

BEFORE THE KANSAS STATE BOARD OF NURSING
Landon State Office Building, 900 S.W. Jackson #1051
Topeka, Kansas 66612-1230

**IN THE MATTER OF
RICHARD H. SWAN
License No. 13-66480-101**

Case No. 05-968-0

FILED
APR 19 2010
KSBN

FILED - OAH
20 APR '10 AM 9:41

CONSENT AGREEMENT AND FINAL ORDER

NOW ON THIS 19th day of April 2010, the Kansas State Board of Nursing (Board), represented by Assistant Attorney General Brenda J. Clary, and the applicant, Richard H. Swan (Applicant), hereby enter into this agreement and proffer evidence, and the hearing officer adopts the agreement and makes the following findings of fact and orders:

AGREED FINDINGS OF FACT

1. Applicant was licensed to practice nursing in Kansas as a registered nurse (RN) until his license lapsed on the 31st day of October 2005. Applicant has filed an application for reinstatement of his license.
2. Applicant's address of record is 525 E. Armour, Apt 210, Kansas City, MO 64109.
3. Applicant understands that, pursuant to K.S.A. 77-515, Applicant may be represented at Applicant's expense by an attorney during these proceedings.
4. Applicant acknowledges that this agreement will be an open record pursuant to the Kansas Open Records Act, K.S.A 45-215 *et seq.*, and may be published or disseminated notwithstanding any state or federal law otherwise restricting public access to, or dissemination of, any personal, substance abuse treatment, or health care information contained herein.
5. Applicant acknowledges and understands his right, pursuant to K.S.A. 77-523, to a hearing at which Applicant could present evidence and argument, conduct cross-examination of the Board's witnesses, and submit rebuttal evidence, and Applicant explicitly waives those rights and voluntarily enters into this agreement instead of proceeding to such a hearing.

6. Applicant further waives all possible substantive and procedural motions and defenses that could be raised during an administrative hearing process pursuant to the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.*

7. Applicant acknowledges and understands that, pursuant to K.S.A. 77-527, he would have the right to seek review of an initial order issued by a hearing officer by filing a petition for review by the agency head (i.e., the Board). Applicant has been advised that such a request must be addressed to Mary Blubaugh, Executive Director, Kansas State Board of Nursing, Landon State Office Building, 900 SW Jackson, Suite 1051, Topeka, KS 66612-1230 and received within fifteen (15) days of the date an initial order is served. Applicant expressly waives review, and the parties agree to the entry of a final order by a presiding officer designated pursuant to K.S.A. 77-514 and 77-527 to act on behalf of the Board.

8. Applicant further acknowledges and understands that, pursuant to the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.*, and amendments thereto, he would have the right to seek judicial review of an adverse final agency action by filing a petition for review with the district court within thirty (30) days after service of a final order and serving the petition on Mary Blubaugh, Executive Director, Kansas State Board of Nursing. Applicant expressly waives judicial review.

9. The parties agree that, after an investigation, the Board's investigative committee found the following reasonable grounds to deny Applicant's application for reinstatement pursuant to K.S.A. 65-1120:

Count 1: K.S.A. 65-1120(a)(4), to be unable to practice with skill and safety due to current abuse of drugs or alcohol.

Count 2: K.S.A. 65-1120(a)(6), unprofessional conduct, as defined by K.A.R. 60-3-110(s), failing to complete the requirements of the impaired provider program of the board.

10. Applicant acknowledges that at the time his license lapsed, he was, or recently had been, unable to practice with skill and safety due to current abuse of drugs or alcohol.

11. Applicant acknowledges that at the time his license lapsed, he was subject to a contractual agreement with the [REDACTED] the impaired provider program of the Board, and was not compliant with the agreement.

12. The parties agree that Applicant signed a new three-year contract with [REDACTED] on or about March 18, 2010

13. Applicant further acknowledges that the Board could present evidence to prove those facts if this matter were to proceed to hearing.

