

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

IN THE MATTER OF:)	
)	
J. DETTE AVALON)	OAH No. 08-0636-NUR
_____)	Board Case No. 2304-08-002

DECISION

I. Introduction

J. Dette Avalon, ANP (advanced nurse practitioner), challenges the Board of Nursing’s October 2008 decision regarding her application for authorization to prescribe controlled substances. The Board declined to approve Ms. Avalon’s application “until more information is available”.¹ The parties agreed that the Board’s action would be treated as a denial so Ms. Avalon could challenge that action. The scope of this proceeding is restricted to whether Ms. Avalon has established that it is more likely true than not true that she meets the requirements for authorization to prescribe and dispense schedule 2-5 controlled substances under 12 AAC 44.445.

A hearing was held on January 12 and 13, 2010. Ms. Avalon represented herself.² Assistant Attorney General Karen Hawkins represented the Division of Corporations, Business, and Professional Licensing. At the conclusion of the hearing, the parties elected to submit written closing arguments and agreed that the record would close February 16, 2010. The division timely submitted its closing argument. Ms. Avalon’s submission was not timely filed and was not considered when rendering this decision.³ The hearing allowed the development of a full record which supports a finding that Ms. Avalon has established by a preponderance of the evidence that she meets the requirements to be authorized to dispense schedule 2-5 controlled substances.

II. Facts

A. Authorization to prescribed schedule 2-5 controlled substances

J. Dette Avalon was licensed as an advanced nurse practitioner in December 2006.⁴ An ANP is a registered nurse

¹ October 2008 Board of Nursing Minutes AGO 00158.
² During the initial stages of this appeal Ms. Avalon was represented by counsel.
³ Ms. Avalon’s written closing argument was submitted six days after the record closed.
⁴ Ex. DIV 1 at 242.

who, because of specialized education and experience, is certified to perform acts of medical diagnosis and the prescription and dispensing of medical, therapeutic, or corrective measures under regulations adopted by the board....⁵

The ability to prescribe controlled substances “is the pinnacle of [an ANP’s] practice and responsibility.”⁶ This importance is reflected in a Board regulation requiring that an ANP should have at least one year of prescribing non-narcotic drugs before applying for authorization to prescribe controlled substances.⁷ The waiting period is to provide the ANP with an opportunity to gain experience prescribing medication and to become comfortable in their new role as a health care provider.⁸ Ms. Avalon waited the prescribed year before applying for authority to prescribe controlled substances, and it was the events of that year that have obstructed her efforts to obtain this authorization.

B. Summary of J. Dette Avalon’s testimony regarding working for Ms. Egbert

Ms. Avalon’s first year as an ANP was spent primarily in the employ of Mary Ann Egbert, ANP, in her clinic, Health Works Family Medical Clinic. Ms. Avalon testified that she did not have a good working relationship with Ms. Egbert’s staff. She found them to be unprofessional and she had concerns about billing practices. Ms. Avalon reported these practices to Medicaid and Medicare and she also contacted the Drug Enforcement Agency (DEA) regarding her concerns about staff’s access to signed blank prescriptions. Ms. Avalon testified that relations with staff were so bad that in one instance a staff member grabbed Ms. Avalon with such force that it left a bruise and a patient was forced to intervene. Ms. Avalon resigned after this incident. She returned to Health Works three months later; however, the work situation had not improved. Ms. Avalon’s working relationship deteriorated to the point that, she reports, Ms. Egbert slapped her and caused her lip to bleed. It was after this incident, on November 3, 2007, that Ms. Avalon left Health Works for good.

