

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

IN THE MATTER OF:)
)
 J. DETTE AVALON) OAH No. 11-0428-NUR
) Board Case No. 2011-000972
_____)

DECISION

I. INTRODUCTION

J. Dette Avalon is licensed as a Registered Nurse and was authorized to practice as an Advanced Nurse Practitioner (ANP). On October 21, 2011, her ANP authorization was suspended by the Board of Nursing for failure to comply with a prior consent agreement. Ms. Avalon appealed that decision, and a hearing was held on December 13, 2011.

Because Ms. Avalon has not yet been evaluated as provided for in the prior consent agreement, the decision to suspend her ANP authorization is upheld.

II. FACTS¹

Ms. Avalon entered into a consent agreement with the Division of Corporations, Business, and Professional Licensing (division) on November 2, 2010. This consent agreement was adopted by the Board on January 19, 2011.² One paragraph of that agreement provided, in part,

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.^[3]

For reasons that were not Ms. Avalon's fault, Dr. Craig did not perform the evaluation. The division suspended Ms. Avalon's licenses and she appealed. On July 1, 2011, the Board of Nursing ordered the suspensions rescinded and further ordered

¹ Additional background information can be found in two prior decisions, *In re Avalon*, OAH No. 08-0636 NUR (Board of Nursing 2010) and *In re Avalon*, OAH No. 11-0075-NUR (Board of Nursing 2011).

² Exhibit 1.

³ Exhibit 1, AVAL 000028 – 000029.

The parties will consult immediately and agree on a substitute person to conduct the evaluation, provided that the Executive [Administrator⁴] 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 [Administrator], 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.^[5]

Ms. Avalon promptly suggested two possible evaluators, Dr. Aaron Wolf or Dr. Richard Fuller.⁶ Five days later, the Division responded and suggested Dr. Heather Macomber or Dr. Russell Cherry.⁷ On July 8, 2011, the division suggested submitting the names of Drs. Fuller, Macomber, and Cherry to the Executive Administrator for a decision as to who would conduct the evaluation.⁸

When the parties could not agree on how to select the evaluator, Ms. Avalon's attorney, Howard Lazar, wrote to the Board of Nursing to ask it to resolve the impasse. At its July 20 meeting, the Board asked the division's investigator, Jo Anna Williamson, to obtain additional information about the different doctors being proposed.⁹

Ms. Williamson first contacted Dr. Fuller's office. She obtained price information, and information about the testing he could conduct. Ms. Williamson determined that the psychological testing performed by Dr. Fuller was not comprehensive, and therefore she did not contact Drs. Cherry and Macomber to obtain pricing information from them.¹⁰ She relied instead on Mr. Lazar's representation as to their hourly rate and she made some assumptions as to how many hours this more extensive evaluation might require.

⁴ Acting as the Board's scrivener, the ALJ used the term Executive Director, but the actual job title for the Board's executive is Executive Administrator.

⁵ Exhibit 2, page 10 (Decision in *Avalon*, OAH No. 11-0075-NUR). Arguably, the description of the examination goes beyond the requirements of the original consent agreement. Ms. Avalon did not appeal this order, however.

⁶ Exhibit C.

⁷ Drs. Cherry and Macomber practice together in the same office.

⁸ Exhibit G.

⁹ The division is one party to the consent agreement. The record does not disclose whether Ms. Avalon was also given notice and an opportunity to provide additional information to the Board at that meeting.

¹⁰ Testimony of Ms. Williamson and Exhibit 6.

On July 25, 2011, the Board's Executive Administrator wrote to Mr. Lazar to inform him that the Board had discussed Ms. Avalon's evaluation during its July 20 meeting.¹¹ This letter clarified the Board's intent as to the scope of the evaluation and concluded that Dr. Fuller's proposed evaluation would not be sufficient. The letter also discussed the question of cost, which was the primary reason the parties were having difficulty agreeing on an evaluator. Ms. Sanders wrote

The Board of Nursing had Ms. Williamson identify the costs. Dr. Fuller's office quoted \$3,500 (6 hours of neuropsychological testing). The cost for Drs. Cherry or Macomber (according to you) is \$450 per hour. If Dr. Cherry or Macomber were to spend 6 hours with Ms. Avalon, the cost will be \$2,700; if 12 hours is spent in testing with her, it would cost \$5,400.^[12]

On July 26, 2011, Mr. Lazar wrote to Ms. Sanders to explain that Dr. Fuller does conduct the type of evaluation specified in Ms. Sander's July 25th letter.¹³ The parties continued to dispute whether Dr. Fuller conducted the types of examination required by the Board. In addition, Mr. Lazar attempted to work with Drs. Cherry and Macomber to obtain an evaluation despite Ms. Avalon's inability to provide the required \$5,000 down payment.¹⁴

On October 12, 2011, Mr. Lazar wrote to Ms. Williamson to inform her that he had finally received a response from Drs. Cherry and Macomber, which was that they were too busy to perform the evaluation.¹⁵ He proposed Dr. Sperbeck as the evaluator. Dr. Sperbeck had previously been suggested by the division.

