

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

IN THE MATTER OF: )  
 )  
 J. DETTE AVALON ) OAH No. 11-0075-NUR  
 ) Board Case No. 2011-000175  
\_\_\_\_\_)

**DECISION**

**I. INTRODUCTION**

This case presents the narrow issue of whether J. Dette Avalon’s nursing licenses should be revoked for not complying with a single provision of a consent agreement. Ms. Avalon is licensed as a Registered Nurse and as an Advanced Nurse Practitioner. She entered into a consent agreement with the Division of Corporations, Business, and Professional Licensing (Division). That consent agreement was approved by the Board of Nursing (Board). One of the provisions of the consent agreement is that Ms. Avalon be evaluated by a neuropsychologist, Dr. Paul Craig, within 30 days of the Board’s approval of the agreement. For reasons that are disputed by the parties, that evaluation did not occur. The Division, therefore, suspended Ms. Avalon’s licenses.

Ms. Avalon appealed the suspension and a hearing was held. Because the Division did not first attempt to obtain approval to modify the consent agreement, the decision to suspend Ms. Avalon’s license is reversed.

**II. FACTS**

This was not Ms. Avalon’s first administrative hearing. A prior decision was issued concerning her application for authorization to write prescriptions for schedule 2 – 5 controlled substances.<sup>1</sup> After a hearing, a proposed decision was issued finding that Ms. Avalon had proven by a preponderance of the evidence that she should be granted authority to issue these prescriptions. The Board adopted that decision on April 7, 2010.<sup>2</sup>

Apparently some of the evidence in the prior case involved complaints about Ms. Avalon’s practice as an Advanced Nurse Practitioner. The Board stated:

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

---

<sup>1</sup> *In re Avalon*, OAH No. 08-0636-NUR (April 7, 2010 Board of Nursing).

<sup>2</sup> *In re Avalon*, page 10.

concerned with Ms. Avalon's fitness to hold an ANP license, then the appropriate procedure would be to serve an accusation.<sup>[3]</sup>

The Division took the Board up on this invitation and filed an accusation. Subsequent to the filing of that accusation, the parties participated in mediation, and entered into a consent agreement.<sup>4</sup> The Board approved the consent agreement on January 19, 2011.<sup>5</sup>

The Board's order approving the consent agreement states:

The Division may enforce the Consent Agreement and Decision and Order by immediately suspending Respondent's license, without an additional order from the Board or without a prior hearing, for a violation of the Consent Agreement and Decision and Order.<sup>[6]</sup>

Paragraph I of the consent agreement required Ms. Avalon to receive a psychological evaluation from Dr. Paul Craig.<sup>7</sup> Dr. Craig was to make his own determination as to the necessary extent of that evaluation, and Ms. Avalon was required to pay for the evaluation.<sup>8</sup>

On January 31, 2011, Dr. Craig spoke with Division Investigator Ken Weimer who asked Dr. Craig to perform this evaluation.<sup>9</sup> Investigator Weimer sent Dr. Craig a copy of the accusation and two pages from the consent agreement that outline the type of evaluation requested by the Board.<sup>10</sup>

Dr. Craig agreed to conduct the evaluation, and after reviewing the accusation he determined that he would need to conduct a complete neuropsychological evaluation.<sup>11</sup> Dr. Craig wrote a Professional Service Record note that documented his conversation with Investigator Weimer and set out his expectations concerning his evaluation.<sup>12</sup> Ms. Avalon would be required to pay a \$4,900 non-refundable fee, one week in advance of the evaluation. Ms. Avalon would be required to sign a release allowing Dr. Craig to communicate with the Board,

---

<sup>3</sup> *In re Avalon*, pages 6 – 7.

<sup>4</sup> Record at 24 – 31.

<sup>5</sup> Record at 32.

<sup>6</sup> *Id.* See also, consent agreement, paragraph B, record at 27.

<sup>7</sup> Record at 28.

<sup>8</sup> Record at 29.

<sup>9</sup> Testimony of Dr. Craig.

<sup>10</sup> Testimony of Dr. Craig and Investigator Weimer.

<sup>11</sup> Testimony of Dr. Craig.

<sup>12</sup> Record at 40.

and her records would not be subject to the Health Insurance Portability and Accountability Act (HIPPA).<sup>13</sup>

Ms. Avalon called Dr. Craig's office to set up an appointment for her evaluation.<sup>14</sup> She was told the amount she would have to pay and Dr. Craig's other conditions. Ms. Avalon was surprised and tried to explain her understanding of the consent agreement, which was that Dr. Craig would meet with her first to determine whether he needed to perform a full evaluation.<sup>15</sup> Dr. Craig's receptionist was adamant that the terms set out in the Professional Service Record would apply.<sup>16</sup> This was not what Ms. Avalon thought she had agreed to, and in discussing this with the receptionist, she admits that she might have used the word "hell."<sup>17</sup> She asked the receptionist to fax to her the note that Dr. Craig had written.<sup>18</sup>

On February 2, 2011, Ms. Avalon's attorney wrote to Dr. Craig to explain that a full evaluation was not required by the consent agreement.<sup>19</sup> The letter explained that there should be an initial evaluation to determine whether a full evaluation was necessary. Dr. Craig was told that Ms. Avalon had "long contested" the need for a comprehensive examination, partly because of the high cost involved.

