

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

IN THE MATTER OF)	
)	
ANTHONY PELAIA)	
)	Case No. OAH-06-0286-NUR
_____)	Board Case No. 2356-06-002

DECISION

I. Introduction

Anthony Pelaia applied for certification as a nurse aide by examination. The Alaska Board of Nursing (“the board”) denied the application, and Mr. Pelaia requested a hearing. The board referred the case to the Office of Administrative Hearings to establish the facts and recommend a decision. Administrative Law Judge David Stebing heard the appeal on June 21, 2006. Mr. Pelaia appeared with his attorney, Daniel Westerburg. Assistant Attorney General David Brower represented the Division of Corporations, Business and Professional Licensing (the division). Following the hearing, the case was reassigned to Administrative Law Judge Dale Whitney. After listening to the entire hearing record, reviewing the written record, and due deliberation, the administrative law judge recommends that the board grant Mr. Pelaia’s application for certification, with certain conditions.

II. Facts

In 1997 Mr. Pelaia was in his late twenties and living in Texas, where he had been working as a firefighter and EMT.¹ Mr. Pelaia and his wife had fallen into habitual drug use, and their marriage was deteriorating. Mr. Pelaia’s wife notified his supervisor at the fire station that Mr. Pelaia was using drugs, and Mr. Pelaia was forced to resign and was unable to find other employment. After this the marriage broke up. Mr. Pelaia fought for custody of their young son, but was unsuccessful. The court did grant him biweekly visitation rights.

On February 11, 1997, Mr. Pelaia was on what he describes as “a binge of crack cocaine,” and he fell asleep in the cab of his pickup truck in a Wal-Mart parking lot in Texas. When he woke up the next morning, Mr. Pelaia had a craving for more cocaine, but no money.

¹ Except where noted, the facts are derived from Mr. Pelaia’s testimony at the hearing. Most of the facts are undisputed.

When he saw a 76-year-old woman carrying a large purse, Mr. Pelaia got out of his truck and grabbed the purse from the woman's hand. The woman fought back, and was able to knock the purse out of Mr. Pelaia's hands on to the ground. Mr. Pelaia picked up the purse and ran back to his truck, with the woman in pursuit. Mr. Pelaia got back into his truck, and as the woman was trying to get the truck's door open Mr. Pelaia drove off and left the area. Mr. Pelaia did not have any kind of weapon, and he did not threaten, push or attack the victim, who was left unhurt.

Mr. Pelaia did not find any cash or an ATM card in the purse, but he did find a checkbook. He wrote out a check for \$200 to "cash" and tried to cash it at a grocery store, only to find that the store would not cash a check for more than \$25.00. Mr. Pelaia then waited for the issuing bank to open and went to the drive-through window to cash the check. When the teller requested identification, Mr. Pelaia presented his own driver's license, and the teller cashed the check. Mr. Pelaia immediately bought some more cocaine and ingested it, and then called his brother and confessed what he had done. After talking to his brother and father, Mr. Pelaia reported to a police station and turned himself in for the crime on that same day.

After spending several months in jail, Mr. Pelaia pled no contest to "theft from a person," which is a felony classified in Texas as a "state jail felony."² He was sentenced to five years of probation and a nine-month confined treatment program in Texas called the Substance Abuse Felony Punishment Facility.³ After completing the inpatient portion of the program, Mr. Pelaia then spent several months in a halfway house. Mr. Pelaia's probation officer reports that after his release, "Mr. Pelaia reported as directed each week for nine months, then, each month for the remainder of his probationary period. He worked and paid his fees. This department does urinalysis drug testing on a random basis. Mr. Pelaia did not have any positive tests."⁴

After he was released from the punishment facility, Mr. Pelaia took an entry-level job during a period he describes as a time of rebuilding his life. Mr. Pelaia never missed his bi-weekly visitation with his son, he faithfully paid his child support every month, and he cooperated with his probation officer. Using his brother as an intermediary, Mr. Pelaia apologized to his victim. Although the court ordered him to repay the victim in increments of ten dollars per month, Mr. Pelaia directed his brother to repay the victim immediately using money from Mr. Pelaia's tax refund.

² Exhibit F.

³ *Id.*; Exhibit 1, p. 39; testimony of Mr. Pelaia.

⁴ Exhibit 1, p. 38.

