

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

IN THE MATTER OF:)

MARY RUTH PYLE)

) OAH No. 05-0797-CNA
) Board Case No. 2356-05-014
)

DECISION

I. Introduction

Mary Ruth Pyle appeals the denial of her application for certification as a Nurse Aide by Endorsement by the Alaska Board of Nursing (Board). The reasons for the denial are that Ms. Pyle attempted to obtain certification by fraud or deceit, and she has been convicted of a crime substantially related to the duties of a certified nurse aide. Ms. Pyle requested a hearing, which was held on March 2, 2006, under the provisions of the Administrative Procedure Act (APA).¹

Ms. Pyle is represented by Donna P. Walker of Walker & Levesque, LLC. Gayle Horetski, Assistant Attorney General, represents the Division of Corporations, Business and Professional Licensing, Alaska Department of Commerce, Community and Economic Development. Kay L. Howard, Administrative Law Judge, presided over the hearing and prepared this decision.

II. Facts

A. Material Facts

Mary Ruth Pyle, nee Goudreau, was born in Sault Ste. Marie, Michigan in 1960, the seventh of nine children in a large Catholic family. At the age of 18, she moved to Drummond, Michigan, where she obtained work as a waitress and housekeeper.

In 1983, Ms. Pyle's long-term boyfriend was in a serious car accident and suffered head injuries that reduced his brain functioning to that of a child. He was in a coma for six months and Ms. Pyle was his primary caregiver for nearly two years. It was an emotionally and physically exhausting experience for her. Ms. Pyle eventually came to accept that her boyfriend would never regain adult functioning, so in 1985 she made the difficult decision to leave the

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

relationship. She moved to Alaska where her brothers Steve and Ray had relocated and began working as a waitress in Anchorage.

By 1989, in part as a result of her emotional devastation from the tragedy of her former boyfriend's accident, and in part because she fell in with the wrong crowd, Ms. Pyle began using drugs. Linda A. Lenoir, her probation officer, described Ms. Pyle's situation this way:

After moving to Anchorage, she [Ms. Pyle] started using illegal drugs and became involved with people who were also using and dealing. She indicated she was approached numerous times by the person she now knows to have been an undercover narcotics agent, asking to purchase drugs. Because she knew several people who sold drugs, she accommodated this person by taking her orders.^[2]

Unbeknownst to her, Ms. Pyle was indicted in May 1989 for selling cocaine to the undercover police officer during the four-month period from February 1989 through May 1989. Her boyfriend, now husband, Randy Pyle, served several months in jail on similar charges, but Ms. Pyle was never arrested. In October 1989, upon Mr. Pyle's release from jail, the two left Alaska and moved to Tacoma, Washington, to get their lives back together.

During the period from 1989 through 1993, Ms. Pyle and Randy lived with his parents. They paid rent and split household expenses. Ms. Pyle worked full-time and went to school. She enrolled in Clover Park Technical College, where she graduated in the Vocational Nursing Assistant program in 1991. Ms. Pyle received excellent evaluation marks and was hired immediately thereafter by the Tacoma General Hospital as a certified nurse assistant in 1992. Miss Pyle's application for the job at Tacoma General required a felony history check, which turned up no records. Ms. Pyle did not yet know about the charges against her in Alaska, and only Washington state records were checked. The state of Washington issued a certified nurse assistant license to Ms. Pyle on October 8, 1992, that only recently expired on December 8, 2005.³

In 1993, Ms. Pyle and her boyfriend Randy went on a vacation to Mexico with his parents. Upon their return, a routine border check revealed there were outstanding warrants for Ms. Pyle in Alaska. She was arrested and held in Texas for two weeks, then voluntarily returned

² Div. Exh. B at pg. 6.

³ Div. Exh. A at pg. 49.

to Alaska to face the charges against her. Linda A. Lenoir, wrote in the presentence report she prepared at the time:

[W]hile the defendant was not particularly youthful when these offenses occurred, she had endured a particularly difficult and emotionally draining experience while caring for her injured boyfriend in the relatively recent past.

