

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 12

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

2011 FEB 11 P 3:15

ANDREA YOLANDA SCOTT,)
)
 Petitioner,)
)
 v.)
)
 KANSAS STATE BOARD OF NURSING,)
)
 Respondent.)
 _____)

Case No. 10 C 1529

MEMORANDUM DECISION AND ORDER

This judicial review action is before the Court on the Motion to Dismiss filed by the Kansas State Board of Nursing on January 14, 2011. No Response has been filed by the Petitioner and the time for doing so has expired. Thus, the Court deems the Motion to Dismiss to be submitted for decision.

PROCEDURAL HISTORY

After the Petitioner failed to appear in person or by telephone for a Prehearing Conference held in the underlying action before the Kansas State Board of Nursing on October 27, 2009, a Proposed Default Order to Revoke License was entered by the presiding officer. On November 5, 2009, the Petitioner filed a request to vacate the Proposed Default Order. This request was denied by the presiding officer and an Initial Order was entered on December 16, 2009.

On January 4, 2010, the Petitioner sought review of the Initial Order by the Kansas State Board of Nursing. The President of the Board declined to exercise review and the Initial Order became final on January 12, 2010. Subsequently, the Petitioner filed a motion to reconsider, which was denied on February 16, 2010.

The Petitioner filed a Petition for Judicial Review in the District Court of Sedgwick County, Kansas on March 15, 2010. However, a Sedgwick County District Judge entered an Order to Transfer this action to the District Court of Shawnee County, Kansas on June 28, 2010. Although this Court does not know the reason for the delay, the file and agency record were not received by the Clerk of the District Court of Shawnee County, Kansas until October 22, 2010.

A briefing schedule was set by this Court in which the Petitioner was granted until 5:00 p.m. on January 10, 2011, to supplement her arguments in support of the Petition for Judicial Review. However, the Petitioner has failed to submit supplemental arguments. Thereafter, on January 14, 2011, the Respondent filed a Motion to Dismiss. No Response has been filed by the Petitioner to the Motion to Dismiss and she has not requested an extension.

LEGAL ANALYSIS AND CONCLUSIONS

The Kansas State Board of Healing Arts seeks dismissal of this judicial review action pursuant to K.S.A. 60-241(b). This statute permits a defendant or respondent to move for dismissal when a plaintiff or petitioner “fails to prosecute” an action. A trial court has the discretion to dismiss a case for failure to prosecute when the relevant circumstances

demonstrate unreasonable delay. See *Flanigan v. City of Leavenworth*, 232 Kan. 522, 657 P.2d (1983); and, *Fischer v. Roberge*, 34 Kan. App. 2d 312, 120 P.3d 796 (2005).

Under the circumstances presented, the Court is reluctant to simply dismiss this action for failure to prosecute. Although the Petitioner was given the opportunity to supplement her Petition for Judicial Review, she was not required to do so. As such, the Court finds that dismissal pursuant to K.S.A. 60-241(b) would not be appropriate under the circumstances presented.

Notwithstanding the above, the Court finds that it is appropriate to review the Petition for Review on its merits. Because the Petitioner has chosen not to supplement her Petition for Judicial Review, there is no reason to delay the review of the agency record pursuant to the terms of the Kansas Judicial Review Act (KJRA), K.S.A. 77-601, *et seq.* Although the Court is required by the KJRA to review the agency record as a whole - including evidence both supporting and detracting from the final order, it is not allowed to substitute its judgment for that of the Presiding Officer in the underlying action. See *Herrera-Gallegos v. H & H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 361-62, 212 P.3d 239 (2009).

In her Petition for Review, the Petitioner contends “that the decision of the Kansas State Board of Nursing is unfair and unjust.” However, based on a review of the agency record as a whole, the Court finds that the presiding officer’s decision was reasonable in light of the circumstances presented. Although this Court may have handled the situation differently, the Petitioner has failed to establish that the presiding officer’s decision to enter a default judgment was either unfair or unjust.

CONCLUSION

For the reasons set forth above, the Motion to Dismiss filed by the Respondent is denied. Furthermore, the Court concludes that there is substantial evidence in the record to support the decision of the Kansas State Board of Healing Arts. Therefore, the final order is affirmed.