Mr. Pelaia testified that the habitual use of drugs is something that he and his former wife descended into together when they were still married. Mr. Pelaia stated that his ex-wife was suffering the continuing effects of serious child abuse, and he testified that after they split up, both continued using drugs. Mr. Pelaia's drug use ended the day of the purse-snatching incident, but he testified that his wife's life continued in a downward spiral, until she was using heroine and otherwise in a desperate state. At one point, Mr. Pelaia testified, his ex-wife extended his weekend visitation to a week, then to a month, and so on until she stopped communicating with him and their son altogether. Besides taking care of their son, Mr. Pelaia was also caring for his ex-wife's daughter from a previous marriage, and he enrolled both children together in a private school. After a lengthy period of time, Mr. Pelaia petitioned for custody of their son, and the court granted the motion when his former wife failed to appear at the hearing. After several years, his ex-wife owed Mr. Pelaia about \$8,000 in back child support. Mr. Pelaia went to the Texas D.A.'s office and requested that the arrears be eliminated, in order to afford his ex-wife an opportunity to get back on her feet.

Mr. Pelaia's testimony about his former wife was generally positive. He stated that she finally did gain control of her life, discontinued all use of drugs, and obtained employment. Although Mr. Pelaia has maintained primary custody of his son, his ex-wife began exercising visitation again, and Mr. Pelaia testified that she now has a good job and is soon to be remarried. Mr. Pelaia testified that he is happy that he can now confidently put his son on a plane by himself to visit his mother, and that his son is comfortable being with either parent.

Mr. Pelaia submitted a number of letters in support of his application, but perhaps the most intriguing of these comes from his ex-wife, who writes:

I am the ex-wife of Anthony Pelaia and the mother our thirteen year old son. Anthony and I were divorced approximately twelve years ago, which is the same time period Anthony's trouble began. We had a bitter divorce and Anthony did some things I know he regrets. The reason I am writing this letter now is because I would like to show my support for Anthony to obtain his certified nurse aide license.

When we were married Anthony was a fireman and an EMT and he did very well. Obviously he had some problems in the past but it was a short period of time. Anthony and I share joint custody however, our son has mainly lived with his father for the last ten years. He does a great job as a father, he is a hard worker and I believe he will be a great asset to the hospital in Homer Alaska. If you have any questions please do not hesitate to call me.⁵

⁵ Exhibit 6.

After his release from the Texas punishment facility, Mr. Pelaia went to work for Longview Coca-Cola Bottling company. He started as a “pull up guy,” which is someone who stocks shelves and arranges products at various sales points around town. This position did not involve handling of money. Mr. Pelaia was eventually promoted to driver on a full service route. Carrying keys to soda machines all over town, Mr. Pelaia would restock machines and collect cash. All of the cash that a driver collected in this position would be counted and matched against the amount of product restocked in the vending machines. Mr. Pelaia worked for the Longview bottler for four years until the locally-owned bottler was bought out by the Coca-Cola Company, whose policies prohibit employment of any person with felony record. Before the sale closed, the local company owners gave Mr. Pelaia \$1,500 and helped him get a job with the local Dr. Pepper bottler in a similar position. From there Mr. Pelaia eventually moved to a higher paying job with more of a sales emphasis for another beverage company, Mountain Valley Water.

Wanting to get back into the medical field, Mr. Pelaia accepted a job as a patient care technician at a DaVita dialysis clinic some time in 2000 or 2001. The person who hired Mr. Pelaia at DaVita was a family friend who was aware of Mr. Pelaia’s conviction and general circumstances. In this position, Mr. Pelaia assessed patients, took vital signs and calculated patient weight, followed doctors’ orders and worked with RNs and LPNs. Mr. Pelaia testified that he enjoyed this job, and liked being able to work with the same patients every other day four to five hours at a time. Mr. Pelaia eventually transferred to a larger DaVita unit with 32 beds, working 12-hour shifts that required getting up at 3 or 4 a.m. Though he enjoyed the work, Mr. Pelaia testified that he eventually became burned out by the early morning shifts and long hours.

Mr. Pelaia had family living in Homer, and around 2002 he came to Alaska and worked for a very short time, about three weeks, for Seldovia Village Tribe as a medical assistant in Homer. Mr. Pelaia was then offered a nine-month temporary job with Conoco-Phillips that paid very well, more than Mr. Pelaia had ever earned in his life. Mr. Pelaia accepted that job, and when it ended he returned to Texas and went back to work at the larger DaVita unit, which rehired him without hesitation.

