

KANSAS STATE BOARD OF NURSING

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FILED

JAN 18 2011

KSBN

IN THE MATTER OF

**Amy Stepp,
Respondent**

Case No. 05-037-7

Case No. 08-078-0

FINAL ORDER

On December 15, 2010, the above-referenced matter came before the Kansas State Board of Nursing (Board) for a hearing on the petition for review filed by Amy Stepp, by and through her counsel, Mark W. Stafford of Holbrook & Osborn, P.A. The following Board members were present: Serena Stutzman, Mary Pomatto, Bernard Becker, Kimberly Hensley, Judith Hiner, Janet Jacobs, and Jane Conroy. Danielle R. Sanger, Assistant Attorney General, appeared on behalf of the Board as disciplinary counsel; Amy Stepp (Respondent) appeared in person and by Mark Stafford. Janet Arndt, Assistant Attorney General, was present as general counsel to the Board.

Pursuant to the parties' stipulation, Board members Janet Jacobs, Bernard Becker, and Jane Conroy were recused and did not participate or attend the review hearing because they had served in the investigatory proceeding. As authorized in K.S.A. 2009 Supp. 77-514(b), the Board designated member Judith Hiner to preside over the proceedings and to render a final order on the Board's decision. After taking notice of its administrative file, reviewing the evidence presented to the Administrative Hearing Officer (AHO), and hearing arguments on the matter, the Board hereby makes the following findings of fact and conclusions of law.

Findings of Fact

1. On September 23, 2004, Respondent was convicted in the United States District Court, District of Kansas, of conspiracy to acquire Lortab by fraud, a felony offense.
2. As a result of Respondent's felony conviction, the Board initiated an investigation, Case No. 05-037-7, wherein Respondent was referred to the Kansas Nurses Assistance Program (KNAP) on June 24, 2005. Respondent entered into KNAP on September 7, 2005.
3. In August 2007, Respondent moved to Mississippi. The Mississippi Board of Nursing issued a license to practice nursing to Respondent and initiated a disciplinary action against her license based upon her felony drug conviction. On October 16, 2007, as a part of that disciplinary action, Respondent voluntarily signed a contract with the Mississippi Board of Nursing entitled, "Program Participation Affidavit Recovering Nurse Program."
4. In the Mississippi contract, Respondent agreed to participate in the Recovering Nurse Program (RNP), take random drug tests and to provide monthly reports of her progress in RNP and verification of attendance at support groups. She also agreed to have restrictions placed on her nursing license "for a minimum of two (2) years" while she participated in RNP and "to limit

[her] practice as a nurse to the State of Mississippi." Respondent acknowledged that her participation in RNP constituted a disciplinary action and that the agreed-upon restrictions remained in effect until she completed RNP and the Mississippi Board of Nursing removed all restrictions from her license or took further action upon her license to practice nursing in Mississippi. On November 21, 2007, the Board closed the KNAP disciplinary case due to Respondent entering RNP in Mississippi.

5. Subsequently, the Board initiated a second investigation, Case No. 08-078-0, against Respondent based upon the disciplinary action taken by the Mississippi Board of Nursing. On April 24, 2008, Respondent voluntarily entered into a diversion agreement with the Board wherein she stipulated to violating K.S.A. 65-2210(a)(8) by having a disciplinary action taken by the Mississippi Board of Nursing against her nursing license, which resulted in her participation in RNP. In the diversion agreement, Respondent agreed to complete RNP and to provide the Board with a RNP compliance report each month from the Mississippi Board of Nursing. Respondent also agreed that proof of completion of RNP required written notification from RNP. The Board agreed to suspend its investigation proceedings while Respondent fulfilled the terms of the diversion agreement and to inactivate the case upon Respondent successfully completing the terms of the diversion agreement.

6. In October 2009, the Board of Mississippi initiated action to revoke Respondent's nursing license for failure to comply with the Mississippi contract.