....

The defendant reports no substance abuse until arriving in Alaska, and it would appear that she engaged in dealing cocaine in order to support her own use.

....

Since leaving Alaska it would appear that the defendant has indeed made significant progress toward establishing a productive lifestyle by engaging in training, education, and employment opportunities. Numerous collateral contacts report no evidence of continued substance abuse, and of observing a complete change of lifestyle over the last several years. When fashioning rehabilitation as a goal, it would appear that she has taken giant strides forward in this realm, and has maintained an appropriate lifestyle for some time.^[4]

In May 1993, Judge Cutler dismissed five of the charges against Ms. Pyle, who pled no contest to three others and received a suspended imposition of sentence. All but one of Ms. Pyle's co-defendants received harsher sentences than she did. Ms. Pyle served 120 days in a halfway house, paid restitution and was placed on three years' probation.⁵ In spite of her convictions, Tacoma General held Ms. Pyle's job open for her while she served her time. Upon her release, Ms. Pyle immediately returned to Washington and resumed her job at the hospital. She and Randy Pyle married in 1994.

From 1993 through 1999, Ms. Pyle continued to work at Tacoma General Hospital as a certified nurse assistant caring predominantly for surgical and cancer patients, for whom she was a consummate caregiver. Ms. Pyle was compassionate, hard working and beloved among staff and patients alike. Janice Jensen, RN, her floor supervisor for several years, considered Ms. Pyle a "star CNA." Also during that time, Ms. Pyle helped her brother Ray overcome his own struggle with addictions. Ms. Pyle took care of Ray while he was waiting for a liver transplant,

⁴ Div. Exh. B at pgs. 12-13 (emphasis added).

⁵ During the course of preparing for the hearing, Ms. Pyle learned that a set-aside order had never actually been issued for her 1993 convictions. She filed a motion and Judge Cutler issued the order on January 30, 2006.

but he died before the procedure could be undertaken. Ms. Pyle also took care of her husband's mother following surgery in 1994, and of her own mother, who died in 2003.

In October 1994, Ms. Pyle applied for certification in Washington as a Health Care Assistant, which would allow her to withdraw venous and capillary blood. Ms. Pyle marked “no” to question # 5 on the application form regarding convictions for drug and alcohol offenses. Ms. Pyle believed that her SIS had removed her convictions from her record. She also answered “no” to questions # 6 and # 7 regarding drug use and alcohol abuse within the past five years, as she had been drug-free for five years.⁶ Ms. Pyle was granted a Health Care Assistant certification by the state of Washington.

In 1999, Ms. Pyle and her husband moved back to Alaska in order to take over the Pyle family's charter boat business in Valdez. Randy and Mary Ruth Pyle became established in the community. They purchased a home and Ms. Pyle obtained a position as a medical assistant at the Valdez Medical Clinic. Both her nurse supervisor and a physician at the clinic made glowing reports about Ms. Pyle's quality of care, optimistic personality and professional work ethic. Dr. George R. Gay, who also testified at the hearing, wrote that he would recommend her "in the highest and most unqualified terms for further employment in the medical field.”⁷

Ms. Pyle subsequently decided to pursue employment at the new Providence Hospital in Valdez. She had been assured of employment there upon obtaining her CNA certification. Ms. Pyle submitted her application to the Division on March 21, 2005. Question # 2 asked whether the applicant had “been convicted, entered a plea of guilty, no contest or had sentence deferred or suspended (SIS) for any criminal offense (including DWI/DUI, reckless driving and DWOL) other than minor traffic violations [.]” Ms. Pyle answered "no.”⁸ Once again, she believed she could answer "no" to that question because of her 1993 set-aside convictions. Ms. Pyle knew she had to disclose a DWI she received on August 17, 2000, so she included with her application a letter that informed the Board of the charge.⁹

In response to a subsequent request, Ms. Pyle provided additional documentation regarding the DWI charge to the Board on March 31, 2005. The information included a letter

⁶ Div. Exh. A at pgs. 43-44.

