IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

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SUSAN TAYLOR,
Appellant,

v.

STATE OF ALASKA, BOARD OF NURSING
Appellee.

Case No. 3AN-11-07631CI

Order on Administrative Appeal

Appellant Susan Taylor appeals the administrative decision by Appellee Board of Nursing (Board) conditioning her certification as a nurse aide pursuant to AS 08.68.331(a). After the Board initially rejected her application, an administrative law judge recommended the Board certify her conditioned on a $500 fine and reprimand. The Board adopted the judge's recommendation but failed to implement it. For the following reasons, the Court AFFIRMS the Board's decision and REMANDS for actions consistent with that decision.

Statutory Background

The Board administers and is empowered to regulate the certification of nurse aides in Alaska.[1] Certification as a nurse aide shall be granted to qualified applicants by either the Board or, when designated, the Department of Commerce, Community, and Economic Development.[2] The Board may deny certification to a

[1] AS 08.68.100, .331.
[2] AS 08.68.331(a).

person who attempts "to obtain certification as a nurse aide by fraud, deceit, or intentional misrepresentation."[3]

The Board is required to comply with the Administrative Procedures Act.[4] Under the Act, if the Board denies an application for certification, an applicant can appeal the denial and request a hearing. After the hearing, an administrative law judge (ALJ) issues a proposed decision while the Board retains discretion to make a final decision.[5] The Board then issues a final decision adopting the proposed decision as the final agency decision, remanding to the ALJ for further findings, adopting the proposed decision with revisions, or rejecting it altogether.[6] Rejections and revisions must be done in writing noting the basis for the final decision and identifying any affected findings and reliance on testimony or other evidence.[7] Judicial review is available within 30 days of the Board's decision.[8]

Facts and Proceedings

This is an appeal from an April 6, 2011, final decision by the Board following an administrative hearing. In January 2010, Ms. Taylor applied for certification as a nurse aide.[9] One of the questions on the application was:

> Have you ever been convicted of **any** criminal offense other than a minor traffic violation (Convictions include "suspended imposition of sentence")?[10]

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[3] AS 08.68.334(1).
[4] AS 08.68.140; 44.62.330(a)(7).
[5] AS 44.64.060(e).
[6] *Id.*
[7] AS 44.64.060(e)(4)-(5).
[8] ALASKA R. APP. PROC. 602(a)(2).
[9] R. at 000040-42, Application for Certified Nurse Aid by Examination (signed January 15, 2010).
[10] R. at 000041, Application (emphasis in original).

Ms. Taylor answered "no."[11] The term "minor traffic violation" was not defined; no definitions or statutes were cited on the form.[12] Ms. Taylor was convicted of DWI in 1999.[13] On April 26, 2010, in response to the Board's request,[14] she wrote a letter describing her conviction, 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 childcare, assets and in the CNA field [sic] I never hid the fact that I had a DUI. I was not hiding this information. I read the Question wrong [sic][15]

Based on her answering "no" and her subsequent admission/explanation, the Division of Occupational Licensing found she should have answered "yes" and that, by answering "no," she tried to obtain certification through "fraud, deceit or intentional misrepresentation."[16] The Division suggested the matter could be resolved if she admitted this, to which she refused.[17] Based on the Division's determination and her refusal, the Board denied her application for certification.[18]

Ms. Taylor appealed the denial,[19] which was heard by ALJ Friedman on December 7, 2010. At the hearing, it came out that any factually false information is assumed to be a violation since the Division does not distinguish between

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[11] *Id.*

[12] *See id.*

[13] R. at 000034, Criminal History Report from Alaska Dep't of Pub. Safety (March 17, 2010); R. at 000037, Judgment of March 5, 1999, in Case No. 3AN-99-1385CR.

[14] R. at 000024, Letter from Niki Ornelas-Garcia, Occupational Licensing Examiner, Bd. of Nursing, to Susan Taylor (April 23, 2010).

[15] R. at 000036, Letter from Susan Taylor to Alaska Bd. of Nursing (April 26, 2010).

[16] R. at 000053, Investigative Report from Alaska Div. of Occupational Licensing (July 15, 2010).

[17] *Id.*; R. at 000087, Investigative Notes (June 16, 2010); R. at 000103-04, Memo from Ken Weimer, Investigator, Dep't of Commerce, Cmty., & Econ. Dev., to Bd. of Nursing (July 19, 2010).

[18] R. at 000002, Letter from Dep't of Commerce, Cmty. & Econ. Dev. to Susan Taylor (July 26, 2010); R. at 000099, License Action (July 27, 2010).

