

KANSAS STATE BOARD OF NURSING

Landon State Office Building
900 SW Jackson, Suite 1051
Topeka, Kansas 66612-1230

FILED

OCT 04 2013

KSBN

IN THE MATTER OF)
)
Michelle Lynn Barnett)
License No. 14-99381-072)

OAH No. 13BN0149

**KSBN Case No. 12-1216-0 and
12-1102-7**

ORDER

Now, on this 4nd day of October 2013, the above-captioned matter comes for consideration of the Petition for Review filed by Michelle Lynn Barnett by and through her attorney, Danielle Sanger of Sanger Law Office. The Petition seeks review of the Initial Order issued by the Presiding Officer of the Office of Administrative Hearings. Pursuant to K.S.A. 2013 Supp. 77-527(a)(2), the Board has delegated to Board member Jeanne Walsh, its authority to determine whether to grant or deny a Petition for Review of an Initial Order and to issue an order accordingly.

The Board hereby grants the Petition for Review based upon the factual findings and conclusions of law set forth below.

Findings of Fact

1. On April 2, 2013, the Board's disciplinary counsel filed a petition requesting the revocation of the nursing license issued to Michelle Lynn Barnett (Respondent). A hearing on the Petition was held on July 18, 2013. The Presiding Officer's Initial Order was filed on August 23, 2013.

2. In the Initial Order, the Presiding Officer found that the Missouri State Board of Nursing had placed Respondent on probation for a period of 5 years due her diversion of drugs for her own use and that while on probation, Respondent violated the terms of probation by testing positive for alcohol, failing to call in to determine if she had been selected for random drug screenings, failing two tests for opiates, and failing to complete a chemical dependency evaluation. Due to her failure to comply with her probation agreement, the Missouri State Board of Nursing revoked Respondent's license to practice nursing in Missouri in January 2012.

3. The Presiding Officer also found that Respondent self-referred to the Kansas Nurse Assistance Program (KNAP) and began KNAP in June 2012. While in KNAP, Respondent relapsed four times on opiates in the months of July and August 2012. Due to her relapses, KNAP closed Respondent's case and Respondent was ordered to stop working until she could be determined safe to practice. In KNAP's

letter, it advised Respondent that she had denied using drugs, but when confronted the positive tests for drugs, she admitted that she was still using; thus, KNAP was unable to monitor her while she continued to violate her agreement by using Hydrocodone.

4 The Presiding Officer next found that while she was in KNAP, Respondent attempted to secure a physician's statement indicating that she needed a letter from the physician to the Board stating that Respondent needed Hydrocodone for her pain. The physician refused to prescribe Hydrocodone for Respondent.

5. The Presiding Officer further noted that since the closure of her KNAP case, Respondent continued to participate in twelve-step meetings, continued treatment by a psychiatrist with Suboxone, completed drug testing, and received alternative treatments in chiropractics and acupuncture.

6. The Presiding Officer then concluded that the facts showed Respondent had violated the following provisions in the Kansas Nurse Practice Act:

(a) K.S.A. 2013 Supp. 65-1120(a)(6), committing an act of unprofessional conduct that is defined in K.A.R. 60-3-110(n) as diverting drugs, supplies, or property of a patient or agency.

(b) K.S.A. 2013 Supp. 65-1120(a)(8), having a license to practice nursing be denied, revoked, limited, or suspended by a licensing authority of another state.

(c) K.S.A. 2013 Supp. 65-1120(a)(6), committing unprofessional conduct as defined in K.A.R. 60-3-110(s) as failing to complete the requirements of the impaired provider program of the Board; and

(d) K.S.A. 2013 Supp. 65-1120(a)(4), being unable to practice nursing with skill and safety due to current abuse of drugs or alcohol.

7. Based upon the above factual findings and conclusions, the Presiding Officer revoked Respondent's license to practice nursing in Kansas.