Regarding Ms. Egbert’s practice of leaving blank signed prescriptions, Ms. Avalon testified that Ms. Egbert gave her unnumbered signed blank prescriptions which she carried with her. Ms. Avalon understood that Ms. Egbert, as her mentor, wanted Ms. Avalon to have practice writing schedule 2-5 medication. Ms. Avalon did not write any prescriptions for scheduled medication unless Ms. Egbert pre approved. This was a practice Ms. Avalon had observed during

⁵ AS 08.68.410(1).
⁶ Ex. 1 AGO 00229.
⁷ 12 AAC 44.445(a)(2).
⁸ Sanders Testimony.

clinical rotation so she felt there was no reason to question whether it was proper. Ms. Avalon distinguished Ms. Egbert giving her signed blank prescriptions from the practice of leaving signed blank prescriptions out where other staff had access to them because the staff lacked her training and expertise.

C. Summary of Aron Wolf, M.D.'s, opinion

Ms. Avalon's experience at Health Works left her distressed and unsure of herself. Knowing she needed a "check and balance," Ms. Avalon went to see psychiatrist Aron Wolf, M.D. Dr. Wolf diagnosed her as suffering from adjustment disorder with anxiety and depression in reaction to experience at Health Works.⁹ In an undated letter to the Board, Dr. Wolf wrote "[t]here is nothing in her demeanor or in her clinical presentation that would give any indication that she might put patient care at risk."¹⁰

D. Summary of Mary DeMers, D.O.'s, testimony

In addition to Dr. Wolf, Ms. Avalon was also seen by her treating physician Mary DeMers, D.O. Dr. DeMers has treated Ms. Avalon as her primary care provider since 2001. She also had diagnosed Ms. Avalon with an adjustment disorder associated with stress in November 2007. Dr. DeMers testified that she was aware that there had been complaints regarding staff interaction and that Ms. Avalon took more time than was necessary with patients. Even knowing about the complaints, Dr. DeMers stated that she had no concern with Ms. Avalon having a license to dispense schedule 2-5 controlled substances. She has never observed drug seeking behavior from Ms. Avalon, nor has she seen any lab results that would lead her to be concerned about drug or alcohol abuse.

E. Summary of evidence concerning complaints

On December 17, 2007, Ms. Egbert filed a complaint with the Board of Nursing. Her complaint questioned Ms. Avalon's mental health, her ability to work with staff, and suggested that Ms. Avalon may have a problem with alcohol.¹¹ Ms. Avalon applied for her authorization to prescribe controlled substances a few days later on December 21, 2007.¹² When she applied for this authorization, she recalls meeting with the Board's executive administrator, Nancy Sanders,

⁹ Ex. RES W.

¹⁰ Ex. RES W at 1.

¹¹ Ex. RES U at 8, 9.

¹² Ex. Div. 1 at 240.

Ph.D. Ms. Avalon recalls telling Dr. Sanders about her experience at Health Works and her concerns regarding how the practice was run. Dr. Sanders testified that she recalls the meeting but not the details of the meeting.

Since leaving Health Works, Ms. Avalon has been employed at several other clinics. Some experiences were good and resulted in positive references that noted her care and compassion for patients, reliability, enthusiasm, and skill.¹³ Other employers reported issues similar to those described in Ms. Egbert's complaint. These employers have also filed complaints with the Board of Nursing. The complaints filed with the Board are from both rural and urban areas throughout the State and have a common theme: short periods of employment where she is perceived to disrupt the operation, exceed her scope of practice, order unnecessary procedures, take excessive time with patients, exhibit manic behavior, and be unwilling to take direction.¹⁴ Ms. Avalon believes that the complaints are retaliatory because she has publicly expressed frustration and concern with how the clinics were run, the lack of medical supplies, and what she characterized as drug seeking behavior by staff.

F. The decision not to approve Ms. Avalon's request for authorization

The Board has delegated to its executive administrator the ability to approve applications to dispense schedule 2-5 controlled substances and Dr. Sanders did not want to approve Ms. Avalon's application until the division had time to complete its investigation of the complaints she had received.¹⁵ Ms. Avalon was unaware of the complaints and expected her application to be approved as a ministerial matter. When it was not and when she could get no answers from the division, she hired an attorney, Amy Menard. It was only after several letters from Ms. Menard that Dr. Sanders took Ms. Avalon's application to the Board.