[19] R. at 000004, Letter from Yale Metzger to Jennifer Strickler, Operations Manager, Dep't of Commerce, Cmty., & Econ. Dev. (July 29, 2010).

answers given intentionally or negligently.[20] The Board's Executive Administrator testified that she herself did not know what would constitute a minor traffic violation.[21] The ALJ found Question 2 "inherently vague because reasonable people could disagree as to which traffic related offenses were reportable and which were not."[22] However, the ALJ also noted that a DWI was most certainly not a minor traffic offense and that Ms. Taylor should have answered "yes," but that it "does not necessarily mean that she attempted to obtain certification through 'fraud, deceit or intentional misrepresentation.'"[23]

In a December 15, 2010, decision, the ALJ found Ms. Taylor should be certified conditioned on a $500 fine and a reprimand, on the understanding the Board would not certify her without it.[24] The decision noted Ms. Taylor "ha[d] not met her burden of proof" that she did not "intentionally answer question 2 inaccurately," but also found no wrongdoing "has been proven."[25] Ms. Taylor requested reconsideration.[26] The State opposed reconsideration, arguing that grounds for reconsideration are limited to "typographical or other manifest error" prior to a final agency decision.[27] The ALJ agreed with this argument in issuing a

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[20] R. at 000499, Proposed Decision by ALJ Friedman at 6, issued December 15, 2010.
[21] R. at 000497, Proposed Decision at 4.
[22] R. at 000498, Proposed Decision at 5.
[23] *Id.*
[24] R. at 000501, Proposed Decision at 8.
[25] *Id.* at 1, 5, 8. *See also* R. at 000491, Letter from ALJ Friedman to Bd. of Nursing (January 7, 2011).
[26] R. at 000476-78, Motion for Reconsideration, filed December 21, 2010.
[27] R. at 000479-80, Opposition to Motion for Reconsideration, filed December 27, 2010.

denial of reconsideration, stating Ms. Taylor's remedy was not reconsideration but a proposal for action submitted to the Board,[28] which she subsequently filed.[29]

The day after the ALJ proposed decision issued, a Division investigator (a witness at the hearing and the investigator who had made the initial determination on her application) engaged in an *ex parte* communication with the ALJ.[30] In her proposal for action, Ms. Taylor referred to this "critical and threatening email," arguing it prejudiced her in her request for reconsideration.[31] She further requested the Board reject the proposed decision for the same reasons she had requested reconsideration – simply, that there is no evidence she did anything other than mistakenly answer a vague question incorrectly.[32]

The Board adopted the ALJ proposed decision,[33] offering to "certify her conditioned on her agreement to pay a $500 fine within 120 days and acceptance of a public reprimand."[34] Her failure to "accept certification with these conditions" would result in the initial denial remaining in effect.[35] Ms. Taylor was never given a consent agreement to sign and accept the stated conditions.[36]

Ms. Taylor filed her brief in September 2011, claiming the following:

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[28] R. at 000481, Order Denying Motion for Reconsideration, issued December 28, 2010.
[29] R. at 000487-89, Susan Taylor's Proposal for Action Pursuant to AS 44.64.070(e)(4-5), filed January 3, 2011.
[30] Notice of *Ex Parte* Communication (December 17, 2010); R. at 000482-86, Susan Taylor's Response to Notice of *Ex Parte* Communication, filed January 3, 2011; R. at 000490, Email from Ken Weimer, Senior Investigator, Div. of Operational Licensing, to ALJ Friedman (December 16, 2010).
[31] R. at 000487-89, Proposal for Action.
[32] *Id.*
[33] R. at 000502, Adoption of the ALJ Proposed Decision of December 15, 2010, issued April 6, 2011.
[34] R. at 000501, Proposed Decision at 8.
[35] *Id.*
[36] Brief of Appellant at 12, 16, filed September 13, 2011.

> [1] the Division investigator engaged in *ex parte* communication with the ALJ, resulting in prejudice to subsequent decisions;
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> [2] the Agency incorrectly applied AS 08.68.334(1), using improper presumptions in interpreting the statute and failing to follow binding case law in applying the statute;
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> [3] the Agency's application of AS 08.68.334 is void as constitutionally vague;
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> [4] the Agency incorrectly applied the evidentiary standard in her hearing; and,
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> [5] the Agency violated her constitutional right to due process and substantive due process.[37]

The Board filed its brief October 13, 2011, stipulating that the reply brief would be due November 2, on which date the reply brief was filed. Oral arguments were requested and Judge Torrisi noted in a December 22 order that any arguments should be scheduled before another judge upon his retirement. Arguments were initially scheduled for May 30, 2012, and then rescheduled upon Ms. Taylor's request. Oral arguments were held on June 22, 2012.

Standard of Review

In an administrative appeal, the Court exercises its independent judgment on the evidence to find whether there was a prejudicial abuse of discretion.[38] "Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."[39]

[37] Appellant's Notice of Appeal and Statement of Points, filed September 9, 2011.
[38] AS 44.62.570(b)-(c).
[39] AS 44.62.570(b).

