

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Patricia A. Sellers,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 297 C.D. 2008
	:	Submitted: June 27, 2008
State Board of Nursing,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: August 28, 2008

Patricia A. Sellers, R.N. (Licensee), petitions for review of an order of the State Board of Nursing (Board) denying her request for reinstatement of her license to practice professional nursing in Pennsylvania. In denying Licensee's most recent reinstatement request, the Board concluded Licensee failed to demonstrate the requisite good moral character needed for licensure as a registered nurse¹ inasmuch as she failed to accept responsibility for her wrongdoing in applying for license renewals in other states and denying or failing to disclose in those applications that Pennsylvania indefinitely suspended her license in 1996. For the reasons that follow, we affirm.

¹ Good moral character is an essential qualification for licensure as a registered nurse in Pennsylvania. See Section 6(a) of the Professional Nursing Law (Act), Act of May 22, 1951, P.L. 317, 63 P.S. §216(a).

I. Background

Licensee first obtained her professional nursing license in 1969. After graduation from a 24-month program at Misericordia Hospital School of Nursing in Philadelphia, Licensee worked as a nurse anesthetist. Over time, Licensee also held nursing licenses in 36 other states. However none of these licenses remain current.

Following her divorce, Licensee began using alcohol as a sedative to sleep, which led to her abusive use of alcohol. In April 1993, Licensee executed an Impaired Professional Program Agreement and entered into the Impaired Professional Program, now known as the Voluntary Recovery Program. However, Licensee violated the terms of the agreement. In October 1996, the Board indefinitely suspended Licensee's nursing license under Section 14(a)(2) of the Act² after finding Licensee unable to practice nursing with reasonable skill and safety to patients due to her alcohol addiction. See Bd. Op., 10/30/96; Reproduced Record "R.R." at 107a-18a.

Licensee last worked as a licensed nurse in Pennsylvania in 1997. Nonetheless, in her license renewal applications in Maine (1997, 1999), North Carolina (1997, 1999) and New Jersey (1998), and in her application to practice in Missouri (1998), Licensee denied or failed to disclose the suspension of her Pennsylvania license. Also in 1998, the nursing authorities in Kentucky took

² 63 P.S. §224(a)(2). Pursuant to Section 14(a)(2), the Board may refuse, suspend or revoke a license if the licensee "is unable to practice professional nursing with reasonable skill and safety to patients by reason of ... physiological or psychological dependence upon alcohol, hallucinogenic or narcotic drugs or other drugs which tend to impair judgment or coordination, so long as such dependence shall continue."

disciplinary action against Licensee for failing to disclose her Pennsylvania suspension. Licensee last worked as a nurse anesthetist in Wisconsin in 2001.

In 1998, the Board denied a reinstatement request. Licensee failed to attend the hearing and demonstrate her fitness.

In 2002, the Board denied another reinstatement request and, in a companion case, suspended Licensee's license for two years based on Kentucky's disciplinary action. In that reinstatement denial, the Board provided Licensee may petition for reinstatement after completing the two-year suspension, demonstrating three years of sustained, documented recovery and establishing fitness and competency to practice nursing.

In 2003, following a second relapse, Licensee began inpatient treatment in Delaware County. Thereafter, Licensee participated in a long-term weekly outpatient program. In October 2005, Licensee successfully completed the outpatient program.

In 2006 and 2007, Licensee again requested reinstatement. In May 2007, the Board held a hearing at which Licensee appeared with counsel. She testified on her own behalf and submitted various supporting documents showing no further impairment. The Commonwealth, however, opposed Licensee's reinstatement on the basis she did not take responsibility for her prior conduct leading to the 2002 extension of her suspension, and because she continued to be dishonest with the Board.

Following the hearing, the Hearing Examiner issued a proposed decision granting reinstatement subject to a two-year probationary period and the condition that Licensee participate in the disciplinary monitoring unit of the Professional Health Monitoring Program. Thereafter, the Board initiated its review.

