

KANSAS STATE BOARD OF NURSING

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

FILED

MAY 06 2014

KSBN

IN THE MATTER OF)
)
Amanda Quinn)
License No. 23-40554-071)

Case No. 12-1936.3
OAH No. 13BN0173

ORDER

Now, on this 5th day of May 2014, the above-captioned matter comes for deliberation of the Petition for Review filed by Amanda Quinn, pro se. The Petition seeks relief from 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 members Jeanne Walsh and Garet King its authority to determine whether to grant or deny relief from an Initial Order and to issue an order accordingly.

After reviewing the agency record provided by the parties, the Board hereby denies relief for the reasons set forth below.

Findings of Fact

1. In 2010, the Board issued a nursing license to Amanda Quinn (Respondent).

2. On or about April 22, 2012, Respondent was employed as a charge nurse by Nicol Home, Inc., in Glasco, Kansas. Her shift began at 6 p.m. that day, but she did not arrive until 6:30 p.m. Because her responsibilities included giving medication to residents, Respondent had keys to the locked medication room.

3. While on duty, two certified nurse aides (CNA) became concerned about Respondent. One CNA noticed Respondent's eyes were dilated and Respondent was not oriented as to day, month or year and did not know which medications she had given and which medications she had not given. Another CNA noticed Respondent was falling asleep at the desk and lethargic. Respondent told the CNA that she was hypoglycemic and that she felt that her blood sugar was low. This CNA saw Respondent drink orange juice and eat a peanut butter sandwich but she did not see Respondent take a blood sugar test.

4. Each CNA became concerned and called the Director of Nursing (DON) for Nicol Home at about 8:58 p.m. The CNAs told the DON Respondent was incoherent and depressed and her speech was slurred. The DON arrived at Nicol Home about 30

minutes later. She was met in the parking lot by one of the CNAs who gave her Respondent's keys to the medication room, stating "I know I'm not supposed to have these, but in the situation, I felt it was the best option."

5. Respondent had never mentioned her blood sugar problems to the DON until this incident. In the employment application for Nicol Home, Respondent answered "no" to the question about a history of diabetes. When the DON asked Respondent what her blood sugar level was, she did not know. The DON checked Respondent's blood sugar; it tested within the normal range. A low blood sugar level could be raised within 30 minutes after consuming orange juice and a peanut butter sandwich.

6. Despite the normal blood sugar level, the DON noticed Respondent "did not say much but wandered around without much purpose," her speech was slightly slurred, and her eyes were glassy. The DON determined Respondent was not capable of safely completing her tasks for the rest of her shift and relieved her from further duty that night. About 1 hour after the DON's arrival, or approximately 10:30 p.m., Respondent left Nicol Home.

7. The DON then reviewed the medication administration record; it indicated that most of the medications had been given. She also conducted a narcotic count and determined the following medications were missing: one morphine sulfate, two Lortabs, 1 Ativan, and two Tylenol #3s, which is Tylenol with codeine.

8. The DON also looked at patients' records for as needed medication during Respondent's shift that day. On one patient's record, Respondent recorded giving the patient Tylenol #3 at 2230, or 10:30 p.m., and checking back on the patient at 1700, or 5:00 p.m. On another patient's record, Respondent recorded giving the patient a Lortab at 2245, or 10:45 p.m., and checking back on the patient at 2315, or 11:15 p.m.

9. On April 25, 2012, Nicol Home referred Respondent to the Kansas Nurse Assistance Program (KNAP). The next day KNAP sent a letter to Respondent regarding the referral. It instructed Respondent to obtain an evaluation for determining whether she had a problem or illness that could affect her ability to practice nursing safely. On May 10, 2012, Respondent completed the evaluation.

10. Based upon Respondent's self-reporting use of alcohol and drug use and the results of her drug evaluation, the evaluation determined there was a low probability of Respondent having a substance dependence disorder and did not recommend treatment at that time. However, "as a preventive measure," it recommended Respondent take random urine drug screens "to rule out any current use that may not have been reported in this assessment. If future result yields a positive drug screen [Respondent] can be reassessed at that time."

11. On June 11, 2012, KNAP sent a letter to Respondent requiring her to sign an agreement with KNAP wherein she agreed to participate in a one-year program, refrain from alcohol or drug consumption, take random drug screens (averaging once

per month), notify her employers of her participation in KNAP, and provide copies of her prescriptions for medication. Respondent did not reply to KNAP's letter.

12. On July 25, 2012, KNAP sent another letter to Respondent requiring her to sign and return within one week the KNAP agreement for participation in the one-year program. Respondent did not reply to KNAP's second letter.

13. On August 9, 2012, KNAP sent a third letter to Respondent advising her that her file with KNAP had been closed due to her non-compliance. On August 10, Respondent called KNAP's office and advised she did not return the agreement because she was unemployed and did not have the money for the fees. She was told her KNAP file was closed because she did not respond to KNAP's letters.

14. KNAP notified the Board that it had closed Respondent's file due to her noncompliance.

15. On April 4, 2013, the Board's Investigator contacted Respondent about the incident at Nicol Home. Respondent said her blood sugar level had been low but, after consuming orange juice and a peanut butter sandwich, it was normal when checked by the DON. Respondent told the Investigator that she had two episodes of low blood sugar while working for a previous employer and the director of nursing there had tested Respondent's blood sugar, finding it to be low on both occasions. However, when the Investigator contacted the director of nursing for that employer, she denied knowing Respondent had hypoglycemia or giving Respondent a blood sugar test.

16. Respondent also told the Investigator that she was not impaired that evening and did not take or sign a narcotic count at the beginning or end of her shift.

17. The narcotic count sheet provided by Nicol Home showed Respondent took and signed a narcotic count at the beginning and end of her shift on April 22, 2012; Respondent's signature was nearly illegible.

18. Respondent later called the Investigator to explain that the standard practice at Nicol Home was to sign a narcotic sheet before doing the narcotic count. When the Investigator pointed out that this statement was inconsistent with her prior denial, Respondent stated that she either heard it wrong or did not explain herself because she would not have denied signing the narcotic sheet.

19. The Board filed a petition alleging Respondent violated the Kansas Nurse Practice Act (KNPA) and requesting revocation of her nursing license. Respondent requested a hearing.

20. At the hearing, Respondent said she did not complete the KNAP agreement because she was unemployed at that time and could not afford it. She stated this complaint was the only one that had ever been made against her. Respondent agreed that she did not "follow documentation guidelines" on April 22,

2012, but now she did "everything by the book." Respondent did not believe she should be held accountable for the missing narcotics because someone else had her keys that evening. Respondent acknowledged that she "was out of it" that evening and that her signatures on the medication sheets demonstrated it, but claimed her condition was due to her low blood sugar not the use of drugs.

21. In the Initial Order, the Presiding Officer concluded that Respondent was guilty of three violations: K.S.A. 2013 Supp. 65-1120(a)(4); K.S.A. 2013 Supp. 65-1120(a)(6) and K.A.R. 60-3-110(n); and K.S.A. 2013 Supp. 65-1120(a)(6) and K.A.R. 60-3-110(s). Based upon these violations, the Presiding Officer granted the Board's petition and revoked Respondent's nursing license.

22. Respondent filed a Petition for Review of the Initial Order requesting relief from the decision. Review was granted on whether the Initial Order was based on a determination of fact that is not supported by evidence that is substantial when viewed in light of the record as a whole.

Conclusions of Law

23. Under the KNPA, the Board is authorized to deny, revoke, limit, or suspend any nursing license if it finds that certain violations exist. See K.S.A. 2013 Supp. 65-1120(a). Respondent was found guilty of the following three violations.

- a. Respondent was unable to practice nursing with skill and safety due to current abuse of alcohol. K.S.A. 2013 Supp. 65-1120(a)(4);
- b. Respondent committed unprofessional conduct by diverting drugs of any patient or agency. K.S.A. 2013 Supp. 65-1120(a)(6) and K.A.R. 60-3-110(n); and
- c. Respondent committed unprofessional conduct by failing to complete the requirements of the Board's impaired provider program. K.S.A. 2013 Supp. 65-1120(a)(6) and K.A.R. 60-3-110(s).

24. Disciplinary proceedings under the KNPA are conducted pursuant to Kansas Administrative Procedure Act (KAPA), K.S.A. 77-501 *et seq.* K.S.A. 2013 Supp. 65-1120(b).

25. K.S.A. 2013 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." (Emphasis added.)

26. K.S.A. 2013 Supp. 77-621(c) sets forth the grounds upon which a court, or in this case an agency, may grant relief. We granted review to determine whether the Presiding Officer's decision was based on a determination of fact, made or implied, 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. K.S.A. 2013 Supp. 77-621(c)(7). This means that a particular finding of fact is judged in light of all the relevant evidence in the record cited by a party that detracts from such finding as well as all of the relevant evidence cited by a party that supports a material finding of fact. K.S.A. 2013 Supp. 77-621(d).

27. K.S.A. 2013 Supp. 77-527(d) allows an agency to exercise de novo review on the record. *Tire Disposal Facilitators, Inc. v. State ex rel. Harder*, 22 Kan. App. 491, 492 (1996). In other words, K.S.A. 2013 Supp. 77-527(d) requires review of the Initial Order to be based upon the evidence presented at the hearing and does not authorize the Board to grant another evidentiary hearing. Under K.S.A. 2013 Supp. 77-527(d) and *Tire Disposal Facilitators*, no legal basis exists to grant Respondent's request for additional time so that she may obtain legal representation and present witnesses to testify on her behalf. Thus, only the agency record is considered for this review.

28. Respondent is also requesting special consideration be given to her because she is a pro se litigant. Her request is contrary to law. See *In re Estate of Broderick*, 34 Kan. App. 2d 695, 701 (2005) ("A pro se litigant in a civil case cannot be given either an advantage or disadvantage solely because of proceeding pro se.").

*Unprofessional Conduct by Failing to Complete the
Requirements of the Impaired Provider Program of the Board*

29. K.S.A. 2013 Supp. 65-1120(a)(6) and K.A.R. 60-3-110(s) authorize the revocation of a nursing license upon a finding that the licensee is guilty of unprofessional conduct as defined in the Board's regulations. K.A.R. 60-3-110(s) defines unprofessional conduct as failing to complete the requirements of the impaired provider program of the Board, or KNAP. Respondent has not briefed the findings regarding the violation of K.S.A. 2013 Supp. 65-1120(a)(6) and K.A.R. 60-3-110(s).

30. When a party does not brief an issue, it is deemed waived or abandoned. *Roy v. Young*, 278 Kan 244, 248 (2004); *Goldbarth v. Kansas State Board of Regents*, 269 Kan. 881, 884 (2000). Thus, the unchallenged findings and conclusions regarding Respondent's failure to complete the requirements of the KNAP program are deemed conclusive on review. See *Parker v. Mid-Century Ins. Co.*, 25 Kan App. 2d 329, 332 (1998) (an unchallenged conclusion by the lower court is a ruling that is deemed conclusive on appeal). The failure to challenge a basis for a decision renders that

decision unassailable and the remaining claims of error are moot or academic. In other words, failing to appeal all alternative grounds for a judgment render the issues raised academic. See *Greenwood v. Blackjack Cattle Co.*, 204 Kan. 625, 627 (1970) (when trial court's decision is based upon alternative grounds, appellant's failure to challenge both grounds on appeal "renders unnecessary" a decision on the issue raised).

31. Because she has not challenged the Presiding Officer's findings and conclusions regarding Respondent's failure to comply with the KNAP requirements, the Board hereby concludes that Respondent is guilty of unprofessional conduct by failing to comply with the requirements of the impaired provider program of the Board.

32. Although it is unnecessary to review the other two grounds for the Presiding Officer's decision, we will do so because both parties have addressed them in their briefs.

*Not Able to Practice Nursing with
Skill and Safety Due to Current Abuse of Drugs or Alcohol*

33. K.S.A. 2013 Supp. 65-1120(a)(4) authorizes the revocation of a nursing license upon a finding that the licensee is not able to practice nursing with skill and safety due to current abuse of drugs or alcohol. Respondent contends the facts do not support this finding because the evaluation concluded that she did not have a substance abuse problem and that she did not need to complete treatment for a substance abuse problem. Respondent also points out that there was no evidence of a positive drug or alcohol screen taken and that a CNA saw her consuming orange juice and a peanut butter sandwich to treat her hypoglycemia.

34. Evidence was presented that Respondent had a hypoglycemic episode rather than being under the influence of a drug. Nevertheless, we give due regard to the Presiding Officer's opportunity to view the witnesses and to weigh the evidence.

35. The same evaluation relied upon by Respondent also contained a recommendation that she be required to complete the KNAP program. It stated, "as a preventative measure," Respondent must take random urine drug screens "to rule out any current use that may not have been reported in this assessment. If future result yields a positive drug screen [Respondent] can be reassessed at that time." This recommendation indicates the evaluator had concerns about Respondent being candid in her responses to current alcohol and drug use.

36. Additionally, the two CNAs described Respondent as being incoherent, not making any sense when she spoke, having slurred speech, not being oriented as to day, month or year; not knowing which medications she had given or not given to patients; was falling asleep at the desk; being lethargic, and having dilated eyes. After observing Respondent, the CNAs became so concerned that they called the DON and one CNA took the medication keys from Respondent. Even after the blood sugar test

tested normal, Respondent "did not say much but wandered around without much purpose," her speech was slightly slurred, and her eyes were glassy.

37. There were also missing narcotics from the medication room. The DON's narcotic count determined one morphine sulfate, two Lortabs, 1 Ativan, and two Tylenol #3s were missing.

38. Respondent contended that her condition was due to her low blood sugar level. However, the facts also show that Respondent did not list this condition in her employment application and had not advised the DON of it prior to the evening of April 22, 2012. Respondent also advised the Investigator that she had a low blood sugar incident with a prior employer and the DON had given her a blood sugar test; however, the DON for that employer denied knowing Respondent's medical condition or giving her such test. Respondent also made inconsistent statements about being impaired that evening and taking or signing a narcotic count that evening. These inconsistencies weaken Respondent's credibility.

39. Based upon the above facts and conclusions, the Board determines that the Presiding Officer's factual findings concerning Respondent being unable to practice nursing with skill and safety due to current use of alcohol or drugs.

*Unprofessional Conduct by
Diverting Drugs From a Patient or Agency*

40. K.S.A. 2013 Supp. 65-1120(a)(6) and K.A.R. 60-3-110(n) authorize the revocation of a nursing license upon a finding that the licensee is guilty of unprofessional conduct by diverting drugs from a patient or agency. Respondent argues that the medication records show she gave patients the same medication that are reported as missing and that this medication is routinely given with PRN orders by Respondent and other nurses at Nicol Home.

41. Respondent also notes that another person possessed the medication keys that evening. However, there was no evidence indicating the CNA with the medication keys accessed the medication room.

42. The importance of the exhibits concerning the medication is to document that Respondent had access to the medication and that Respondent erroneously reported giving the medication to the patients. For example, Respondent reported giving the medication to patients when she no longer possessed the key to the medication room and had left the facility. These erroneous recordings infer Respondent attempted to conceal her unauthorized taking of the drugs. The totality of this evidence supports the inference that Respondent diverted drugs from the patients.

43. We recognize that the evidence concerning Respondent's unprofessional conduct is circumstantial. However, circumstantial evidence is competent to prove a fact in issue, and such evidence is sufficient to sustain a finding even if it does not rise

to that degree of certainty which will exclude any and every other reasonable conclusion. *Arterburn v. St. Joseph Hospital and Rehabilitation Center*, 220 Kan. 57, 61-62 (1976); *Casey v. Phillips Pipeline Co.*, 199 Kan. 538, 551 (1967).

44. Based upon the above, the Board concludes that the record when reviewed in its entirety supports the Presiding Officer's findings of fact that Respondent committed unprofessional conduct by diverting drugs from a patient or agency.

45. The Board further concludes that Respondent's nursing license should be revoked based upon these three violations, separately and collectively.

Order

WHEREFORE, it is the decision and order of the Board that the conclusions in the Initial Order are supported by evidence that is substantial when viewed in light of the record as a whole and that Respondent violated the Kansas Nurse Practice Act by committing unprofessional conduct when she failed to complete the requirements of the impaired provider program of the Board, by committing unprofessional conduct when she diverted drugs from a patient or agency, and by not being able to practice nursing with skill and safety due to current abuse of drugs or alcohol. Based upon these three violations, separately and collectively, it is also the decision of the Board that Respondent's nursing license should be revoked.

IT IS SO ORDERED.



Jeanne Walsh, Board Member
On behalf of the
Kansas State Board of Nursing



Garet King, Board Member
On behalf of the
Kansas State Board of Nursing

NOTICE OF ADMINISTRATIVE RELIEF

The above Order is a final order. Pursuant to K.S.A. 77-529, a party may file with the Board a petition for reconsideration within 15 days from the date noted below in the Certificate of Service. Such petition must state the specific grounds upon which relief is requested. The filing of a petition for reconsideration is not a prerequisite for seeking judicial review.

Pursuant to K.S.A. 77-530, a party may file, if applicable, a petition for stay of effectiveness of the order prior to the expiration of the time in which to file a petition for

judicial review. The filing of a petition for a stay of effectiveness is not a prerequisite for seeking judicial review.

NOTICE OF JUDICIAL RELIEF

If a petition for reconsideration is not filed pursuant to K.S.A. 77-613, a party may file within 30 days from the date noted below in the Certificate of Service 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 designee who may receive service of a petition for reconsideration or 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 May 6th, 2014, copies of the above Order, Notice of Administrative Relief, and Notice of Judicial Relief were deposited with the United States Postal Service, postage pre-paid, and addressed to:

Amanda Quinn
431 SE Winfield, #7
Topeka, KS 66607

and hand delivered to:

Alma Heckler
Assistant Attorney General
Disciplinary Counsel for the
Kansas State Board of Nursing
900 SW Jackson, Suite 1051
Topeka, KS 66612



Staff, Kansas State Board of Nursing