CONCLUSIONS OF LAW

14. The Kansas State Board of Nursing has the authority under K.S.A. 74-1106 *et seq.* to examine, license and renew license for duly qualified applicants and may limit, deny, suspend or revoke a license or authorization to practice nursing, may issue a public or private censure upon making any of the findings listed under K.S.A. 65-1120(a). Further, the Board may levy administrative fines consistent with K.S.A. 74-1110 upon finding a violation of the Nurse Practice Act.

15. The Board has jurisdiction over the Applicant and the subject matter of this action.

16. Evidence supports the following statutory grounds for denial of Applicant's application for reinstatement of his nursing license:

Count I: K.S.A. 65-1120(a)(4), to be unable to practice with skill and safety due to current abuse of drugs or alcohol, and

Count II: K.S.A. 65-1120(a)(6), unprofessional conduct, as defined by K.A.R. 60-3-110(s), failing to complete the requirements of the impaired provider program of the board.

17. *Vakas v. Kansas State Board of Healing Arts*, 248 Kan. 589 (1991), sets out the following factors to be considered in determining whether a license should be reinstated after a disciplinary finding has been made are the following:

- The present moral fitness of the petitioner;
- The demonstrated consciousness of the wrongful conduct and disrepute which the conduct has brought the profession;

- The extent of petitioner's rehabilitation;
- The nature and seriousness of the original misconduct;
- The conduct subsequent to discipline;
- The time elapsed since the original discipline;
- The petitioner's character, maturity, and experience at the time of the original revocation; and
- The petitioner's present competence in medical skills.

18. The parties agree that evidence of Applicant's rehabilitation is currently insufficient to warrant reinstatement in light of the *Vakas* factors but that Applicant has made progress.

19. By entering into this Consent Agreement and consenting to the entry of the Final Order, both parties waive their right to full administrative proceedings pursuant to K.S.A. 65-1120 and K.S.A.77-501 *et seq.* and to judicial review.

POLICY STATEMENT

20. The role of the Kansas State Board of Nursing is to protect citizens of Kansas, and the proposed disposition serves that policy by providing support and oversight during Applicant's continued rehabilitation with the goal of restoring Applicant to an unencumbered license when Applicant has established that he can practice with skill and safety.

DISPOSITION

21. Applicant's application for reinstatement of Applicant's Kansas Nursing license will be granted once the following conditions have been met: (a) Applicant has met all statutory requirements for reinstatement of Applicant's Kansas Nursing License; (b) [REDACTED] has issued a written statement to the Kansas State Board of Nursing which states the Applicant has submitted to at least one drug screen per month since entering this consent agreement, the result of which is valid and negative for substances prohibited by [REDACTED] and (c) [REDACTED] has issued a written statement to the Kansas State Board of Nursing which states that the Applicant has completed six consecutive months of compliance in [REDACTED] since entering this consent agreement and that the Applicant is safe to practice nursing in the State of Kansas.

22. Based upon this agreement, and pursuant to the disciplinary remedies available in K.S.A. 65-1120, the parties agree that this Consent Agreement will continue through any

renewal periods of Applicant's nursing license until Applicant completes each of the conditions and requirements of this agreement. Further, the parties agree that in the event of a lapse of Applicant's nursing license, reinstatement of Applicant's nursing license shall be contingent upon this Consent Agreement and Final Order remaining in effect until Applicant completes each of the conditions and requirements of this agreement.

23. Based upon this agreement, and pursuant to the disciplinary remedies available in K.S.A. 65-1120, the parties agree that once Applicant's application for reinstatement of his license to practice nursing in Kansas is granted pursuant to paragraph 19 of this Consent Agreement and Final Order, then Applicant's license to practice nursing in Kansas will be immediately suspended. The suspension will be stayed as long as the requirements and conditions of this agreement are met.