Ultimately, the Board issued a decision and order denying Licensee's reinstatement petition on the basis she failed to demonstrate she is fit and competent to practice professional nursing. More specifically, the Board noted Licensee did not take responsibility for not being forthright and truthful with licensing authorities in other states regarding the disciplinary action taken against her in Pennsylvania; rather, Licensee blamed unreliable mail delivery. Without acknowledgement of her wrongdoing, the Board believed such conduct would continue. Consequently, the Board concluded Licensee did not demonstrate the good moral character required for licensure as a nurse in Pennsylvania. See Krichmar v. State Bd. of Vehicle Mfrs., Dealers and Salespersons, 850 A.2d 861 (Pa. Cmwlth. 2004) (licensing board entitled to seek a straightforward acknowledgement of wrongdoing from licensee in fraud cases). Licensee appeals the Board's final order.³

³ Our review of Board decisions is limited to determining whether the Board's findings were supported by substantial evidence and whether the Board committed errors of law or constitutional violations. Wittorf, R.N. v. State Bd. of Nursing, 913 A.2d 956 (Pa. Cmwlth. 2006).

II. Argument

Licensee argues the Board erred in denying her reinstatement petition because there is ample evidence showing she abstained from the use of alcohol since March 2003, is no longer regarded as impaired and possesses good moral character.⁴ The Board, Licensee asserts, justified its reversal of the Hearing Examiner's proposed decision entirely on Licensee's failure to acknowledge the violations leading to the extension of her suspension and the most recent denial of her request for reinstatement. She maintains the Board improperly concluded she failed to demonstrate the required good moral character despite decades of evidence to the contrary.

Noting the Board relied on this Court's decision in Krichmar, Licensee asserts that case is not on point because it involved a licensed car salesman who pled guilty to felony insurance fraud. Here, in contrast to Krichmar, Licensee asserts she has no criminal history other than a 15-year-old conviction for driving under the influence of alcohol. In addition, she has no employment history of discipline, is supported by her family and church, and has continuously worked as an unlicensed health care or nursing assistant.

Further, Licensee asserts the Board's conclusion, that her explanation of her behavior, including problems with mail delivery, was unpersuasive, ignores

⁴ Licensee emphasizes a license to practice a particular profession, once acquired, constitutes a property right. Brady v. State Bd. of Chiropractic Exam'rs, 471 A.2d 572 (Pa. Cmwlth. 1984). Further, although a professional license is suspended, the licensee still possesses a property right subject to due process protection. Brown v. State Bd. of Pharmacy, 566 A.2d 913 (Pa. Cmwlth. 1989). Moreover, the right to practice a chosen profession free from unreasonable government interference is a liberty right protected by the Fifth and Fourteenth Amendments. Pa. Med. Providers Ass'n v. Foster, 582 A.2d 888 (Pa. Cmwlth. 1990).

the unusual circumstances in her life at the time. Licensee traveled from state to state in search of positions to practice her profession and support herself.

Given these facts, Licensee asserts the Board's denial of her reinstatement petition reflects an unduly harsh judgment of the behavior of an essentially good woman and skilled professional who battled a debilitating illness for much of her adult life. In doing so, Licensee argues, the Board ignored the Supreme Court's direction in Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (1954), that the exercise of the police power not be unreasonable, oppressive or beyond the necessities of the case.

Licensee also argues the Board erred by not deferring to the Hearing Examiner's credibility determinations, evaluations and conclusions that she possessed the moral character and qualities necessary to reinstate her license. Licensee further asserts the Board never stated she needed to meet a "good moral character" threshold, which the Board did not define. For these reasons, Licensee requests reversal of the Board's decision and reinstatement of her license.