⁷ App. Exh. 2 at pg. 1.

⁸ Div. Exh. A at pg. 8.

⁹ Div. Exh. A at pgs. 14-16.

from the Valdez Counseling Center dated March 6, 2001, that certified Ms. Pyle had completed the drug and alcohol evaluation following her DWI and there were "no other further recommended requirements" for counseling.¹⁰

On May 23, 2005, the Division received Ms. Pyle's Alaska criminal history check, which revealed the 1989 charges that resulted in her 1993 arrest and SIS convictions.¹¹ On June 22, 2005, Investigator Brian Howes notified Ms. Pyle she had not properly answered question # 2 on the CNA application regarding prior convictions. On June 28, 2005, Ms. Pyle contacted Mr. Howes to explain she believed she had truthfully answered the question because in her understanding, the SIS convictions were no longer a part of her record.

On July 18, 2005, Ms. Pyle filed even more documentation with the Board regarding her SIS convictions, including a copy of her presentence report and a handwritten letter. The letter stated she truly thought SIS meant that all of her charges were "buried" and that she and her husband had worked hard to make up for their mistakes.¹² On July 25, 2005, Investigator Howes called Ms. Pyle for further clarification. She explained she was not aware of the criminal charges against her when she moved to Tacoma in October 1989, but rather learned about the charges for the first time when she was arrested in January 1993 after having returned from Mexico. On September 21, 2005, the Board denied Ms. Pyle's application for CNA certification.

B. Hearing

At the March 2, 2006, hearing, eight witnesses testified on Ms. Pyle's behalf: three family members, three former supervisors in the medical field, and two other professionals.

Edgar and Delores Pyle, Ms. Pyle's parents-in-law, both testified that Ms. Pyle began turning her life around the day she and Randy arrived from Alaska in 1989. Both asserted that during the four years she and Randy lived with them, she evidenced no sign of drug or alcohol use or abuse, nor has she since then. Edgar described Ms. Pyle as a hard worker – "she turns to like a seaman" on the family charter boat – who has lead a productive life and is well loved by family and friends. Edgar stated he was skeptical of her when Ms. Pyle arrived from Alaska with their son in 1989, but that the elder Pyle grew to love her. He said they even traveled to Alaska to testify on her behalf after she was arrested on the drug charges in 1993. Delores

¹⁰ Div. Exh. A at pg. 25.

¹¹ Div. Exh. A at pg. 4.

¹² Div. Exh. A at pg. 50.

testified that in 1989, when Randy and Mary arrived on the flight from Alaska, it was very early in the morning, yet Mary insisted on buying a newspaper so she could start looking for a job even before they went to breakfast. Delores described Ms. Pyle as a dedicated worker and caregiver who, in addition to her regular job, gave her mother-in-law excellent care for two months following surgery. Delores also told the story of how Ms. Pyle helped her brother Ray recover from the heroin addiction he acquired in Vietnam. Delores said that Ray went on to become a speaker at high schools who talked to students about the dangers of drugs.

Debbie McCann, Ms. Pyle's sister-in-law, is a business owner in Valdez, where she has lived for 26 years. She testified that Ms. Pyle is a person who fell prey to drugs, but woke up one day as though a cold fish had been slapped in her face. Ms. McCann stated that Ms. Pyle did all the things one must do in order to become rehabilitated - she separated herself from her friends, left Alaska and its dangerous surroundings, got an education and a job and turned her life around. Ms. McCann said Ms. Pyle reformed her life when she went to Washington in 1989, so she was especially devastated when she was arrested four years later. Ms. McCann said she has daily contact with Ms. Pyle and is often in social situations with her, and that her sister-in-law has had no involvement with drugs since 1989, nor does she drink to excess. Ms. McCann described Ms. Pyle as an innate caregiver. She said because Ms. Pyle does not have any children, all her nurturing instincts are directed toward other people. Finally, Ms. McCann testified she could have filled the room with people who would testify on Ms. Pyle's behalf. For example, Ms. McCann recounted the story of an older man who tearfully told her Ms. Pyle had literally saved his life one day at the clinic because she was kind to him, and her kindness made him change his mind about committing suicide.

