

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

In the Matter of:	)	
	)	
RICHARD L. STAVALE,	)	
	)	
<u>Respondent</u>	)	OAH No. 07-0278-NUR Board No. 2300-06-020

**REVISED DECISION**

**I. Introduction**

The Division of Corporations, Business and Professional Licensing filed an accusation requesting the imposition of disciplinary sanctions on Richard L. Stavale, a registered nurse, on the grounds that he had failed to document or to meet continued competency requirements, and that he had misrepresented his compliance with those requirements on his license renewal application.

Mr. Stavale requested a hearing. The case was referred to the Office of Administrative Hearings and the assigned administrative law judge conducted an administrative hearing on September 18, 2007. The administrative law judge issued a proposed decision on March 18, 2008. The Board of Nursing considered the proposed decision at its meeting on July 9, 2008. The board did not adopt the proposed decision. It remanded the case to the administrative law judge under AS 44.64.060(e)(2) to make additional findings about “written documentation in compliance with 12 AAC 44.600 and 12 AAC 44.620” and to prepare “a revised decision taking into account that the licensee presented no documentation.” Upon remand, the parties agreed to waive the presentation of additional evidence. At the request of the administrative law judge, the division submitted a legal memorandum and the record was closed on December 24, 2008.

Because the division proved that Mr. Stavale falsely certified that he had satisfied the requirement for continuing education credit, a fine of \$1,500 is imposed under Count I. Because the division did not prove that Mr. Stavale willfully or repeatedly failed to meet the continuing competency requirements, or that he fraudulently submitted a false certification with the intent to deceive the board, Counts II and III are dismissed.

**II. Facts**

Nurse licenses are subject to a biennial renewal process. As a condition of license renewal, during the preceding licensing period licensees must have satisfied two out of three

continuing competency requirements: (1) 320 hours of nursing employment; (2) 30 contact hours of continuing education in nursing; or (3) 30 hours of uncompensated professional activities.<sup>1</sup> In the fall of 2004, Mr. Stavale held a license that had been renewed effective December 1, 2002, and was due to expire November 30, 2004. As a condition of license renewal, he was required to comply with the continuing competency requirements during that period of time.

A. Continuing Competency Activities

1. *Employment*

Richard Stavale was initially licensed as a registered nurse in 1982, adding an Alaska license in 1989. From 1989 through October, 2003, when he retired and moved to Finland, Mr. Stavale was a full time employee of the Alaska Department of Health and Social Services, with various duties including management of the Assisted Living Home program. During that time he was also employed as an officer and a registered nurse in the Alaska Air National Guard, retiring at the end of January, 2003, with the rank of major. Mr. Stavale's primary function in the military was as a staff nurse in a busy Air National Guard clinic. Mr. Stavale's compensated military service consisted of one weekend per month plus fifteen full days each year, with occasional additional compensated time outside of those times.

Mr. Stavale was employed as a nurse for in excess of 320 hours between December 1, 2002, and November 30, 2004.

2. *Professional Activities*

In 2003, Mr. Stavale acted as a proctor for the administration of certified nurse aide examinations. He was compensated for 39 hours of service in 2003 as a proctor at seven separate examinations.<sup>2</sup> In addition to the time spent as a proctor during the administration of the exam itself, Mr. Stavale spent about an hour and a half<sup>3</sup> of uncompensated time preparing for the administration of the examination by reviewing the certification manual (a 55-page document)<sup>4</sup> as well as associated materials<sup>5</sup> for each test administration.<sup>6</sup>

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<sup>1</sup> Exhibit A, p. 2. See AS 08.68.276; 12 AAC 44.600-.640.

<sup>2</sup> Exhibit TT.

<sup>3</sup> Odette Jamieson, Mr. Stavale's supervisor, estimated that a person might spend up to 5 hours per test doing this sort of work. Exhibit LL. Mr. Stavale's estimate of the amount of time he spent was only one and one half hours per test. Recording 1:52.

<sup>4</sup> Exhibit PP.

<sup>5</sup> Exhibit MM (24 pages); NN (30 pages).

<sup>6</sup> Exhibit LL.

In addition to proctoring, while he was a full time employee of the State of Alaska and a part-time employee of the Alaska Air National Guard Mr. Stavale typically spent 15-20 hours per month providing uncompensated services to the Alaska Air National Guard, health care-related agencies of the Municipality of Anchorage, and various local health facilities. These uncompensated services, while they were generally within the scope of Mr. Stavale's duties as an employee of the Alaska Air National Guard, were not required by his employer as a condition of continued employment. Typically, these additional, uncompensated services included such things as: attending public, health facility, and agency meetings concerning emergency and disaster preparedness; assisting in coordinating the Arctic Care program; mentoring, providing classes and training to other health professionals; providing immunizations; and meeting with local and federal officials to facilitate the delivery of health services to veterans and homeless persons. These services were a valuable contribution to the public health of citizens of the Municipality of Anchorage.

Mr. Stavale spent in excess of 30 hours engaged in uncompensated professional activities between December 1, 2002, and November 30, 2004.

### 3. *Continuing Education*

The Alaska Air National Guard requires its registered nurses, such as Mr. Stavale, to obtain a minimum of 20 hours per year of continuing education units. Throughout his military service, Mr. Stavale obtained his required continuing education units<sup>7</sup> through courses, classes or programs qualifying for continuing education credit available to employees of the State of Alaska and from other providers. During the course of his military service, Mr. Stavale's continuing education units satisfied both his military and Alaska continuing education requirements.

In 2002-2003, Mr. Stavale took more than 30 hours of contact continuing education, but less than 30 hours of that continuing education occurred between December 1, 2002 and October, 2003, when he retired from state employment. However, at the time Mr. Stavale submitted his license renewal application in the fall of 2004, he believed that the number of hours of continuing education units he had acquired while in the service until February, 2003, and thereafter while employed by the State of Alaska through October, 2003, were sufficient for the continuing education requirement for license renewal.