When Dr. Sanders took the matter before the Board she was aware that, depending upon the outcome of the investigation, the Board could be hearing the complaints, and was cautious about what she told them.¹⁶ She presented minimal information to the Board: Ms. Avalon's application, a copy of her ANP license, and Ms. Menard's letter insisting that the Board take some action on Ms. Avalon's application. Dr. Sanders informed the Board that there had been a complaint of "erratic" behavior lodged against Ms. Avalon that was under investigation. She did

¹³ Ex. RES H.

¹⁴ Weimer Testimony; Ex. RES U.

¹⁵ Sanders Testimony.

¹⁶ Sanders Testimony.

not go into any specifics.¹⁷ The Board unanimously declined to take action on Ms. Avalon's application until more information was available.¹⁸ The Board did not give Dr. Sanders any instruction on what information it was seeking or when it would again consider the application.

This appeal followed. By agreement of the parties, the matter was stayed for six months to provide the investigator time to complete his investigation on the complaints.

III. Discussion

To date, no accusation has been filed against Ms. Avalon. Her ANP license was renewed without delay in November 2008. Ms. Avalon believes she has met her burden of proof and that her license to prescribe controlled substances should not be withheld any longer based only on hearsay. The division believes that questions remain concerning Ms. Avalon's "mental and physical fitness, professional judgment, skills maturity, and decision-making abilities" and the Board should deny Ms. Avalon's application.¹⁹ In the alternative, the division urges that the Board direct Ms. Avalon to undergo a complete mental and physical evaluation before it takes further action on her application.

A. Based on information not previously before the Board, Ms. Avalon's application for licensure under AS 12 AAC 44.445 should be granted.

It is Ms. Avalon's burden to establish that it is more likely true than not true that the Board should exercise its discretion and grant her application for authorization to dispense controlled substances.²⁰ She can do this by either identifying evidence already in the record or adding evidence to the record in support of her position. The Board's exercise of discretion must be reasonable, not arbitrary, and based on the evidence in the record.²¹

It is undisputed that the Board could have authorized Ms. Avalon to prescribe controlled substances, as she meets all the basic requirements set out in 12 AAC 44.445. She is licensed as an ANP, submitted a completed application, verified a year of prescribing legend drugs, and paid the application fee. Instead, the Board exercised its discretion and concluded it would not take

¹⁷ Sanders Testimony.

¹⁸ Minutes; Sanders Direct Testimony.

¹⁹ Division's Closing Argument at 13.

²⁰ When authority has been initially denied or not issued, the applicant has the burden of proof by a preponderance of the evidence. AS 44.62.460(e)(2). *See also* 2 AAC 64.290(e) ("Unless otherwise provided ... the burden of proof and of going forward with evidence is on the party who requested the hearing ... and the standard of proof is preponderance of the evidence....").

²¹ When reviewing the merits of agency action on matters of discretion, the court reviews the action to determine whether "the decision was arbitrary, unreasonable or an abuse of discretion." *N. Slope Borough v. LeResche*, 581 P.2d 1112, 1115 (Alaska 1978).

action on her application until more information was available because Dr. Sanders reported that there was an open complaint of erratic behavior.²²

The factors for the Board to consider in excising its discretion are set out in statute:

The board may deny, suspend, or revoke the license of a person who

- (1) has obtained or attempted to obtain a license to practice nursing by fraud or deceit;
- (2) has been convicted of a felony or other crime if the felony or other crime is substantially related to the qualifications, functions or duties of the licensee;
- (3) habitually abuses alcoholic beverages, or illegally uses controlled substances;
- (4) has impersonated a registered or practical nurse;
- (5) has intentionally or negligently engaged in conduct that has resulted in a significant risk to the health or safety of a client or in injury to a client;
- (6) practices or attempts to practice nursing while afflicted with physical or mental illness, deterioration, or disability that interferes with the individual's performance of nursing functions;
- (7) is guilty of unprofessional conduct as defined by regulations adopted by the board;
- (8) has willfully or repeatedly violated a provision of this chapter or regulations adopted under it;
- (9) is professionally incompetent;
- (10) denies care or treatment to a patient or person seeking assistance if the sole reason for the denial is the failure or refusal of the patient or person seeking assistance to agree to arbitrate as provided by AS 09.55.535(a).²³