In the spring of 2005 Mr. Pelaia was offered a job back in Homer working for his grandmother’s estate as his grandmother’s caregiver. This job was guaranteed to last for twelve months, and included the use of a cabin, rent free with all utilities paid, and use of a car. In this position Mr. Pelaia monitored his grandmother’s vital signs, picked up her medications, and took

her to doctor's appointments and other places she needed to go. Mr. Pelaia accepted this job and stayed with it until his grandmother was ready to move into assisted living facility, at which time he stayed on as her care coordinator and continued in that capacity. Mr. Pelaia's grandmother wrote the following letter in support of his application for certification:

Anthony S. Pelaia has been my custodial care provider since June 2005. I am 79 years old and I have found him to be polite, gentle, very helpful, and extremely attentive to my needs.

I no longer drive and part of Anthony's duties is to assist me with my shopping, doctor visits, and any other outings. On one occasion I fainted in the check-out lane at the grocery store from anemia and he was right there to catch me before I hit the floor. He was calm and professional during the crisis and managed the situation without panic. He alleviated the concerns of the store manager, called an ambulance on his cell phone, and attended to my needs as we waited for the ambulance. I felt very secure.

I recently have been diagnosed with Type 2 diabetes and he gathered information for me over the internet from the American Diabetes Association and took me grocery shopping, expertly guiding me on food choices. I felt overwhelmed by the prospect of making new choices and he alleviated my stress by making the whole process easy.

I have had no concerns as to his character or integrity. I have a monthly stipend and conduct my purchases with cash and have never felt any uneasiness in the company of Anthony.⁶

While living in Homer, caring for his grandmother did not take all of Mr. Pelaia's time. In addition to caring for his grandmother, Mr. Pelaia went to work for Bay Realty, a real estate firm where his sister is an agent. Mr. Pelaia does janitorial work in the firm's main office, carrying keys to the building and working nights and weekends without supervision after the office is closed. Mr. Pelaia also began performing occasional manual labor jobs for Long Maintenance, a property management and development firm that has frequent business contacts with Bay Realty.

Since his release from treatment, Mr. Pelaia has become a runner and fitness enthusiast. Through a fitness club in Homer, Mr. Pelaia met and became friends with Veronica Hill, a registered nurse in Homer. Knowing Mr. Pelaia and of the need for CNA's at the hospital in Homer, Ms. Hill was the first person to encourage Mr. Pelaia to seek certification as a CNA. Mr. Pelaia testified that he was initially reluctant to pursue any kind of job that required certification because of his conviction, but Ms. Hill persuaded him to apply and seek certification. In a

⁶ Exhibit 5.
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reference letter she wrote for Mr. Pelaia on December 19, 2002, Ms. Hill stated that prior to moving to Alaska she was director of a geriatric psych unit for six year, with a staff of 25 RNs and CNAs.⁷ Ms. Hill spoke highly of Mr. Pelaia and listed a number of positive attributes that would make him a valuable healthcare worker. These included being dependable, responsible, intelligent, a non-smoker, a non-drinker except for occasional glasses of wine, having good health habits, a friendly, optimistic demeanor, and very good relations with patients.

Mr. Pelaia eventually contacted South Peninsula Hospital in Homer and applied for a nurse aide position. He went through the full application and interview process, which required disclosure of his felony record, and included an orientation and an 80-hour clinical evaluation in which he worked in the hospital and was assessed for his suitability for different areas of care. Of five areas of care, Mr. Pelaia was evaluated for three, with the following comments being recorded on his evaluation form:

- 1. Long Term Care:** Tony, everyone enjoyed working with you both staff & residents – Don't get discouraged, the health field is where you need to be – I encourage you to take more classes & pursue that degree – don't let setbacks hold you from going forward.
- 2. Acute Care:** Great job Tony – you jumped right in & were eager to learn – this area you would excel in.
- 3. Home Health:** N/A
- 4. Friendship Center:** 11/23/05 Tony did a good job with everything he was requested to do. He had several games including a guessing game. He assisted a client at lunch time. He was upbeat and enjoyed being with the participants. Judy Calhoun Assistant Program Director.
- 5. Assisted Living Facility:** [blank]

Mr. Pelaia testified that the comments in category 1, Long Term Care, were written by Sue Brooks, and that he had told her about his past including his conviction.

The hospital was impressed with Mr. Pelaia and was prepared to hire him. Ultimately, however, Mr. Pelaia was not able to qualify for the job. The position required certification as a nurse aide; Mr. Pelaia applied for the job thinking he would be able to obtain certification, but he was not aware of the time required for certification even without the issue of a felony conviction on his record. The hospital did place Mr. Pelaia on its rehire list and sent him a letter stating that it would be happy to consider him for future openings.