24. Based upon this agreement, and pursuant to the disciplinary remedies available in K.S.A. 65-1120, the parties agree that once Applicant's application for reinstatement of his license to practice nursing in Kansas is granted pursuant to paragraph 19 of this Consent Agreement and Final Order, then Applicant's license to practice nursing in Kansas is immediately limited. The limitations placed on the license and described below will remain in place until the requirements and conditions of this agreement are met or until the requirements and conditions of this agreement call for the modification of the limitations.

25. The Kansas State Board of Nursing will not take additional disciplinary action against Applicant's nursing license for the violations stated above as long as Applicant completes each of the following conditions and requirements:

(a) Once Applicant's license to practice nursing in Kansas has been granted pursuant to paragraph 19 of this Consent Agreement and Final Order, Applicant shall receive a license card which shall be issued with an "S" placed in the status code portion of the license card to indicate that the license is suspended with a Stay. The card will have an "L" indicating the limitations on the practice. Applicant will comply with the limitations.

(b) Applicant will continue to participate in and complete the reasonable recommendations and requirements of the [REDACTED]; sign releases of information necessary for [REDACTED] to evaluate and monitor Applicant and for [REDACTED] to report information to the Board. Applicant will be deemed to have completed the [REDACTED] program when [REDACTED] issues written notification that Applicant has completed the program. Noncompliance with [REDACTED] is a violation of this agreement.

(c) Applicant must submit to random drug screens as directed by the Board or by [REDACTED]. The costs of the drug screens will be paid by the Applicant. Applicant agrees that a Positive Drug Screen is a violation of this agreement.

(d) Applicant shall have a narcotic key restriction on Applicant's license for the first six (6) months after Applicant secures employment that requires a nursing license. The narcotic key restriction prohibits the Applicant from passing of narcotics, wasting of narcotics or having access to narcotics. The narcotic key restriction also prohibits the Applicant from supervising nurses or others that have access to narcotics. After Applicant completes six (6) months of employment that requires a nursing license, without violating any terms of this agreement, Applicant may request that the narcotic key restriction be removed from Applicant's license. Applicant's request shall include written verification from Applicant's employer, to the Kansas State Board of Nursing, as to whether the Applicant has been employed in a position that requires a nursing license; as to whether the Applicant has held that position for at least six (6) months; as to whether the Applicant has passed, wasted, had access to, or supervised others that had access to narcotics. With a showing that the narcotic key restriction term of this agreement has been met by the Applicant, and the Applicant is compliant with all other terms of this agreement, the narcotic key restriction will be removed from Applicant's license.

(e) Applicant shall immediately notify the Legal Division of any use of alcohol, if prohibited by [REDACTED], or controlled substances, or any violation of this Consent Agreement and Final Order.

(f) The Applicant shall immediately inform all employers and prospective employers of this Consent Agreement and the Final Order.

(g) Applicant shall send a money order for \$70 to the Board upon entering into this agreement to pay the cost of this action.

(h) Applicant shall not violate the Kansas Nurse Practice Act during the duration of this agreement.

(i) Applicant shall not violate the laws of the United States, of State, or of any political subdivision of any State during the term of this agreement. Traffic infractions shall not be considered violations of this agreement.

(j) Applicant agrees to notify the Legal Division of any changes in address and phone number as well as all employment terminations or employer changes or additions. All such notifications shall be made in writing within fourteen (14) days of such a change.

26. Applicant acknowledges and agrees that Applicant is responsible for the costs related to satisfying the conditions and requirements of this Consent Agreement. Applicant further acknowledges and agrees that to provide the Board with false information regarding compliance with this Consent Agreement is a violation of this Consent Agreement.

27. If Applicant does not meet these conditions and requirements, the Kansas State Board of Nursing may request additional sanctions against Applicant's license or application for a license. Applicant would be sent notice of such action and would be entitled to a hearing as to whether Applicant had complied with this Consent Agreement, but Applicant could not contest the violations listed in this agreement.