This Memorandum Decision and Order shall serve as the final judgment of the Court. No further Journal Entry is required.

Entered on this 11th day of February, 2011.



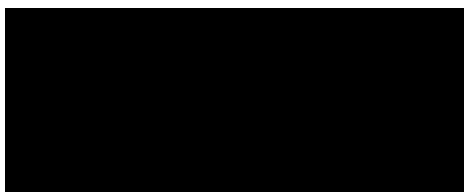
David E. Bruns
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed on this day 14th of February, 2011, to the following:

Andrea Yolanda Scott
1444 N. Battin Street
Wichita, Kansas 67208

Alma A. Heckler
Disciplinary Attorney-Kansas Board of Nursing
900 SW Jackson - #1051
Topeka, Kansas 66612



Colleen A. Speaker
Administrative Assistant

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

FILED
OCT 27 2009
KSBN

IN THE MATTER OF
ANDREA Y. SCOTT
License No. 23-029101-062

Case No. 05-775-0

PROPOSED DEFAULT ORDER TO REVOKE LICENSE

NOW ON THIS 27th day of October, 2009, petitioner, the Kansas State Board of Nursing, appears by disciplinary counsel, Alma A. Heckler, for a Hearing on the Petition. Respondent does not appear.

Wherefore, the Presiding Officer finds as follows:


1. Respondent is licensed to practice nursing in Kansas through 6/30/2010. The Kansas State Board of Nursing has jurisdiction over the Respondent and the subject matter of this action.
2. Respondent was sent a copy of the petition and notice of this hearing to respondent's last known address and service is proper. Respondent does not appear.
3. Petitioner moves for issuance of a proposed default order revoking respondent's license. The petitioner's request is granted by default pursuant to K.S.A. 77-520.
4. The petition is hereby granted and incorporated into this order as if set forth herein. Respondent violated the Nurse Practice Act as alleged in the petition.
5. Per Petitioner's request, Respondent's license to practice nursing is revoked. Respondent may not practice nursing in Kansas.
6. Costs of the action of \$70 are assessed to respondent to be paid to the board by cash or money order within 30 days of the effective date of this order.
7. Respondent shall immediately forward his or her original Kansas licensed practical nurse license to the Kansas State Board of Nursing.

8. This Proposed Default Order shall become effective seven days after service or ten days after mailing of this order unless the Respondent files a written motion with the Board stating why the Proposed Default Order should be vacated and the order is then vacated.

9. If this Proposed Default Order becomes effective, the Respondent's request for administrative hearing is dismissed pursuant to K.S.A. 77-520(d).

10. Disciplinary counsel shall mail a copy of this proposed default order to respondent's last known address.

IT IS SO ORDERED.




Sandra L. Sharon, Presiding Officer
Office of Administrative Hearings
1020 S Kansas Ave.
Topeka, KS 66612-1327

NOTICE

Pursuant to K.S.A. 77-527, either party may request a review of this order by filing a petition for review with the Kansas State Board of Nursing. The petition for review shall state its basis. A petition for review must be filed within 15 days from the date this order becomes effective. Failure to timely request a review by the Kansas State Board of Nursing may preclude further judicial review. The petition for review shall be mailed or personally delivered to: State Board of Nursing - Legal Division, Landon State Office Building, 900 SW Jackson, Ste 1051, Topeka, KS 66612-1230.

Pursuant to K.S.A. 77-530, if neither party requests a review by the Kansas State Board of Nursing, then this initial order becomes final and binding on both parties on the 30th day following its service.

Pursuant to K.S.A. 77-531, if the initial order is served by mail, three days are added to the time limits set out above.




Alma A. Heckler, #11555
Disciplinary Counsel
Kansas State Board of Nursing
900 S.W. Jackson, Suite #1051
Topeka, KS 66612-1230
785-296-4325

CERTIFICATE OF SERVICE

I certify that on the 27th day of October, 2009, the foregoing copy of the Proposed Default Order Revoking License was served by depositing the same in the United States Mail, first-class postage prepaid, addressed to the following:

Andrea Y. Scott
2624 N Wellesley
Wichita, KS 67220



Alma A. Heckler
Assistant Attorney General