

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARILYN A. FERGUSON,)
)
 Appellant,)
) C.A. No. 08A-11-011 MMJ
 v.)
)
 DELAWARE BOARD OF NURSING,)
)
 Appellee.)

Submitted: May 12, 2009
Decided: August 20, 2009

Upon Appeal From a Decision of the Delaware Board of Nursing.
REVERSED AND REMANDED.

MEMORANDUM OPINION

Richard R. Weir, Jr., Esquire, Richard R. Weir, Jr., P.A., Wilmington, Delaware,
Attorney for Appellant.

Barbara J. Gadbois, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for Appellee.

JOHNSTON, J.

INTRODUCTION

Before the Court is Marilyn A. Ferguson's appeal of the Delaware Board of Nursing's decision, which found Ferguson in violation of the rules and regulations governing Delaware nurses. Upon review of the record in this appeal, the Court finds that the Board's decision lacked substantial evidence and the Board committed legal error in rendering its decision. Therefore, the Board's decision is **REVERSED AND REMANDED.**

FACTS

On January 11, 2007, Ferguson traveled to Texas to care for Ferguson's husband's ailing grandmother. The grandmother required around-the-clock care. Ferguson spent almost the entire weekend within the grandmother's single-wide trailer.

While caring for the grandmother, Ferguson was exposed to heavy marijuana smoke. Ferguson's husband's cousin, who resided with the grandmother, was an avid marijuana smoker. Ferguson requested that the cousin either stop smoking or at least shut the door to his room; but the cousin refused.

Ferguson attempted to get other relatives to care for the grandmother, but was unsuccessful. The cousin was incapable of caring for the grandmother because of his substance abuse. After being unable to get a replacement or to convince the cousin to stop smoking, Ferguson stayed at the trailer and continued

to care for the grandmother. Ferguson maintains that she did not experience a “contact high” from the passive inhalation.

On January 14, 2007, the grandmother’s usual caretaker, Ferguson’s husband’s aunt, returned from her weekend-long break. Ferguson informed the aunt that she would not return to visit or care for the grandmother if the cousin was at the trailer. Ferguson left the grandmother in the aunt’s care and returned to Delaware that day.

On January 17, 2007, Ferguson’s employer requested that she take a drug test. Ferguson informed her employer that she had been exposed to heavy marijuana smoke while caring for her grandmother-in-law in Texas. Ferguson explained to her employer that she was not sure whether passive inhalation would make it “possible to test positive or not for marijuana.” Ferguson’s employer reassured her that they would not be testing for marijuana. Instead, the employer was testing for anesthesia-related drugs. Thereafter, Ferguson voluntarily took the drug test.

On January 21, 2007, Ferguson was informed that she had tested positive for marijuana. Ferguson was supplied a copy of the drug test results. While the report references a page two, no one has a copy of it. When Ferguson found out that she had tested positive for marijuana she was “surprised and in disbelief because [she] wasn’t sure if it was possible or not...[she] was also surprised that they even tested

[her] for it because [she] was told prior to giving this test that marijuana was not an issue in the drug screen being provided.”

As a result of the positive drug test result, Ferguson was terminated by her employer. Ferguson requested that her employer perform a split sample on her test results, but the employer refused. Ferguson did not immediately have another drug test performed because it was “recommended that [she] wait until [she] was requested to give one by the Board of Nursing because it costs money, and [she] needed a doctor’s order and [she] didn’t have health insurance after being terminated.”

On October 23, 2007, Ferguson took another drug test. Ferguson tested negative for all illegal substances.

PROCEDURAL CONTEXT

On November 26, 2007, a complaint was filed against Ferguson before the Delaware Board of Nursing. The complaint claimed that Ferguson tested positive for marijuana on January 25, 2007. The complaint asserted:

In testing positive for marijuana, [Ferguson] was guilty of unprofessional conduct in violation of the provisions of 24 *Del. C.* § 1922(a)(8) in that she violated the following Rules of the Board of Nursing:

- a. Rule 10.4.1 in that her behavior failed to conform to legal standards and accepted standards of the nursing profession;

b. Rule 10.4.2.13 in that she practiced nursing when unfit to perform procedures and make decisions in accordance with the license held because of physical impairment.

