

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

In the Matter of:	)	
	)	
STEFANIE WENGER,	)	
	)	
Applicant.	)	OAH No. 05-0526-CNA
_____	)	Div. Occ. Lic. No. 2356-05-015

**DECISION**

**I. Introduction**

Stefanie Wenger’s application for a license as a certified nurse aid was denied by the Board of Nursing at its meeting on June 3, 2005, on the ground that Ms. Wenger has been convicted of a crime substantially related to the duties of a certified nurse aide, and has attempted to obtain certification by fraud or deceit. Ms. Wenger requested a hearing, which was conducted on August 25, 2005, with Administrative Law Judge Andrew M. Hemenway presiding, under the provisions of the Administrative Procedure Act.<sup>1</sup>

Ms. Wenger argues that the board should exercise its discretion to allow her application. Based on the evidence and the testimony at the hearing, the administrative law judge recommends that the application be denied.

**II. Facts**

At around the end of 2001, Stefanie Wenger started working part-time for Kerri McCaffery as a bookkeeper for Ms. McCaffrey’s business, Movin’ Free Farms. Soon after she started, Ms. Wenger started forging checks on Ms. McCaffrey’s account. By the end of the year, she had forged about ten checks, totaling around \$1,500-\$2,000.

Ms. Wenger was indicted on ten felony forgery counts. She paid back the money she had taken, and in April, 2003, she plead no contest and was convicted on all ten counts. Ms. Wenger was given a suspended imposition of sentence and placed on probation for twelve months, to

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<sup>1</sup> AS 08.01.090 applies the Administrative Procedure Act, AS 44.62, to all Board proceedings, with listed exceptions not applicable in this case. AS 44.62.370 provides for a hearing in the event an application is denied.

expire on October 1, 2004. She was advised at her sentencing hearing that after she completed her probation her conviction could be set aside. She understood that she would not have to disclose her conviction if asked about it for employment purposes.

In February, 2004, Ms. Wenger applied for a certified nurse aide license. She disclosed her prior felony conviction and her application was denied. Ms. Wenger's conviction was set aside after she completed her probation in October, 2004, and she filed a second application for licensure on April 21, 2005. She did not disclose her prior conviction on the application form. On June 3, 2005, the board denied the application on the pursuant to AS 08.68.334(1) and (2). Ms. Wenger appeals.

### **III. Discussion**

#### **A. Applicable Law**

##### *1. Effect of Set-Aside Conviction*

Ms. Wenger testified that her conviction had been set aside. Although she did not submit documentation to that effect, she stated at the hearing that she had a notice from the court to that effect, using language that would be on a document issued by the court upon setting aside a conviction pursuant to AS 12.55.085(e). The preponderance of the evidence is that her conviction was set aside.

A conviction that has been set aside pursuant to AS 12.55.085(e) is not a "prior conviction" for purposes of presumptive sentencing.<sup>2</sup> However, such a conviction has not been expunged: it remains part of an individual's criminal record, and it continues to have limited collateral consequences.<sup>3</sup> The nature of the collateral consequences of a set-aside conviction must be determined on a case-by-case basis, but there is no legal barrier to consideration of a set-aside conviction in making an employment decision.<sup>4</sup>

Because of the vulnerable and dependent status of many patients under the care of certified nurse aides and the important role certified nurse aides play in the delivery of public health services, a person against whom a judgment of conviction has been entered and

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<sup>2</sup> Larson v. State, 688 P.2d 592, 597 (Alaska App. 1984).

<sup>3</sup> Journey v. State, 895 P.2d 955, 959 (Alaska 1995).

<sup>4</sup> *Id.*

subsequently set aside pursuant to AS 12.55.085(e) is a person who “has been convicted” within the meaning of AS 08.68.270(2).<sup>5</sup>

2. *The Board May Disqualify an Applicant Convicted of Forgery*

The board may, in its discretion, deny a license to a person who has been convicted of a crime substantially related to the duties of a certified nurse aide.<sup>6</sup> The board’s regulations include forgery as a crime substantially related to the duties of a certified nurse aide.<sup>7</sup>

A forgery conviction does not in itself disqualify an applicant. Following an administrative hearing the board makes an individualized determination based on the entire record. In making a decision, the board should seek to maintain consistency with its prior decisions.<sup>8</sup> To maintain consistency, different outcomes should be supported by differences in the particular facts of the individual case. The applicant has the burden of proof with respect to any specific factual findings relevant to an application, but the board may consider the record as a whole in determining what weight to give to any of those findings, and may exercise its discretion accordingly.