8. On September 6, 2013, Respondent filed a Petition for Review of the Initial Order requesting relief from the Initial Order. Respondent contends that the Board should address "unresolved issues often seen in the nursing profession, including how to appropriately deal with a nurse's medical conditions and injuries, pain management through the use of narcotics, and narcotic dependency." She also argues that the findings in the Initial Order do not address the evidence that she submitted at the hearing. Respondent does not contest any interpretation or application of the law by the Presiding Officer.

Conclusions of Law

9. K.S.A. 2013 Supp. 77-527(b) states in pertinent part: "If the agency head determines not to review an initial order in response to a petition for review, the agency head shall, within 20 days after filing of the petition for review, serve on each party an order stating that review will not be exercised."

Here, the Petition for Review of the Initial Order was filed with the Board on September 6, 2013, making the expiration date for denial of a petition for review Thursday, September 26, 2013. Due to staff error, the petition was not directed to the agency head so that the Petition for Review could be handled in a timely manner. Thus, the Petition for Review has, by default, been granted.

10. The Petition for Review must state its basis for relief. K.S.A. 2013 Supp. 77-527(c).

11. The authority of the Board for reviewing an initial order is set forth in K.S.A. 2013 Supp. 77-527(d). It provides in pertinent part:

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.

Subsection (c) of K.S.A. 2013 Supp. 77-621 sets forth the reasons upon which a court, or in this case an agency, may grant relief.

12. Respondent did not identify any reason set forth in K.S.A. 2013 Supp. 77-621(c) as a basis for relief. This lack of specification is problematic as it requires sorting through various possibilities. Consequently, the Board must determine whether any of the issues raised in Respondent's Petition are within the ambit of K.S.A. 2013 Supp. 77-621(c). See *Friedman v. Kansas State Board of Healing Arts*, 296 Kan. 636, 646-47 (2013). It appears the grounds for relief based upon Respondent's petition are that an issue requiring resolution was not decided and that the agency action is based upon factual findings not supported by the appropriate proof of evidence that is substantial when viewed in light of the record as a whole. Thus, the Board finds that the applicable grounds for review are set forth in subsections (c)(3) and (7) of K.S.A. 2013 Supp. 77-621.

Order

WHEREFORE, after consideration of the above facts and conclusions, it is the decision and order of the Board that Respondent's Petition for Review of the Initial Order in this matter should be granted to determine whether an issue that required resolution was not decided and whether the decision to revoke is based on a determination of fact that is supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole.

IT IS FURTHER ORDERED that the parties to this matter may file briefs on the merits of these issues on or before November 4, 2013. Such briefs shall be filed with

Mary Blubaugh, Executive Director, Kansas State Board of Nursing, Landon State Office Building, 900 S.W. Jackson, Ste. #1051, Topeka, Kansas 66612-1230. If neither party or only one party files a brief, the Board shall render a final decision based upon the record as it exists at the time of its review.

IT IS SO ORDERED.



Jeanne Walsh, President
Kansas State Board of Nursing

CERTIFICATE OF SERVICE

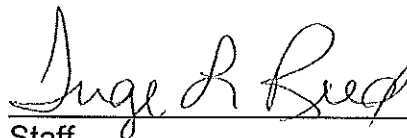
I hereby certify that on October 4, 2013, a copy of the above Order was deposited with the United States Postal Service, postage pre-paid, and addressed to:

Michelle Lynn Barnett
1716 SE Cardinal Drive
Blue Springs, MO 64014

Sanger Law Office
ATTN: Danielle R. Sanger
5040 Bob Billings Parkway, Suite C-1
Lawrence, Kansas 66049

and hand delivered to:

Michael R. Fitzgibbons
Assistant Attorney General
Kansas State Board of Nursing
900 SW Jackson, Suite 1051
Topeka, KS 66612



Staff
Kansas State Board of Nursing

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 1

FILED BY CLERK
K.S. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS.

2014 JUL -7 P 3:43

MICHELLE LYNN BARNETT)

Petitioner,)

vs.)

KANSAS STATE BOARD OF NURSING)

Respondent.)