28. All parties understand that if an action based on failure to meet the conditions and requirements of this Consent Agreement is filed, K.S.A. 77-531 requires the Notice of Hearing to be served upon the Applicant and the Applicant's attorney of record, if any. All parties agree that serving the Notice of Hearing upon the Applicant only will be proper service and it is the Applicant's responsibility to contact his or her attorney, if any, in reference to the action.

29. Applicant acknowledges and agrees that if any action based on failure to meet the conditions and requirements of this Consent Agreement is filed during the term of this Consent Agreement and Final Order, or within 30 days after the expiration date of the KNAP contract, the conditions of this Consent Agreement and Final Order shall continue in effect until the Board or a hearing/presiding officer designated pursuant to K.S.A. 77-514 and K.S.A. 77-526, rules on the action.

30. Applicant acknowledges and agrees that upon a first finding that Applicant has failed to comply with any of the conditions or requirements of this Consent Agreement, the Stay of Suspension of Applicant's license to practice nursing in the State of Kansas, shall be lifted for a period of six months from the date of said finding. Applicant will not be allowed to practice nursing in the state of Kansas during the period of suspension. Applicant acknowledges and agrees that all conditions and requirements of this Consent Agreement remain in effect during the period of suspension.

31. Applicant acknowledges and agrees that upon a second or subsequent finding that Applicant has failed to comply with any of the conditions or requirements of this Consent Agreement, the Stay of Suspension of Applicant's license to practice nursing in the State of Kansas, shall be lifted for a period of one year from the date of said finding. Applicant will not be allowed to practice nursing in the state of Kansas during the period of suspension. Applicant acknowledges and agrees that all conditions and requirements of this Consent Agreement remain in effect during the period of suspension.

32. Applicant acknowledges and agrees that if the Stay of Suspension is lifted due to a finding of noncompliance with any of the conditions or requirements of this Consent Agreement, the Suspension will not again be Stayed until the Applicant has, following the prescribed time period of suspension, provided written verification to the Board that Applicant is in compliance and has remained in compliance during the period of suspension, with all conditions and requirements of this Consent Agreement. Once the Board, through its investigative staff and

attorney, is satisfied that Applicant has provided written verification, the suspension will again be stayed.

33. The Board will inactivate this case file once Applicant satisfies this agreement. This agreement does not prohibit the agency from taking disciplinary action against Applicant's license for any additional or cumulative characteristic, condition, or violation of the Kansas Nurse Practice Act committed by the Applicant before or after this agreement is entered into.

34. This agreement is a disciplinary action and must be reported on any future renewal or reinstatement applications. This agreement is a contract entered into by the parties to resolve an investigative case. The original of this agreement shall be placed in the Agency Record. This Agreement is a public record and will be reported to national disciplinary data banks.

35. After successful completion of all of the conditions and requirements of this Consent Agreement by the Applicant, the Consent Agreement will be satisfied and the case will be inactivated.


36. By signing this Consent Agreement and Final Order, Applicant acknowledges that Applicant has read and understands the entire document, and agrees to be bound by its terms. This Consent Agreement and Final Order constitute the entire agreement of the parties and may not be modified except in writing and if modification is approved by all parties. The effective date of this Consent Agreement and Final Order is the date shown on the certificate of service.

37. The hearing/presiding officer whose signature appears below has been designated pursuant to K.S.A. 77-514 and K.S.A. 77-526 to act on behalf of the Board/agency head and to hear discipline cases on behalf of the Board/agency head and to render either initial orders or final orders, if by agreement of both parties, in those discipline cases.

CERTIFICATE OF SERVICE

On the 23rd day of April, 2010, I mailed a copy of this CONSENT AGREEMENT AND FINAL ORDER to:

Richard H. Swan
525 E. Armour Apt 210
Kansas City, MO 64109



Brenda J. Clary, #18770
Assistant Attorney General
Kansas State Board of Nursing
Landon State Office Building
900 SW Jackson #1051
Topeka, KS 66612