Where agency expertise is implicated, the Court applies a "substantial evidence" test.[40] For example, whether the Board could deny or condition Ms. Taylor's certification based on an incorrect answer to Question 2 would be evaluated using this test.[41] If the decision has a reasonable basis in law and is supported by substantial evidence, meaning "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" the Court must uphold it, even if it ultimately disagrees.[42]

The Court applies a "substitution of judgment" test for statutory and regulatory interpretation issues which do not require agency expertise.[43] For example, constitutional questions and evidentiary standards would be evaluated using this test. Even if the decision "has a reasonable basis in law," the Court substitutes "its own judgment for that of the agency" to "independently consider the meaning of the statutes."[44]

Decision on Appeal

Ms. Taylor argues that an improper evidentiary standard was used to evaluate the Board's initial denial at her hearing. In the Board's decision (the ALJ proposed decision, without amendment), the standard was given as "Ms. Taylor has the burden of proving by a preponderance of the evidence that she should have received certification . . . prov[ing] that she did not attempt to obtain her license

[40] *See Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 332 (Alaska 2009).
[41] *See Alaska Bd. of Nursing v. Platt*, 169 P.3d 595, 601 (Alaska 2007).
[42] *See id.* (citations omitted).
[43] *Borkowski v. Snowden*, 665 P.2d 22, 27 (Alaska 1983).
[44] *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903-04 (Alaska 1987).

through fraud, deceit, or intentional misrepresentation."[45] Since Ms. Taylor was seeking certification upon an initial denial for that reason, this was the appropriate standard under AS 44.62.460(e)(2).

Ms. Taylor argues that an inappropriate *ex parte* communication tainted these proceedings. However, the ALJ denied reconsideration based on valid grounds, which was independently reviewed by the Board.[46] Further, the Board adopted the ALJ proposed decision without amendment, which was issued before the *ex parte* communication by a Division investigator. Since the decision on appeal could not have been tainted, Ms. Taylor has not shown where any prejudice could have attached to be evaluated.

Ms. Taylor argues the Board's application of AS 08.68.334(1) is void as constitutionally vague, or at the very least was improper in her case, resulting in her due process and substantive due process rights being violated. The statute provides the Board with discretion in denying certification based on fraud, deceit, or intentional misrepresentation. There is no provision authorizing denial for negligence in completing the application. The issue then is whether fraud, deceit, or intentional misrepresentation is irrebuttably imputed to all applicants who incorrectly answer the prior convictions question, negligently or otherwise.

The application at one time phrased the question as follows:

> Have you been convicted, entered a plea of guilty, nolo contendere (no contest), or had sentence deferred or suspended, for any criminal

[45] R. at 000496, Proposed Decision at 3.
[46] Brief of Appellee at 5, filed October 13, 2011.

offense (including DWI/DUI, reckless driving and DWOL) other than minor traffic violations?[47]

Testimony at the hearing provided that the wording had been changed over the years to reduce the number of "falsified" applications.[48] It appears from the record, however, that DWI, reckless driving, and DWOL convictions are omitted considerably more often when the question is phrased the way it is currently phrased (without specifying those offenses).[49] Further, regardless of how the question is phrased, other applicants claim, as Ms. Taylor claims, that convictions are omitted because the question is confusing.[50] By adopting the ALJ proposed decision without amendment, the Board admits to these observations.[51]

The record shows a fine and reprimand (by consent agreement) is one way the Board frequently allows certification of those who fail to report convictions on

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[47] *See* R. at 000497, Proposed Decision at 4.
[48] *Id.*
[49] *See* R. at 000138-468. When the question included DWI and DWOL, omitted offenses included Failure to Obey a Citation, Assault, Fraud, Resisting Arrest, Minor in Possession of Alcohol, two Minor on Premises, two Shopliftings, two Minor Consuming Alcohols, three Disorderly Conducts, three old DWOL convictions and two 20-year-old DWI convictions. When the question is phrased without those offenses, as it is here, omitted offenses included Failure to Obey a Citation, Improper Use of Evidence of Registration, Child Abuse, Larceny, Bad Checks, Absent Without Leave, Evading an Officer, Furnishing Alcohol to a Minor, Misconduct Involving Weapons, two Merchandise Concealments, two Thefts, two Criminal Mischiefs, two Possessions of Controlled Substances, two Minor Consuming Alcohols and one Driving After Consuming, two Driving Without Insurances, three Disorderly Conducts, three Reckless Drivings, four Shopliftings, six Assaults, ten DWI convictions (including Appellant) and eleven DWOL convictions.
[50] *See, e.g.*, R. at 000146, Memorandum of Agreement between Dep't of Cmty. & Econ. Dev., Div. of Occupational Licensing, and Jamaal T. Roberts (adopted March 8, 2006); R. at 000201, Memorandum of Agreement between Dep't of Commerce, Cmty., & Econ. Dev., Div. of Occupational Licensing, and Maria L. Cobain (adopted December 7, 2005); R. at 000310, Memorandum of Agreement between Dep't of Commerce, Cmty., & Econ. Dev., Div. of Occupational Licensing, and Sandra Tsinnie (adopted May 18, 2004); R. at 000413, Memorandum of Agreement between Dep't of Cmty. & Econ. Dev., Div. of Occupational Licensing, and Sharon Roberts (adopted May 14, 2003) (Roberts, who had a 25-year-old Shoplifting conviction, checked both "yes" and "no" in answering Question 2).
[51] R. at 000500, Proposed Decision at 7.