The Board counters it properly denied Licensee's reinstatement petition based on her failure to accept responsibility for the actions resulting in the disciplinary actions against her. The Board did not address the issue of whether Licensee established three years of continuous, documented recovery. Rather, the Board determined Licensee's acts of deception in failing to report the suspension of her Pennsylvania license to other licensing states impugned her character and fitness to practice nursing. See Section 6(a) of the Act (good moral character required for licensure as a professional nurse); Section 14(a)(4)(i) of the Act, 63 P.S. §224(a)(4)(i) (Board may suspend or revoke any nursing license where the

licensee committed fraud or deceit in securing admission to practice); and Section 14(a)(6) of the Act, 63 P.S. §224(a)(6) (Board may suspend or revoke a license where the licensee received other disciplinary action by the proper licensing authority in another state).

The Board also cites the following language from its decision:

At hearing in this matter, the prosecuting attorney gave [Licensee] the opportunity to explain her prior actions. [Licensee] first explained that she did not tell the licensing authorities in other states about her Pennsylvania discipline because she believe[d] that, since Pennsylvania was endorsing her license to those states, it must have been in good standing. When the prosecuting attorney pointed out that the last endorsement was at least six months before the suspension of [Licensee's] license, she began to blame unreliable mail delivery for her failure to be forthright and truthful. When the prosecuting attorney pointed out that [Licensee] had already admitted she was aware of the suspension long before she filed any of [the] false and deceptive out-of-state applications for which those states took disciplinary action, [Licensee] again blamed her mail delivery. The Board finds from this testimony that [Licensee] has not confronted and acknowledged the violations that led to the extension of her suspension and most recent denial of her request for reinstatement. Without such an acknowledgment, the Board cannot find any basis to believe that such wrongful conduct will not continue. (Bd. Op., 01/18/08, at 13)

Citing Krichmar, the Board maintains it is entitled to seek Licensee's acknowledgment of her wrongdoing as a condition of reinstatement. Having determined Licensee's failure to acknowledge her wrongdoing reflects that she lacks the good moral character to practice professional nursing, the Board asserts it did not err or abuse its discretion in denying Licensee's reinstatement petition.

III. Analysis

In the absence of bad faith, fraud, capricious action or an abuse of power, a reviewing court will not inquire into the reasonableness of an administrative agency's action or into the details or manner of executing that action. Slawek v. State Bd. of Med. Educ. & Licensure, 526 Pa. 316, 586 A.2d 362 (1991). Judicial discretion may not be substituted for administrative discretion. Id. In other words, absent a flagrant abuse of administrative discretion or a purely arbitrary execution of administrative duties and functions, a reviewing court may not reverse or modify an agency's order. Id.

Here, Licensee asserts the Board's denial of her reinstatement petition on the basis she failed to demonstrate good moral character is indefensibly excessive and punitive. Licensee maintains there is ample evidence in the record demonstrating her good moral character: she has no employment history of discipline or discharge; in 1993, she voluntarily reported her alcohol problem and began treatment for it; as a result of her 2003 inpatient treatment and several years of outpatient treatment, she is no longer diagnosed as impaired; she worked continuously for several years as a nurse's assistant; and she is supported by her family and her church.

For these reasons, Licensee asserts the Board improperly based its reasoning entirely on Krichmar, which involved a licensed salesman who pled guilty to felony charges of insurance fraud. In short, Licensee contends her situation is distinguishable from that of the licensee in Krichmar and her confusion several years ago over the status of her Pennsylvania license cannot be compared to felony insurance fraud.

To begin, we commend Licensee's demonstrated commitment to recovery from alcohol dependency and acknowledge the facts in her case are different from those in Krichmar. Nevertheless, we believe the rationale in Krichmar cited by the Board is equally applicable here.

In Krichmar, the Board of Vehicle Manufacturers, Dealers and Salespersons indefinitely suspended the licensee's salesperson license after he pled guilty to felony insurance fraud. The licensee paid another individual to burglarize his home so he could file an insurance claim. The board noted the licensee, rather than acknowledging his wrongdoing, testified at his suspension hearing that he pled guilty to the criminal charge to avoid a prison sentence in a county with a high conviction rate, to avoid trial expenses and to put the matter behind him. The board thus conditioned the licensee's reinstatement in part on an actual acknowledgment of his wrongdoing.