Janice Jensen, RN, is a charge nurse and floor supervisor who has worked at Tacoma General Hospital since 1981. She testified she was Ms. Pyle's supervisor for five years and that Ms. Pyle was delightful to work with. Ms. Jensen added she trusted Ms. Pyle, who exceeded her expectations as a CNA. Ms. Jensen insisted Ms. Pyle showed no signs of substance use or abuse, as evidenced by the quality of her work and her high regard among staff and patients alike at Tacoma General. Ms. Jensen further testified that the hospital has had to deal with employees with drug and alcohol problems and she knows what to look for, but she has never seen any indication that Ms. Pyle has a substance abuse problem.

Dr. George R. Gay is a physician at the Valdez Medical Clinic. He testified he has known Ms. Pyle since 2002, and that she is the total professional. He said patients responded well to her and that she was always ready to work extra shifts, and to come early and stay late. Dr. Gay testified that for several years he ran a drug and alcohol program in the Haight-Ashbury district of San Francisco, where he saw 50 - 60 addicts and alcoholics per day. Dr. Gay said he never saw any hint that Ms. Pyle has a drug or alcohol problem, because "I can spot these people from a mile away." Dr. Gay said he had no prior knowledge of Ms. Pyle's 1989 drug charges, but he stated even if he had known, his assessment of her as a person and a caregiver would not be diminished.

Kelly Boulier, RN, was Ms. Pyle's supervisor at the Valdez Medical Clinic. She testified Ms. Pyle was dependable and worked well with patients and other staff members. Ms. Boulier also said she was not aware of Ms. Pyle's 1993 drug convictions, but maintained even if she had known, it would not prevent her from hiring Ms. Pyle again because she was always on time, stayed late when necessary, and volunteered for extra work.

Bert Cottle is the mayor of Valdez. He was with the Valdez Police Department for 23 years and from 1989 - 1996 he was the Chief of Police. Mayor Cottle said there are approximately 4,000 people in Valdez and he knows about 80% of them. He testified he has been acquainted with Ms. Pyle for 5 - 7 years through the charter business and her work at the clinic. Mayor Cottle said he occasionally observes Ms. Pyle in social situations, but he has never seen her drink to excess, and, based on his extensive knowledge of what goes on in the town, does not believe she has a substance abuse problem. The mayor added that based on his observation of her work ethic, he concluded that Ms. Pyle would give someone in need the shirt off her back and that as far as he was concerned, he would trust her with anything.

Finally, Linda A. Lenoir, Probation Officer II, was Ms. Pyle's probation officer in relation to the 1993 drug charges. Ms. Lenoir acknowledged she does not remember specifically what she told Ms. Pyle in 1993 about the effect of a set-aside conviction. However, she testified she would have informed Ms. Pyle, as is her standard practice, that if she completed probation, her conviction would be set-aside and she would no longer be considered a convicted felon. Ms. Lenoir added it is also her standard practice to tell defendants they may legally answer "no" to subsequent questions about being a convicted felon.

Ms. Pyle testified she and Randy decided when he got out of jail in October 1989 that they needed to turn their lives around, so they went to Washington to live with his parents. Ms. Pyle said that by the time she went into the vocational nursing assistant program at Clover Park Technical College, she had already been drug-free for two years. She said she had trained at Tacoma General in connection with her schooling at Clover Park, and she was offered a job at the hospital immediately upon graduating. She testified she chose a career as a nurse aide because she enjoys people and because she had a rewarding personal experience when taking care of her brother Ray during his illness. Ms. Pyle added she has never had a complaint about the quality of care she gives as a nurse aide.

Ms. Pyle testified she was devastated by her 1993 arrest because she did not know about the charges against her until then, and because she had already worked so hard to turn her life around. She said she believed her record was clean as a result of receiving the SIS convictions. Ms. Pyle said she knows now that when she applied for the Health Care Assistant license in Washington, she should not have answered "no" to the question about her criminal history because she was still on probation. However, she did not know that she was supposed to file a motion to have an actual set-aside order issued by the judge; she assumed it had all been taken care of automatically and that the convictions were cleared from her record. She stated in spite of her convictions, Tacoma General kept her job open for her while she was in Alaska taking care of the charges against her.

Ms. Pyle explained she resigned from the Valdez Medical Clinic primarily because one of the other staff members treated her poorly, but also because she wanted to work at the new Providence Hospital in Valdez. Ms. Pyle said that Dr. Todd, one of the clinic owners, asked her to return, but she wanted to work at the hospital. When her application for the CNA license was denied, Ms. Pyle testified she went to work for Frontier Community Services as a nurse aide at a local group home. She stated the majority of patients are from Harborview Hospital, a mental health care facility, and that most of them have some sort of mental handicap.

The Division's primary witness was Dorothy Fulton, RN, Executive Administrator for the Board of Nursing since 1989.¹³ Ms. Fulton testified Alaska currently has about 10,000 registered nurses and 2,500 certified nurse aides. The Board, in carrying out its statutory duties,

¹³ Ms. Fulton retired in August 2005, but returned on a temporary basis after her replacement retired.

has as its primary consideration the protection of the public. Ms. Fulton said certified nurse aides usually work in long-term, assisted settings, and in client's homes, doctor's offices and hospitals. She explained a nurse aide working in a client's home has easy access to the client's belongings, including money and drugs.

Ms. Fulton further testified applicants for a certified nurse aide license frequently have convictions for drug possession or sale, but all of the applicants with convictions for the sale of drugs are denied. She explained the Board's concern is that nurse aides often deal with vulnerable clients in their homes without supervision, and there is a potential for theft of the client's drugs or theft of the client's money to purchase drugs. Ms. Fulton said the Board considers those applicants with convictions for drug possession to have the ability to get treatment for the drug problem and later reapply with protections in place such as memoranda of agreement that the applicant will have regular drug tests and attend 12-step meetings or have documented sobriety. However, an applicant with a conviction for distribution usually is a repeat offender at the outset because of the inherent nature of selling drugs.

III. Discussion

In 1998, the Alaska Legislature adopted AS 08.68.331--336 within the Nursing Practice Act (AS 08.68), creating explicit licensing authority and a registry for certified nurse aides. Regulations were adopted in 1999 at 12 AAC 44.800--895. The Nursing Practice Act (AS 08.68) is intended to protect the public's health and safety and assure competency of licensees.¹⁴

The Alaska Board of Nursing regulates the certification of nurse aides in this state.¹⁵ The Board has the responsibility of protecting the health, safety, and welfare of clients who are served by nurse aides.¹⁶ A person may work as a nurse aide in Alaska without certification, but a person may not claim to be a certified nurse aide (CNA) without having first obtained Board certification.¹⁷

¹⁴ See, *Allison v. State*, 583 P.2d 813, 816 (Alaska 1978).

¹⁵ AS 08.68.331.

¹⁶ AS 08.68.100 (a)(1).

¹⁷ AS 08.68.332.

Under the APA, Ms. Pyle has the burden of proof by a preponderance of the evidence.¹⁸ This evidentiary standard means that something is more likely than not true, or, that there is a greater than 50 percent chance it is true.¹⁹

A. Ms. Pyle did not attempt to obtain certification as a nurse aid by fraud, deceit, or intentional misrepresentation

The Alaska Board of Nursing may, in its discretion, deny CNA certification to a person who "has obtained or attempted to obtain certification as a nurse aide by fraud, deceit, or intentional misrepresentation."²⁰ The Division asserts Ms. Pyle attempted to obtain a CNA license in this way.

Ms. Pyle did not disclose her prior felony convictions until after her application process turned them up, but there is no evidence that she intended to mislead the Board about having a criminal record. To the contrary, she disclosed her DWI conviction with her initial application paperwork, and when asked about her 1989 charges, provided even her confidential presentencing report.

Rather than being an attempt to mislead the Board, Ms. Pyle's failure to disclose her felony convictions was based on a mistaken belief that her SIS convictions cleared her record and she was free to answer "no" to questions that asked whether she had any felony convictions. Ms. Pyle also answered "no" to an analogous question on the application for a Health Care Assistant license she filled out in Washington in 1994. Probation Officer Linda A. Lenior testified she would have told Ms. Pyle she could legally answer "no" to questions about having any felony convictions. Ms. Pyle formed a reasonable belief that she could answer "no" to those questions, and her actions, in both Washington and Alaska applications, were consistent with that belief.

Ms. Pyle was a credible witness. At the hearing, she acknowledged she made a mistake by answering "no" to question # 2, but it was a reasonable mistake based on her probation officer's guidance. In hindsight, one might argue that Ms. Pyle's belief was not reasonable because she was answering "no" to questions about possible felony convictions as early as 1994, before she had completed her probation. But Ms. Pyle was not legally sophisticated, and she was

¹⁸ AS 44.62.460(e)(2).

¹⁹ See, *Dairy Queen of Fairbanks, Inc. v. Travelers Indemnity Co. of America*, 748 P.2d 1169, 1170-72 (Alaska 1988).

devastated by her 1993 arrest. Indeed, Ms. Lenoir was the professional whose information about the effect of an SIS conviction Ms. Pyle took to heart. The central issue here is not whether Ms. Pyle's belief that she was entitled to answer "no" to a question about a felony conviction was correct, but whether it was reasonable under the circumstances. I find it was. On balance, Ms. Pyle proved by a preponderance of the evidence that she did not intentionally attempt to deceive or mislead the Board. Therefore, her failure to disclose her prior felony SIS convictions does not warrant denial of the license under the facts of this case.

B. Ms. Pyle has been convicted of a crime substantially related to the qualifications . . . of a certified nurse aide

The Alaska Board of Nursing may, in its discretion, deny CNA certification to a person who has been convicted of a crime "substantially related to the qualifications, functions, or duties of a certified nurse aide."^[21] The Board has identified unlawful distribution of a controlled substance (as defined under AS 11.71.900) as a crime "substantially related to the qualifications, functions, or duties" of a CNA.²² This provision is the second reason the Board denied Ms. Pyle's application for a CNA license.

Alaska law authorizes trial courts to suspend imposition of a sentence and thereafter set aside the conviction after the defendant successfully completes a probationary period.²³ In general, only low risk, first-time offenders are eligible to receive a suspended imposition of sentence (SIS).²⁴ A judge who has ordered an SIS "has evaluated the defendant's background and offense and decided the defendant deserves a chance to show that he or she has 'reformed' and therefore should be rewarded with a clean record."²⁵ After a defendant successfully completes the probationary period, the judge may issue a set-aside order, which "reflects a substantial showing of rehabilitation."²⁶ A set-aside order is, at a minimum, an implicit

²⁰ AS 08.68.334.

²¹ AS 08.68.334.

²² 12 AAC 44.705(19).

²³ AS 12.55.085.

²⁴ *Doe v. State, Dept. of Public Safety*, 92 P.3d 398, 405 (Alaska 2004).

²⁵ *Id.* at 406.

²⁶ *Wickham v. State*, 844 P.2d 1140, 1143-1144 (Alaska App. 1993).

indication that the defendant poses “little threat of committing new crimes.”²⁷ A set-aside order is in the nature of a pardon.²⁸

However, a set-aside does not change the fact that the conviction took place, or that the defendant did not commit the act for which he or she was convicted.²⁹ Neither does a set-aside order expunge the crime from the defendant’s record.³⁰ Rather, members of the public may research court records or require a job applicant to divulge the fact of a prior conviction.³¹

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, I conclude a person against whom a judgment of conviction has been entered and 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). 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,” a person whose conviction has been set aside will always be a person who “has been convicted.” The fact that the conviction has been set aside and may no longer be visible does not change the fact that it did occur.

Even though Ms. Pyle has been convicted of a crime substantially related to the qualifications, functions, or duties of a certified nurse aide, the Board is not required to deny her a CNA license. The Board must make an individual determination in Ms. Pyle's case. A felony conviction does not in itself disqualify an applicant; the Board, in its discretion, may grant a license to an applicant who has been convicted of a felony. Following an administrative hearing the Board makes an individualized determination based on the entire record. In making the decision, the Board should seek to maintain consistency with its prior decisions.³² 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

²⁷ *Doe*, 92 P.3d at 408.

²⁸ *Spnard Action Committee v. Lot 3, Block 1, Evergreen Subdivision*, 902 P.2d 766, 779 (Alaska 1995).

²⁹ *Larson*, 688 P.2d at 597-598.

³⁰ *Journey v. State*, 895 P.2d 955, 959 (Alaska 1995).

³¹ *Doe*, 92 P.3d at 406.

³² *Cf.* AS 08.01.075(f) (requiring the Board to “seek consistency in the application of disciplinary sanctions”).

determining what weight to give to any of those findings, and may exercise its discretion accordingly.

C. Relevant considerations

In determining whether to deny a license based on a prior conviction, 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.³³

1. Length of time since the offense

Ms. Pyle's crimes occurred in early 1989, a period of 17 years ago. She was arrested in 1993 and completed her probation in 1996. Ms. Pyle's set-aside order was issued only recently because she did not know she had to file a motion in court to obtain the order. Had she filed a timely motion, Judge Cutler's order setting Ms. Pyle's convictions aside would have been issued approximately ten years ago.

2. Nature and circumstances of the crime

Ms. Pyle was convicted on three counts of distribution of a controlled substance to an undercover officer. In contrast to possession only, as Dorothy Fulton testified, distribution by its very nature usually involves multiple incidents of the same crime and suggests the dealer will sell drugs for a profit to any buyer, regardless of the person's age or situation. The circumstances surrounding Ms. Pyle's three felony convictions are significantly different. Her conduct arose because she was penniless and needed to support her own drug habit. Ms. Pyle was solicited to obtain drugs by an undercover police officer, and the sales she arranged all took place within a relatively short four-month period of time, and most involved minor quantities of drugs sufficient for personal use but not subsequent distribution. The sales had more to do with Ms. Pyle being a "middle man" than with being a drug dealer with a large clientele. Further, the criminal conduct did not involve the abuse of a direct personal relationship.

³³ 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, 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) aggravating or mitigating circumstances. 2 AAC 07.091.

3. Character and behavior of applicant

After having temporarily lost her way to drugs in 1989, Ms Pyle turned her life around and has not looked back in the 17 years that have since transpired. She lived with her in-laws, worked full-time while attending school for nurse assistant training, and was immediately hired by the largest hospital in the area. Ms. Pyle obtained a CNA license in Washington and became a valued employee, beloved by staff and patients alike for her compassion, kindness and the quality of care she gave to oncology and surgical patients. When she was arrested in 1993, Ms. Pyle easily could have become bitter and disillusioned and allowed herself to fritter away all she had accomplished in life. Rather, she voluntarily came to Alaska to serve her time, then returned to her rewarding job and loving family in Washington. She helped others overcome their addictions. When Ms. Pyle (and her husband) moved to Valdez to help with the Pyle family charter boat business, she soon became a solid and respected member of the community. She obtained work as a nurse aide at the local clinic and once again impressed both staff and patients alike with quality caregiving and a wonderful personality. Other than a misdemeanor DWI in the year 2000, Ms. Pyle has had no other negative contact with law enforcement.