⁷ Exhibit 2.
OAH No. 06-0286-NUR

Mr. Pelaia called several witnesses in support of his application for certification, and he submitted a number of letters. Brad Henderson, RN, is the facility administrator for DaVita's Longview Dialysis Center in Texas where Mr. Pelaia used to work. This facility offers kidney dialysis and dialysis for patients suffering end-stage renal disease. Mr. Henderson testified that Mr. Pelaia's duties as a patient care technician included responsibility for total patient care during dialysis for four patients at a time, with eight to twelve patients per day. Under the oversight of an RN or LPN, this responsibility included cannulating a graft or fistula, monitoring vital signs and observing for signs of hypoglycemic shock. Mr. Pelaia was also responsible for water treatment and hospital-grade water quality assurance.

Mr. Henderson testified that when he took over the DaVita facility in July 2004, Mr. Pelaia was already working there. Though as facility administrator he did not directly supervise Mr. Pelaia, Mr. Henderson testified that he was very familiar with Mr. Pelaia's work for a period of just over a year, up to the time Mr. Pelaia resigned to come to Alaska again. Mr. Henderson testified that both the patients and other staff members expressed a great sense of loss at Mr. Pelaia's departure. Mr. Henderson stated that while he wished Mr. Pelaia success, his hope is that Mr. Pelaia will return to Texas and go back to work at DaVita, where a position will always be available for him. Mr. Henderson had not been aware of Mr. Pelaia's conviction because Mr. Pelaia had already been an employee when Mr. Henderson took over the facility; nevertheless, having been advised of the matter shortly before the hearing, Mr. Henderson stated that the fact made no difference in his desire to hire Mr. Pelaia back, and that the company's general rule against hiring employees with felony records would be waived in Mr. Pelaia's case.

Debra Leisek, broker and owner of Bay Realty in Homer, submitted a letter in support of Mr. Pelaia and also testified on his behalf. In her letter, she writes in part that Mr. Pelaia "is trustworthy, fair and honest. He is family orientated and exceptionally ethical...his integrity is beyond reproach." Ms. Leisek states that Bay Realty trusts Mr. Pelaia with a great deal of confidential information that is kept in the agents' desks, and she speaks highly of his caring and upbeat personality. Ms. Leisek's testimony reaffirmed her letter. She testified that Mr. Pelaia is a very valuable employee because he is a hard worker, is attentive to detail, and is extremely likable and personable.

Jim Long is the owner of Long's Maintenance, for whom Mr. Pelaia has done odd maintenance and cleanup jobs. Long's Maintenance manages and develops property and does a great deal of business with Bay Realty. Mr. Long writes that "I have known Tony Pelaia for

almost 2 years. He has never given me any reason to doubt his integrity or his honesty. I do know about his past problems but I also know he has put the past away and lives an open and direct life...I know Tony is most interested in helping folks who need it. He loves working with people and helping them. I think he would be a true asset to any hospital and I know I would want him to be there for me should I need medical attention.”⁸

Julie Rogers is a board-certified real estate appraiser in Homer whom Mr. Pelaia knows through his work at Bay Realty. Ms. Rogers writes that “Tony has assisted me in many aspects of my business. I have found his work ethic to be impeccable.”⁹

Debbie Williams is an Insurance Broker in Texas who lived next door to Mr. Pelaia and his son. Mr. Pelaia testified that Ms. Williams is a very involved single mother who home schools her son, and that after their sons became friends Mr. Pelaia got Ms. Williams’ son involved in the church youth group that Mr. Pelaia’s son was active in. Ms. Williams wrote in part, “I make it a point to know a person to whom I am intrusting the care and safety of my son. I found Mr. Pelaia to be a wonderful father and a man who loves people. His home is one of two where I have allowed my son to stay overnight with a friend. I consider Mr. Pelaia to be one of integrity and character, as well as my friend.”

Sharin Anderson works for Knik Construction in Homer and owns a very nice home. Mr. Pelaia testified that he has done maintenance and cleaning jobs for Ms. Anderson, and that he takes care of her home and animals for extended periods while she is working in the bush. Ms. Anderson writes in part that Mr. Pelaia is a “cheerful, professional enthusiastic worker who gets the job done. He is a great father and a delight to be around.”¹⁰ Mr. Pelaia’s sister, a realtor in Homer at Bay Realty, wrote a letter in Mr. Pelaia’s support, as did his father, a lawyer in Texas.