The appellant in Krichmar appealed to this Court on the basis the Board erred in premising his indefinite suspension on the inaccurate conclusion that he failed to acknowledge wrongdoing. In affirming the Board, this Court, speaking through your current author, reasoned:

We do not agree that the Board erred in its evaluation of Salesman's testimony. While not proclaiming innocence, Salesman failed to show the Board that he understood what he did was wrong. Rather, Salesman explained why his guilty plea was a good deal. ...

It is reasonable for the Board to seek a straightforward acknowledgement of wrongdoing from a licensee convicted of fraud. Such an acknowledgement is an initial step in preventing recurrence of wrongful

conduct. Also, a straightforward acknowledgement is essential to restore credibility. Such an acknowledgment to the Board is lacking here.

850 A.2d at 865 (emphasis added).

Here, in Finding of Fact No. 12, the Board quotes from its January 2002 decision denying Licensee's previous reinstatement request:

[Licensee] argues that she did not know that her Pennsylvania license had been disciplined because "her license was not suspended to discipline her for unprofessional conduct." (Respondent's brief on exceptions at p. 8). The Board's 1996 order clearly stated that [Licensee's] license was being suspended because the Board found she was not fit and competent to practice nursing. [Licensee's] assertions that she believed the suspension was merely "procedural" are absurd. Moreover, if [Licensee] had questions about the status of her Pennsylvania license, she could have requested information from the Board. She did not. [Licensee] was not a credible witness. (Bd. Op., 01/18/08, at 5, quoting Bd. Op., 01/17/02, at 10 (R.R. at 135a))

At the May 2007 hearing on her reinstatement petition, Licensee again failed to acknowledge her wrongdoing in failing to disclose the 1996 Pennsylvania suspension of her license when renewing her license in other states. When asked by the prosecuting attorney why she did not do so, Licensee testified as follows:

Q. You received the Board Order suspending your nursing license in January of 1997, according to your previous testimony, which you're not disputing here today. How did you not understand that you had – you're an intelligent person, and you've told us you're an intelligent person. How could you not understand that

you had – your license in Pennsylvania had been disciplined?

A. As I said, at times I didn't get mail for months, and there is probably a hiatus in there where I applied for these things and had not received my current mail.

Q. You received the Order of Discipline in January of 1997, by your own testimony, correct?

A. Yes, ma'am.

Q. And you made application for these nursing license renewals after that. I'm trying to understand how you could not understand that your license was suspended and disciplined in the State of Pennsylvania.

A. Once again, mail was sporadic. I didn't really understand the terminology. (Notes of Testimony (N.T.), 05/31/07, at 51; R.R. at 82a)

As reflected by her testimony, Licensee received the order suspending her license in Pennsylvania in 1997, prior to applying for license renewals in several states. Id. at 45-49, R.R. at 76a-80a. Nonetheless, she denied or failed to disclose the Pennsylvania suspension in those applications. Id.

Rather than admitting she understood what she did was wrong, Licensee blamed her actions on sporadic mail and the fact that she did not understand the terminology in the Board's suspension order. In Krichmar, we recognized the acknowledgment of wrongdoing is an important initial step in preventing recurrence of such conduct and restoring the licensee's credibility. As in Krichmar, such an acknowledgment to the Board is lacking here. Consequently, we conclude the Board did not abuse its discretion by denying Licensee's reinstatement petition on the basis "that [she] has not confronted and acknowledged the violations that led to the extension of her suspension and most recent denial of her request for reinstatement." Bd. Op., 01/18/08, at 13. In doing so, we reject Licensee's suggestion that only fraudulent conduct requires a

straightforward acknowledgment of wrongdoing; rather, we hold that in a case involving any wrongful conduct, especially deceptive conduct, the Board does not err by taking into consideration a licensee's failure to acknowledge prior bad acts.

Additionally, Licensee asserts the Board erred or abused its discretion by not deferring to the Hearing Examiner's credibility determinations, evaluations and conclusions. See Longo v. Weinberger, 369 F. Supp. 250 (E.D. Pa. 1974) (where credibility is a significant factor, great deference is given to Hearing Examiner's evaluations and conclusions).