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<sup>7</sup> Exhibit OO.

## B. Documentation of Credit Claimed

On November 5, 2004, Mr. Stavale submitted a timely application for renewal of his license for the period from December 2, 2004, through November 30, 2006. On his renewal application, Mr. Stavale certified that he had met the continuing competency requirements by completing (1) 320 hours of nursing employment and (2) 30 contact hours of continuing education in nursing.<sup>8</sup> Based upon the certification in the application, on November 18, 2004, the board renewed Mr. Stavale's license, to expire on November 30, 2006.<sup>9</sup>

Mr. Stavale's file was selected for audit and on February 7, 2005, the division requested him to submit documentation of the claimed credits.<sup>10</sup> In response to the request, Mr. Stavale emailed the division, noting that he was living in Finland and that all of his records were in storage in Anchorage. Subsequently, Mr. Stavale submitted an employment verification form completed by Odette Jamieson, his supervisor in the Division of Senior and Disabilities Services in Anchorage, verifying that Mr. Stavale had completed 320 hours of nursing employment during the specified period.<sup>11</sup>

Because Mr. Stavale did not submit documentation for the claimed hours of continuing education, the division sent him a second request dated April 15, 2005.<sup>12</sup> In response, Mr. Stavale notified the division by email that "[t]he person I contacted to search through my storage area [for the continuing education documentation] wasn't able to find the CEU documentation."<sup>13</sup> In the absence of documentation for the continuing education, Mr. Stavale suggested that his service as a proctor at the certified nurse aide examinations might satisfy the professional activities requirement, stating, "If this would be sufficient..., I'll find out who I should contact so I can provide you with the documentation."<sup>14</sup>

The division took no further action for some time. Eventually, on February 3, 2006, having received no documentation regarding either continuing education or professional activities, the division notified Mr. Stavale that if he did not supply the requested documentation,

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<sup>8</sup> Exhibit A, p. 2. *See* 12 AAC 44.600(2).

<sup>9</sup> Exhibit B.

<sup>10</sup> Exhibit A, p. 2; Exhibit C.

<sup>11</sup> Exhibit D.

<sup>12</sup> Exhibit E.

<sup>13</sup> Exhibit G, p. 1. CEU is a military acronym for "continuing education units." Mr. Stavale's use of the term indicates that for purposes of the board's continuing education requirements, he intended to use the continuing education units he had acquired during the course of his military service.

<sup>14</sup> Exhibit G, p. 1.

surrender his license, or enter into an agreement on terms specified by the division, the division would proceed to file an accusation for revocation of the license.<sup>15</sup>

On March 28, 2006, Mr. Stavale responded. He reiterated what he had told the division in May of the prior year: his personal records were in storage in Anchorage, and he had been unable to locate the continuing education documentation, but his service as a proctor for the certified nurse aide examination might satisfy the professional activities criterion for continuing competency.<sup>16</sup> After reviewing internal financial records at Mr. Stavale's request, on June 6, 2006, the division informed Mr. Stavale that its records showed he had been compensated for 30 hours of proctoring in 2002, and 39 hours in 2003.<sup>17</sup> However, because only uncompensated hours are acceptable under 12 AAC 44.620(a)(1), the division concluded that Mr. Stavale was not entitled to license renewal. On April 17, 2007, some four and one-half months after expiration date of the renewed license, the division filed the accusation in this case. At the hearing in the case, Mr. Stavale submitted a memorandum written by his commanding officer, verifying that Mr. Stavale had been required to obtain continuing education of 20 hours per year while assigned to the Alaska Air National Guard, and that he had "remained current and in good standing while assigned to the AKANG (Sept 1989-Jan 2003)." At the hearing, Mr. Stavale and a staff medic testified that Mr. Stavale had engaged in at least 30 hours of uncompensated professional activities between December 1, 2002, and his departure from military service.

### **III. Discussion**

#### **A. Count I: Mr. Stavale Violated 12 AAC 44.660 and 12 AAC 02.960(e)**

Count I of the accusation alleges that Mr. Stavale failed to submit documentation to verify completion of the continuing competency activities claimed on his 2004-2006 license renewal application, in violation of 12 AAC 44.660 and 12 AAC 02.960(e).

##### *1. 12 AAC 44.660*

12 AAC 44.660, adopted by the board under authority of AS 08.68.100(a)(1), states that "Satisfaction of continuing competency requirements must be documented on a renewal form provided by the board and must be submitted before license renewal." The renewal form provided by the board does not require the submission of any independent written documentation before license renewal: the form merely requires that the licensee identify and self-certify the

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<sup>15</sup> Exhibit H.

<sup>16</sup> Exhibit J.

<sup>17</sup> Exhibit T, p. 1.

methods of continuing competency claimed, and promise, if audited, to “submit certified copies of documentation and proof of completion of the continued competency as claimed above.”<sup>18</sup> To “document” a fact may reasonably be read to mean to provide independent written documentation, or to provide self-certification.<sup>19</sup> In light of the fact that the division and the board have, since 1997, accepted self-certification as sufficient for license renewal, the proposed decision concluded that self-certification on the renewal form constitutes pre-renewal “documentation” within the meaning of 12 AAC 44.660.