On October 21, 2011, the Board suspended Ms. Avalon's ANP authorization.¹⁶

On November 8, 2011, the division agreed to use Dr. Sperbeck.¹⁷ Ms. Avalon has an appointment to be evaluated by him on February 7, 2012.¹⁸

//

11 Exhibit H.

12 Exhibit H, page 2. Ms. Williamson testified that she did contact the office of Drs. Cherry and Macomber on November 10, 2011. At that time, she learned that because Mr. Lazar is an attorney he would have been told that the cost of the evaluation would have been as much as \$10,000. If the referral came from the Board of Nursing, however, the cost would be \$4,600. This information was not available to the Board in July, however.

13 Exhibit I.

14 Exhibit M.

15 Exhibit P.

16 Ms. Avalon and her attorney interpreted this order as also suspending her RN license. It actually only suspended the ANP authorization.

17 Exhibit U.

18 Testimony of Ms. Avalon.

III. DISCUSSION

In 2010, an Accusation was filed against Ms. Avalon alleging several violations. It is important to remember, however, that there is no evidence in the record to support those allegations because this matter was settled before a hearing was held. The only question in this matter at this time is whether the Board properly suspended Ms. Avalon's ANP authorization. Whether the prior allegations are valid is not relevant to the current dispute. The division has the burden of proving that the Board's decision was correct.¹⁹

The original consent agreement in this matter allowed Ms. Avalon to continue practicing as an RN and as an ANP provided that she obtain an examination to confirm she is "capable of safely and competently performing the professional duties of her licenses."²⁰ A central role of the Board is to protect the public.²¹ By accepting the consent agreement, the Board precluded either party from proving or disproving the allegations in the Accusation. Some of the allegations, if true, could arguably raise concerns about neuropsychological or psychological issues related to Ms. Avalon's ability to practice. Had a hearing been conducted and some discipline imposed, the Board might have placed Ms. Avalon on probation and required this type of evaluation.²² Instead, the parties agreed to this evaluation as part of the consent agreement. The Board accepted that agreement and allowed Ms. Avalon to continue practicing in part because it knew that this evaluation would occur.

Unfortunately, the parties were unable to agree on an evaluator. Ms. Avalon resisted using Drs. Cherry or Macomber because she could not afford their fee. The division resisted the use of Dr. Fuller. The end result of the parties' failure to agree is that the Board did not receive the evaluation it had required. It has now been nearly a year since the consent agreement was approved. The evaluation has not occurred and the Board has not been reassured that Ms. Avalon is "capable of safely and competently performing the professional duties of her licenses."²³ The Board's order of October 21, 2011 suspending Ms. Avalon's ANP authorization is upheld.

//

¹⁹ AS 44.62.460(e)(1).

²⁰ Exhibit 1, Record at AVAL 000028 – 000029.

²¹ See AS 08.68.270 (grounds for discipline).

²² 12 AAC 44.770. See *In re Small*, OAH No. 09-0396-NUR & 10-0057 NUR (Board of Nursing 2010), pages 5 – 6 (psychological examination required as part of consent agreement).

²³ Exhibit 1, Record at AVAL 000028 – 000029.

IV. CONCLUSION

The Board’s order of October 21, 2011 is upheld. Ms. Avalon shall obtain a comprehensive neuropsychological and psychological evaluation from Dr. Sperbeck, and a copy of that evaluation shall be submitted to the Board. If Ms. Avalon submits an evaluation that confirms she is capable of safely and competently performing the professional duties of her licenses, the division shall reinstate her ANP authorization within five business days and without further order. If the division does not reinstate Ms. Avalon’s authorization, the division shall inform Ms. Avalon of its decision not to reinstate her within five business days of its receipt of the evaluation, and Ms. Avalon will have the right to appeal that decision.²⁴

DATED this 30th day of December, 2011.

By: Signed
Jeffrey A. Friedman
Administrative Law Judge

Adoption

The 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 this decision.

DATED this 18th day of January, 2012.

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

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

²⁴ If Dr. Sperbeck does not perform the evaluation for any reason, the Board delegates to the Executive Administrator the authority to select a different evaluator, who shall be qualified to perform a comprehensive neuropsychological and psychological examination.