The Board counters the Hearing Examiner's proposed decision did not restrict the Board's discretion in whether to grant or deny reinstatement. See Telang v. State Bd. of Med., 561 Pa. 535, 751 A.2d 1147 (2000) (licensing board authorized to reach an otherwise permissible result without regard to result proposed by hearing examiner). We agree. The Board, as the ultimate fact-finder, may accept or reject the testimony of any witness, in whole or in part. See Barren v. State Board. of Med., 670 A.2d 765 (Pa. Cmwlth. 1996). In reviewing a Board decision, this Court may not reweigh the evidence or second-guess the Board's credibility determinations. Id. Here, the Board, as the ultimate fact-finder, determined Licensee, by not accepting responsibility for her past misconduct, did not demonstrate the good moral character required for licensure. As noted above, this finding is supported by the record.

Moreover, having determined our rationale in Krichmar is equally applicable here, we conclude the Board did not abuse its discretion in denying Licensee reinstatement of her nursing license until she straightforwardly acknowledges her wrongful conduct.

Finally, Licensee asserts the Board never stated she needed to meet a “good moral character” threshold and that it did not define that term.⁵ As discussed above, Section 6(a) of the Act provides: “Every applicant, to be eligible for examination for licensure as a registered nurse, shall furnish evidence satisfactory to the Board that he or she is of good moral character” 63 P.S. §216(a). Also, Section 14(a)(4)(i) of the Act authorizes the Board to “refuse, suspend or revoke any license in any case where the Board shall find that ... [t]he licensee has committed fraud or deceit in ... the practice of nursing, or in securing his or her admission to such practice” 63 P.S. §224(a)(4)(i).

In Gombach v. Department of State, Bureau of Commissions, Elections and Legislation, 692 A.2d 1127 (Pa. Cmwlth. 1997), this Court held a similar “good moral character” requirement in Section 5 of the Notary Public Law⁶ to be constitutionally certain insofar as it requires the absence of conduct or acts indicating moral turpitude. “Our courts have defined moral turpitude as ‘anything done knowingly contrary to justice, honesty or good morals.’” Id. at 1130 (quoting Foose v. State Bd. of Vehicle Mfrs., Dealers and Salespersons, 578 A.2d 1355, 1357 (Pa. Cmwlth. 1990)). See also Bowalick v. Commonwealth, 840 A.2d 519

⁵ “Good moral character” is defined in part as follows (with emphasis added):

1. A pattern of behavior that is consistent with the community’s current ethical standards and that shows an absence of deceit or morally reprehensible conduct. ...
 2. A pattern of behavior conforming to a profession’s ethical standards and showing an absence of moral turpitude. ...
- Good moral character is [usually] a requirement of persons applying to practice a profession such as law or medicine. ...

Black’s Law Dictionary 714 (8th ed. 2004).

⁶ Act of August 21, 1953, P.L. 1323, as amended, 57 P.S. §151.

(Pa. Cmwlth. 2004) (an act of moral turpitude may consist of intentional, knowing or reckless conduct involving dishonesty, fraud or deception).

Clearly, Section 6(a) of the Act requires good moral character as a qualification for a license to practice nursing. The term good moral character is not unconstitutionally vague or incapable of definition. Gombach. It is demonstrated by the absence of conduct or acts done knowingly contrary to justice, honesty or good morals. Id.

Licensee, by failing to acknowledge her prior deceitful conduct demonstrated she presently lacks the good moral character required for nursing licensure in Pennsylvania. Given the questions Licensee's past conduct raises about her honesty and truthfulness, conditioning her license reinstatement on proof of fitness to practice, including credible proof of remorse, is reasonable. Krichmar.

Discerning no error in the Board's decision, we affirm.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Patricia A. Sellers,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 297 C.D. 2008
	:	
State Board of Nursing,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 28th day of August, 2008, the order of the State Board of Nursing is **AFFIRMED**.

ROBERT SIMPSON, Judge