While Dr. Craig found nothing objectionable about the attorney's letter, Exhibit G, it was inconsistent with Dr. Craig's view of what should occur.<sup>20</sup> He had already decided to do a full evaluation based on the Accusation he had reviewed. If the full, comprehensive evaluation was not necessary, he would not have been involved at all; he would refer this matter to someone else who could do a less extensive evaluation. In Dr. Craig's view, there would be no point in interviewing Ms. Avalon to determine the extent of his evaluation. He explained that when there

---

<sup>13</sup> No finding is made as to whether Dr. Craig could exclude Ms. Avalon's records from HIPPA coverage.

<sup>14</sup> Testimony of Ms. Avalon.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Dr. Craig testified that his receptionist told him Ms. Avalon had refused to be evaluated and said "hell no." This evidence is hearsay. Hearsay can be used to supplement other evidence. AS 44.62.460(d). Ms. Avalon agrees that she was disturbed during this conversation, and Dr. Craig's testimony is admissible to further explain the extent of her disturbance. While Ms. Avalon may not have said "hell no," she was likely forceful in her objection to the amount being charged and the determination that a full evaluation was required.

<sup>18</sup> Testimony of Ms. Avalon. Dr. Craig testified that it was understandable for Ms. Avalon to be concerned about the cost.

<sup>19</sup> Exhibit G.

<sup>20</sup> Testimony of Dr. Craig.

are severe issues it is easy to tell whether someone is impaired, but more subtle impairments cannot be seen in an initial interview, and an extensive evaluation is required.

Dr. Craig wrote another Professional Service Record note on February 7, 2011.<sup>21</sup> He testified that this note was in response to the attorney's letter of February 2. This note documents his decision to conduct the complete evaluation according to his usual office policies. Dr. Craig implies that he was still willing to conduct the evaluation, but there is no evidence in the record that this note was transmitted to Ms. Avalon or her attorney prior to the commencement of this appeal.

On February 9, 2011, the Division's attorney informed Ms. Avalon's attorney that Ms. Avalon was still required to be evaluated by Dr. Craig.<sup>22</sup> Also on February 9, 2011, Dr. Craig wrote his third Professional Service Record note.<sup>23</sup> Dr. Craig testified that he had thought about this situation for a few days and decided he would not conduct the evaluation of Ms. Avalon. He felt that he was caught in the middle of a dispute concerning the nature of his evaluation, and he was not interested in participating.<sup>24</sup> The note also explains the reasons for some of Dr. Craig's office policies concerning this type of evaluation.<sup>25</sup> There is no evidence in the record that this note was transmitted to Ms. Avalon or her attorney prior to the commencement of this appeal.<sup>26</sup>

On February 14, 2011, Ms. Avalon had a friend deliver a check in the amount of \$4,900 to Dr. Craig's office, along with a note asking to schedule the evaluation.<sup>27</sup> Ms. Avalon's attorney also attempted to speak with Dr. Craig that day.<sup>28</sup> Dr. Craig did not speak with the attorney, and Ms. Avalon's check was returned to her.<sup>29</sup>

On February 16, 2011, Ms. Avalon's attorney contacted the Division noting that Dr. Craig was no longer willing to conduct the evaluation. The attorney suggested a different doctor

---

21 Record at 46.

22 Record at 49.

23 Record at 52.

24 Testimony of Dr. Craig.

25 Record at 52 – 53. There is nothing inappropriate about Dr. Craig's policies.

26 The Division, however, was aware by February 9 that Dr. Craig had decided not to conduct the evaluation. Record at 6.

27 Testimony of Ms. Avalon; Record at 66.

28 Affidavit of Renee Coad.

29 *Id.*

– one recommended by Dr. Craig’s office – to conduct the evaluation.<sup>30</sup> The Division rejected this suggestion and also rejected any attempt to find a different professional to conduct the evaluation.<sup>31</sup>

On February 24, 2011, the Division suspended Ms. Avalon’s nursing licenses for failing to provide an evaluation report from Dr. Craig.<sup>32</sup> On February 25, 2011, Ms. Avalon filed a notice of defense to the suspension.<sup>33</sup>

On March 4, 2011, the Division sent an e-mail to Ms. Avalon’s attorney stating that it would agree to either of two alternatives to replace Dr. Craig. “The language in the Consent Agreement remains the same. Only the name of the evaluator would change.”<sup>34</sup> Ms. Avalon’s attorney responded, asking whether the suspension would remain in effect.<sup>35</sup> There is no evidence in the record as to whether that question was ever answered.