When exercising its discretion, the Board balances the interest of an individual in pursuing his or her chosen profession with its obligation to assure competency of licensees and its obligation to protect the public's health, safety, and welfare.²⁴

Much of Ms. Avalon's testimony focused on providing responses and explanations to the complaints made against her. In this proceeding, the substance of the complaints are a red herring. This matter involves whether Ms. Avalon is entitled to authorization to prescribed schedule 2-5 drugs. The concerns raised in the complaints go to Ms. Avalon's fitness to practice as an ANP. They do not allege improper prescribing practices. If the division is concerned with Ms. Avalon's

²² Sanders Testimony.

²³ AS 08.68.270. Factors 3 and 5 through 9 are the only factors potentially applicable in this case.

²⁴ *Allison v. State*, 583 P.2d 813, 816 (Alaska 1978) ("Title 8 contains many chapters which contemplate protection of the public's health and safety and assure competency of those providing the service regulated.")

fitness to hold an ANP license, then the appropriate procedure would be to serve an accusation. As long as Ms. Avalon has a valid ANP license, she meets this requirement for licensure to prescribe controlled substances.

Moreover, to the extent the complaints are offered as evidence that the allegations contained therein are true, the complaints are hearsay.²⁵ Under the evidentiary rules applicable to this proceeding, hearsay may not be used to support a finding unless it would be admissible over objection in a civil action.²⁶ Hearsay may be used to supplement or explain direct evidence.²⁷ The complaints are, therefore, admissible to explain why Dr. Sanders did not approve Ms. Avalon's application without guidance from the Board and why the Board wanted more information. But because the complaints are hearsay, they cannot be used to establish that Ms. Avalon lacks the mental and physical fitness, professional judgment, skills, maturity, or decision-making abilities necessary to be authorized to prescribe schedule 2-5 drugs. There is no admissible evidence of any behavior contrary to AS 08.68.270.

Of course, if the staff were to investigate the complaints and offer admissible proof that they are true, that proof could be considered. The staff cannot, however, rest its case on the complaints alone.

When exercising its discretion, the Board must rely on evidence in the record, but it can only rely on that evidence to support a proposition for which the evidence was admissible. To rely on the complaints to establish more than the reason why Dr. Sanders brought Ms. Avalon's application before the Board, and why the Board wanted additional information, would be unreasonable and an abuse of discretion.

There is no evidence that Ms. Avalon has ever prescribed inappropriately. There is evidence that she held blank prescriptions signed by another provider with controlled substance prescribing authority. Dr. Sanders testified that she was unaware of any situation where this practice would be acceptable, but this fact says more about Ms. Avalon's employer's practices than it says about her own qualification to prescribe controlled substances, as there is no evidence that she used those blank prescriptions to prescribe inappropriate drugs.

²⁵ AK Rule Ev. 801(c) ("Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

²⁶ AS 44.62.460(d).

²⁷ AS 44.62.460(d).

Dr. Sanders also testified that she had not observed Ms. Avalon act in an “erratic” manner. Ms. Avalon’s demeanor was observed throughout the two days of hearing – which can be quite stressful. Ms. Avalon remained composed and focused.

