

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

In the Matter of:)
)
 SUSAN TAYLOR) OAH No. 10-0409-CNA
) Board Case No. 2010-000591
_____)

DECISION

I. INTRODUCTION

Susan Taylor applied for a Nurse Aide Certification. In doing so, she answered “no” to a question concerning prior criminal convictions. In fact, she had previously been convicted of Driving Under the Influence (DUI). The Board of Nursing denied her certification based on an allegation that she had attempted to obtain certification by fraud, deceit, or intentional misrepresentation. Ms. Taylor argued that she had not engaged in fraud, deceit, or intentional misrepresentation because she honestly believed that the question asked on the application did not ask her to disclose a DUI conviction. Because Ms. Taylor has not met her burden of proof, the Board’s decision to deny her application should be upheld.

II. FACTS

Most of the relevant facts are not in dispute. In January of 2010, Ms. Taylor completed her CNA application.¹ Question 2 in the Professional Conduct section of the application asks:

Have you ever been convicted of **any** criminal offense other than a minor traffic violation (Convictions include “suspended impositions of sentence”)?^[2]

Ms. Taylor answered “no.” In fact, she had previously been charged with a violation of Anchorage Municipal Code section 9.28.020.A.³ This provision makes it illegal to drive while intoxicated. A judgment of guilty was ultimately entered.⁴ Ms. Taylor was sentenced to a \$700 fine with \$400 suspended and 60 days in jail with 57 days suspended.⁵ She also lost the use of her vehicle for 30 days, had her driver’s license revoked for 90 days, had to pay \$270 towards the cost of imprisonment, and was placed on probation for 3 years.⁶ Her sentence was slightly

¹ Record at 25 – 26.
² Record at 26 (emphasis in original).
³ Exhibit A, page 6.
⁴ Exhibit A, page 4.
⁵ *Id.*
⁶ *Id.*

more than the minimum sentence permitted by law,⁷ but the court was not permitted to impose the minimum sentence without proof of mitigating factors.⁸

As part of the CNA application process, Ms. Taylor's fingerprints were submitted to the Department of Public Safety and the Federal Bureau of Investigation for a criminal record review.⁹ This review disclosed her prior DUI.¹⁰

A Board of Nursing licensing examiner contacted Ms. Taylor, asking her to explain why she answered no to question two.¹¹ Ms. Taylor provided a written response acknowledging her prior conviction and further stating:

I answered no to question 2 because I misread the question where it said other than a minor traffic violation. I have worked for child care, assets and in the CNA field. I never hid the fact that I had a DUI. I was not hiding this information. I read the question wrong.^[12]

She later spoke with Investigator Ken Weimer. Investigator Weimer testified that Ms. Taylor told him she did not disclose this DUI on the application because it "did not apply" and that she had disclosed it on job applications. The Division¹³ argued that her written statement and her statement to Investigator Weimer were inconsistent. These statements are consistent. Ms. Taylor testified, as discussed in more detail below, that she felt her DUI was a "minor traffic offense" that she was not asked to disclose. In other words, the question did not apply to that offense and she did not need to disclose it to the Board of Nursing. Her statement to Investigator Weimer that she reported this DUI on job applications supports her previous written statement that she was not hiding this information.¹⁴

Nancy Sanders is the Executive Administrator of the Board of Nursing. On July 26, 2010, Ms. Sanders informed Ms. Taylor that her application had been denied. The factual basis for this denial was stated as Ms. Taylor's answer to Question 2 which did not disclose her DUI

⁷ See AMC 9.28.020 C (1) (1999 version).

⁸ AMC 9.28.020 C (2) (1999 version.)

⁹ 12 AAC 44.812.

¹⁰ Record at 19.

¹¹ Record at 09.

¹² Record at 21.

¹³ The Division of Corporations, Business, and Professional Licensing is the agency that investigated Ms. Taylor's application and defended the Board's decision at this hearing.