B. Relevant Considerations

In determining whether a prior forgery conviction warrants denial of a license, the board may consider any relevant factors, including: (1) the length of time since the conviction; (2) the nature and circumstances of the crime; (3) the applicant’s age, character and behavior, both before and since the crime.<sup>9</sup>

(1) Nature and Circumstances of the Crime

The crime in this case is forgery in the second degree, a Class C felony. Over the course of eight months, Ms. Wenger forged her employer’s name on ten checks, with a total value of

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<sup>5</sup> The wording of this statute is significant: it does not apply to a person who “has a prior conviction”, but to a person who “has been convicted.” Regardless of whether a conviction that has been set aside remains “a prior conviction” after it has been set aside, a person whose conviction has been set aside is a person who “has been convicted”, *i.e.*, was at any time in the past convicted.

<sup>6</sup> AS 08.68.270(2).

<sup>7</sup> 12 AAC 44.705(18).

<sup>8</sup> *Cf.* AS 08.01.075(f) (requiring the Board to “seek consistency in the application of disciplinary sanctions.”)

<sup>9</sup> The state’s personnel rules provide that an applicant for state employment may be disqualified if the applicant has been convicted of a crime that directly relates to the applicant’s future performance in the position applied, after consideration of: (1) the nature and seriousness of the offense; (2) the position for which the applicant is applying; (3) the circumstances of the offense; (4) the amount of time since the offense; (5) the age of the applicant at the time of the offense; (6) whether the offense was isolated or repeated; (7) and aggravating or mitigating circumstances. 2 AAC 07.091.

around \$1,500-\$2,000. Her crime was discovered by her employer when the employer was going over her year-end paperwork.

The criminal conduct occurred over a substantial period of time, and involved the abuse of a direct personal relationship with the business owner, Ms. Kerri McCaffrey. Ms. Wenger took advantage of the opportunity to obtain funds from her employer and used those funds for her own personal benefit.

(2) Length of Time Since the Offense

The crime in this case was committed in 2002, less than four years ago. Because the period of probation in this case was only one year, the criminal conviction was set aside about two years after the crime.

(3) Age, Character and Behavior of Applicant

(a) Personal Information

At the time of the crime, Ms. Wenger was 20 years old. She has no other criminal record and there is no indication of any other wrongful conduct before or after her conviction.

(b) References

Ms. Wenger did not provide any character witnesses, a report from her probation officer, or references from past or current employers.

(c) Other Indicia

Ms. Wenger did not provide any testimony or evidence to establish grounds for granting a license, other than to assert that her crime was in the past, she knows it was wrong, and she would not do it again.

C. Licensing Considerations

The board's prior decisions in similar cases set out the considerations that apply:

The evolution of health care nationally in recent decades has resulted in expanded duties for and increasing regulation of non-physician health care providers including professionals engaged in the practice of nursing; physicians' assistants; nurse aids; emergency medical technicians; and midwives. In 1998, the Alaska Legislature adopted AS 08.68.331-.336 within its Nursing Practice Act, creating licensing authority and a registry for certified nurse aides. Regulations were adopted at 12 AAC 44.800-.44.895 in 1999.

In Re: Sharon Mosbrucker, Case No. 2306-01-016 (Proposed Decision, June 17, 2003), at 9.

CNA's provide basic nursing skills in a variety of settings including long term care and acute care facilities; assisted living homes; and even in private homes.

Reflecting a dominate demographic trend, a growing portion of our nation's health care delivery system is focused on needs of the elderly, the fastest growing segment of our population. Assisted-living and long-term care options are steadily increasing for the elderly and inform...Both Congress and state legislative bodies have recognized a need to address problems attendant with this growth through protecting vulnerable patients....The safety and care of patients in these settings is largely a responsibility of the nursing board in exercising its licensing authority.

Matter of Margaret C. Schwantes, Case No. 2306-99-022 (Board Order, June 29, 2001).

The board's primary and most important concern is health and safety. Only slightly less important, however, is the need to protect a vulnerable population against the misappropriation of property. The board has promulgated a regulation specifically identifying forgery as a crime of moral turpitude directly bearing on an individual's trustworthiness and fitness for licensing as a certified nurse aide.<sup>10</sup>

D. Relevant Prior Decisions.

1. *Failure to Disclose*

In three recent cases, the board has denied licensure to applicants who were convicted of a felony and failed to disclose it. These denials typically rely on the failure to disclose as in itself evidence of untrustworthiness sufficient, in conjunction with a prior felony conviction, to warrant denial of licensure.