At the hearing, the Executive Administrator for the Board of Nursing, Dorothy Fulton, described the work done by certified nurse aides, or CNAs. CNAs care for patients, usually adults, who are vulnerable and not able to take care of themselves. While many CNAs work in institutions where they are supervised, many work with individual clients in their homes and have access to their checking accounts and personal property. CNAs may also have access to their patients’ prescribed drugs. Ms. Fulton testified that there is currently a need in Alaska for certified nurse aides.

⁸ Exhibit 8.

⁹ Exhibit 7.

¹⁰ Exhibit 13.

After the hearing, this case was transferred to a different administrative law judge for a proposed decision. The entire record is available to the current ALJ. Regarding Mr. Pelaia's tone and demeanor at the hearing, the ALJ who conducted the hearing stated:

I think it does make a difference that Mr. Pelaia is here, and I've watched him testify, and I think he's a credible individual and I sense a true sense of remorse, and a lot of courage too in having to face up to things that occurred years ago. Some things which he certainly thinks he would have done differently and he's not too proud of today. So it takes a little bit of courage for him to do this.

III. Discussion

According to AS 08.68.334, "the board may deny a certification to...a person who...has been convicted of a crime substantially related to the qualifications, functions, or duties of a certified nurse aide." Theft is a crime that is substantially related to the qualifications, functions, and duties of a CNA.¹¹ There is no dispute that the board was within its authority to deny Mr. Pelaia's application; it is also undisputed that the board has the authority, in its discretion, to grant Mr. Pelaia's application.

The board has a range of options beyond merely granting or denying Mr. Pelaia's application. The board may issue a license subject to a specific probationary period. As conditions of probation, the board may require Mr. Pelaia to meet any of the following requirements:

- (1) obey all federal and state laws and regulations pertaining to the practice of a certified nurse aide;
- (2) fully comply with orders from the board regarding probation;
- (3) notify the board in writing of the dates of departure from and return to the state, if the certified nurse aide leaves the state to practice outside the state;
- (4) report in person to the board, according to the conditions of probation;
- (5) submit written reports to the board according to the conditions of probation;
- (6) be employed as a certified nurse aide only in a setting in which on-site supervision is available, as specified by the board.¹²

¹¹ 12 AAC 44.705.

¹² 12 AAC 44.875(a).

If the board imposes probation on a certified nurse aide for the habitual abuse of alcohol or drugs, the board may, in its discretion and as a condition of probation, require that the certified nurse aide do one or more of the following, in addition to other conditions:

- (1) submit to physical and mental health examinations as the board determines necessary to evaluate the probationer's ability to competently perform the duties of a certified nurse aide;
- (2) as determined by the board, participate in a program of rehabilitative counseling such as
 - (A) an impaired health care provider treatment program that provides progress reports from the treatment program when requested by the board; or
 - (B) a 12-step program, such as Alcoholics Anonymous or Narcotics Anonymous;
- (3) abstain from the personal use of alcohol or drugs in any form, except as lawfully prescribed by a licensed practitioner;
- (4) at the request of the board, submit physical specimens to be tested for the presence of alcohol or drugs.¹³

In addition to probation, the board may also impose limitations or conditions on the professional practice of a licensee, or require a licensee to submit to peer review.¹⁴ At a hearing on the denial of a license application, the applicant has the burden of proving facts by a preponderance of the evidence, but the board exercises broad discretion in determining whether to grant the application.

Previous Cases

The board has considered a number of applications from people with criminal convictions. In cases where applicants have misdemeanor records, the board had denied a large number of applications, but it has also approved a number of these applications. The board has granted applications to persons who have been convicted of driving under the influence of drugs or alcohol, including instances where the conviction was relatively recent. It has granted applications twice to persons who had been convicted of disorderly conduct, twice to applicants who had been convicted of assault, once to someone who had been convicted of food stamp fraud, and once to someone who had been convicted of misconduct involving a controlled substance just one year before the application.¹⁵

¹³ 12 AAC 44.875(b).

¹⁴ AS 08.01.075.

¹⁵ These actions of the board are listed in the *Wick* and *Pyle* decisions, apparently based on evidence in the record in those cases.

