

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE BOARD OF PHYSICAL THERAPY & OCCUPATIONAL THERAPY**

In the Matter of:)
)
 RICHARD J. COWAN)
)
) OAH No. 13-0740-POT
) Board Case No. 2012-001445
_____)

DECISION

I. Introduction

Richard Cowan applied for a license to be a physical therapist in Alaska. The Board of Physical Therapy and Occupational Therapy (Board) denied his license and Mr. Cowan appealed that decision. A hearing was held on August 26, 2013. After careful consideration of the applicable law and the evidence presented, the Board’s denial of Mr. Cowan’s application is affirmed.

II. Facts

Mr. Cowan submitted his application to be licensed by credentials.¹ At the time of his application, he was licensed in the State of New York as a physical therapist.² He is also licensed in New York as a massage therapist.³ In response to the professional fitness questions, he correctly indicated that he had previously been disciplined and had his license denied, revoked, suspended, or otherwise restricted.⁴ Mr. Cowan acknowledged in his testimony that he had engaged in a sexual relationship with a patient and had also borrowed money from this patient.⁵ This relationship began in 1996, and continued intermittently until the summer of 1999.⁶

In his New York disciplinary proceeding, Mr. Cowan was charged with three specifications of misconduct.⁷ The first two specifications were related to the sexual relationship

¹ Exhibit A, page 28. (The agency record was submitted as Exhibit A).

² Exhibit A, page 29.

³ Cowan Testimony.

⁴ Exhibit A, page 31.

⁵ Cowan Testimony; Exhibit A, page 33.

⁶ Cowan Testimony.

⁷ Ariana Miller, who is the New York official supervising Mr. Cowan’s probation, testified about the disciplinary scheme applicable to New York State professional licensees. At the first stage, a hearing panel conducts a hearing and issues a recommendation to the Regents Review Committee. The review committee considers the hearing recommendation, and makes a recommendation to the New York State Board of Regents. The Board of Regents issues the final decision.

with his patient, in violation of 8 NYCRR 29.1(b)(5) and 29.2(a)(2).⁸ The third specification alleged a violation of 8 NYCRR 29.1(b)(2) and was related to accepting a loan from his patient.⁹

The disciplinary hearing panel found that Mr. Cowan was guilty of the first two specifications, but that the third had not been proven by a preponderance of the evidence.¹⁰

The Regents Review Committee accepted the findings of fact, but rejected the hearing panel's proposed suspension and fine. Instead, the Committee recommended revocation of Mr. Cowan's license.¹¹ The Board of Regents accepted the Committee's recommendation and revoked Mr. Cowan's physical therapist license.¹²

Three years later, Mr. Cowan applied to have his license restored. A peer committee met to consider that application, and accepted evidence as to what changes had occurred to ensure that Mr. Cowan would not violate professional standards in the future. The peer committee recommended that the prior revocation be stayed, and that Mr. Cowan be placed on probation for five years.¹³ That recommendation was adopted.¹⁴

Mr. Cowan subsequently applied to be licensed as a physical therapist in Alaska. This Board denied his application for two reasons: first, because he did not have a current license in good standing; second, because he had previously engaged in gross negligence or malpractice or conduct contrary to the recognized standards of ethics of the profession.¹⁵

III. Discussion

A. Applicable law

With some exceptions not applicable here, a person may not practice physical therapy in Alaska without a license.¹⁶ Among other requirements, an applicant must pass a national examination in order to be licensed.¹⁷ A person may be licensed by credentials, without taking an additional examination, if he or she is licensed in another state that has substantially the same

⁸ Exhibit A, pages 65 – 67. New York Code of Rules and Regulation 29.1(b)(5) prohibits conduct that demonstrates moral unfitness to practice the profession. Section 29.2(a)(2) prohibits harassing, abusing, or intimidating a patient either physically or verbally.

⁹ Exhibit A, page 67. Section 29.1(b)(2) prohibits the use of undue influence to exploit the patient for purposes for receiving a financial gain.

¹⁰ Exhibit A, pages 59 – 61. The hearing panel found that Mr. Cowan had not used any undue influence to obtain the loan, and thus the violation charged was not proven. Exhibit A, page 61.

¹¹ Exhibit A, pages 48 – 49.

¹² Exhibit A, page 45.

¹³ Exhibit D, pages 8 – 15.

¹⁴ Exhibit D, page 6.

¹⁵ Exhibit A, page 7.

¹⁶ AS 08.84.150.