7. Upon further investigation, the Board's investigative committee found reasonable grounds to believe that Respondent was subject to discipline and referred the matter for further proceedings. On January 13, 2010, a petition was filed alleging Respondent violated K.S.A. 65-2210(a)(2), (6), and (8) in the Kansas Nurse Practice Act (KNAP) and requesting revocation of Respondent's nursing license.

8. At the evidentiary hearing before the AHO, Respondent testified that in May 2008 she moved from Mississippi to Missouri and then Kansas to work as a nurse in Kansas without arranging with either nursing board to substitute KNAP for RNP. Respondent believed that she successfully completed the contract with the Mississippi Board of Nursing and that the contract with the Mississippi Board of Nursing terminated in October 2009. Thus, after that time, she stopped taking the drug tests and submitting the required reports to the Mississippi Board of Nursing. Respondent provided copies of receipts for payment of the drug tests taken from June 2008 to October 2009.

Respondent acknowledged that the Mississippi Board of Nursing advised her in October 2008 that she had violated the Mississippi contract. She did not respond as her Mississippi nursing license was renewed in December 2008 and she was not notified of any disciplinary action by the Mississippi Nursing Board until October 2009. Respondent admitted that, due to that disciplinary action, the Mississippi Board of Nursing revoked her license to practice nursing in March 2010.

9. Based upon the above facts, the AHO found that Respondent had violated K.S.A. 65-2210(a)(2) by being convicted of a felony offense involving an illegal drug and had not shown sufficient rehabilitation to warrant public trust; K.S.A. 65-1120(a)(8) by having a license to practice nursing revoked by the licensing authority of another jurisdiction; and K.S.A. 65-1120(a)(6) by being guilty of unprofessional conduct. Based upon these findings, the AHO granted the petition requesting revocation of Respondent's license to practice nursing.

10. Respondent filed a timely request for review of the AHO's initial order wherein she:
- (a) challenged the "propriety" of the revocation of her license by the Mississippi Board of Nursing;
 - (b) disputed the AHO's findings of fact, whether stated or implied, regarding the revocation of her license by the Mississippi Board of Nursing, specifically that she failed to comply with the Mississippi contract;
 - (c) claimed documents not provided to the AHO show the revocation of her Mississippi license should be deemed as only a "technical violation" of KNAP;
 - (d) argued she has been successfully rehabilitated to warrant the public trust; and
 - (e) asked the Board to admit evidence not presented to the AHO.

11. The Board granted review and requested the parties to address whether K.S.A. 2009 Supp.77-527 granted the Board authority to admit evidence not presented to the AHO and whether Respondent could collaterally attack the disciplinary action of the Mississippi Board of Nursing.

Conclusions of Law

Whether K.S.A. 2009 Supp. 77-527 authorizes the Board to admit new evidence

12. Under the Kansas Nurse Practice Act (KNPA), the Board has authority to deny, revoke, limit, or suspend any nursing license if it finds that certain statutory circumstances exist.¹ Disciplinary proceedings are conducted pursuant to Kansas Administrative Procedure Act (KAPA).² To determine whether the Board has authority to admit additional evidence, we must interpret K.S.A. 2009 Supp. 77-527(d)—the KAPA provision governing the review of an initial order issued by the administrative hearing officer. K.S.A. 2009 Supp. 77-527(d) provides:

"Subject to K.S.A. 77-621, and amendments thereto, in reviewing an initial order the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties. In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties."

13. Respondent relies upon the first sentence of K.S.A. 2009 Supp. 77-527(d) and contends, because it does not expressly authorize or prohibit an agency from admitting additional evidence, the Board has discretion to do so. However, the first sentence of K.S.A. 2009 Supp. 77-527(d) was interpreted differently in *Tire Disposal Facilitators, Inc. v. State ex rel. Harder*.³

14. In *Tire Disposal*, the issue was whether the agency acted arbitrarily and capriciously by disregarding the presiding officer's determination of witness credibility and then reversing the presiding officer's decision. The court held: "We read this statute to allow the agency to

¹ See K.S.A. 65-1120(a)(1) through (9).