¹⁴ People don't usually use the exact same words each time they speak about a topic. Using the exact words each time could be considered an indication of fabrication.

conviction.¹⁵ The legal basis for this denial was the statutory prohibition against “attempt[ing] to obtain certification as a nurse aide by fraud, deceit, or intentional misrepresentation.”¹⁶ There is no dispute that Ms. Taylor was fully qualified to be certified but for the allegation that she attempted to obtain her certification by fraud, deceit, or intentional misrepresentation.

Ms. Taylor requested a hearing on the Board’s denial of certification. The matter was referred to the Office of Administrative Hearings and a hearing was held on December 7, 2010. Ms. Taylor testified at that hearing, as did Executive Administrator Nancy Sanders and Investigator Ken Weimer.

III. DISCUSSION

A. LEGAL STANDARDS

In Alaska, in order to use the title Certified Nurse Aide a person must first be certified by the Board of Nursing.¹⁷ The Board issues that certification to any qualified applicant.¹⁸ It may, however, deny certification to a person who has attempted to obtain certification through fraud, deceit, or intentional misrepresentation.¹⁹

When certification is denied, the board must provide a written statement identifying the statute or regulation with which the applicant must show compliance as well as the particular matters that authorize denial of the certification.²⁰ Ms. Sanders’ July 26, 2010 letter provided this information.²¹

Because she is seeking to obtain certification, Ms. Taylor has the burden of proving by a preponderance of the evidence that she should have received certification.²² In the context of this proceeding, that means she must prove that she did not attempt to obtain her license through fraud, deceit, or intentional misrepresentation. Fraud, deceit, and intentional misrepresentation, in turn, all require a specific state of mind. An incorrect answer on an application is only

15 Record at 06.
16 *Id.*, citing AS 08.68.334(1).
17 AS 08.68.332(a).
18 AS 08.68.331(a).
19 AS 08.68.334(1).
20 AS 44.62.370(a)(1) & (2).
21 Record at 06.
22 AS 44.62.460(e)(2).

fraudulent, deceitful, or an intentional misrepresentation if the applicant knew it was wrong or had doubts about the accuracy of the answer.²³

B. QUESTION TWO ON THE APPLICATION REQUIRED DISCLOSURE OF PRIOR DUI'S.

The wording of question two has changed over the years. These changes were made in an attempt to clarify the question and reduce the number of “falsified” applications.²⁴ One previous version of this question asked:

Have you been convicted, entered a plea of guilty, nolo contendere (no contest) or had sentence deferred or suspended for any criminal offense (including DWI/DUI, reckless driving, and DWOL) other than minor traffic violations?^[25]

This version makes it clear that an applicant should answer “yes” if she had previously been convicted of a DWI. The current version says

Have you ever been convicted of **any** criminal offense other than a minor traffic violation (Convictions include “suspended impositions of sentence”)?^[26]

The way the question is currently worded suggests that minor traffic violations are criminal offenses, but they are a type of criminal offense that need not be disclosed when completing this application. There is no definition of which offenses are included within the category of minor traffic violations that need not be disclosed.

Ms. Sanders was unable to define what traffic related violations were minor. She testified that an applicant would not need to report a conviction of Improper Use of Evidence of Registration/Title because that was a minor traffic violation. She was then shown a recent consent agreement in which a CNA applicant paid a \$500 fine and received a reprimand for failing to answer yes to this question when she had previously been convicted of Improper Use of Evidence of Registration/Title.²⁷ Ms. Sanders did say that there might have been particular circumstances that made this violation different, but the consent agreement was not based on any particular circumstance other than the incorrect answer to Question 2.

²³ *Lightle v. State, Real Estate Commission*, 146 P.3d 980, 983 – 984 (Alaska 2006); *Devlin v. Radvansky*, OAH No. 07-0531-RES (Alaska Real Estate Commission 2008), Decision at 5.

²⁴ Sanders’ testimony; Weimer’s testimony. Investigator Weimer repeatedly used the term “falsified” to refer to an application that had incorrect information. He did not appear to make any distinction between intentional misstatements and negligent misstatements.

²⁵ Exhibit 1, ¶ 3(c).