Case No.: 2014-CV-27

MEMORANDUM DECISION AND ORDER

The above captioned matter comes before the Court upon Petitioner Michelle Lynn Barnett's Petition for Judicial Review. After careful consideration, the Court finds and concludes as follows:

STATEMENT OF FACTS

Drug Use and Termination

1. Petitioner was a nurse licensed in both Missouri and Kansas. Petitioner diverted controlled substances in October 2010 while working at Children's Mercy Hospital in Kansas City, Missouri. Her Missouri license was revoked in January 2012 after testing positive for alcohol in violation of her probation.
2. Petitioner referred herself to the Kansas Nurse Assistance Program (KNAP) and began treatment in June 2012. She tested positive for hydrocodone on four occasions from July 5, 2012, through August 14, 2012. She said she was not using drugs but then admitted to doing so after the tests came back positive. The hydrocodone she was taking came from an old prescription in her name.

3. On August 28, 2012, KNAP deemed Petitioner uncooperative, and her KNAP case was closed.
4. Petitioner began acupuncture treatments in August 2012. She also began an independent twelve-step program for substance abuse in September 2012 and continued treatment with a psychiatrist. This treatment included drug testing, during which she tested positive for alcohol. She began working in case management, which neither requires direct patient contact nor provides access to drugs.
5. The Kansas State Board of Nursing filed a petition to revoke her license on April 2, 2013.

Procedural History

6. The Board alleged four violations of the Kansas Nurse Practice Act:
 - (1) that Petitioner was unable to practice with skill and safety due to current abuse of drugs or alcohol in violation of K.S.A. 65-1120(a)(4);
 - (2) that Petitioner was guilty of unprofessional conduct as defined by rules and regulations of the Board because she diverted drugs, supplies, or property of any patient or agency in violation of K.S.A. 65-1120(a)(6), as defined in K.A.R. 60-3-110(n);
 - (3) that Petitioner willfully or repeatedly violated the provisions of the Kansas Nurse Practice Act because she failed to complete the requirements of the impaired provider program in violation of K.S.A. 65-1120(a)(7), as defined in K.A.R. 60-3-110(s);
 - (4) that Petitioner's license to practice nursing as a registered nurse or as a practical nurse was denied, revoked, limited, or suspended by a licensing authority of another state in violation of K.S.A. 65-1120(a)(8).

7. A hearing occurred on July 26, 2013. The Board revoked Petitioner's license on August 22, 2013. Petitioner filed for review on September 6, 2013. The Board granted review on October 4, 2013. The Board affirmed the final order on December 12, 2013.
8. The only count contested is K.S.A. 65-1120(a)(4), specifically whether Petitioner is safe to practice due to current abuse of drugs or alcohol.

STANDARD OF REVIEW

The Court's review of this action is limited by the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.* In reviewing an agency action, this Court may not simply substitute its opinion for that of the agency. *Kan. State Bd. of Healing Arts v. Foote*, 200 Kan. 447, 450, 436 P.2d 828 (1968). A rebuttable presumption of validity attaches to all actions of an administrative agency. *Kansas Racing Management, Inc. v. Kan. Racing Comm'n*, 244 Kan. 343, 365, 770 P.2d 423 (1989). The Court cannot grant relief from an agency action unless the Court determines that:

1. "The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
2. the agency has acted beyond the jurisdiction conferred by any provision of law;
3. the agency has not decided an issue requiring resolution;
4. the agency has erroneously interpreted or applied the law;
5. the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
6. the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
7. the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
8. the agency action is otherwise unreasonable, arbitrary or capricious." K.S.A. 2013 Supp. 77-621(c).

Under K.S.A. 77-621(c)(7), the agency action must be based on substantial evidence in light of the record as a whole. The Court may not reevaluate the evidence or engage in de novo review in a judicial review action; it may only “consider all of the evidence—including evidence that detracts from an agency’s factual findings—when [it assesses] whether the evidence is substantial enough to support those findings.” *Herrera-Gallegos v. H&H Delivery Serv., Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239 (2009). Evidence is substantial if a reasonable person might accept it as sufficient to support a conclusion. *Wiehe v. Kissick Constr. Co.*, 43 Kan. App. 2d. 732, 741, 232 P.3d 866 (2010).