² K.S.A. 65-1120(b).

³ 22 Kan. App. 2d 491 (1996).

exercise *de novo* review on the record."⁴ This holding shows the statute authorizes the agency to make different factual findings and conclusions of law than the presiding officer but must do so based upon the record that was present to the presiding officer—not on additional evidence presented upon review by the agency. The court's conclusion clarifies this point: "Because the [agency's] standard of review was *de novo*, and because [the agency] fully explained [its] reasons for disagreeing with the presiding officer's witness credibility determination, the [agency] did not act arbitrarily or capriciously."⁵

In 2009, the second sentence was added to K.S.A. 2009 Supp. 77-527(d) to address the broad *de novo* review of an agency.⁶ Because the review could result in a lack of deference to the AHO's decision, especially when witness demeanor and credibility was the basis for that decision, the 2009 amendments require an agency to give "due regard" to the AHO's observations and credibility determinations.⁷ If an agency disagrees with an AHO's factual findings, it should cite to the parts of the record supporting its view on a credibility issue.⁸ Thus, the 2009 amendment codifies the *Tire Disposal* decision.

15. The Board hereby concludes that K.S.A. 2009 Supp. 77-527(d) does not authorize an agency to admit or consider evidence not presented to the AHO at the evidentiary hearing. Accordingly, the Board hereby denies Respondent's request for the Board to admit additional evidence and orders that the exhibits Respondent proffered with her brief be removed from the record and returned to Respondent.

Whether the disciplinary action by the Mississippi Board of Nursing can be challenged

16. Under the KNPA, the Board is authorized to determine whether a person has committed an unlawful practice of nursing, and if so, whether that person's license to practice nursing in Kansas should be denied, limited, suspended, or revoked.⁹ The State's police power is to regulate certain professions for the good of society. This regulatory power is not limited to fitness to practice, but may also include requirements to protect and promote the public health and safety.¹⁰

K.S.A. 65-1120(a)(8) authorizes the Board to deny revoke, limit, or suspend a license if it finds the licensee had a nursing license denied, revoked, limited, or suspended by a licensing authority of another state. A certified copy of the record or order of the disciplinary action by the licensing authority of the other state constitutes *prima facie* evidence of such a fact.

17. Respondent does not dispute that the Mississippi Board of Nursing revoked her nursing license, but questions whether the Board can rely on the underlying facts for that revocation. Such questioning of the validity of the Mississippi decision is a collateral attack.¹¹

⁴ *Id.* at 492. (Emphasis added.)

⁵ *Id.*

⁶ L. 2009, Ch. 109, § 13.

⁷ *Minutes*, Senate Judiciary Committee, Feb. 4, 2009, Attachment 1-4, 11 (Report of the Judicial Council Administrative Procedure Advisory Committee, Dec. 9, 2008). See also Judicial Council Administrative Procedure Advisory Committee Report to the Special Committee on the Judiciary at 4, Nov. 1, 2007.

⁸ *Id.*

⁹ K.S.A. 65-1120(a).

¹⁰ *Harrison v. Long*, 241 Kan. 174, 180-81 (1987).

¹¹ See *Jones v. Jones*, 215 Kan. 102, 111, *cert. denied* 491 U.S. 1032 (1974) (questioning the validity of a judgment in any proceeding other than a direct appeal or a petition to set aside the judgment is a collateral attack).