Ms. Avalon’s primary care provider of the past nine years, Dr. DeMers, has never observed her in a clinical setting. She did, however, talk with other ANP’s and was aware of the complaints that Ms. Avalon caused problems with staff and took too long with patients. However, based on her knowledge of Ms. Avalon as a patient, she was not concerned with Ms. Avalon being authorized to dispense controlled substances. Dr. DeMers had contact with Ms. Avalon during the time period in question and was aware of the complaints against her. Dr. DeMers had not observed Ms. Avalon act erratically and has observed no evidence of substance abuse. She had no concerns with Ms. Avalon’s being authorized to prescribe controlled substances.

Dr. DeMers’ opinion as Ms. Avalon’s health care provider was corroborated by the undated letter from Dr. Wolf, to the Board. Dr. Wolf’s letter did not specifically address her fitness to prescribe controlled substances. However, as a medical doctor, if he was concerned about this part of her practice, it is reasonable to assume he would have noted any concern. Additionally, when presented with the division’s Health Assessment form, Drs. Wolf and DeMers responded in the affirmative to the question “is this person capable of performing the duties of an advanced nurse practitioner/registered nurse?”²⁸

In support of its assertion that Ms. Avalon should not be authorized to prescribe schedule 2-5 drugs, the division presented only the concerns of Dr. Sanders and the investigator, all of which are based on inadmissible hearsay. The division’s witnesses’ concerns are not supported by their own first hand observations of Ms. Avalon or the observation of Ms. Avalon throughout the hearing. The record does not support a finding that Ms. Avalon has acted in a manner that would indicate she posed a threat to the public if authorized to prescribe under 12 AAC 44.445.

In October of 2008, the Board reasonably requested more information before deciding whether to grant Ms. Avalon authorization to prescribe schedule 2-5 drugs. Fourteen months later, the Board received that additional information through this hearing. Based on the evidence now available, Ms. Avalon has established by a preponderance of the evidence that she is entitled to authorization to prescribe these drugs.

²⁸ Ex. RES V at 2, 3.

B. *Alternatives to granting a full license.*

The Board may adopt a middle ground between full approval and full denial of Ms. Avalon's application. It may instead impose limitations or conditions on her authorization, such as peer review, educational requirements, probation, or reporting to the board.²⁹ Any limitation or condition should relate to the Board's need to assure competency of licensees and its obligation to protect the public's health, safety, and welfare.³⁰ Ms. Avalon admitted that she accepted signed blank prescriptions for purposes of writing prescriptions. She stated that she had observed this practice in her clinical program. Dr. Sanders testified that this practice is not proper. This raises the question of whether Ms. Avalon and the public would benefit from her receiving instruction on when, if ever, it is appropriate to give a signed blank prescription to another ANP.³¹ If such instruction is available through the division or elsewhere, the Board could approve conditional authorization requiring completion of this instruction. It would be appropriate to provide a time limit by which the instruction must be completed. Failure to report to the Board that this instruction has been completed within the stated time period would result in revocation of Ms. Avalon's authorization to prescribe or dispense schedule 2-5 controlled substances.³²

IV. Conclusion

As requested by the Board, more information is now available regarding Ms. Avalon's application to prescribe and dispense schedule 2-5 controlled substances. Ms. Avalon has established by a preponderance of the evidence that she should be authorized to prescribe and dispense scheduled 2 – 5 controlled substances.

DATED this 12th day of March, 2010.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

²⁹ AS 08.68.275(a). The statute identifies nine disciplinary sanctions in total, some of which are not appropriate to the issue before the board such as revocation of a license, letter of reprimand, etc.

³⁰ *Allison v. State*, 583 P.2d 813, 816 (Alaska 1978) ("Title 8 contains many chapters which contemplate protection of the public's health and safety and assure competency of those providing the service regulated.").

³¹ During the hearing, neither party cited regulations that either permit or prohibit this practice.

³² The need for instruction, if found by the Board, should not delay Ms. Avalon's authorization. Ms. Avalon did not provide signed blank prescriptions to another provider. There is no evidence to support a finding that she has abused her non-controlled substance prescription authority.

Adoption

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

Dated this 7th day of April, 2010.

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