

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark A. Ancharski, :
 :
 Petitioner :
 :
 : No. 1765 C.D. 2010
 v. :
 :
 : Submitted: January 7, 2011
 Bureau of Professional and Occupational :
 Affairs, State Board of Nursing, :
 Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: June 21, 2011

Mark A. Ancharski (Petitioner) appeals, pro se, from the August 5, 2010, adjudication of the State Board of Nursing (Board), which suspended Petitioner's license to practice as a registered nurse pursuant to the Professional Nursing Law (Law)¹ and the Criminal History Record Information Act (CHRIA).² We affirm.

On September 9, 2009, Petitioner pleaded guilty to theft by unlawful taking, a misdemeanor, for stealing approximately one hundred thirty tablets of Percocet from a patient in Langhorne, Pennsylvania. That same day, Petitioner was sentenced to imprisonment for a period of not less than one month or more than

¹ Act of May 22, 1951, P.L. 317, as amended, 63 P.S. §§211-226.

² 18 Pa. C.S. §§9101-9183.

twenty-three months, followed by one year of probation, as well as payment of costs, fifty hours of community service, and drug and alcohol evaluation.

On December 15, 2009, the Department of State (Department) issued an order to show cause directing Petitioner to demonstrate why the Board should not suspend, revoke, or otherwise restrict his license to practice nursing pursuant to section 14(a)(5) of the Law³ and section 9124(c)(2) of CHRIA.⁴ Petitioner did not

³ Section 14(a)(5) of the Law 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).

⁴ Section 9124(c)(2) of CHRIA provides as follows:

(c) State action authorized. --Boards, commissions or departments of the Commonwealth authorized to license, certify, register or permit the practice of trades, occupations or professions may refuse to grant or renew, or may suspend or revoke any license, certificate, registration or permit for the following causes:

(1) Where the applicant has been convicted of a felony.

(2) Where the applicant has been convicted of a misdemeanor which relates to the trade, occupation or profession for which the license, certificate, registration or permit is sought.

18 Pa. C.S. §9124(c)(2).

respond to the order to show cause, and, on January 26, 2010, the Department filed a motion to enter default and deem facts admitted pursuant to 1 Pa. Code §§35.35 and 35.37.⁵ Again, Petitioner did not respond, and on March 2, 2010, the Board granted the motion.

On August 5, 2010, the Board issued an adjudication and order suspending Petitioner's license pursuant to section 14(a)(5) of the Law⁶ and section 9124(c)(2) of CHRIA.⁷ The Board explained its reasons for the suspension as follows:

In assigning an appropriate sanction, the Board weighs the number and seriousness of the violations against any mitigating evidence. Respondent failed to respond to the OSC or the MDFA. Therefore, no hearing took place in this matter, and no mitigating evidence was offered.

Respondent's conduct undermines the high standards of competence, professionalism, and integrity intrinsic to the practice of professional nursing. The Board is concerned that

⁵ In relevant part, 1 Pa. Code §35.37 provides that a respondent failing to file an answer to an order to show cause within the time provided in that order shall be deemed in default and, consequently, the relevant facts stated in the order to show cause may be deemed admitted.

⁶ This Court has recognized crimes involving theft as crimes 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. Petitioner's theft by unlawful taking demonstrated a lack of moral character and, therefore, the Board did not err in deciding to suspend Petitioner's license under section 14(a)(5) of the Law, 63 P.S. §224(a)(5).

⁷ Petitioner pleaded guilty to theft by unlawful taking, which is a misdemeanor. Because Petitioner stole the Percocet from his patient, it is clear that the misdemeanor relates to his profession as a nurse. Therefore, the Board did not err in suspending Petitioner's license to practice nursing pursuant to section 9124(c)(2) of CHRIA, 18 Pa. C.S. §9124(c)(2).

there may be an underlying drug dependency issue related to Respondent's practice of nursing. Respondent's criminal conviction and behavior signify that Respondent is not fit to practice professional nursing at this time. The duty of the Board is to protect the health and safety of the citizens of the Commonwealth and ensure that the sanction imposed reaches that end. Therefore, the Board will indefinitely suspend Respondent's nursing license until he can demonstrate fitness to practice as a professional nurse.

(Board's adjudication at 8.) The Board's order provided that Petitioner may request restoration of his license in three years after he has submitted to a drug and alcohol examination, demonstrates competency to resume practice as a nurse, and demonstrates that he has not practiced as a nurse during the suspension.

On appeal to this Court,⁸ Petitioner asserts that the Board erred in suspending his license indefinitely based on its concern that Petitioner had an underlying drug dependency. Petitioner avers that the Board did not have evidence of an underlying drug dependency and that Petitioner is able to demonstrate that he has been drug free since April 2005.

However, as the Board observes, Petitioner waived the opportunity to introduce mitigating evidence that he has been drug free since 2005 when he failed to respond to the Department's order to show cause and motion to deem facts admitted. Belote v. State Harness Racing Commission, 688 A.2d 264 (Pa. Cmwlth.), appeal denied, 548 Pa. 683, 699 A.2d 736 (1997) (holding that issues not raised before an administrative agency or raised in a brief for the first time are waived); Seneca Landfill, Inc. v. Department of Environmental Protection, 948 A.2d 916 (Pa. Cmwlth.

⁸ Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

2008) (holding that issues not raised before an administrative agency are waived). Moreover, the Board did not find that Petitioner was dependent on drugs, nor did the Board indicate that it was suspending Petitioner's license to practice nursing as a result of a perceived drug dependency. Rather, the Board determined that Petitioner's "criminal conviction and behavior signify that [he] is not fit to practice professional nursing at this time." (Board's adjudication at 8.) Petitioner does not challenge the Board's conclusions that he pleaded guilty to a crime of moral turpitude that relates to his profession. Under these circumstances, we reject Petitioner's contention that the Board's concern about an underlying drug dependency, even if unfounded, reflects reversible error.

Accordingly, we affirm.

PATRICIA A. McCULLOUGH, Judge

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	:	
Bureau of Professional and Occupational	:	
Affairs, State Board of Nursing,	:	
Respondent	:	

ORDER

AND NOW, this 21st day of June, 2011, the final adjudication and order of the State Board of Nursing, dated August 5, 2010, is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge