

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE BOARD OF NURSING

In the Matter of:)
)
 ANDREA WERMAGER,)
)
 Respondent.)
_____)

OAH No. 04-0289-CNA
Board No. 2306-01-023



PROPOSED DECISION

I. Introduction

This is a licensing case in which the Board of Nursing seeks to discipline certified nurse aide (CNA) Andrea Wermager. The division of occupational licensing filed a six-count accusation in this case based on Wermager's criminal background, including allegations for violations of AS 08.68.334(1), (2) and (5)(D), and 12 AAC 44.870(b)(9). Wermager requested a hearing in accordance with the Administrative Procedure Act.¹ It is recommended that her CNA license be revoked.

II. Facts

The hearing took place on May 3, 2005, and the following witnesses testified in the sequence indicated: Andrea Wermager, Brian Howes and Beverly Miles. The division's Exhibits 1, 2, 3, 4, 5 and 7 were admitted as evidence. References are made in the findings to the audiocassette tapes of the hearing record, which are not transcribed at this time. The following fact findings are based on the evidentiary record.

1. Andrea Wermager resides in Palmer, Alaska. She was first licensed as a CNA in Alaska on September 8, 1998 (certificate # A 5899). Wermager renewed her license on a bi-annual basis and her current license expires on March 31, 2006. (Direct and cross-exam of Wermager, tapes 1A, 1B, 2A; Exh. 5)

2. Wermager has the following criminal background:

(a) Conviction for violating AS 28.35.050(a) Driving While Intoxicated (DWI)
Case No. 3 KO S90-383 CR Date: May 16, 1990

(b) Conviction for violating AS 28.15.011(b) (driving without license)
Case No. 3 KO-S90-383 CR Date: May 16, 1990

¹ See AS 44.62.330-.640.

- (c) Conviction for violating AS 28.35.030 (DWI)
Case No. 3 PA 95-1219 CR Date: August 11, 1995
- (d) Conviction for violating 11.41.230(a) (4th degree assault)
Case No. 3 PA 95-1219 CR Date: August 11, 1995
- (e) Conviction for violating AS 11.71.040(a)(3)(G)
(misconduct involving controlled substances)
Case No. 3 PA 95-1908 CR Date: April 29, 1996
- (f) Conviction for violating 11.41.230(a) (4th degree assault)
Case No. 3 PA S96-1750 CR Date: September 16, 1996
- (g) Probation modification (extending probation under August 11, 2005)
Case No. 3 PA 95-1219 CR Date: September 16, 1996
- (h) Conviction for violating AS 28.35.030 (DWI)
Case No. 3 PA 03-1656 CR Date: October 27, 2003

(Direct and cross-exam of Wermager, tapes 1A, 1B, 2A; Direct exam of Howes, tapes 1A, 1B; Exhs. 1-7)

3. In her CNA applications, Wermager did not divulge the following criminal convictions from her past:

- Conviction for violating AS 28.35.050(a) Driving While Intoxicated (DWI)
Case No. 3 KO S90-383 CR Date: May 16, 1990
- Conviction for violating AS 28.15.011(b) (driving without license)
Case No. 3 KO-S90-383 CR Date: May 16, 1990
- Conviction for violating AS 11.71.040(a)(3)(G)
(misconduct involving controlled substances)
Case No. 3 PA 95-1908 CR Date: April 29, 1996
- Conviction for violating 11.41.230(a) (4th degree assault)
Case No. 3 PA S96-1750 CR Date: September 16, 1996

(Direct and cross-exam of Wermager, tapes 1A, 1B, 2A; Direct exam of Howes, tapes 1A, 1B; Exhs. 1-7)

III. Discussion

A. Accusation

The accusation in this case contains the following six counts alleging violations as indicated:

- I. AS 08.68.334(2) (convicted of crime substantially related to the qualifications, functions, or duties of a CNA) and 12 AAC 44.870(b)(9) (violated state or federal laws regulating drugs)

- II. AS 08.68.334(1) (obtained CNA certification by fraud, deceit, or intentional misrepresentation)
- III. AS 08.68.334(1) (obtained CNA certification by fraud, deceit, or intentional misrepresentation)
- IV. AS 08.68.334(1) (obtained CNA certification by fraud, deceit, or intentional misrepresentation)
- V. AS 08.68.334(1) (obtained CNA certification by fraud, deceit, or intentional misrepresentation)
- VI. AS 08.68.334(2) (convicted of crime substantially related to the qualifications, functions, or duties of a CNA) and AS 08.68.334(5)(D) (discipline based on “other factors determined by the board”)

Before the hearing, the division filed a Motion for Partial Summary Judgment seeking a ruling that Wermager violated licensing laws as alleged in the accusation. Partial summary judgment was granted with regard to Counts I and VI. As a result, as to Counts I and VI, this decision need only discuss the appropriate discipline. The motion was denied regarding Counts II, III, IV and V, based on the existence of genuine issues of material fact. The remaining discussion will first address Counts II, III, IV and V. Appropriate disciplinary sanctions in this case are addressed in the last section of the discussion.

Counts II, III, IV and V – AS 08. 68.334(1) allows the board to impose a disciplinary sanction against a person who obtained or attempted to obtain a license by fraud, deceit or intentional misrepresentation. Counts II, III, IV and V all allege this violation.

Fraud, deceit, and intentional misrepresentation are related causes of action. Fraud is defined as a false representation of a material fact, whether by words or by conduct, through false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.² The elements for knowing misrepresentation or deceit are similar and defined as “a false representation of fact, scienter, intention to induce reliance, justifiable reliance, and damages.”³ A material fact is one “which could reasonably be expected to influence someone’s judgment or conduct concerning a transaction.”⁴ To act with intent to defraud means to act willfully, and with specific intent to deceive or cheat; ordinarily for the purpose of either causing some

² See Barber v. National Bank of Alaska, 815 P.2d 857, 862 (Alaska 1991).

³ See id.

⁴ See Cousineau v. Walker, 613 P.2d 608, 613 (Alaska 1980). See also Restatement (Second) of Torts, pp. 753-54 (1977); W.P. Keeton, Prosser and Keeton on the Law of Torts, § 105 (5th ed. 1984).

financial loss to another, or bringing about some financial gain to oneself.⁵ Direct evidence is not necessary to establish intent to defraud. Intent is a question of fact that may be proven by inference through circumstantial evidence.⁶ The scienter element requires that the individual knew the falsity of the representation.⁷

In applying these elements, it is not disputed that Wermager's 1998 renewal application contained four false representations of fact by omitting her two 1990 convictions and her 1996 convictions for assault and probation violation (Counts II, III, IV and V). Wermager's representations in the 1998 application were intended to provide a basis for reliance by the division and the board in administering the licensing mechanism set forth at AS 08.68. The representations at issue are material facts, as they reveal Wermager's criminal background.⁸ The division and the Board of Nursing justifiably relied on Wermager's representations about her criminal past, or lack thereof, in issuing her a license.

Scienter is the final element for determining if Wermager engaged in fraud, deceit or intentional misrepresentation. Under applicable law, if she did not know the falsity or untrue character of her misrepresentation, then there is no deceit.⁹ Wermager checked the box answering "yes" in response to question 5 on the 1998 application ("Have you been convicted of any criminal offense other than minor traffic violations?"). The handwritten sheet accompanying application that explains her criminal past omits any reference to the two 1990 convictions and the 1996 convictions for assault and probation violation. Wermager testified that she "was not aware of what was in [her] criminal record" and that she "was surprised" at this hearing to see the charges for which she was previously convicted.¹⁰

Wermager's testimony is unpersuasive that she was unaware of the convictions she omitted from her 1998 license application. For each conviction, she was sentenced in a court proceeding after a plea of either guilty or no contest. She served 72 hours in jail for the DWI conviction in 1990. Wermager disclosed her 1995 DWI conviction, but did not reveal the accompanying 4th degree assault conviction arising from the incident due to her assaulting a state

⁵ See Keeton, supra, § 107.

⁶ See Gabaig v. Gabaig, 717 P.2d 835, 838 (Alaska 1986). See also City of Fairbanks v. Amoco Chemical Co., 952 P.2d 1173, 1179 (Alaska 1998) (evidence of scienter is usually circumstantial).

⁷ See City of Fairbanks, 952 P.2d at 1176.

⁸ See 12 AAC 44.705 (criminal history may provide a basis for denying licensure). See also Wilkerson v. State of Alaska, 993 P.2d 1018 (Alaska 1999)(criminal background information central to effective regulation).

⁹ See City of Fairbanks, 952 P.2d at 1176 n.4 (citing Bubbel v. Wien Air Alaska Inc., 682 P.2d 374, 381 (Alaska 1984)).

trooper. Wermager also did not disclose a 1996 assault conviction which stemmed from her breaking into the room of another boarder at a residence where she rented. The man whose room she unlawfully entered stood in his doorway to block her and she “grabbed [him] by the testicles, causing him fear of imminent injury.” The victim had no relationship with Wermager except for the fact that they were boarders in the same house.

At one point in the hearing, Wermager held up the division’s exhibits, which included her criminal convictions, and rhetorically asked “who can understand this?” However, it is more probable than not that Wermager knew of her criminal convictions, but she intentionally chose not to disclose them. With all the safeguards of due process in the criminal justice system, Wermager’s position that she did not understand her convictions is not plausible. Further, Wermager certified under oath that her 1998 license application was true.¹¹ All elements for fraud, deceit or intentional misrepresentation were proven for violations of AS 08.68.334(1) in Counts II, III, IV and V.

A Board of Nursing regulation at 12 AAC 44.705 enumerates grounds for denial of a CNA license or discipline of a licensee based on crimes “substantially related to the qualifications, functions, or duties of a certified nurse aide” as referenced in AS 08.68.334. The non-exhaustive list includes the crimes of assault (12 AAC 44.705(4)) and unlawful distribution or possession for distribution of a controlled substance (12 AAC 44.705(19)). Wermager’s assault convictions are crimes “substantially related to the qualifications, functions, or duties of a certified nurse aide.”

Wermager’s misconduct involving controlled substances conviction was for possession. While the conviction does not fit the criterion at 12 AAC 44.705(19)(distribution / possession for distribution), it nonetheless provides a basis for discipline under AS 08.68.334(5)(D) (“other factors determined by the board”) under Count VI of the accusation. The board also has discretion under AS 08.68.334(5)(d) to impose discipline based on the three DWIs relying on “other factors determined by the board.”

Wermager additionally argued that the division did not conduct a criminal background check for her until more than a year after her CNA license was issued and, therefore, her license should not now be revoked. Although not identified as such, the argument is one of equitable

¹⁰ Wermager blamed her public defender for some of her convictions. She also admitted that with one of her convictions, after being handed the judgment document, she “did not want to look at anything more” and “I didn’t read it.”

estoppel. Under this judicial doctrine, a state agency may be precluded from taking a legal position upon a showing that (1) the governmental body asserted a position by conduct or words; (2) the private party acted in reasonable reliance thereon; (3) the private party suffered resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.¹² The defense does not apply in this case, however, because under AS 08.68.334(1) the nursing board, like other boards, has statutory authority to revoke a license based on “fraud, deceit, or intentional misrepresentation” discovered after initial licensure (“has obtained or attempted to obtain certification”).¹³ A licensee may not reasonably rely on the fact that she receives a license before the division conducted a criminal background check. Moreover, estoppel would not serve the interest of justice in this case, as the public interest would be harmed if an individual with a strong pattern of criminal activity (seven convictions including two for assault), a history of substance abuse, and eight licensing violations remains licensed as a CNA.¹⁴

B. Disciplinary Sanction

The Board of Nursing has a variety of disciplinary sanction options under AS 08.01.075(a) and AS 08.68.334, including license revocation, suspension, probation, censure, reprimand, imposition of license conditions or educational requirements, and civil fine. These sanctions may be imposed singly or in combination, in the board’s discretion. AS 08.01.075(f) is a constraint on the exercise of this discretion. The provision requires the board to be consistent in applying disciplinary sanctions.¹⁵

Wermager committed eight licensing violations. Discipline may be imposed based upon her conviction of a crime substantially related to the qualifications, functions, or duties of a CNA [Counts I and VI], her violation of state or federal laws regulating drugs [Count I], the fact that she obtained CNA certification by fraud, deceit, or intentional misrepresentation [Counts II, III, IV, V], and “other factors determined by the board [Count VI].”¹⁶ Under AS 08.01.075(a), any one of Wermager’s violations may provide a basis for discipline. Alaska’s Supreme Court stated

¹¹ See Exhibit 5, p. 000053. The certification states immediately above her signature: “I understand that any false or misleading information may result in failure to obtain certification or subsequent revocation of my certification.” (emphasis added)

¹² See *Boyd v. State of Alaska*, 977 P.2d 113, 116-17 (Alaska 1999).

¹³ See, e.g., AS 08.64.326(a)(1)(physicians); AS 08.68.270(1)(nurses).

¹⁴ Wermager may still be employed as a personal care attendant without the state’s licensing approval.

¹⁵ The commission must explain a significant departure from prior decisions involving similar facts. See AS 08.01.075(f).

¹⁶ Violations in Counts I and VI were established through the division’s Motion for Partial Summary Judgment.

that license discipline is not punishment. Discipline “serves the regulatory goal of protecting the public from unfit practitioners.”¹⁷

In protecting the public, courts have recognized that the healing arts in particular require a high degree of trust and confidence from the public, due to the obvious potential for harm to patients. “There is no other profession in which one passes so completely within the power and control of another as does the medical patient.”¹⁸ Patients are inherently vulnerable. In some care contexts, such as with bedridden or comatose patients, they are totally reliant on health care workers to meet their daily needs. Certified nurse aides perform a wide variety of tasks with patients, as indicated by the following non-exhaustive list of CNA curriculum topics enumerated in the board’s regulation at 12 AAC 44.845:

- Monitoring body functions
- Taking and recording vital signs
- Caring for the client’s environment
- Non-invasive collection and testing of physical specimens
- Bathing
- Grooming
- Dressing
- Toileting
- Assisting with eating and hydrating
- Personal hygiene
- Activities of daily living

In a Montana discipline case involving the nursing board, the court noted that “the practice of nursing, by its very nature, involves the care of patients and brings the nurse [CNA] into close physical contact with patients, including possible contact with intimate body areas of patients who are young, old, male, and female.”¹⁹ Some patients they care for need “total care,” and the caregiver performs nearly every task for the patient. Notably, it is common for CNAs to work in a patient’s home or residence, often without direct supervision.²⁰ CNAs in Alaska may also work in the following settings: hospitals, clinics, physician offices, assisted living facilities and Pioneer Homes. They have access to patient medications. CNAs, therefore, must not only

¹⁷ See Wendte v. State of Alaska, 70 P.3d 1089, 1094 (Alaska 2003). AS 08, the title of the Alaska Statutes regulating professional licensing, contains many chapters that contemplate protection of the public and assuring competency of those providing the services regulated. See Allison v. State of Alaska, 583 P.2d 813, 816 (Alaska 1978).

¹⁸ See Shea v. Board of Medical Examiners, 146 Cal. Rptr. 653, 660 (1978) (physician discipline case).

¹⁹ See Gilpin v. Board of Nursing, 837 P.2d 1342, 1345 (Mont. 1992)(nursing board revoked nurse’s license that expired less than three years previously).

²⁰ See Matter of Macato, Case No. 2306-01-014 (Order dated 9/26/03).

be trustworthy, but they also must respect authority and be willing to follow instructions from supervisors, including other health care providers and clients.

The division argued for revocation of Wermager's license. Abundant evidence exists in this case to justify revocation. The board should consider Wermager's untrustworthiness, her involvement with drugs and alcohol, her violent past, and her criminal convictions as established by evidence in this case. Revocation is not inconsistent with prior board disciplinary actions under the constraint of AS 08.01.075(f).²¹ One prior case is particularly relevant to the discipline decision for Wermager. In Matter of Holloway, the CNA obtained her initial and renewal licenses by fraud and failed to disclose a conviction for Misconduct Involving a Controlled Substance. The CNA had a criminal history that included three convictions and a probation violation. The board revoked her license.²²

The certified nurse aide designation is an indication of state imprimatur that allows an individual the license to provide intimate personal care to patients in an unsupervised private setting. In the public interest, Wermager's approval to do this should be revoked.

IV. Conclusion

The division proved by a preponderance of the evidence all six counts of the accusation involving eight licensing violations. It is recommended that Wermager's CNA license be revoked.

DATED this 15th day of September, 2005.

David G. Stebing
Administrative Law Judge



²¹ In the following cases, the nursing board applied AS 08.68.334(2) and either denied initial licensure or revoked a CNA license, because of a "crime substantially related to the qualifications, functions, or duties of a certified nurse aide." Macato, *supra*; Matter of Gonzalez, Case No. 2306-01-006 (Board Order 6/28/04); Matter of Carmack, Case No. 2356-00-009 (Board Order 9/20/01); Matter of Pearson, Case No. 2356-00-006 (Board Order 6/29/01); Matter of Parker, Case No. 2356-01-002 (Board Order 3/14/03); Matter of Walker, Case No. 2306-99-010 (Board Order 3/14/03). In Matter of Burton, OAH No. 04-0280 (Board Order 3/11/05), board sanctions for a licensee's continuing education non-compliance and false representation in a renewal application included revocation.

²² See Matter of Holloway, Case No. 2306-99-013 (Board Order 3/14/03).

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ANDREA WERMAGER,

Respondent.

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OAH No. 04-0289-CNA
Board No. 2306-01-023

CERTIFICATE OF DISTRIBUTION

The undersigned certifies that the **Proposed Decision** in the Matter of **Andrea Wermager**, OAH Case No. 04-0289-CNA was distributed on September 16, 2005 to the following in the manner indicated

Andrea Wermager, Respondent – Certified mail
Rick Urion/Jennifer Strickler, Division of Occupational Licensing – Certified mail
Karen Hawkins, Assistant Attorney General – F/C mail
Dorothy Fulton, Executive Administrator for the Board of Nursing – F/C mail
Lt. Governor's Office – F/C mail

By: c _____

Linda Schwass

RULES OF APPELLATE PROCEDURE

Rule 602. Time — Venue — Notice — Bonds.

(a) When Taken.

(1) *Appeals from the District Court.* An appeal may be taken to the superior court from the district court within 30 days from the date shown in the clerk's certificate of distribution on the judgment.

(2) *Appeals from Administrative Agencies.* An appeal may be taken to the superior court from an administrative agency within 30 days from the date that the decision appealed from is mailed or otherwise distributed to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the date the agency's reconsideration decision is mailed or otherwise distributed to the appellant, or after the date the request for reconsideration is deemed denied under agency regulations whichever is earlier. The 30-day period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. An appeal that is taken from a final decision that does not include such a statement is not a premature appeal.

(3) Rule 204(a)(2) — (6) concerning the timing of appeals applies to appeals to superior court.

(b) Venue.

(1) *Appeals from the District Court.* Venue for an appeal from a district court decision shall be at the superior court location within the same judicial district as the district court that would best serve the convenience of the parties.

(2) *Appeals from Administrative Agencies.* Unless otherwise provided by law, venue for an appeal from an administrative agency decision shall be at the superior court location that would best serve the convenience of the parties.

(c) Notice of Appeal.

(1) A party may appeal from a judgment or agency decision by filing a notice of appeal with the superior court. The notice of appeal must specify the parties taking the appeal and their current addresses, designate the judgment, agency decision or part thereof appealed from, and name the court to which the appeal is taken. At the time the notice of appeal is served and filed, it must be accompanied by:

(A) a statement of points on which appellant intends to rely on appeal. The grounds for appeal stated in the statement of points on appeal constitute the sole basis for review by the superior court. On motion in the superior court, and for cause, the statement of points may be supplemented;

(B) if required, the filing fee as provided by Administrative Rule 9;

(C) if required, a bond for costs on appeal as provided by paragraph (d) of this rule;

(D) a copy of the district court judgment or agency decision from which the appeal is taken; and

(E) proof of service on all parties to the appeal. In an appeal from an agency decision, the notice of appeal must be served on the head of the agency and, if the agency is a state agency, on the Attorney General of Alaska, at Juneau, Alaska.

(2) An appellant seeking to have the cost bond waived or reduced, an extension of time to file the bond, or to appeal at public expense shall file an appropriate motion at the time the notice of appeal is filed.

(3) The clerk of the superior court shall refuse to accept for filing any notice of appeal not conforming with the requirements of this rule.

(d) Notification by Clerk.

(1) In an appeal from a district court which is not at the same location as the superior court, the clerk shall send a copy of the notice of appeal to the district court and shall notify the district court of the date by which it must

forward the record on appeal as provided by Rule 604(a)(1).

(2) In an appeal from an administrative agency, the clerk shall send a copy of the notice of appeal to the agency and request the agency to submit a list of the names and addresses of all counsel who appeared in the matter before the agency, and of all persons who appeared therein pro se. The agency shall file the list with the clerk within ten days of service of the request. The clerk also shall notify the agency of the date by which it must prepare the record in accordance with Rule 604(b)(1).

(e) Cost Bond.

(1) In a civil case or an appeal from an administrative agency, unless a party is exempted by law, or has filed an approved supersedeas bond under Rule 603(a)(2), a bond for costs on appeal must be filed in superior court with the notice of appeal. The amount and terms of the bond are governed by Rule 204(c)(1) and Civil Rule 80.

(2) The cost bond exemptions provided by Rule 204(c)(2) apply in appeals to superior court.

(f) Supersedeas Bond. The appellant may file a supersedeas bond pursuant to Rule 603(a)(2) in lieu of a cost bond.

(g) Cash Deposit. The appellant may deposit cash in the amount of the bond with the court in lieu of filing a cost or supersedeas bond. At the time of the deposit, appellant also shall file a written instrument properly executed and acknowledged by the owner of the cash, or by the owner's attorney or the owner's authorized agent, setting forth the ownership of the fund; agreement to the terms of Civil Rule 80(f); and satisfaction of the conditions specified in Rule 204(c)(1) if the deposit is in lieu of a cost bond, or Rule 204(d) if the deposit is in lieu of a supersedeas bond.

(h) Parties to the Appeal. All parties to the trial court or agency action when the final order or judgment was entered are parties to the appeal. A party who files a notice of

appeal, whether separately or jointly, is an appellant under these rules. All other parties, including the agency in an appeal from an administrative agency decision, are deemed to be appellees. An appellee may elect at any time not to participate in the appeal by filing and serving a notice of non-participation. The filing of a notice of non-participation shall not affect whether the party is bound by the decision on appeal.

(i) Joint or Consolidated Appeals. If two or more parties are entitled to appeal from a judgment or order of a court or agency and their interests are such as to make joinder practical, they may file a joint notice of appeal. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party.

(j) Service of Documents. Papers filed or served in the appeal must be served on all parties, except appellees who have elected not to participate in the action.

(SCO 439 effective November 15, 1980; amended by SCO 460 effective June 1, 1981; by SCO 495 effective January 4, 1982; by SCO 510 effective August 30, 1982; by SCO 514 effective October 1, 1982; by SCO 554 effective April 4, 1983; by SCO 575 effective February 1, 1984; by SCO 847 effective January 15, 1988; by SCO 888 effective July 15, 1988; by SCO 1015 effective January 15, 1990; by SCO 1250 effective July 15, 1996; by SCO 1284 effective January 15, 1998; by SCO 1385 effective April 15, 2000; by SCO 1411 effective October 15, 2000; and by SCO 1476 effective October 15, 2002)

Note: Ch. 77 SLA 2002 (HB 157), Section 2, adds new Chapter 26 to Title 6 of the Alaska Statutes, concerning providers of fiduciary services. According to Section 9 of the Act, AS 06.26.760(b)(2) has the effect of amending Appellate Rule 602 by postponing the deadlines for the filing of appeals to the superior court from a district court or an administrative agency by a trust company when the Department of Community and Economic Development has taken possession of the trust company.