In this case, although Ms. Wenger did not disclose her prior felony conviction, there is no evidence that she intended to mislead the division. To the contrary, she had previously disclosed the felony conviction in a prior application. Furthermore, Ms. Wenger testified that her understanding after her sentencing hearing was that after the conviction was set aside, she could honestly answer that she had no convictions if asked. Although the 2004 application form called for disclosure of not only convictions, but also a plea of guilty or nolo contendere, or a deferred or suspended sentence, it did not (unlike the 2003 form) specifically refer to a "suspended imposition of sentence." Ms. Wenger's understanding of her status could have led her to enter a mistaken response. On balance, the preponderance of the evidence is that Ms. Wenger did not

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<sup>10</sup> See AS 08.68.270; 12 AAC 44.705(18).

intentionally attempt to deceive the board. Therefore, her failure to disclose her prior conviction or suspended imposition of sentence does not warrant denial of the license under the facts of this case.

## 2. *Prior Conviction*

### A. LICENSE DENIED

In three recent cases, the board has considered whether to grant a license to an individual with a prior felony conviction. In all of them, the board denied the application. In Matter of Gibson, Case No. 2356-02-003 (Board Decision, July 11, 2004), the applicant was convicted of multiple counts of felony forgery stemming from two separate episodes of forged check-writing over a six-month period, including 25 separate checks totaling nearly \$10,000. Both victims were personal acquaintances of the applicant, who was convicted of misdemeanor shoplifting while on probation. In denying the application, “the Board placed particular weight on the serious and repeated criminal conduct and the close relationship between the victims and the applicant.” In a prior case, Matter of Parker, Case No. 2356-01-002 (Board Order March 14, 2003), the applicant had a felony forgery conviction as well as misdemeanor convictions for shoplifting and driving under the influence of alcohol and had attempted to deceive the Board concerning her record. Although the convictions were more than ten years old, the Board denied the application. In the third prior case, Matter of Pearson, Case No. 2356-00-006 (Board Order June 29, 2001), the applicant had two felony convictions (forgery and failure to appear) within five years of the application, as well as (earlier) two misdemeanor theft convictions and a misdemeanor false report conviction.

### B. LICENSE GRANTED

The board has not previously granted a license to a person with a felony conviction. It has on a number of occasions granted applications from individuals with misdemeanor convictions for driving under the influence, including instances where the conviction was relatively recent. It has granted applications where the applicant had a single misdemeanor conviction for disorderly conduct (twice), assault (twice, each more than 20 years prior), food stamp fraud (once, 15 years prior), and misconduct involving a controlled substance (once, one year prior).

The board presently has under consideration an application from a person with a prior felony conviction in which the administrative law judge and the division have recommended that the application be granted. In re Wick (OAH No. 05-0059-CNA, Div. No. 2356-05-001). In that case, the applicant provided a report from his probation officer and a reference and testimony from his current employer as an unlicensed personal care attendant. In addition, there was a single isolated instance of criminal conduct, the applicant not taken property from its rightful owner (the crime was theft by possession of stolen goods), community service had been performed, and the criminal conviction was more than five years old.

3. *Comparison*

Ms. Wenger's conviction is more serious than any of the instances in which the board has previously allowed licensure notwithstanding a prior criminal conviction, in none of which had the applicant been convicted of a felony. Because of the number of counts and the length of time over which her offenses occurred, Ms. Wenger's felony record is substantially similar to the applicant In the Matter of Gibson, although Ms. Wenger's overall criminal record is less serious than in that case (in which there were multiple victims, and an additional misdemeanor shoplifting conviction). The nature and number of crimes committed by Ms. Wenger, the period of time over which they occurred, the lack of any evidence or testimony to support a claim of reformation, and the relatively short time since the criminal conviction distinguish this case from In the Matter of Wick, currently under consideration by the board.

**IV. Conclusion**

In light of the entire record, the administrative law judge recommends that the board deny the application.

DATED February 8, 2006

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

## BOARD OF NURSING ACTION

The Board of Nursing having reviewed the proposed Decision by the administrative law judge In the Matter of Stefanie Wenger (OAH Case No. 05-0526-CNA, February 8, 2006) hereby:

Option 1: Adopts the proposed Decision in its entirety under AS 44.62.500(b). A decision adopted in this manner is the final agency action and may be appealed to the superior court within thirty days of the date is mailed to the applicant pursuant to AS 44.62.560 and the Alaska Rules of Court.

Date: March 10, 2006

By: Signed  
Catherine Giessel, Chairperson

[This document has been modified to conform to the technical standards for publication.]