Upon receipt of the complaint, Ferguson submitted several research articles to the Board explaining that an individual can test positive for marijuana based solely upon passive inhalation. Ferguson also vehemently denied ever ingesting marijuana or ever utilizing an illegal substance.

On June 11, 2008, the Board held a hearing. At the hearing, the complaint was amended to reflect that the drug test was done on January 17, 2007 and not on January 25, 2007, as alleged in the complaint.

At the hearing, Ferguson introduced into evidence research articles on passive marijuana smoke inhalation. Ferguson testified that she did not know at the time of inhalation that passive inhalation could result in a positive test result. Ferguson also explained to the Board that she had requested that a confirmatory test be performed to determine whether the result was a false positive. Ferguson explained that her request was denied.

Additionally, Ferguson presented Dr. Robert John Kokoski as an expert in urine drug testing. Dr. Kokoski is the Director of the Friends Medical Laboratory in Baltimore, Maryland. Dr. Kokoski explained that he is a toxicologist who specializes in urine drug testing. Dr. Kokoski asserted that he previously had been qualified as an expert by courts and professional licensing boards. Dr. Kokoski

stated that he regularly conducts testing on behalf of the Maryland Board of Nursing.

Dr. Kokski testified that the Board should not consider Ferguson's drug test for disciplinary purposes because it is unreliable. Dr. Kokski asserted that positive test results typically are confirmed to ensure that the result is not a false positive. Dr. Kokski explained that false positives can occur by interference with the sample. It is undisputed that Ferguson's positive drug test result was not confirmed.

Additionally, Dr. Kokski testified that research has shown that passive inhalation can result in a positive drug test result. Dr. Kokski stated that the facts of exposure as alleged by Ferguson could explain the positive test result. However, Dr. Kokski maintained that the result should not be utilized for disciplinary purposes because of its unreliability.

Dr. Kokski was the only expert witness who testified at the hearing. The State did not present an expert or any independent research articles to refute Dr. Kokski's testimony.

On September 10, 2008, the Board issued a Decision and Order finding that Ferguson was guilty of violating 24 *Del. C.* § 1922(a)(8) by committing unprofessional conduct and violating Board Rule 10.4.1 in that her behavior failed to conform to the legal standards and accepted standards of the nursing profession.

The Board concluded that “even accepting Ms. Ferguson’s testimony that the positive test was the result of passive inhalation, based on her testimony she knew the risks of passive inhalation and did not remove herself from the situation.” The Board found that the State had failed to prove any violation of Board Rule 10.4.2.13 (practicing nursing when physically impaired).

The Board stated that it was not persuaded by the articles on passive inhalation or by the expert’s testimony that it should disregard the unconfirmed test result. The Board found that the expert’s testimony was “largely irrelevant” because “Ferguson did not dispute that she had marijuana in her system.”

The Board determined that Ferguson’s conduct was grounds for disciplinary sanctions pursuant to 24 *Del. C.* § 1922(a). The Board issued Ferguson a Letter of Reprimand on October 23, 2008. In determining the appropriate sanction, the Board considered the fact that Ferguson had no prior disciplinary record, several positive reference letters, and possibly tested positive solely based on passive inhalation.

On November 21, 2008, Ferguson filed an appeal of the Board’s decision and the Letter of Reprimand.

