accepted the ALJ's order in its entirety and revoked Ryer's license and advanced practice certificate. A.R.S. § 41-1092.08(B). Ryer sought review of the Board's decision by the superior court. A.R.S. §§ 12-905(A), 32-1665(B). The superior court affirmed the Board's decision concluding that substantial evidence existed to support the Board's decision and "the decision was not contrary to law, was not arbitrary or capricious, and was not an abuse of discretion." Ryer timely appealed, and we have jurisdiction pursuant to A.R.S. § 12-913. *Svensen v. Ariz. Dep't of Transp.*, 234 Ariz. 528, 533, ¶ 13 (App. 2014) (interpreting § 12-913 as permitting an appeal to this court).

RYER v. ASBN
Decision of the Court

DISCUSSION

¶5 When the superior court reviews an administrative action, it must determine whether the action "was illegal, arbitrary, capricious, or involved an abuse of discretion." *Ethridge v. Ariz. State Bd. of Nursing*, 165 Ariz. 97, 100 (App. 1989); A.R.S. § 12-910(E). On appeal to this court, we must determine whether substantial evidence supports the superior court's decision. *Ethridge*, 165 Ariz. at 100. It is not our role to reweigh conflicting evidence. *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 335-36 (App. 1984).

I. The Board's Authority to Investigate

¶6 Ryer first argues the Board "acted beyond the expressed legislative authority and the legislative intent" by conducting "an investigation in the absence of a valid third-party complaint" and conducting "hearings and proceedings on its [own] motion." We review this legal question de novo. *Comm. for Justice & Fairness v. Ariz. Sec'y of State's Office*, 235 Ariz. 347, 351, ¶ 17 (App. 2014).

¶7 The Board has statutory authority to regulate and control the practice of nursing, including the authority to discipline licensees and certificate holders for unprofessional conduct. A.R.S. §§ 32-1606, -1663(D), -1664(O). Pursuant to A.R.S. § 32-1606(C):

The board may conduct an investigation *on receipt of information that indicates that a person or regulated party may have violated this chapter or a rule adopted pursuant to this chapter*. Following the investigation, the board may take disciplinary action pursuant to this chapter.

(emphasis added). If the Board determines, through its investigation, that "grounds exist to discipline a person," then it must afford the licensee an opportunity to request a hearing. A.R.S. §§ 32-1663(F) and -1664(I). Thereafter, if the Board finds that the licensee acted unprofessionally, it has the authority to take disciplinary action. A.R.S. §§ 32-1663(D) and -1664(O).

¶8 In this case, the Board received information that Ryer acted unprofessionally through its investigation of the patient complaint. Specifically, the Board received pharmacy records revealing that Ryer self-prescribed medication outside the scope of his practice area. See A.A.C. R4-19-403(12) (defining unprofessional conduct to include "[a]ssuming patient care responsibilities . . . that are outside the scope of practice of the nurse"); A.A.C. R4-19-508(C) (providing that a nurse practitioner shall only prescribe and dispense medication within the nurse's "population focus and

RYER v. ASBN
Decision of the Court

role" and for which he is "educationally prepared and for which competency has been established and maintained"). The Board also received records from Ryer's prior employers reflecting that he had failed "to take appropriate action to safeguard a patient's welfare or follow policies and procedures of the nurse's employer designed to safeguard the patient," and practiced in a manner "that gives the Board reasonable cause to believe the health of a patient or the public may be harmed." A.A.C. R4-19-403(9) and (31).

¶9 Having received that information, the Board had authority to investigate. *See* A.R.S. § 32-1606(C). Simply because the Board received the information by means of an initial, but subsequently unsubstantiated, patient complaint does not negate the Board's authority to further investigate and act upon information uncovered during the investigation. The question before the Board was not whether the nurse had engaged in unprofessional conduct premised solely upon the allegations of the initial complainant, but whether upon investigation it could be determined that the nurse had engaged in unprofessional conduct.

¶10 Accordingly, we affirm the superior court's determination that the Board was authorized to investigate Ryer's unprofessional conduct.

II. Ryer's Right to Due Process

¶11 Ryer next asserts that the Board's decision is unconstitutional. He argues the Board improperly considered his "[d]ue [p]rocess right to assert a defense" as an "aggravating factor" in determining his discipline. This court reviews constitutional issues *de novo*. *Savord v. Morton*, 235 Ariz. 256, 260, ¶ 16 (App. 2014).

¶12 Ryer is correct in pointing out that the Board could not revoke his nursing license without providing him due process of law. *Wasef v. Ariz. State Bd. of Dental Exam'rs*, 242 Ariz. 90, 93, ¶ 12 (App. 2017). "[A] licensee has a property interest in his or her license, and the State must afford due process before it can curtail that right." *Id.* Due process requires "notice and an opportunity to be heard in a meaningful manner and at a meaningful time." *Id.* (citation omitted).

¶13 Here, Ryer had notice of the administrative hearing and a meaningful opportunity to be heard at the hearing. He testified, offered evidence, and confronted adverse witnesses.

¶14 Following the hearing, the ALJ made findings of facts and conclusions of law, and crafted a recommended order, which the Board

RYER v. ASBN
Decision of the Court

subsequently adopted. Ryer specifically objects to the ALJ's conclusion that:

[A]t the hearing, [Ryer] went to great lengths to avoid any accountability for his past actions, including blaming his patients, arguing that their alleged diagnoses justified his mistreatment, and blaming his employers and coworkers to justify his misconduct. Not only were [Ryer's] justifications not credible, the extent of the efforts that he took to avoid accepting any responsibility for his actions demonstrates that[,] at this time, he cannot be regulated.

Because the ALJ observes the demeanor and attitude of all witnesses, the Board should defer to the ALJ's credibility findings and overrule them "only if it finds evidence in the record for so doing." *Ritland v. Ariz. State Bd. of Med. Exam'rs*, 213 Ariz. 187, 191, ¶¶ 13, 14 (App. 2006). This court will uphold the superior court's decision to affirm the Board when that decision is supported by substantial evidence. *Ethridge*, 165 Ariz. at 100.

¶15 The ALJ found that Ryer was unwilling to take responsibility for his actions and considered this in recommending that his license be revoked. In the professional licensing context, acceptance of responsibility, or lack thereof, is a permissible consideration. *In re King*, 212 Ariz. 559, 564, ¶ 13 (2006); *see also Curtis v. Richardson*, 212 Ariz. 308, 313-14, ¶¶ 22, 25 (App. 2006) (affirming ALJ's consideration of the lack of acceptance of responsibility). The record contains substantial evidence to support the ALJ's finding and the Board's adoption of the same. We find no violation of Ryer's due process rights.

III. Other Claims

¶16 The Board contends that Ryer makes two arguments on appeal that he failed to raise below, specifically that (1) his conduct was not harmful to a patient and therefore was not a violation of A.A.C. R4-19-403(31), and (2) the Board was obligated to support its credibility findings with "specific, cogent reasons that are substantial and bear a legitimate nexus to the determination." Although Ryer contends he raised these arguments in his brief before the superior court, our review of the record does not support that contention. Accordingly, Ryer has waived these

RYER v. ASBN
Decision of the Court

arguments on appeal.¹ *City of Tempe v. Fleming*, 168 Ariz. 454, 456 (App. 1991) (explaining that "[a]s a rule, arguments not made at the trial court cannot be asserted on appeal").

CONCLUSION

¶17 Because the record contains substantial evidence to support the revocation of Ryer's nursing license and advanced practice certificate, we affirm the decision of the superior court.



AMY M. WOOD • Clerk of the Court
FILED: AA

¹ Ryer also asks this court to order the Board and the Office of Administrative Hearings "to remove any reference or image or mention" of his case from their websites. Ryer, however, offers no legal authority to support his request. See ARCAP 13(a)(7) (explaining that a brief must set forth arguments that contain "citation to supporting legal authority"). Accordingly, Ryer has waived this argument. *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62 (App. 2009) (holding that failure to support arguments with legal authority may constitute waiver and abandonment of that claim).