On remand, the division does not contend that “documentation” within the meaning of 12 AAC 44.660 consists of independent written documentation; rather, it argues that self-certification on the renewal form does not constitute pre-renewal “documentation” within the meaning of 12 AAC 44.660 unless the facts certified are true.<sup>20</sup> The division relies on 12 AAC 02.960(b)(1), a regulation adopted by the department under the authority of AS 08.01.050, -.080 and -.100.<sup>21</sup> That regulation provides that an applicant for license renewal must “complete and sign a statement of compliance with continuing competency requirements”. The division interprets 12 AAC 02.960(b)(1) as requiring a truthful certification, and it argues that the board should read 12 AAC 44.660 harmoniously with the division’s interpretation of 2 AAC 02.960.<sup>22</sup> It adds, “[a] licensee does not ‘document’ compliance with continuing competency requirements by simply checking boxes on an application to make assertions that are not true.”<sup>23</sup>

The latter observation states a conclusion, not a premise. Whether satisfaction of continuing competency requirements has been “documented” within the meaning of 12 AAC 44.660 when the self-certification is untrue is precisely the issue to be decided. Nonetheless, it is not unreasonable to construe the requirement for self-certification in 12 AAC 44.660 as a requirement for a truthful certification; indeed, the renewal form itself requires that the applicant certify that the information provided is true.<sup>24</sup>

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<sup>18</sup> Exhibit A, p. 2.

<sup>19</sup> The dictionary defines the verb “to document” as “to furnish documentary evidence of”; “documentary” is defined as “being or consisting of documents: contained or certified in writing”. Webster’s Ninth New Collegiate Dictionary (1990). Under these definitions, written statement by an individual certifying the individual’s own prior actions is “documentation”, even though it does not independently corroborate the facts asserted.

<sup>20</sup> [Division’s] Memorandum of Law at 7 (hereinafter, “Memorandum”).

<sup>21</sup> Eff. 3/14/2001, register 157.

<sup>22</sup> Memorandum at 8-9.

<sup>23</sup> Memorandum at 10.

<sup>24</sup> In a somewhat analogous situation, 15 AAC 23.993(b)(2) has been interpreted as “presupposing true answers” to certain questions on an application for an Alaska Permanent Fund dividend. See In Re C.T., OAH No. 07-0698-PFD at 3-5 (Department of Revenue, June 6, 2008).

12 AAC 44.660 expressly requires only documentation that the continuing competency requirements have been satisfied. However, it also requires that the documentation occur on a form, and the form requires self-certification of the specific methods by which satisfaction occurred. It is not unreasonable to interpret 12 AAC 44.660, in conjunction with the form, as mandating truthful self-certification of the methods by which continuing competency requirements were met. Mr. Stavale's certification that he had acquired 30 hours of continuing education was false. He therefore violated 12 AAC 44.660.

2. *12 AAC 02.960(e)*

12 AAC 02.960 was adopted by the department under authority of AS 08.10.050, -.080, and -.100;<sup>25</sup> it establishes a random audit process for all licensees with continuing competency requirements under AS 08.<sup>26</sup> Under 12 AAC 02.960(e), licensees selected for audit must submit documentation including "a valid copy of a certificate or similar verification of satisfactory completion of the continuing competency activities claimed..."<sup>27</sup> For professions licensed by and subject to the disciplinary authority of a board, the department notifies the board in the event of a failure to provide the requested documentation.<sup>28</sup> For professions licensed by the department, the failure to comply with a request for submission of documentation is considered grounds for imposition of disciplinary sanctions to the extent allowed by AS 08 and 12 AAC.<sup>29</sup>

In this case, the continuing competencies claimed on the license renewal application were for continuing education and employment. The division's letter of February 5, 2005, asked for documentation with respect to both claimed credits.<sup>30</sup> Mr. Stavale submitted the necessary

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<sup>25</sup> Eff. 3/14/2001, Register 157.

<sup>26</sup> 12 AAC 02.960(a)(1).

<sup>27</sup> 12 AAC 02.960(e) states:

(e) A licensee selected for audit...will be notified by the department. Within 30 days of notification, the licensee shall submit to the department, documentation to verify completion of the continuing competency requirements claimed on the statement submitted with the application for license renewal. The documentation must include a valid copy of a certificate or similar verification of satisfactory completion of the continuing competency activities claimed that provides

- (1) the name of the licensee;
- (2) the amount of continuing competency credit awarded;
- (3) a description of the continuing competency activity;
- (4) the dates of actual participation or successful completion; and
- (5) the name, mailing address and signature of the instructor, sponsor, or other verifier.

<sup>28</sup> 12 AAC 02.960(h).

<sup>29</sup> 12 AAC 02.960(i).

<sup>30</sup> Because Mr. Stavale had not claimed credit for professional activities, the division did not request verification for it. *See* Exhibit C, p. 1.

verification of his employment,<sup>31</sup> but he did not submit any documentation of the continuing education credits claimed on the renewal application. Consistently with its authority to extend the due date,<sup>32</sup> the department provided numerous extensions of time,<sup>33</sup> and did not provide a final and definitive date for submission of documentation prior to hearing. Given the lack of a definitive pre-hearing deadline for submission of the requested documentation, Mr. Stavale retained the ability to meet the requirement of timely submission of documentation for the claimed continuing education credits through the date of the hearing. Although at the hearing Mr. Stavale offered testimony to establish that he had taken continuing education, he never submitted the documentation specified in 12 AAC 02.960(e), which he was required to keep<sup>34</sup> and which the division had asked for.<sup>35</sup> The division established that in the post-renewal audit process, Mr. Stavale failed to submit written documentation of the continuing education credits claimed on his renewal application, in violation of 12 AAC 02.960(e).

**B. Count II: Mr. Stavale Engaged in the Required Continuing Competency Activity**

Count II alleges that Mr. Stavale failed to meet the board's continued competency requirements, in violation of AS 08.68.276.<sup>36</sup> Alaska Statute 08.68.276 states: "A license to practice nursing may not be renewed unless the nurse has complied with continuing competence requirements established by the board by regulation."

The continuing competency requirements established by the board are set out at 12 AAC 44.600,<sup>37</sup> and include satisfaction of two of three criteria set out in 12 AAC 44.610, -.620, and -

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<sup>31</sup> The division requested documentation in the form of verification from the employer. Exhibit D.