The board has denied a number of applications from people with felony records. In many of these cases, the applicants did not disclose the convictions, and a primary reason for denying the application was the failure to disclose. These cases should not be compared with the case now before the board, in which Mr. Pelaia did fully disclose his conviction. There are four relatively recent cases in which the board denied applications from people who had disclosed felony convictions. In the *Matter of Tina Brown*, OAH-06-0287-CNA, Board Case No. 2356-06-003, the applicant had been convicted of first degree burglary, a felony, and second degree theft, a misdemeanor, in Oregon twelve years before her application. The convictions had not been vacated or set aside, and the applicant did not present any evidence other than her own testimony. The board found that the applicant had not presented sufficient evidence of her rehabilitation to demonstrate that she was an appropriate candidate for certification. In the *Matter of Wenger*,¹⁶ the applicant had been convicted about two years before her application of ten counts of felony forgery for a total amount of under \$2,000 taken from her employer's account over a period of about a year. The board denied the application because of concern about the recentness of the crimes, the number of convictions, and the period over which the offenses recurred. In the *Matter of Gibson*,¹⁷ 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. The application was filed less than five years after the crime, and before the convictions were set aside. 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." This case is now pending before the Supreme Court.¹⁸ In the *Matter of Parker*,¹⁹ 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 *Matter of Pearson*,²⁰ the applicant had two felony convictions (forgery and failure to

¹⁶ OAH 05-0526-CNA, Board Case No. 2356-05-015.

¹⁷ Case No. 2356-02-003 (Board Decision, July 11, 2004).

¹⁸ *State of Alaska, Alaska Board of Nursing vs. Joy Platt*, S12173.

¹⁹ Case No. 2356-01-002 (Board Order, March 14, 2003).

²⁰ Case No. 2356-00-006 (Board Order, June 29, 2001).

appear) within five years of the application, as well as two earlier misdemeanor theft convictions and a misdemeanor false report conviction.

The board has granted very few applications to people with felony convictions. In the *Matter of Donal Wick*,²¹ the board considered the application of a person who had been convicted for selling stolen cigarettes in 1999, six years before the board considered the case in 2005. In 2006 the board approved certification in the *Matter of Mary Ruth Pyle*,²² a case in which the applicant had been convicted in 1989 for three counts of selling cocaine to an undercover police officer, seventeen years prior to the board's decision. In the *Wick* and *Pyle* cases the trial judge had granted suspended imposition of sentence, and had later set aside the conviction; the board has never certified an applicant with a felony conviction that has not been set aside by the court.²³

Of all the cases the board has considered, the *Pyle* case presents the most important point of comparison, and it should be carefully considered when evaluating Mr. Pelaia's case. In that case, the applicant's "conduct arose because she was penniless and needed to support her own drug habit."²⁴ Ms. Pyle had been convicted of three counts for very serious offenses, as compared to one count for Mr. Pelaia. Ms. Pyle had been apprehended at the border because of a warrant stemming from the work of an undercover police officer, whereas Mr. Pelaia turned himself in to the police on the day of the offense. Ms. Pyle, however, did have a longer period of successful rehabilitation before she applied for certification.

Level and Gravity of the Offense

The specific facts underlying Mr. Pelaia's conviction were the theft of a purse from the victim's person. Mr. Pelaia was not convicted of hurting, harming, or threatening the victim; the offense was purely a property crime, theft, and not a variation of an assault. In this respect the offense is more like pickpocketing than mugging; the case represented a classic instance of "purse snatching." Although no weapons, attacks, or threats were involved, stealing property from the victim's person elevates theft to a felony-level offense in both Texas and Alaska.²⁵ This crime constitutes a "state jail felony" in Texas. A "state jail felony" is the lowest level of felony, punishable by up to two years in jail plus fines.²⁶ Similar conduct in Alaska would be a

²¹ *In the Matter of Donal Wick, Jr.*, OAH no. 05-0059-CNA, board case no. 2356-05-001.

²² *In the Matter of Mary Ruth Pyle*, OAH no. 05-0797-CNA, board case no. 2356-05-014.

²³ Unlike Alaska, Texas does not have a provision for set-aside of a conviction.

²⁴ *Pyle* decision at 13.

²⁵ 3 Tex. Stat. 31.03(e)(4)(B); AS 11.46.130(3).

²⁶ 3 Tex. Stat. 12.04; 3 Tex. Stat. 12.31-35.

class C felony,²⁷ which is also the lowest level of felony offense and is punishable by up to five years plus fines. No charges were brought against Mr. Pelaia regarding the use of his victim's checkbook, possibly because Mr. Pelaia signed his own name on the check and presented his own identification, clouding the issue of whether the transaction could be considered forgery.

In both Texas and Alaska jail time may be suspended, and it is possible to be convicted of a felony and serve no jail time in the most mitigated circumstances. Mr. Pelaia was sentenced to two years with all of the jail time suspended, so long as he complied with the terms of his five-year probation. Mr. Pelaia was in jail for several months while he waited for his court date and then for admission to the inpatient treatment program, and while he was in the program his liberty was restricted. Nevertheless, technically he was not required to serve any jail time.