¹⁷ AS 08.84.030(2).

licensure requirements as are imposed in Alaska.¹⁸ In either licensure by examination or licensure by credentials, the Board may refuse to grant a license if the applicant has committed “gross negligence or malpractice or has engaged in conduct contrary to the recognized standards of ethics of the physical therapy profession[.]”¹⁹ This Board has adopted a regulation that precludes granting a license by credentials to anyone who does not have a current license in good standing from at least one other jurisdiction.²⁰

Mr. Cowan has the burden of proving by a preponderance of the evidence that the Board’s decision was incorrect, and that he should receive a license.²¹

B. License in good standing

The first reason given by the Board for denying Mr. Cowan a license was that he did not have a current license in good standing.²² An applicant for licensure by credentials must provide the board with

verification of the applicant’s licensure status sent directly to the department from each jurisdiction where the applicant holds or has ever held a license to practice physical therapy, one of which must indicate a current license in good standing.^[23]

Mr. Cowan’s only active license is from New York State, and that license is currently subject to conditions of probation. Whether this precludes him from being licensed in Alaska depends on the definition of “good standing.”

This Board does not have a statute or regulation defining “good standing.” Many other boards in Alaska use the concept of good standing in their regulations, but also do not define it. However, the legislature has created a definition of good standing for the Alaska Board of Chiropractic Examiners. Under that definition, a person is in good standing if no action has been reported to the national database of the Federation of Chiropractic Licensing Boards, the applicant has not been subject to an adverse discipline action in the past five years, and the applicant has not been convicted of a felony with the past five years.²⁴ Under that definition, Mr.

¹⁸ AS 08.84.060.
¹⁹ AS 08.84.120(a)(4).
²⁰ 12 AAC 54.100(3).
²¹ AS 44.62.460(e)(2).
²² Record at 004.
²³ 12 AAC 54.100(3).
²⁴ See AS 08.20.141(2) (definition of good standing).

Cowan would be considered in good standing as the adverse decision revoking his license was in 2005.²⁵

The Alaska Bar Association has also adopted a definition of good standing:

Any active or inactive member of the Alaska Bar Association who has paid the requisite membership fees for the current calendar year and who has not been transferred to interim disability or disability inactive status, or been suspended or disbarred, is a member in good standing and entitled to all of the privileges and benefits accorded Bar members.^[26]

Mr. Cowan would likely be considered in good standing under this definition since his license is no longer revoked.

This Board is not bound by these other definitions of good standing. It could reasonably find that a person subject to ongoing probation is not in good standing for purposes of being licensed by credentials. However, there are good reasons for adopting a less stringent standard.

The Alaska legislature, in enacting AS 08.84.120(a)(1)-(8), gave a great deal of discretion to the Board to deny licensure in appropriate circumstances. For example, under AS 08.84.120(a)(4), the Board *may* deny a license to someone who has engaged in gross negligence or unethical conduct, but it is not *required* to deny a license in those circumstances. In addition, even if a license is initially denied for any reason under AS 08.84.120(a), the Board may modify or rescind that denial if the applicant has been rehabilitated to the Board's satisfaction.²⁷

Alaska Statute 08.84.120(a)(1)-(8) gives the Board the ability to consider each applicant carefully, and decide on a case-by-case basis whether the application should be approved.²⁸ To the extent the Board's own regulation restricts its discretion to grant a license by credentials, that restriction should be interpreted narrowly so as to allow discretion commensurate with the discretion the board has for other applicants.

A reasonable basis for deciding whether a license is in good standing is whether the applicant is allowed by his or her current license to practice physical therapy. A person whose license is currently revoked or suspended does not have a license in good standing because he or she is not currently authorized to practice physical therapy. A person who was simply reprimanded or who has successfully completed probation would be in good standing since there

²⁵ The decision placing him on probation is more recent, but likely would not be considered an adverse action since it granted him more rights related to the practice of physical therapy than he possessed prior to that action.

²⁶ Alaska Bar By Laws, Article II, Section 5.

²⁷ AS 08.84.120(b).

²⁸ In doing so, the Board must seek to be consistent so that similar applicants are treated similarly, AS 08.01.075(f), but the Board may still distinguish between differing circumstances.

are no restrictions on the ability to practice physical therapy. An applicant on probation falls between those two situations because he or she is allowed to treat patients, but with some restrictions.

The Board could potentially look at the specific conditions of probation imposed in each situation to determine the extent of the restriction and whether the applicant is in good standing. Such a process would be hard to implement consistently as there are many different probationary terms that licensing authorities may use around the country. In order to enhance consistency, a bright line rule as to whether someone on probation is in good standing is preferable. Therefore, any applicant who is allowed to practice physical therapy under a license from another jurisdiction is considered to have a license in good standing for the purpose of implementing 12 AAC 54.100(3). These applicants may be *considered* for licensure by credentials, but are not guaranteed a license as the Board retains the discretion to deny that license pursuant to AS 08.84.120. Because Mr. Cowan’s New York license allows him to practice physical therapy, his license is in good standing.