<sup>32</sup> 12 AAC 02.960(f).

<sup>33</sup> See, e.g., Exhibit G, p. 1.

<sup>34</sup> 12 AAC 02.960(f).

<sup>35</sup> The division requested "copies of education certificates that include the following information: [1] your name; [2] the name of the education program or a description of the activity; [3] the date of the education program or date of participation; [4] the name, address, and signature of the instructor, sponsor, or other verifier; [5] and [6] the number of hours being credited." Exhibit C, p. 1.

<sup>36</sup> The accusation references a "presumed failure to meet the continuing competency requirements." No statute or regulation establishes such a presumption. See *In Re Demars*, OAH No. 06-0678-RES at 4 (Board of Certified Real Estate Appraisers, June 6, 2008) (interpreting AS 08.87.120).

<sup>37</sup> 12 AAC 44.600 states:

The purpose of continuing competency requirements is to ensure that nurses maintain the ability to safely and effectively apply nursing knowledge, principles and concepts in the practice of registered or practical nursing as defined in AS 08.68.410. Before a license can be renewed each biennial period, a registered nurse or a licensed practical nurse must document either:

- (1) compliance with 12 AAC 44.640; or
- (2) completion of two of the following three methods for maintaining continuing competency:
  - (A) continuing education as prescribed under 12 AAC 44.610;
  - (B) professional activities as prescribed under 12 AAC 44.620; and
  - (C) nursing employment as prescribed under 12 AAC 44.630.



.630. The division does not dispute that Mr. Stavale met the employment requirement as prescribed under 12 AAC 44.630. Thus, Mr. Stavale met the continuing competency requirements if he met either 12 AAC 44.610 or 12 AAC 44.620.

1. *Mr. Stavale Did Not Acquire Sufficient Continuing Education*

The board's continuing education requirements are set out in 12 AAC 44.610. The fundamental requirement is for 30 contact hours of instruction, at least 20 of which must be from a continuing education program sponsored by one of the specific organizations identified by regulation, or another organization included on a list maintained by the board.

It is undisputed that during the time he was in military service, Mr. Stavale maintained his compliance with the minimum of 20 hours per year of continuing education units required by the Alaska Air National Guard, and that his Air National Guard continuing education units were acceptable as contact hours of instruction for purposes of the 12 AAC 44.610. Because he had routinely satisfied the military requirement and had taken additional continuing education courses after he retired from the military, at the time he submitted his application for renewal Mr. Stavale believed that he had satisfied the board's continuing education requirements.

However, Mr. Stavale was on active duty for only two months of the applicable reporting period, from December 1, 2002, through the end of January, 2003. While he did take additional courses while he remained employed by the state through the end of October, 2003, Mr. Stavale was unable to state with any degree of certainty that he took a sufficient number of credits to satisfy the board's 30 hour requirement between December 1, 2002, and October, 2003, when he retired from state employment. Mr. Stavale's belief that he had done so, at the time he submitted his license renewal, was based on his longstanding practice of satisfying the military requirement over a two-year period, not on a specific recollection of the courses he had taken during the qualifying period.

The preponderance of the evidence is that Mr. Stavale did not receive at least 30 hours of creditable continuing education during December 1, 2002-November 30, 2004.

2. *Mr. Stavale Engaged in Sufficient Professional Activities*

The board's professional activities requirements are set out in 12 AAC 44.620. The board requires 30 hours of participation in professional activities.<sup>38</sup> Professional activities are "activities, performed without compensation, that use nursing knowledge and contribute to the

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<sup>38</sup> 12 AAC 44.620(a)(1).

health of individuals or the community.”<sup>39</sup> The professional activities may be earned in one of four specified forms of activity identified by regulation,<sup>40</sup> or in “other professional activities approved by the board and included on a list that the board maintains.”<sup>41</sup>

A. SERVICE MUST BE UNCOMPENSATED

Mr. Stavale argues that his 39 hours of compensated service on behalf of the Board of Nursing as a proctor at certified nurse aide licensing examinations should be accepted as professional activities, because at the time he rendered those services, 12 AAC 44.620 did not specify that professional activities must be uncompensated.

The division argues that even though former 12 AAC 44.620 did not specify that professional activities must be uncompensated in order to receive continuing competency requirements, that is “how the Board of Nursing has always interpreted this section” and the 2004 amendment simply clarified that intent.<sup>42</sup>

The board has substantial discretion to interpret its own regulations, and that authority includes the interpretation of regulations promulgated by prior boards. In this case, as the division points out, interpreting former 12 AAC 44.620 as allowing compensated professional activities to count towards continuing competency would create the possibility of an overlap in the continuing competency regulations, in that a licensee’s professional activities could at the same time constitute qualifying employment. While it would be possible to construe the term “employment” in a manner that would differentiate it from “compensation” in the context of professional activities, it is reasonable to construe the prior regulation to exclude compensated professional activities in order to avoid potential overlap. The board has previously interpreted the prior regulation as not covering uncompensated service, and in the absence of any evidence as to the board’s intent at the time the prior regulation was adopted, the board’s prior interpretation of its own former regulation is adopted. Mr. Stavale’s 39 hours of compensated professional activities, therefore, are not entitled to recognition.

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<sup>39</sup> 12 AAC 44.620(b).

<sup>40</sup> 12 AAC 44.620(a)(2)(A)-(D).

<sup>41</sup> 12 AAC 44.620(a)(2)(E).

<sup>42</sup> Exhibit O, page 1; Exhibit Q; Exhibit U, page 2. The regulation was amended to its current form effective October 15, 2004 (Register 172). The division has not argued that, assuming the prior regulation did not preclude compensated professional activities, Mr. Stavale’s services to the Board of Nursing as a proctor would not qualify as professional activities.