"Collateral attacks upon judicial proceedings are never favored, and where such attacks are made, unless it is clearly and conclusively made to appear that the court had no jurisdiction or that it transcended its jurisdiction, the proceedings will not be held to be void but will be held to be valid."¹² Respondent does not contend that the Mississippi Board of Nursing lacked jurisdiction or transcended its jurisdiction. Rather, she contends collateral estoppel should not be applied because the Mississippi Board of Nursing issued a default judgment. She cites *Tilzer v. Davis, Bethune & Jones*,¹³ for the proposition that the doctrine of collateral estoppel operates to preclude reconsideration of issues that were actually litigated in the prior proceeding. Respondent argues, because nothing in the record shows she actually litigated the issues in the Mississippi disciplinary proceeding, she can present new evidence showing she complied with the Mississippi contract.

18. Respondent's argument misconstrues the language of the KNPA provision. K.S.A. 65-1120(a)(8) does not require the foreign jurisdiction to impose discipline only after a full hearing on the merits. The statute applies to any discipline imposed by another state on the licensee to practice nursing in that state. Thus, there need not be a finding or admission of the charges in the decision issued by the foreign jurisdiction. Pursuant to K.S.A. 65-1120(a)(8), the violation lies not in the alleged underlying misconduct in the foreign state but in the fact that another state licensing authority imposed discipline upon the respondent's license to practice nursing in that state. Respondent's argument erroneously seeks to expand the scope of K.S.A. 65-1120(a)(8) to include proof of the underlying facts for the decision of the other jurisdiction.

Based upon statutes or regulations nearly identical to K.S.A. 65-1120(a)(8), appellate courts in other jurisdictions have concluded that a state licensing agency can properly base discipline on the fact of discipline by a licensing agency of another jurisdiction even in the absence of a finding or admission of wrongdoing in that jurisdiction or taking evidence of the licensee's misconduct in the foreign jurisdiction.¹⁴

19. Moreover, the fact that Respondent did not have an evidentiary hearing on the charges by the Mississippi Board was her own choice. Respondent knew of the charges, but for personal reasons, she elected not to attend and present evidence at the Mississippi hearing. Although the record does not contain a certified copy of the default order revoking her Mississippi license, the record does contain a certified copy of the contract between Respondent and the Mississippi Board of Nursing that required completion of RNP and was considered a disciplinary action by the Mississippi Board of Nursing. Respondent also admitted the Mississippi Board of Nursing notified her of disciplinary charges alleging she failed to comply with the contract and her Mississippi nursing license was later revoked. Based upon the totality of the evidence, the record shows that the Mississippi Board of Nursing took disciplinary action against Respondent's Mississippi nursing license and subsequently revoked it.

20. The Board hereby concludes that K.S.A. 65-1120(a)(8) does not require evidence of the underlying basis for the discipline of Respondent's license in Mississippi; that Respondent may not collaterally attack the underlying basis of the decision by the Mississippi Board of Nursing,

¹² *Id.* (Citations omitted.)

¹³ 288 Kan. 477, 487 (2009).

¹⁴ See *Marek v. Board of Podiatric Medicine*, 20 Cal. Rptr. 2d 474, 478-79 (1993); *Anusavice v. Board of Registration in Dentistry*, 451 Mass. 786, 799 (2008) (citing *Ramirez v. Board of Registration in Medicine*, 441 Mass. 479 (2004); *Tandon v. State Board of Medicine*, 705 A.2d 1338, 1345 (1997); and *Butts v. Wyoming State Board of Architects*, 911 P.2d 1062, 1065-066 (1996).

and that Respondent violated K.S.A. 65-1120(a)(8) by having her Mississippi nursing license revoked by the licensing authority of that state.

Although a violation K.S.A. 65-1120(a)(8) is sufficient to revoke Respondent's license, the Board elects to address the remaining charges as alternative rationale for its decision.

Whether Respondent has shown sufficient rehabilitation after her felony conviction involving an illegal drug

21. K.S.A. 65-1120(a)(2) authorizes the Board to deny or revoke a nursing license if it finds that the licensee "to have been guilty of a felony or to have been guilty of a misdemeanor involving an illegal drug offense unless the applicant or licensee establishes sufficient rehabilitation to warrant the public trust, . . ."

22. Respondent admits that she was convicted of a felony offense involving an illegal drug but asserts she has been successfully rehabilitated to warrant the public trust. To support her assertion, she relies upon the exhibits attached to her brief. Unfortunately, these documents were not presented to the AHO at the evidentiary hearing. Based upon our prior conclusion, the Board cannot consider those documents in its review of the record.

23. At the evidentiary hearing, Respondent testified she complied with the required drug tests and RNP until October 2009. Her testimony indicates her sobriety during that time is due to the supervision by the Mississippi Board of Nursing rather than her desire to have a drug-free lifestyle. Respondent did not present any evidence that she continues to abide by or adhere to a maintenance program for her continued sobriety. Without such program, the Board believes Respondent is at a greater risk to relapse. The total lack of evidence in this regard indicates Respondent has not been sufficiently rehabilitated to warrant the public trust.

24. Based upon the evidence presented to AHO at the evidentiary hearing, the Board hereby concludes Respondent violated K.S.A. 65-1120(a)(2) by being convicted of a felony offense involving an illegal drug and has not shown that she has been sufficiently rehabilitated to warrant public trust.

Whether Respondent has been guilty of unprofessional conduct

25. K.S.A. 65-1120(a)(6) authorizes the Board to deny, revoke, limit, or suspend a license if it finds the licensee "to be guilty of unprofessional conduct as defined by rules and regulations of the board." The Board's regulation, in pertinent part, defines "unprofessional conduct" as failure to "comply with any disciplinary order of the Board" or "complete the requirements of the impaired provider program of the board."¹⁵

26. The record shows Respondent failed to complete RNP in lieu of KNAP, to continue to provide reports showing compliance with RNP, and to show proof that she had completed RNP. Respondent does not specifically challenge any findings or conclusions by the AHO regarding a violation of K.S.A. 65-2210(a)(6).

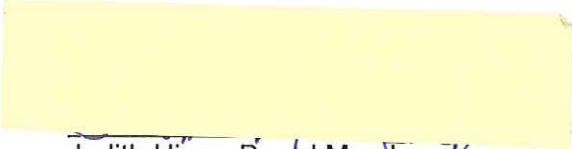
27. The Board hereby concludes that Respondent violated K.S.A. 65-2210(a)(6) by being guilty of unprofessional conduct for not complying with a disciplinary order of the Board or completing an impaired provider program as required by the Board.

¹⁵ K.A.R. 60-3-110(r)-(s).

Order

Based upon the above findings and conclusion, the Board hereby orders that the Initial Order in this matter be affirmed and that Respondent's license to practice nursing be revoked for violating the Kansas Nurse Practice Act as set forth in K.S.A. 65-1120(a)(2) (Respondent convicted of a felony offense involving an illegal drug without showing sufficient rehabilitation to warrant the public trust); K.S.A. 65-1120(a)(6) (Respondent guilty of unprofessional conduct); and K.S.A. 65-1120(a)(8) (Disciplinary action taken against Respondent's nursing license by the licensing authority of another state).

IT IS SO ORDERED.



Judith Hiner, Board Member
As directed by and on behalf of
Kansas State Board of Nursing

NOTICE OF JUDICIAL RELIEF

Judicial review of the above Final Order of the Board may be had by filing a petition for judicial review with the appropriate district court as provided in the Kansas Judicial Review Act, K.S.A. 77-601 *et seq.* The agency officer who may receive service of a petition for judicial review on behalf of the Board is Mary Blubaugh, Executive Director, Kansas State Board of Nursing, Landon State Office Building, 900 S.W. Jackson, Ste. #1051, Topeka, Kansas 66612-1230.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2011, a copy of the above Final Order and Notice of Judicial Review was deposited with the U.S. Postal Service, postage pre-paid, and addressed to:

Amy N. Stepp
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Mark W. Stafford
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