C. Conduct contrary to the recognized standards of ethics

The second reason identified by the board for denying Mr. Cowan a license is that he had previously engaged in unethical conduct.²⁹ The board has the discretion to deny a license under this circumstance.³⁰

Mr. Cowan readily admits that his prior conduct amounted to gross negligence and was unethical. Accordingly, the Board “may refuse to license” Mr. Cowan.³¹ It may also grant him a license, and there is evidence in the record to support such an action.

The conduct in question occurred 14 years ago, and there is no evidence of any subsequent misconduct. After his unethical conduct was reported, Mr. Cowan reached out to different schools of physical therapy and arranged to speak to groups of students and faculty members about professional ethics. During these events he would disclose his own misconduct, and warn others to learn from his mistake. He wrote a letter to the professional magazine for New York physical therapists, and sent letters to each physical therapist licensed in New York, covering this same information.³²

²⁹ Record at 004.

³⁰ AS 08.84.120(a)(4).

³¹ *Id.*

³² Cowan testimony; Exhibit D, pages 11 – 12.

Mr. Cowan has been fully compliant with the terms of his probation in New York.³³ He was also a licensed massage therapist in New York when his misconduct came to light. No action was taken against his massage license at that time, and there are no known complaints of unethical conduct result from his treatment of massage patients.³⁴ In addition, New York's Peer Committee reviewed Mr. Cowan's situation and found that he should have his licensed restored, though with a period of probation. That committee had an opportunity to meet with and question Mr. Cowan closely about his misconduct and his subsequent rehabilitation. The Committee on Professions then reviewed the Peer Committee's work and recommended that his license be restored, and that recommendation was adopted by the Board of Regents.³⁵

Evidence that weighs against Mr. Cowan also exists. Mr. Cowan testified that he was not previously aware that it was improper to have a sexual relationship with a patient. His lack of knowledge of such a basic ethical principal is a concern even though he has since rectified that lack.

Mr. Cowan was also not entirely candid in his application to this Board. He wrote that his license "was reinstated without restrictions as to where I work and whom I work with."³⁶ In one sense, this is accurate because Mr. Cowan was focused on a proposed probationary requirement that would have limited him to only working in a hospital setting or with children.³⁷ That restriction was removed before his probation conditions were established. However, he did not disclose in this letter that he was required to work under the supervision of another physical therapist and that any supervising therapist must be approved by the New York State Office of Administrative Hearings Professional Discipline.³⁸ He did not attempt to hide those requirements since he gave the division information as to how to contact Ms. Miller, who was supervising his probation,³⁹ but he didn't volunteer these restrictions either. While it is understandable that someone would want to present their circumstances in the best possible light, the failure to fully disclose the restrictions on his New York license is a factor that is considered in deciding how to exercise the Board's discretion.

³³ Miller testimony. The terms are set out in Exhibit D, pages 14 – 15.

³⁴ Cowan testimony.

³⁵ Exhibit D.

³⁶ Exhibit A, page 33. *See also* Exhibit A, page 34.

³⁷ Cowan testimony.

³⁸ *See* Exhibit D, page 15, paragraph 8 (conditions of probation).

³⁹ Exhibit A, page 131.

This Board previously considered Mr. Cowan’s application and determined that his application should be denied. Now that the Board has more information from the hearing conducted on Mr. Cowan’s appeal, it could reasonably reach a different conclusion. However, it is Mr. Cowan’s burden to prove by a preponderance of the evidence that the Board is required to reach a different conclusion and grant him a license. He has not met that burden here.

IV. Conclusion

Mr. Cowan does have a license in good standing from New York State as his license permits him to provide physical therapy to patients. Accordingly, the Board is permitted to consider granting him a license by credentials. Based on his prior unethical conduct, however, the Board declines to grant that license at this time.⁴⁰

DATED this 4th day of September, 2013.

Signed

Jeffrey A. Friedman
Administrative Law Judge

ADOPTION OF REVISED DECISION

Pursuant to AS 44.64.060(e), the State Physical Therapy and Occupational Therapy Board adopts the ALJ’s proposed decision with the following revision:
The Board interprets the phrase “license in good standing” in 12 AAC 54.100(3) to mean a license that is not revoked, suspended, or subject to probation.

DATED this 24th day of October, 2013.

By: Signed

Signature
Kathleen Lind

Name
Board of Physical and Therapy and Occupational Therapy
Title

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

⁴⁰ Mr. Cowan may reapply in the future after he has served more of his probationary time in New York, and further establishes that he is able to continue to comply with all professional obligations.