Alaska and many other states have provisions of law that allow judges to set aside or vacate a conviction in certain cases if, after a period of time, the defendant has met specified conditions demonstrating rehabilitation. These provisions vary widely by state, sometimes requiring a finding at the time of conviction that the defendant is a good candidate for rehabilitation. In Alaska, the sentencing judge may suspend imposition of sentence, and then set aside the conviction if the defendant is successful during probation.²⁸ In every other case in which the board has granted a license to an applicant with a felony record, the convictions had been set aside. In the recent *Brown* case, the convicting state, Oregon, did have a provision allowing set-aside of a conviction even if the judge had not initially suspended imposition of sentence. It appeared in that case that the applicant may have been eligible to have her conviction set aside, had she applied to the sentencing court. It does not appear that Texas has any provisions for setting aside or vacating convictions of rehabilitated offenders, and therefore it should not be held against Mr. Pelaia that his conviction has not been set aside or vacated. Had the offense occurred in Alaska, it cannot be said for certain whether the conviction would have been set aside, because the matter would have been one of discretion for the sentencing judge. However, as a first time offender with a serious drug problem, Mr. Pelaia would have been a very likely candidate for suspended imposition of sentence, and his success in treatment and in complying with probation would have almost certainly resulted in the set-aside of the conviction.

²⁷ AS 11.46.130.

²⁸ AS 12.55.085.

Although Mr. Pelaia's conviction was for theft, for purposes of this proceeding the case is best viewed as a drug case. Mr. Pelaia openly conceded that at about the same time as this incident occurred, he also took some property from his sister and from his father to pawn in order to buy crack cocaine. The purse-snatching incident that gave rise to the conviction occurred after heavy use of crack cocaine, and Mr. Pelaia's sole purpose in committing the crime was to obtain more cocaine as soon as possible; he did not appear to have any interest in obtaining property for any use but to exchange for cocaine, and he does not have any other history of theft or dishonest activity except during a short period of cocaine use.

It is significant that when Mr. Pelaia cashed the check that he had taken from the purse, he signed his own name on the check and presented his own identification when the teller so requested. It is possible, as Mr. Pelaia's attorney argues, that Mr. Pelaia did this in an effort to get himself caught and into the criminal justice system where he could get the help he needed to regain control of his life. Regardless of his conscious or subconscious intent, by presenting his own identification at the bank Mr. Pelaia did almost guarantee that he would eventually be apprehended for the purse snatching. At the very least, this shows a lack of premeditation and a rather desperate disregard for the future. This state of mind appears to be more consistent with dependency or addiction than with an inherently dishonest nature. Mr. Pelaia is an intelligent man, and if he were naturally inclined to crime he would have almost certainly done a better job of evading apprehension.

This board has independent expertise regarding medical and drug issues, and need not be advised on that subject. The evidence does show, however, that but for his use of cocaine, Mr. Pelaia would not have committed this offense. The evidence showed very clearly that Mr. Pelaia is not by nature a violent or dishonest person, so long as he is free from the influence of drugs. Rather than looking at whether Mr. Pelaia represents a risk to patients because of a dishonest or violent nature or a propensity to steal, the board's approach to this case should be to weigh the risk of Mr. Pelaia relapsing into drug use.

Mr. Pelaia's period of drug use occurred during a time of turmoil in his life, and to his credit Mr. Pelaia has healed many of the wounds in his family and turned his life in a positive direction. Nevertheless, the future is always uncertain, and the board must consider Mr. Pelaia's likely response to the serious unforeseen setbacks that all persons are potentially subject to. While Mr. Pelaia's life is sunny now, one cannot predict the catastrophes that may occur ten or

twenty years from now, when as a CNA Mr. Pelaia might have many vulnerable patients in his care.

Mr. Pelaia is not currently involved in any program for recovering drug users. He did complete a very intensive and long-term drug rehabilitation program during the five years he was on probation. Mr. Pelaia did not deny or minimize the seriousness of his drug use, and it is likely that he would willingly comply with any treatment requirements the board imposed on him. It appears that at this point Mr. Pelaia has achieved a level where the most productive approach to avoiding further drug use is to continue focusing on and building up positive aspects of his life, such as his work, physical fitness, and relationships with his son, other family members, and friends.