B. MR. STAVALE ENGAGED IN 30 HOURS OF UNCOMPENSATED SERVICE TO  
A HEALTH-RELATED ORGANIZATION

Under 12 AAC 44.620(a)(2)(A), uncompensated service with a “health-related organization” may qualify for professional activities credit. A hospital, clinic or other health care facility, and a municipal, state, or federal public health agency are “health-related organization[s]” within the meaning of 12 AAC 44.620(a)(2)(A).<sup>43</sup> Thus, uncompensated services provided to a health care facility or a municipal, state or federal public health agency could qualify for professional activities credit. Mr. Stavale established by a preponderance of the evidence that during the relevant time frame he provided uncompensated services for more than 30 hours to a variety of health-related organizations, such as the Army Air National Guard clinic and other local health care facilities, and local and regional public health agencies. Thus, the primary factual issue to be determined is whether Mr. Stavale’s services were “professional activities”: did they involve the “use of nursing knowledge and contribute to the health of individuals or the community.”

The uncontradicted testimony at the administrative hearing of Mr. Stavale and his co-worker established that Mr. Stavale provided more than 30 hours of uncompensated services to health care facilities, including the direct provision of nursing services such as immunizations, as well as mentoring and training of personnel, and to public health agencies, including coordination of the delivery of public health services in emergency and disaster situations, outreach to homeless and veterans populations, and assistance with the Arctic Care program. On the latter occasions Mr. Stavale utilized his nursing knowledge to provide community leaders with valuable information concerning the delivery of health care services in a variety of emergency and non-emergency scenarios, thus contributing to the public health of the community. His uncompensated services to health care facilities and public health agencies, therefore, constituted professional activities within the meaning of 12 AAC 44.620.<sup>44</sup>

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<sup>43</sup> See also 12 AAC 44.620(a)(2)(E). Under this subsection, the board maintains a list of qualifying professional activities. The current list, as set forth online at [www.commerce.state.ak.us/occ/pub/nur4472.pdf](http://www.commerce.state.ak.us/occ/pub/nur4472.pdf), includes health care facilities, health fairs, wellness programs and a variety of other activities substantially equivalent to the services Mr. Stavale provided.

<sup>44</sup> Mr. Stavale’s uncompensated services for the Board of Nursing in his capacity as a proctor did not involve the use of nursing knowledge: rather, his services consisted of gaining competency in test administration. Thus, even if preparing for the administration of the certified nurse aide examination indirectly contributed to public health, it is not a professional activity within the meaning of 12 AAC 44.620.

C. Count III: Mr. Stavale Falsely Certified Compliance by Continuing Education

Count III alleges that Mr. Stavale falsely certified compliance with the continuing competency requirements of 12 AAC 44. As previously observed, Mr. Stavale certified that he had met the continuing competency requirement by obtaining 30 contact hours of continuing education. That certification was false.

D. The Division Established Grounds for Discipline Under AS 08.68

1. *Count I*

The proposed decision concluded that the division had not established a violation of 12 AAC 44.660 or of AS 08.68. Although the board could have by regulation provided for imposition of disciplinary sanctions based on a violation of AS 08.01 or 12 AAC 02.960, it has not done so. Instead, the board has by regulation provided only for the imposition of disciplinary sanctions on nurses “found to have violated a provision of AS 08.68 or 12 AAC 44.”<sup>45</sup> Because the revised decision concludes that a violation of AS 12 AAC 44.660 has been established, it is not necessary to decide whether, in the absence of a regulation, the board has implied authority to impose a disciplinary sanction based upon a violation of AS 08.01 or 12 AAC 02.960.<sup>46</sup> AS 08.68.275 and 12 AAC 44.710(a) provide the board express authority to impose a disciplinary sanction for a violation of 12 AAC 44.660.

2. *Count II*

In Count II, the division alleges that Mr. Stavale failed to comply with the board’s continuing education requirements before the board renewed his license, and that he thus violated AS 08.68.276, which states: “A license to practice nursing may not be renewed unless the nurse has complied with continuing competence requirements established by the board by regulation.” Count II asserts that the alleged violation of AS 08.68.276 “constitutes grounds for imposition of disciplinary sanctions under AS 08.68.270(8).”

AS 08.68.270(8) provides: “The board may deny, suspend, or revoke the license of a person who...(8) has willfully or repeatedly violated a provision of [AS 08.68] or regulations adopted under it.” Thus, in order to impose a disciplinary sanction under authority of AS

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<sup>45</sup> 12 AAC 44.710(a). An agency may by regulation restrict its discretion. See Smith v. State of Alaska, Department of Corrections, 872 P.2d 1218, 1226 (Alaska 1994).

<sup>46</sup> On remand, the division argues that because AS 08.01.010(27) makes AS 08.01 applicable to the board, AS 08.01 and all of its implementing regulations (12 AAC 02) have been “incorporated by implication into...AS 08.68.” Memorandum at 10. However, although an ambiguous regulation may be interpreted in a manner consistent with a reasonable understanding of its written words, the board “may not read into [AS 08.68] that which is not there.” Alaskans for a Common Language, Inc., v. Kritz, 170 P.3d 183, 192 (Alaska 2007).

08.68.270(8), the division needed to show that Mr. Stavale “willfully or repeatedly” violated AS 08.68 or 12 AAC 44.

In Count II, the division alleged that Mr. Stavale on a single occasion failed to meet the continuing competency requirements for license renewal. It did not allege a repeated failure to meet those requirements. Thus, there is no basis for license suspension or revocation under AS 08.68.270(8) unless Mr. Stavale willfully failed to comply with continuing competency requirements.