²⁶ *Id.* (emphasis in original).

²⁷ Exhibit 3, ITMO Denise Teal, Case No. 2010-000385.

Question 2 is inherently vague because reasonable people could disagree as to which traffic related offenses were reportable and which were not. A person must have his license in his possession while operating a motor vehicle.²⁸ It is unlawful to permit an unlicensed driver to operate a vehicle.²⁹ It is illegal, with some exceptions, to race a vehicle on a public street.³⁰ Reckless driving³¹ and careless driving³² are prohibited separately, possibly because they have different levels of seriousness. A passenger vehicle may not carry a load that extends beyond the left fenders, or that extends beyond the right fenders by more than six inches.³³ All of these are traffic offenses, but it is not immediately obvious which of these, if any, would be considered serious violations for purposes of question 2.

Even though this question is vague as to many traffic related offenses, it is not vague as to all offenses. Driving under the influence of alcohol cannot reasonably be viewed as a minor traffic violation. Because Ms. Taylor had been convicted of DUI, the only correct answer to question 2 on her application was “yes.” Ms. Taylor answered incorrectly, but that does not necessarily mean that she attempted to obtain certification through fraud, deceit, or intentional misrepresentation.

C. FRAUD, DECEIT, OR INTENTIONAL MISREPRESENTATION

The Board may only deny a license for one of the reasons listed in AS 08.68.334. In this case, the denial is based on an allegation that Ms. Taylor intentionally answered question 2 inaccurately. Other boards have different statutory and regulatory justifications for denying a license. For example, the Medical Board may deny a license for unprofessional conduct.³⁴ That Board has defined unprofessional conduct to include the failure to disclose material information on an application.³⁵ Thus, the Medical Board may refuse to issue a license to an applicant who fails to answer a question correctly even if that failure was due to carelessness. The Medical Board does not have to prove the applicant *intended* to answer the question wrong.³⁶

²⁸ AMC 9.12.030.

²⁹ AMC 9.12.060.

³⁰ AMC 9.26.080.

³¹ AMC 9.28.010.

³² AMC 9.28.015.

³³ AMC 9.46.030.

³⁴ AS 08.64.240(b); AS 08.64.326(a)(9).

³⁵ 12 AAC 40.967.

³⁶ See *In the Matter of Sykes*, OAH No. 08-475-MED, page 6.

The Board of Nursing does not have the same latitude enjoyed by the Medical Board. Fraud, deceit, and intentional misrepresentation all include an element of intent. Certification can be denied only if Ms. Taylor intended to provide an incorrect answer on her application, or had doubts as to the accuracy of her answer.

Both Ms. Sanders and Investigator Weimer testified that they could not and did not distinguish between intentionally and negligently wrong answers on an application. They testified that they could not know what the applicant was thinking and could not know if the wrong answer was intentional. According to these witnesses, if the answer is factually wrong, the application is “falsified” and certification may be denied unless the applicant enters into a consent agreement to accept a reprimand and a fine. Ms. Sanders and Investigator Weimer are mistaken, however. The applicable law *requires* a determination of the applicant’s state of mind. State of mind can be determined in a variety of ways, including an examination of the circumstances surrounding the incorrect answer.³⁷

In cases where the Division has the burden of proof, the failure to adequately address this element could result in a ruling against the Division. In this case, however, it is Ms. Taylor’s burden to prove that she is eligible for certification. She must prove it is more likely true than not true that her incorrect error was not intentional.³⁸

Ms. Taylor testified that she believed her DUI fell within the category of a minor traffic violation that did not need to be reported. She explained that she was released to go home immediately after her arrest, that when she was convicted in 1999 the laws concerning driving under the influence were not as strict as they are today, and that her violation was not a felony conviction.

In response, the Division emphasized the significant penalty that was imposed after Ms. Taylor’s conviction. Among other penalties, she served three days in a half-way house, paid a fine, and lost the use of her car for 30 days. The Division argued that anyone would know that a conviction that resulted in this sentence was more than just a minor traffic violation. Proof of a person’s knowledge or intent is often shown through indirect evidence of this type.