4. References

The best assessments of the character of an applicant are made by individuals who have the experience, opportunity and detachment to form mature and considered opinions based on personal observation. In this case, all of the testimony and evidence from those who have had the opportunity to observe Ms. Pyle over time is in agreement that she gave up drugs and turned her life around in 1989 and has never looked back. Ms. Pyle is supported in this matter by her probation officer, by longtime acquaintances from law enforcement, and by three members of the medical profession (a doctor and two RN's), all of whom have known Ms. Pyle for several years and have supervised her work as a certified nurse aide. The testimony of these individuals, in particular the medical professionals with significant knowledge and expertise regarding the nurse's aide profession and substance abuse issues, should be given significant weight in this matter because they are based on longtime personal observation and supervision of Ms. Pyle's work over the course of several years.

Normally, assessments of a person's character given by family members may be affected by close personal ties, but in this case they are especially useful and should be afforded substantial weight. In particular, Edgar and Delores Pyle were in a position to observe Ms.

Pyle's character and behavior "up close and personal" while she lived in their home for four years. They began the relationship with her with skepticism, but both grew to love and appreciate Ms. Pyle because of her hard work, personality, and her success in defeating drugs and turning her life around. Edgar and Delores Pyle, in addition to Debbie McCann, are Ms. Pyle's in-laws by virtue of her marriage to Randy. They are not members of her birth family, so they had no native family relationship with her, and no obligation to maintain any loyalty toward Ms. Pyle or to see her in any light more favorable than that which she herself created and nurtured.

Also, the decision of Judge Cutler to provide for a suspended imposition of sentence, and to maintain the SIS notwithstanding a subsequent DWI, should also be given some weight.

5. Other indicia

In addition to the length of time that has passed since Ms. Pyle's criminal acts, one of the primary distinguishing facts of this case is that Ms. Pyle has been working as a nurse aide since 1992, a period of no less than 14 years, and for seven of those years, she was certified as a nurse aide in the state of Washington and worked at a metropolitan hospital. During all of that time, Ms. Pyle has been an exemplary caregiver, as indicated by three medical professionals, one doctor and two RN's all of whom supervised Ms. Pyle on a long-term basis and have extensive personal knowledge of the quality of her work. Dr. Gay recommended Ms. Pyle "in the highest and most unqualified terms for further employment in the medical field."

D. Prior related cases

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. Each of these denials typically relied on the failure to disclose as evidence in itself of untrustworthiness, sufficient, in conjunction with a prior felony conviction, to warrant denial of licensure.

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.” The applicant appealed the denial to the Superior Court, which reversed the Board's decision. However, issuance of the license was stayed by the court pending resolution of the Board's subsequent appeal to the Alaska Supreme Court. The parties are currently briefing the matter, but a decision is unlikely for at least one year.

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.

a. License granted

At the present time, 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 has recently considered an application from a person with a prior felony conviction in which an administrative law judge and the Division 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.

IV. Conclusion

Protecting the health and safety of patients is of paramount importance in licensing certified nurse aides. There is no suggestion in the record that Ms. Pyle poses any threat to the physical well-being or the belongings of patients she would serve. Indeed, the Board now is in the position of knowing Ms. Pyle to a much greater extent than they would have known any otherwise qualified candidate for a CNA license. In light of the entire record, the administrative law judge recommends that the Board grant Ms. Pyle's application.

DATED this 20th day of March, 2006.

By: Signed
Kay L. Howard
Administrative Law Judge

Adoption

On behalf of the Alaska Board of Nursing, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 9th day of June, 2006.

By: Signed
Signature
Catherine Giessel
Name
Board Chair
Title

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