the application.[52] At least one prior consent agreement allowed an applicant to sign without admitting or denying any wrongdoing,[53] but most require admission, which makes sense since, under the statute, the Board cannot deny certification or discipline an applicant without wrongdoing.

By adopting the ALJ proposed decision without amendment, the Board's final decision provides that "[a]n incorrect answer on an application is only fraudulent, deceitful, or an intentional misrepresentation if the applicant knew it was wrong or had doubts about the accuracy of the answer."[54] The decision also provides that Question 2 is "inherently vague"[55] and that the statute requires a distinction be made as to the applicant's state of mind before certification can be denied under AS 08.68.334(1).[56] The hearing testimony and the overwhelming number of applicants who signed consent agreements after incorrectly answering a vague question may show this was not the Board's position before now; but, by adopting the ALJ proposed decision, it was the position as applied to Ms. Taylor.

Ms. Taylor was provided and took advantage of all the due process provided by Alaska law to obtain her certification, including the present appeal. The Court finds the Board acknowledged in its final decision that an applicant can

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[52] *See* R. at 000092-93, Letter from Dan Branch, Asst. Attorney Gen., to Yale Metzger (July 15, 2010); R. at 000124-27, Bd. of Nursing Discipline Database, Falsification of Application – CNA; R. at 000138-468, Memoranda of Agreement between Dep't of Commerce, Cmty. & Econ. Dev., Div. of Occupational Licensing, and various CNA applicants.

[53] *See, e.g.*, R. at 000371, Memorandum of Agreement between Dep't of Commerce, Cmty., & Econ. Dev., Div. of Occupational Licensing, and Pamela J. Hansen at ¶3 (adopted June 6, 2007) ("Respondent admits to the following facts (or neither admits nor denies the following allegations)").

[54] R. at 000497, Proposed Decision at 4.

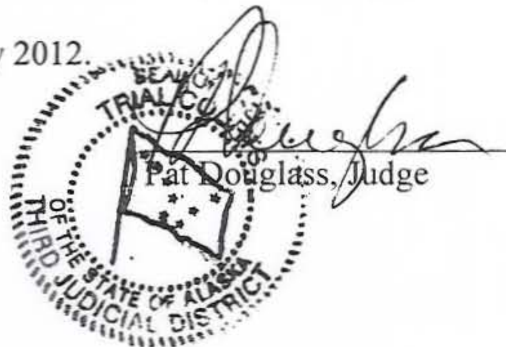
[55] R. at 000498, Proposed Decision at 5.

[56] R. at 000496-99, Proposed Decision at 3-6.

rebut the Board's apparently automatic presumption of fraud, deceit, or intentional misrepresentation, initially applied to all applicants who incorrectly answer Question 2. The Board's final decision also outlines how Ms. Taylor failed to rebut this presumption by a preponderance of the evidence, which was her burden, and this finding is supported. The Board could have denied her application and/or disciplined her under the statute; thus, it did not abuse its discretion in offering certification conditioned on a signed consent agreement to pay a fine and receive a reprimand. The Board's decision is hereby AFFIRMED.

However, the Board failed to provide her with the consent agreement. At oral argument, it countered that Ms. Taylor had not paid the $500 fine, either.[57] The decision is clear, however, that "[t]he Board should offer Ms. Taylor [the] opportunity [to] accept certification conditioned on a $500 fine and a reprimand" and that her "acceptance would not be an admission of any wrongdoing."[58] To comply with its own decision, the Board shall provide Ms. Taylor with a consent agreement which does not require her to admit wrongdoing within 45 days of the date of this order. If she accepts, she shall be given 120 days to pay the fine.

So ordered this 5th day of July 2012.



Pat Douglass, Judge

I certify that on 7/5/12
a copy of this document was sent/faxed to
the attorneys of record or other, Val Metzger
Dan Branch
VM
Clerk

[57] *See also* Brief of Appellee at 3.
[58] R. at 000501, Proposed Decision at 8. *See also* Reply Brief of Appellant at 2, filed November 4, 2011.