In evaluating the likelihood of relapse into drug use or other destructive behavior, a number of facts set Mr. Pelaia's case apart from many others. Most significantly is the fact that, when things were at their worst for Mr. Pelaia, it was Mr. Pelaia himself who recognized that his life was out of control and that his situation had become desperate. Even with the influence of cocaine weighing on him, Mr. Pelaia had the presence of mind to reach out to his support group, specifically his brother and father, when he needed help. In weighing his honesty, it cannot be overlooked that Mr. Pelaia was not apprehended by the police. He turned himself in to a police station and openly confessed on the very same day as the offense. This fact probably sets Mr. Pelaia apart from every other applicant with a criminal record, felony or misdemeanor.

Mr. Pelaia's father is a very successful attorney, and it is almost certain that Mr. Pelaia could have been released on bail, but he stayed in jail until his court date, possibly to avoid the temptation of further cocaine use. Though Mr. Pelaia was ordered to repay his victim on a schedule of ten dollars per month, while in jail he arranged for his brother to apologize to the victim and to use Mr. Pelaia's income tax return to immediately repay the stolen money he took. This history shows that, although he is not immune to falling into drug addiction or dependency, Mr. Pelaia possesses the intrinsic ability to recognize his problems and to take whatever corrective steps are necessary. It is true that in the past Mr. Pelaia was not able to do this before causing at least one person some harm, but Mr. Pelaia has made a very credible demonstration that age and experience have made him wiser and stronger. I find it unlikely that in the future Mr. Pelaia will present a significant risk to the public, even if he does have access to vulnerable patients, their property, and their medications. Counterbalancing any risk he might present, Mr.

Pelaia has affirmatively demonstrated that his availability to work as a certified nurse aide would be a valuable asset to the patients in his care and to a community in need of his services.

Mr. Pelaia presents his application with an expressed willingness to accept a probationary status under any terms the board may wish to impose that would permit him to work at South Peninsula Hospital. The board may wish to discuss a probationary period, but with or without probation I find it unlikely that Mr. Pelaia will conduct himself in an unprofessional manner in the near future, when his life seems to be going so well. While it is unlikely, the greater concern is a relapse into drug use in the more distant future. The better manner in which to protect the public would be to issue Mr. Pelaia certification on the condition that he never use any controlled substance other than as prescribed by a physician, and that he agree to submit to random drug testing at any time by the board as a condition of maintaining his certification. Mr. Pelaia has agreed to certification subject to a limitation that he only work in a supervised capacity for an institution. Again, while the board may wish to consider this proposal, Mr. Pelaia has shown that he can be quite valuable as an individual caregiver. So long as he remains drug-free, Mr. Pelaia presents no risk to individual patients. Rather than imposing a probationary period, the board could simply request more frequent drug testing in the earlier part of Mr. Pelaia's certification.

IV. Conclusion

It is easy to view this case as a judgment of Mr. Pelaia as a citizen, and whether, having repaid his debt to society, he deserves or is entitled to reward. This approach would be erroneous. The board is not in the position of a court, and it owes Mr. Pelaia no reward for his years of good conduct. The only considerations before the board are its duties to the nursing profession and to the public.

Upon careful review of the record and due deliberation, I conclude that Mr. Pelaia has demonstrated that he presents minimal or no risk to the vulnerable members of society who fall into the care of certified nurse aides. I further find that Mr. Pelaia has demonstrated that his certification as a nurse aide in the State of Alaska would be a significant benefit to the nursing profession and to the public generally.

Because of its high level of responsibility to the public, the board should only certify Mr. Pelaia as a nurse aide on the condition that he agree, for so long as he is certified, to undertake drug testing at any time the board or its staff so requests, and with the understanding that the board may immediately revoke or otherwise take action regarding Mr. Pelaia's certification if he refuses to take a drug test or if a test results positive for any unprescribed controlled substance.

Upon adoption of this decision as a final administrative decision in this matter, the division shall certify Mr. Pelaia as a nurse aide under the stated conditions.

DATED this 10th day of January, 2007.

By: Signed
DALE WHITNEY
Administrative Law Judge

Non-Adoption Options

1. The undersigned, on behalf of the Alaska Board of Nursing and in accordance with AS 44.64.060, declines to adopt this decision, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2007.

By: _____

Signature

Name

Title

2. The undersigned, on behalf of the Alaska Board of Nursing and in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

The Board of Nursing agrees that Anthony Pelaia be certified as a CNA subject to compliance with a Memorandum of Agreement to be developed by the Board of Nursing investigative staff.

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 7th day of March, 2007.

By: *Signed* _____

Signature

Catherine A. Giessel

Name

BON Chair

Title

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