The Alaska Supreme Court has observed in a number of cases that “willful” conduct generally means conduct that is not only in violation of a statute or regulation, but involves consciousness of wrongdoing.<sup>47</sup> To act willfully, as defined in those cases, a licensee would have to not only act in violation of a statute or regulation, but would have to be aware of the wrongfulness of the conduct. On remand, the division argues that the term “willfully” in AS 08.68.276 should be interpreted to include actions taken by a licensee who is not actually aware of wrongdoing, as the Alaska Supreme Court has in some cases.<sup>48</sup> For two reasons, however, the statutory language militates against such an interpretation. First, AS 08.68.270(8) provides for the most severe disciplinary penalties (license denial, suspension or revocation, as compared with a fine or reprimand), and it is more consistent with those penalties to require that the violation be aggravated: *i.e.*, that the licensee was aware of wrongdoing. Second, in addition to willful violations, AS 08.68.270(1) prescribes repeated violations, and if a single violation without awareness of wrongdoing is a ground for a sanction under AS 08.68.270(1), then the reference to repeated violations is superfluous.

In this case, the division did not prove an intentional violation of AS 08.68 or 12 AAC 44. The preponderance of the evidence at the hearing was that Mr. Stavale believed he had satisfied the continuing competency requirement by obtaining sufficient continuing education credits, and that although he was mistaken about his continuing education credits, Mr. Stavale

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<sup>47</sup> See, e.g., McGee v. State, 162 P.3d 1251, 1258 (Alaska 2007); Hawes Firearms Co. v. Edwards, 634 P.2d 377, 381 (Alaska 1981) (“Willful” for purposes of Civil Rule 37 means “conscious intent to evade discovery, and not mere delay, inability or good faith resistance”); Hentzer v. State, 613 P.2d 821, 827 (Alaska 1980) (construing “willfully” in 45.55.210(a) to require “awareness of wrongdoing as essential element of offense”).

<sup>48</sup> Memorandum at 19. See, In Re Ford, 128 P.3d 178, 183 (Alaska 2006) (attorney “should have realized” his conduct was contrary to Code of Professional Responsibility); Jeff A.C., Jr. v. State, 117 P.3d 697, 704 (Alaska 2005) (objective test for “willful neglect” for purposes of termination of parental rights); State v. Strane, 61 P.3d 1284 (Alaska 2003) (violation of domestic violence protective order); Hutchison v. State, 27 P.3d 774, 779-780 (Alaska App. 2001) (defendant acts “willfully” within meaning of in former AS 12.30.060 when the defendant “the defendant makes a deliberate decision to disobey a known obligation, but “willfully” is closer to “knowingly” than “intentionally” for purposes of determining whether intoxication is a defense under AS 11.81.900).

did not certify that he had, knowing that he had not. Interpreted consistently with the general principle that willful conduct involves consciousness of wrongdoing, AS 08.68.270(1) does not provide authority for the denial, suspension, or revocation of Mr. Stavale's license under the facts of this case.<sup>49</sup>

### 3. *Count III*

Count III alleges that Mr. Stavale falsely certified compliance with the continuing competency requirements, and that this constitutes a ground for imposition of a disciplinary sanction under AS 08.68.270(1). AS 08.68.270(1) provides that the board may deny, suspend or revoke the license of a person who "has obtained or obtained to obtain a license to practice nursing by fraud or deceit."

The division established that Mr. Stavale falsely certified that he had acquired 30 or more hours of continuing education. However, the preponderance of the evidence is that Mr. Stavale's false certification was unintentional, and therefore neither fraudulent nor deceitful. Therefore, the division has not established grounds for denial, suspension or revocation of his license under AS 08.68.270(1).

### 4. *Other Issues*

In its order of remand, the board instructed the administrative law judge to make findings regarding "written documentation in compliance with 12 AAC 44.600 and 12 AAC 44.620," and to prepare a revised decision "taking into account that the licensee presented no documentation."

#### A. COMPLIANCE WITH 12 AAC 44.600

12 AAC 44.600 provides that "Before a license can be renewed..., a registered nurse or a licensed practical nurse must document either (1) compliance with 12 AAC 44.640; or (2) completion of two of the...three methods for maintaining continuing competency...". In order to harmonize 12 AAC 44.600 with the division's administrative process as set out in 2 AAC 12.960, the requirement in 12 AAC 44.600 that competency requirements be documented "[b]efore a license can be renewed" may be interpreted as a requirement for a truthful self-certification of compliance with the continuing competency requirements. Because 12 AAC 44.600(1) and (2) expressly require that the document show compliance with 12 AAC 44.640 or

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<sup>49</sup> It is therefore unnecessary to determine whether a licensee may be said to "violate" either AS 08.68.276 or 12 AAC 44.600 when the board erroneously renews the license of a licensee who has not met continuing competency requirements. See *In re Demars*, OAH No. 08-0678-REA, at 4-5 (Board of Real Estate Appraisers, June 6, 2008) (interpreting AS 08.87.120(a), providing that "The board may not renew a certificate...unless the person applying for renewal presents evidence..."). According to the division, the board has inherent authority to rescind a license issued in error, even if it lacks disciplinary authority. Memorandum at 23-25.

two of the three methods set out in 12 AAC 44.610-.630, the lack of a reference in 12 AAC 44.600 to the renewal form is immaterial, and 12 AAC 44.600 on its face may be interpreted to require truthful self-certification of the specific method of compliance.

The division established, thus, that Mr. Stavale failed to submit, prior to renewal, the documentation required by 12 AAC 44.600.

B. LACK OF DOCUMENTATION OF PROFESSIONAL ACTIVITIES

At the administrative hearing, Mr. Stavale did not submit documentation of his professional activities. The board's order of remand highlights one other potential issue: whether at an administrative hearing, an applicant may establish compliance with continuing competency requirements without providing the documentary evidence that the board accepts under 12 AAC 44.620(a) for purposes of license renewal and post-renewal audit.