### **III. DISCUSSION**

The sole question in this case is whether Ms. Avalon’s licenses should be suspended for failing to comply with the consent agreement. It is the Division’s burden to prove that they should be suspended.<sup>36</sup>

There are three provisions of the consent agreement relevant to this proceeding:

#### **B. Violation of Agreement**

If Respondent fails to comply with any term or condition of this Consent Agreement, including the terms and conditions of license probation set forth in this proposed decision and order, the Division may enforce this agreement by immediately suspending Respondent’s license, without an additional order from the Board or without a prior hearing, for a violation of this agreement.

\* \* \*

#### **F. Good Faith.**

All parties agree to act in good faith in carrying out the stated intentions of this Consent Agreement.

\* \* \*

---

<sup>30</sup> Record at 70. This letter refers to Dr. Richard Fuller. Dr. Craig, in his testimony, referred to Dr. Christie Fuller. There may have been a misunderstanding as to which Dr. Fuller was recommended by Dr. Craig’s office.

<sup>31</sup> Record at 80.

<sup>32</sup> Record at 14 – 15.

<sup>33</sup> Record at 9.

<sup>34</sup> Exhibit B, page 1.

<sup>35</sup> Exhibit B, page 2.

<sup>36</sup> AS 44.62.460(e).

I. Ability to Practice

The parties agree that Respondent will consult with Dr. Paul Craig for an evaluation within 30 days of the effective date of this order. Within 30 days of the consultation, Respondent shall submit to the Board satisfactory evidence in writing from Dr. Craig confirming that Respondent is capable of safely and competently performing the professional duties of her licenses. Dr. Craig shall determine the necessary extent of his evaluation. ....<sup>[37]</sup>

The Division's position is that when Ms. Avalon did not obtain a report from Dr. Craig as required by the consent agreement, it had no choice but to suspend her license. This position ignores a prior Board decision that discusses what the Division should do in this situation.<sup>38</sup>

In *Small*, the Board of Nursing found that a nurse's inability to comply with a requirement of a consent agreement did not warrant disciplinary action.<sup>39</sup> The consent agreement in that case required Ms. Small to have a psychological examination by Dr. Weisner. She was also required to be supervised by Dr. Tung.<sup>40</sup> Dr. Weisner was unable to perform the evaluation, but the Division agreed to a substitute evaluator.<sup>41</sup> When Dr. Tung could no longer be Ms. Small's supervisor, however, the parties could not agree on a replacement.<sup>42</sup> After some efforts to work around this problem, Ms. Small's license was suspended.<sup>43</sup>

The Board noted that the consent agreement is not just a contract between the Division and the licensee; the consent agreement is also a disciplinary order of the Board.<sup>44</sup> The Division cannot make changes to that agreement without Board approval.<sup>45</sup> Instead, when compliance with the agreement becomes impossible,

the division and [licensee] need[ ] to act in good faith to present the board a proposal to modify the . . . provisions of the agreement, and it [needs] to be one designed to be acceptable to the board. Anything less would show a lack of good faith on both their parts.<sup>[46]</sup>

---

<sup>37</sup> Record at 24 – 32. Paragraph E authorizes the Board to terminate probation if a person required to submit reports to the Board fails to do so. Record at 27. That paragraph is not applicable to this proceeding because the Division took action, not the Board.

<sup>38</sup> *In re Small*, OAH No. 09-0396-NUR & 10-0057-NUR(consolidated) (Board of Nursing October 27, 2010).

<sup>39</sup> *Small*, page 1.

<sup>40</sup> *Small*, page 8.

<sup>41</sup> *Id.*

<sup>42</sup> *Small*, page 12.

<sup>43</sup> *Small*, page 13.

<sup>44</sup> *Small*, page 28.

<sup>45</sup> *Id.* In *Small*, the Division changed the person who would conduct the evaluation. In the present case, the Division agreed to extend the time for Ms. Avalon to obtain an evaluation. Record at 33.

<sup>46</sup> *Small*, page 28.

While there are differences between this case and the *Small* case, the Board's holding in *Small* still provides important instruction. When it became impossible to obtain a psychological evaluation within 30 days, and when Dr. Craig decided not to perform that evaluation, it was incumbent on both parties to present to the Board a proposal to modify the consent agreement. The Division would have the discretion to immediately suspend Ms. Avalon for noncompliance only if Ms. Avalon refused to cooperate in that process.<sup>47</sup>

Of course, a licensee cannot cause compliance with a consent agreement to become impossible, and then insist that it be modified.<sup>48</sup> In this case, however, the Division has not met its burden of proving that Ms. Avalon caused Dr. Craig to change his mind about performing the evaluation.