CONCLUSIONS OF LAW

I. The Board’s final order was based on a determination of fact that was supported by substantial evidence when viewing the record as a whole.

1. The Board did consider all evidence.

Because Petitioner admitted to diverting drugs, failing to complete the requirements of KNAP, and having her Missouri nursing license revoked, the only issue to consider is whether Petitioner is unable to practice with skill and safety due to current abuse of drugs or alcohol. Thus, the Board’s finding that Petitioner was unsafe to practice must be supported by substantial evidence. In reviewing the evidence, “the agency head shall consider the agency record or such portions of it as have been designated by the parties.” K.S.A. 77-527(d).

Here, the Board considered the evidence provided by KNAP. This evidence showed four positive drug tests over the course of two months. KNAP then deemed Petitioner uncooperative. The Board further considered evidence produced by the Petitioner, which included her voluntary participation in a twelve-step program, continued treatment by a psychiatrist, drug testing, and chiropractic and acupuncture treatments. Petitioner presented this evidence to provide an

explanation for her drug use, which she further expanded upon in the transcript. Petitioner failed, however, to provide the Board with the transcript. Thus, the Board could not review it in making its determination. Consequently, the Board did consider all the evidence presented to it.

2. The presiding officer's credibility determination was supported by substantial evidence.

"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." K.S.A. 77-527(d). Petitioner was not forthcoming with her treatment providers at KNAP. At her drug testing, she originally stated that she was not taking drugs; however, Petitioner admitted to drug use after she was presented with the positive test results. Despite Petitioner being monitored by independent third parties, namely Petitioner's psychiatrist, KNAP is the only program approved by the Board. Thus, the presiding officer's determination of the credibility of witnesses was supported by substantial evidence.

3. The Board gave sufficient explanation for why evidence supports its finding.

Given the evidence the Board reviewed, including Petitioner's evidence regarding participation in the twelve-step program and acupuncture treatments, the Board's decision to revoke Petitioner's license was based on substantial evidence in light of the record as a whole. The evidence speaks for itself. The Board stated that it did not need an explanation for why Petitioner was abusing narcotics because the fact that Petitioner was abusing narcotics was sufficient. The Board stated that without a transcript the Board could not determine how much weight the presiding officer gave to Petitioner's evidence. Thus, the Board made a judgment call given the information that it had. The evidence clearly showed Petitioner abused narcotics throughout the KNAP program and tested positive for alcohol during her independent drug tests. This current abuse of both drugs and alcohol rendered her unable to practice with skill and

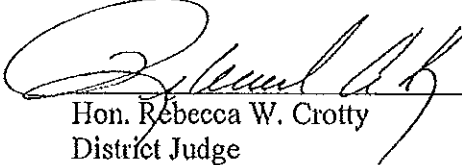
safety. The reason for the abuse, thus, is irrelevant, making the Board's explanation for its finding sufficient.

The Board reviewed all the evidence it received, accurately determined the credibility of witnesses, and correctly decided that the evidence it did receive clearly established a current abuse of drugs and alcohol, rendering Petitioner unsafe to practice.

CONCLUSION

For the reasons stated above, the Court DENIES Claimant Petitioner Michelle Lynn Barnett's Petition for Judicial Review and affirms the Board's decision. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

Dated this 7 day of July, 2014.

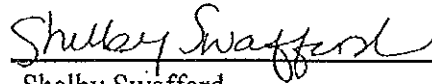

Hon. Rebecca W. Crotty
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing MEMORANDUM DECISION AND ORDER was mailed, hand delivered, or placed in the pick-up bin this 7th day of July, 2014, to the following:

Michael Fitzgibbons
Assistant Attorney General
Kansas State Board of Nursing
Landon State Office Building
900 S.W. Jackson #1051
Topeka, Kansas 66612
Attorney for Respondent

Danielle R. Sanger
Sanger Law Offices
5040 Bob Billings Pkwy, Ste C-1
Lawrence, KS 66049
Attorney for Plaintiff



Shelby Swafford
Administrative Assistant