However, whether the requirement for documentary evidence that applies for purposes of license renewal and post-renewal audit also applies in an administrative hearing is an issue that need not be decided in this case because, as explained elsewhere in the revised decision, the division did not establish a ground for license denial, suspension or revocation under AS 08.68.270, and Mr. Stavale is subject to other discipline under 12 AAC 44.710(a) without regard to the nature of the evidence submitted at the administrative hearing.

E. Sanction

In order to impose a disciplinary sanction, the board must have legal authority to do so based on the facts of the particular case; given legal authority, the imposition of a disciplinary sanction, and the nature of the sanction imposed, if any, are within the discretion of the board.<sup>50</sup> The available disciplinary sanctions, which may be imposed singly or in combination, include permanent revocation, suspension, censure, letter of reprimand, limitations or conditions on the license, peer review, professional education requirements, probation, surrender, or a civil fine.<sup>51</sup> The legislature by statute has specifically identified the grounds upon which the board may deny, suspend, or revoke a license.<sup>52</sup> In addition, the board has by regulation provided that a disciplinary sanction may be imposed for a violation of AS 08.68 or 12 AAC 44.<sup>53</sup> In determining whether imposition of a disciplinary sanction is appropriate, and the nature of the

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<sup>50</sup> See *Wendte v. State, Board of Real Estate Appraisers*, 70 P.3<sup>rd</sup> 1089, 1093 (Alaska 2002).

<sup>51</sup> AS 08.68.275(a)(1)-(9); AS 08.01.075(8).

<sup>52</sup> AS 08.68.270.

<sup>53</sup> 12 AAC 44.710.

sanction, if any, the board must be consistent.<sup>54</sup> To maintain consistency, significantly different outcomes in cases involving similar situations must be explained.<sup>55</sup> Thus, in making its decision the board should consider the facts and disciplinary actions it has taken in prior contested cases,<sup>56</sup> as well as the disciplinary guidelines set out in 12 AAC 44.700-.785.

*1. Legal Authority to Impose a Disciplinary Sanction*

The grounds upon which the board may impose a disciplinary sanction are identified in AS 08.68.270, and 12 AAC 44.710(a).

AS 08.68.270 provides that the board may revoke, suspend, or deny the license of an person who has engaged in conduct identified in AS 08.68.270(1)-(10). Apart from AS 08.68.270(1) and (8), addressed previously, the only provision in AS 08.68.270 that is potentially applicable under the facts of this case is AS 08.68.270(7), under which the board may revoke, suspend, or deny the license of a person who engages in professional misconduct as defined in 12 AAC 44.770(1)-(32). The only provision in 12 AAC 44.770 that is potentially applicable under the facts of this case is 12 AAC 44.770(31), under which the board may revoke, suspend, or deny the license of a person for “failing to cooperate with an official investigation by the board’s representatives, including failing to timely provide requested information.” The division repeatedly extended the time for Mr. Stavale to provide documentation; he maintained contact with the division and he did not intentionally fail to provide requested information. There is no finding that he “failed to cooperate” with an official investigation, and the accusation did not identify violation of 12 AAC 44.770(31) or AS 08.68.270(7) as grounds for a disciplinary action. Under the accusation and facts of this case, AS 08.68.270 does not authorize revocation, suspension or denial of Mr. Stavale’s license.

The board has authority to impose a disciplinary sanction for Mr. Stavale’s violation of 12 AAC 44.660, pursuant to AS 12 AAC 44.710(a). However, in light of the legislature’s specific identification of the grounds for revocation, suspension, or denial of a license, 12 AAC 44.710(a) should not be interpreted as providing for those sanctions in cases where the legislature has not expressly authorized the board to impose them. In order to avoid potential

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<sup>54</sup> AS 08.68.275(f).

<sup>55</sup> *Id.*

<sup>56</sup> In general, disciplinary sanctions imposed in prior cases resolved by a memorandum of agreement should not be considered as comparable to disciplinary sanctions imposed in prior contested cases. See Hawthorne v. State, Board of Nursing, Superior Court No. 3AN 04-10154 CI, at 5-6 (December 5, 2006).



conflict with a governing statute, 12 AAC 44.710(a) should be construed as authorizing only sanctions other than revocation, suspension or license denial, unless AS 08.68.270 applies.

## 2. *Comparison With Prior Contested Cases*

The division filed an exhibit describing the outcome in prior Board of Nursing disciplinary cases involving continuing competency or similar requirements.<sup>57</sup> The board has addressed non-compliance with continuing competency requirements in three prior contested cases involving a nurse, In Re Jones, and two certified nurse aides, In Re Burton and In Re Smoke.<sup>58</sup>

In both Jones and Burton, the licensee had not complied with continuing competency requirements, fraudulently or with the intent to deceive the board falsely certified compliance, and failed to submit required documentation. In Jones, the licensee voluntarily surrendered his license; in addition, the board imposed a civil fine of \$1,500, issued a letter of reprimand, and imposed mandatory audit of his continuing competency compliance for two licensing periods. In Burton, the board revoked the license, imposed a civil fine of \$500, and imposed a mandatory audit for two licensing periods. In Smoke, the licensee had not complied with continuing competency requirements, falsely represented that she had, and failed to submit required documentation; the decision does not find that she submitted the false representation fraudulently or with the intent to deceive the board. The board suspended her license until she met continuing competence requirements, imposed a civil fine of \$2,500 with \$1,500 suspended, issued a reprimand, and imposed a mandatory audit for two licensing periods.

Mr. Stavale's case is unlike the three prior contested cases in which the board has imposed discipline involving continuing competence. In this case, unlike any of the other three cases, the licensee has actually engaged in the activities necessary to meet the continuing competency requirements, and it is the lack of documentation alone that is at issue. Furthermore, Mr. Stavale's case is unlike either Jones or Burton, in that he did not submit false information with fraudulent intent. The lack of fraudulent intent is the sole distinction between Jones and Burton on the one hand, and Smoke on the other; the facts suggest that in Smoke the board did not revoke the license due to the lack of a fraudulent intent, and that it imposed suspension due to the failure to meet continuing compliance requirements (since the suspension was removed

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<sup>57</sup> Exhibit KK.