There is no dispute that Ms. Avalon initially balked at having Dr. Craig perform a complete evaluation or that she objected to the cost of that evaluation. Ms. Avalon's attorney promptly wrote a letter to Dr. Craig explaining Ms. Avalon's (and the attorney's) understanding of the consent agreement's evaluation requirement.<sup>49</sup> Dr. Craig did not say it was Ms. Avalon's interactions with his staff or the attorney's letter that caused him to change his mind about participating. Instead, he testified that it was the disagreement between Ms. Avalon and the Division that changed his mind. He testified that it became clear to him there was a contested issue about how to interpret the consent agreement, and he did not want to be in the middle of that dispute.<sup>50</sup>

As stated above, when Dr. Craig changed his mind about performing the evaluation, both parties were obligated to request approval of a different evaluator. Ms. Avalon suggested a different psychologist and sent the Division a copy of that person's curriculum vitae.<sup>51</sup> The

---

<sup>47</sup> It is important to note that paragraph B of the consent agreement says the Division "may" enforce the agreement by suspending Ms. Avalon's licenses rather than saying it "shall" do so.

<sup>48</sup> The question whether a licensee's actions that cause impossibility must be intentional, as opposed to negligent, before the Division might be excused from attempting to modify the agreement is not addressed in this decision.

<sup>49</sup> Exhibit G.

<sup>50</sup> Dr. Craig's Professional Service Record of February 9, 2011, Record at 52, does imply that his decision was partly based on Ms. Avalon's actions and her attorney's letter, but his testimony at the hearing put more emphasis on the fact that the two parties disagreed. In addition, two days earlier he was still willing to perform the evaluation. Record at 46. Based on all of the evidence, the Division has not met its burden of proving that Ms. Avalon caused the impossibility of performance.

<sup>51</sup> Record at 70 – 79.

Division rejected that suggestion. Instead of naming a different evaluator for Ms. Avalon to consider, the Division continued to insist that Dr. Craig perform the evaluation.<sup>52</sup>

On February 24, 2011, Ms. Avalon's attorney reminded the Division of the Board's decision in the *Small* case.<sup>53</sup> He asked the Division to suggest someone else to replace Dr. Craig.<sup>54</sup> The Division did not suggest any alternate evaluator until after Ms. Avalon's license had been suspended and her appeal filed.<sup>55</sup> There was apparently no discussion by the Division of rescinding that suspension pending Board approval of a substitute evaluator.<sup>56</sup>

In *Small*, the Board instructed the Division and licensees on what to do when provisions of a consent agreement become impossible to perform. Ms. Avalon attempted to comply with the Board's instructions. The Division did not. The Division should not have exercised discretion to revoke Ms. Avalon's licenses without first attempting to obtain Board approval to have the evaluation conducted by a different psychologist.

#### IV. CONCLUSION

The consent agreement provided for a psychological evaluation by Dr. Craig within 30 days of approval of that agreement. When those conditions became impossible to perform, both parties were obligated to act in good faith and present to the Board a proposed modification of the agreement. The Division should rescind the suspension of Ms. Avalon's licenses pending a separate decision by the Board as to whether the consent agreement should be modified.

DATED this 5<sup>th</sup> day of April, 2011.

By: Signed \_\_\_\_\_  
Jeffrey A. Friedman  
Administrative Law Judge

---

<sup>52</sup> Record at 80. Despite Dr. Craig's unequivocal statement that he would not perform the evaluation, Record at 52, Investigator Weimer continued to believe that Dr. Craig might change his mind. Testimony of Inv. Weimer and Record at 6. Given this belief, a good faith attempt to implement this agreement would have included communicating this belief to Ms. Avalon so she could attempt to change Dr. Craig's decision. Absent this information, it was not unreasonable for Ms. Avalon to believe Dr. Craig would not conduct the evaluation.

<sup>53</sup> Record at 85.

<sup>54</sup> Record at 86.

<sup>55</sup> Exhibit B.

<sup>56</sup> Exhibit B, page 2.



## Non-Adoption Options

---

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

The parties will consult immediately and agree on a substitute person to conduct the evaluation, provided that the Executive Director must approve the person agreed to. That agreement will be reached within 5 business days, and the evaluation conducted within 30 days of this decision. If the evaluation is not conducted within 30 days, Ms. Avalon's licenses may be suspended by the Division subject to prior approval of the Executive Director, pending further review by the Board.

The evaluation will be a comprehensive neuropsychological and psychological evaluation, and the report of that evaluation will be provided to the Board within 30 days of the evaluation.

The prior suspension of Ms. Avalon's licenses is rescinded.

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<sup>st</sup> day of July, 2011.

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

---

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