³⁷ *Jackson v. State*, 85 P.3d 1042, 1044 (Alaska 2004) (State of mind determined by circumstantial evidence).

³⁸ It is important to note that the intent at issue is not whether she intended to fill in the “no” circle. The question is whether she knew the application was asking whether she had a prior DUI, and she intended to deceive or mislead the Board by answering “no.” It should also be noted that there was no dispute in this case that she answered question 2 for the purpose of obtaining certification and that she knew the Board would rely on her answer.

Without more, Ms. Taylor's testimony would not be sufficient to meet her burden of proof.³⁹ Although DUI's have not always been viewed as serious offenses, by 1999 DUI's were commonly viewed as serious. She did receive a significant penalty, including 60-day sentence with 57 days suspended. Minor traffic offenses do not include offenses that result in three days of incarceration.

Ms. Taylor did present additional evidence however. She presented the consent agreements and memoranda of agreements from the past ten years that involved a CNA applicant who had answered question 2, or a similar question, incorrectly. These have been marked as exhibits 4, 5, and 6.⁴⁰

These agreements have been summarized in Attachment A. There are 38 agreements where the applicant was asked a question similar to the question asked of Ms. Taylor. In eight of these (21%) the applicant failed to disclose a prior DWI/DUI.⁴¹ There are 15 agreements where the applicant was specifically asked to report a DWI/DUI. In those, only one applicant (7%) failed to report that offense. This evidence suggests that the form of the question, and not intent to mislead, might dictate whether people disclose a prior DWI/DUI in response to Question 2. However, the overall sample size is small, and there are few agreements where applicants were specifically asked about a prior DWI/DUI. Ms. Taylor has not shown that the difference between these two groups is a mathematically significant difference. It could be that this difference is simply the result of random variation. Although it is a close question, even with this additional evidence Ms. Taylor has not met her burden of proof.

D. CERTIFICATION

The Board denied Ms. Taylor's application for certification based on the evidence before it at the time. Ms. Taylor exercised her right to a hearing, and the Board now has more information about Question 2 and Ms. Taylor's answer.

³⁹ This does not mean she intentionally provided a wrong answer; it only means she has not proven that she did not intentionally provide a wrong answer.

⁴⁰ Ms. Taylor's counsel divided these into three categories. It is not clear why counsel created a third category labeled "cases of no particular relevance." One agreement (Hansen) contained in that category did not specify the question asked on the application, but the remaining agreements are relevant. Instead of accepting counsel's categorization, each agreement in all three exhibits has been examined and analyzed.

⁴¹ One applicant failed to report numerous offenses, including a DWI. This applicant is not counted as one of the applicants failing to report a DWI.

The Board has acted consistently when it has learned that an applicant has failed to properly disclose information requested in an application.⁴² The Board typically grants certification but imposes a \$500 fine and a reprimand. The Board should offer Ms. Taylor that same opportunity. She should be allowed to accept certification conditioned on a \$500 fine and a reprimand.⁴³ Her acceptance would not be an admission of any wrongdoing – as none has been proven – but would be an acceptance of the Board’s determination that it would otherwise exercise its discretion to deny certification.

IV. CONCLUSION

Ms. Taylor has not met her burden of proving the Board’s original denial of her application for certification was incorrect. The Board will certify her conditioned on her agreement to pay a \$500 fine within 120 days and acceptance of a public remand that states “It is hereby ordered that a public reprimand be issued against CNA, Susan Taylor.” If Ms. Taylor does not accept certification with these conditions, then the Board’s denial of July 21, 2010 remains in effect.

DATED this 15th day of December, 2010.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

⁴² Exhibits 4, 5, 6, and B.

⁴³ This would be an agreement directly between the Board and Ms. Taylor, and not a Consent Agreement between the Division and Ms. Taylor, subject to Board approval.

Adoption

The Board of Nursing 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 6th day of April, 2011.

By: Signed _____
Signature
Beth Farnstrom _____
Name
Board of Nursing Chair _____
Title

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