<sup>58</sup> In Re Jones, OAH No. 06-0246-NUR (Board of Nursing No. 2302-06-005, March 7, 2007) (hereinafter, Jones); In Re Burton, OAH No. 04-0280-CNN (Board of Nursing No. 2306-04-019; March 11, 2005) (hereinafter, Burton); In Re Smoke (Board of Nursing No. 2306-02-023; June 28, 2004) (hereinafter, Smoke).

when continuing compliance requirements were met). To maintain consistency in the application of disciplinary sanctions, in light of the factual differences between this case and Jones, Burton and Smoke, discipline in this case should be limited to a civil fine, reprimand, and mandatory audit. Because Mr. Stavale did not act with fraudulent intent, his license should not be revoked; because he actually engaged in the activities necessary to meet continuing competency requirements, it should not be suspended. Imposition of a civil fine, a reprimand, and mandatory audits would be consistent with prior cases, as sanctions for Mr. Stavale's false certification.

### 3. *Disciplinary Guidelines*

The board has issued disciplinary guidelines providing for revocation or suspension of a license for specific conduct.<sup>59</sup> The guidelines do not prohibit the board from imposing a greater or lesser penalty for the specified conduct.<sup>60</sup> However, Mr. Stavale did not engage in any of the conduct identified as grounds for revocation or suspension.

## **IV. Conclusion**

Mr. Stavale did not engage in conduct that has been identified by the legislature as grounds for license revocation, suspension, or denial. Furthermore, revocation or suspension of Mr. Stavale's license would not be consistent with prior contested cases, and Mr. Stavale's conduct does not appear to warrant revocation or suspension under the board's disciplinary guidelines. Under these circumstances, neither revocation nor suspension is appropriate.

However, Mr. Stavale's false certification is detrimental to the board's professional oversight responsibilities, and is conduct for which the board has express authority to impose a disciplinary sanction under 12 AAC 44.710(a). Because Mr. Stavale did not act with fraudulent intent and because he actually engaged in activities sufficient to meet the continuing competency requirements, a reprimand, a civil fine, and mandatory audits will reflect the seriousness of the offense and will deter future inadvertent false certification by ensuring proper documentation. A fine of \$1,500 would be consistent with prior cases.

## **V. Order**

A. Richard L. Stavale is reprimanded for his false certification of his continuing competency activities, as set forth in Attachment A.

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<sup>59</sup> 14 AAC 44.720.

<sup>60</sup> 14 AAC 44.710(b).

B. A civil fine of \$1,500 is imposed on Richard L. Stavale, with none suspended. Mr. Stavale shall pay the fine within 90 days of the date the board adopts this order. The civil fine shall be paid in the form of a cashier's check, money order, or personal check payable to the State of Alaska and shall be sent to the attention of Karen Wilke, Paralegal, Department of Commerce Community and Economic Development, Division of Corporations, Business and Professional Licensing, PO Box 110806, Juneau, AK 99811-0806.

C. Mr. Stavale's license renewal application shall be subject to a mandatory audit for two renewal periods for which Mr. Stavale seeks license renewal following the date the board adopts this order. The board will not issue a renewed license in those renewal periods unless documentation of compliance with continuing competency requirements satisfactory to the board or its designee has been submitted.

DATED March 17, 2009.

By: *Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

## Reprimand

The Board of Nursing issues this reprimand to Richard L. Stavale for his false certification of his continuing competency activities for the 2004-2006 renewal cycle.

The purpose of the continued competency requirement is to ensure that nurses maintain the ability to safely and effectively apply nursing knowledge, principles and concepts in the practice of registered or practical nursing as defined in AS 08.68.41097) and (8). To obtain renewal of his registered nurse license for the period from December 1, 2004, to November 30, 2006, Mr. Stavale was required to meet the continuing competency requirements established by the board under 12 AAC 44. The board issues the renewal of licenses based upon an applicant's affirmative certification in the renewal application that the continuing competency requirement was met.

Under 12 AAC 02.960(f), Mr. Stavale is required to maintain evidence to establish meeting continuing competency requirements and to make that evidence available upon request. Satisfactory documentation would provide independent verification of each claimed continuing competency activity and contain the verification elements listed in 12 AAC 01.960(e)(1)-(5).

Additionally, the 2004-2006 license renewal application submitted by Mr. Stavale contains a notice that license renewal applications are subject to a random audit, and, if selected for audit, he would be required to submit documentation to verify the continued competency requirements were satisfied as claimed on the renewal application.

Subsequent to the renewal of his registered nurse license, Mr. Stavale was informed that his renewal application was among the group randomly selected for audit to monitor compliance with the continuing competency requirement. He did not submit documentation to support the continuing education credits claimed on his renewal application.

Mr. Stavale's response on the renewal application was false; it reflected his mistaken belief that the continuing education credits he had obtained while serving in the military and while employed by the State of Alaska were sufficient to satisfy his continuing education credit requirement for the 2004-2006 renewal cycle. The board expects each Alaska licensed nurse to be aware of all laws and regulations pertaining to the practice of nursing in Alaska, including those relating to documentation of continuing competency requirements. The board relies on each licensee to obtain and provide to the board upon request accurate documentation of all continuing competency credits claimed on the renewal application and thereafter.

Mr. Stavale is hereby reprimanded for his false certification that he had obtained sufficient continuing education credits to satisfy the continuing competency requirements.

Richard L. Stavele  
Board Case # 2300-06-020

### Adoption

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

DATED this 1 day of April, 2009.

By Catherine A. Giessel  
Signature  
Catherine A. Giessel  
Name  
Board Chair  
Title

correct pg 19  
Paralegal Karen Wilke

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