STANDARD OF REVIEW

This Court has a limited role in reviewing decisions from an administrative agency. The Court’s role is to review the record to determine if substantial

evidence exists to support the Board’s factual findings and to determine whether the Board’s decision is free from legal error.¹ Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”² It is not the Court’s role to make credibility decisions or to independently weigh the evidence.³ Where the Court determines that the record supports the Board’s findings, the Court must accept those findings even if the Court would have reached a different conclusion.⁴

DISCUSSION

Substantial Evidence

The Board lacked substantial evidence to support its factual findings. The Board’s conclusion – “even accepting Ms. Ferguson’s testimony that the positive test was the result of passive inhalation, based on her testimony she knew the risks of passive inhalation and did not remove herself from the situation” – is not supported by substantial evidence. The record reflects that at the time of inhalation Ferguson did not know the risks of passively inhaling marijuana smoke.

Ferguson testified that prior to taking the drug test she had informed her employer that she had been around marijuana smoke and was not sure whether it was “possible to test positive or not for marijuana” from passive inhalation.

¹ *Rivera v. Arthur Jackson Co., Inc.*, 2009 WL 418303, at *1 (Del. Super.).

² *Id.* quoting (*Del. Alcoholic Beverage Control Comm’n v. Newsome*, 690 A.2d 906, 910 (Del. 1996)).

³ *Id.*

⁴ *Id.*

Ferguson also testified that when she received her positive test result, she was “surprised and in disbelief because [she] wasn’t sure if it was possible or not” to test positive for marijuana from passive inhalation. Ferguson never stated that she knew the risks of passively inhaling marijuana smoke at the time of inhalation. There is no contradictory evidence in the record.

Additionally, the Board lacked substantial evidence to conclude that “Ferguson did not dispute that she had marijuana in her system.” Ferguson testified that after she was informed of the test results she was surprised and she requested a confirmatory test. Such a test would not have been necessary if Ferguson had not disputed that she had marijuana in her system. Further, Ferguson’s statement to her employer that she had been exposed to marijuana smoke is not a confession that she had marijuana in her system.

The Letter of Reprimand is based on the Board’s finding that Ferguson “failed to remove [herself] from a situation in which [she] was exposed to illegal drug use of such a magnitude that it resulted in a positive drug test result.” It is axiomatic that the duty to remove oneself must be predicated on knowledge of the danger or impropriety of the situation as it relates to professional standards. There is no record evidence that Ferguson knew or should have known that by remaining in the home, and caring for an invalid family member, she would be in violation of

professional nursing standards. Therefore, the Court finds that the Board's factual findings are not supported by substantial evidence in the record.

Legal Error

The Board committed legal error by ignoring the only expert's testimony without providing specific relevant reasons as to why such testimony was ignored. While it is the Board's role to determine the credibility of witnesses, the Board is not free to ignore the objective and uncontradicted testimony of the only expert witness without providing specific relevant reasons for doing so.⁵

Here, the Board states that the expert's testimony is "irrelevant" because Ferguson "did not dispute that she had marijuana in her system." However, as explained above, the record lacks substantial evidence to support such a conclusion. Ferguson did dispute the test results. Therefore, the Board's reasoning for ignoring the expert's testimony is invalid. The Board's decision fails to provide an adequate basis upon which the Board may disregard the opinion of the only expert.⁶ Therefore, the Court finds that the Board committed legal error when it failed to provide specific relevant reasons for ignoring the only expert's objective testimony.

⁵ *Jepsen v. Univ. of Delaware – Newark*, 2003 WL 22139774, at *2 (Del. Super.).

⁶ *See id.* (holding that where the Board's stated reason for ignoring the expert's testimony was found by the Court to be invalid, the Board's decision then lacked an adequate basis upon which the Board could disregard the expert's opinion).

CONCLUSION

The Court finds that the Board lacked substantial evidence to support its findings. Specifically, the record does not support the Board's conclusion that Ferguson knew the hazards of passive marijuana inhalation at the time of inhalation and that she confessed to having marijuana in her system. Additionally, the Court finds that the Board committed legal error when it ignored the expert's opinions without providing specific relevant reasons for doing so.

THEREFORE, the decision of the Board is **REVERSED AND REMANDED** for further proceedings in accordance herewith.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston