

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

In the Matter of:)	
)	
JAY RYDBERG)	OAH No. 12-0049-NUR
<hr style="width:40%; margin-left:0;"/>)	Board Case No. 2012-000281

DECISION

I. Introduction

Jay Rydberg applied for reinstatement of his lapsed registered nurse license. The Board of Nursing denied his application because it concluded that Mr. Rydberg had attempted to obtain a license by fraud or deceit and attempted to practice while afflicted with a condition that interferes with the performance of nursing functions. Mr. Rydberg requested a hearing. The division participated by telephone and was represented by Assistant Attorney General Harriet Milks. Mr. Rydberg participated in person and was self-represented. The evidence establishes that Mr. Rydberg intentionally provided an incorrect answer on his application or had doubts about the accuracy of the answer. This constitutes an attempt to renew his license by fraud or deceit. Accordingly, the Board affirms its decision to deny Mr. Rydberg’s application for renewal.

II. Facts

Jay W. Rydberg holds registered nurse license number 25466 issued November 18, 2005. His license lapsed in November 2008 while he was living and working in the state of Washington under a Washington license.

In December 2010, Mr. Rydberg sought to reinstate his lapsed license, but his application was denied because he answered “no” to the following question on his Alaska application, whereas the correct answer in his case would have been “yes”:

Within the past five years, have you been or are you currently being treated, or on medication for, bipolar disorder, schizophrenia, paranoia, psychotic disorder, substance abuse, depression (excluding situational or reactive depression) or any other mental or emotional illness?^[1]

¹

 Exh. H at 3.

Mr. Rydberg's application was also denied for attempting to practice nursing while afflicted with a mental condition that interferes with the performance of his nursing functions.

These grounds for denial came to light after the division was investigating a "yes" answer to another question on the application.² It was only after the division's inquiry that it was discovered that Mr. Rydberg had been hospitalized for Bipolar Disorder 11 months before he submitted his application.

Mr. Rydberg contends his need for treatment was situational or reactive and therefore not reportable. To resolve this matter it is necessary to understand the history and circumstances surrounding Mr. Rydberg's treatment and subsequent decision to answer "no" on his application.

Mr. Rydberg first experienced depression in 1997 after receiving a low grade in nursing school.³ He saw a counselor a few times and took an anti-depressant for a few weeks.

He experienced his next episode in 2006⁴ and was hospitalized for three days. Mr. Rydberg testified that this "panic attack" was brought on by the corticosteroids he was taking for his Crohn's/Colitis and sleep deprivation.⁵

In September 2008, after losing custody of his son, he experienced another episode and as before, it was preceded by sleep deprivation. This time he was hospitalized for three weeks.⁶

Mr. Rydberg denies any further clinical symptoms until January 2010 when he experienced what he refers to as his "most recent panic attack and was diagnosed with Bipolar Disorder."⁷ As with the prior two "episodes" he was suffering from lack of sleep, on steroids for his Crohn's/Colitis, and suffering financial and personal losses. Unlike the prior two episodes Mr. Rydberg, a deeply spiritual man, took the bible verse "if your eye offends you, cast it off" out of context⁸ and attempted to remove his eye. As a result he has lost his sight in that eye. Mr. Rydberg was hospitalized for three weeks including one week on suicide watch. Upon

² Exh. H at 3. Nancy Sanders Testimony.

³ Exh. C at 2.

⁴ Conflicting dates are contained in the record. Regardless of the exact date, the second "episode" occurred in either December 2005 or in 2006. Because of the proximity in time to Mr. Rydberg's December 2010 application, it is not necessary to determine the exact date.

⁵ "Believe I went without sleep for over one week prior to having the psychological symptoms for which I was treated (a panic attack)." *Id.* at 2.

⁶ *Id.* at 2, 3.

⁷ *Id.* at 3.

⁸ Rydberg Testimony.

release he was subject to a three month less restrictive commitment that permitted him to remain out of the hospital subject to continued counseling and medication.⁹

Mr. Rydberg complied with the less restrictive conditions, including taking lithium as prescribed and counseling as required. In February 2010 a psychiatric evaluation noted that Mr. Rydberg presented as defensive, in denial of his illness, and reluctant to take the prescribed medication.¹⁰ By April 2010, Mr. Rydberg's counselor wrote that his mental state was within normal limits, but affirmed the diagnosis of Bipolar I Disorder and noted her concern for future episodes and the need for ongoing treatment including medication.¹¹

Mr. Rydberg returned to nursing in Washington without incident.

In December 2010, he applied for reinstatement of his lapsed Alaska license. When faced with the application he spent several weeks contemplating how to answer the question on mental illness. He sought counsel of a close friend, Michael Zuyus, and after several conversations it was decided that Mr. Rydberg's "episodes" were situational or reactive and therefore not reportable. Mr. Rydberg did not provide Mr. Zuyus with a copy of the application nor did he accurately read the question to Mr. Zuyus. Mr. Rydberg did not make clear that the parenthetical "excluding situational or reactive" modifies only depression. Mr. Zuyus testified that as conveyed to him, he understood that "excluding situational or reactive" applied to all preceding conditions. Nor was Mr. Zuyus aware that Mr. Rydberg had been diagnosed and treated for Bipolar I Disorder.¹²

Upon further questioning, Mr. Zuyus testified that had he known Mr. Rydberg had been diagnosed and treated for Bipolar Disorder, he might have counseled Mr. Rydberg to answer differently. Regardless, the thought was that if the division wanted more information, it would ask. When Mr. Zuyus was asked if the plan was to "let the State figure it out," Mr. Rydberg nodded his head "yes" in response, while Mr. Zuyus explained in response to the question that he thought the Washington records would be available and if the division thought the answer was incorrect, Mr. Rydberg could address his history at that time.

As noted previously, the inaccuracy of Mr. Rydberg's answer came to light when the division followed up on Mr. Rydberg's "yes" answer to another question. That question asked if

⁹ Exh. TT.

¹⁰ Exh. N.

¹¹ Exh. M at 3.

¹² Zuyus Testimony.

he was currently the subject of an investigation in another state, and Mr. Rydberg responded affirmatively. This reported investigation resulted, on February 9, 2011, in a statement of charges by the State of Washington Department of Health Nursing Care's Quality Assurance Commission. On February 15, 2011, in response to an inquiry by the division about the Washington proceeding, Mr. Rydberg wrote an 11.5 page, single space letter explaining in detail the circumstances preceding his January 2010 hospitalization and his plan for dealing with the aftermath.¹³ Mr. Rydberg wrote:

I have been working full time since this this time (March 2010) without treatment of any kind or the return of any psychiatric symptoms, with only the counsel of close friends. That said though, I have taken this experience very seriously and believe I do have a possible tendency to symptoms again if given the right circumstances (wrong circumstances), such as if I were to continue to draw myself toward extreme conclusions, extreme ambitions, of forgoing sleep and food and to try to solve problems that are too great or complex for me to realistically handle on my own. For this reason I rely on regular 'mental hygiene', such as exercise, and sometimes reading up on mental illness, and talking about my life with friends. I try not to always assume I am irrevocably 'well', but to proactively do things that promote and ensure that I remain so.^[14]

In July 2011, at the request of the Washington Commission, Mr. Rydberg underwent an independent Psychological Evaluation with Allen D. Bostwick, Ph.D.¹⁵ Dr. Bostwick provided a diagnosis of Bipolar I Disorder with psychotic features "currently in remission with no psychotropic medication or mental health treatment."¹⁶ Although he ultimately concluded that Mr. Rydberg was "presently capable of working as a Registered Nurse with reasonable skill and safety," he found "his prognosis for maintaining stability is fair to guarded without ongoing treatment and care."¹⁷ He recommended ongoing follow-ups and medication for Mr. Rydberg's Bipolar Disorder. Dr. Bostwick opined that Mr. Rydberg "has very poor insight into his psychological condition . . . prone to denial of psychological problems . . . overall acceptance of his diagnosis of Bipolar I Disorder is very limited . . . tendency is to deny severe problems and to attribute decompensation in psychological functioning to a lack of sleep."¹⁸

13 Exh CC.
14 Exh CC at 11; Rydberg Testimony.
15 Exh. K.
16 *Id.* at 14.
17 *Id.* at 15.
18 *Id.* at 15.

In August 2011, Mr. Rydberg entered into a Stipulated Findings of Fact, Conclusions of Law and Agreed Order in Washington, where Mr. Rydberg admitted, among other things, that he would not remain on medication long term but would only take medication when his symptoms return, and that he had been diagnosed with Bipolar I Disorder but was currently in remission.¹⁹ As a result of the stipulation and Dr. Bostwick's report, the Washington Commission ordered a 3-year probation, ongoing psychiatric treatment, and compliance with any medication regime.²⁰ The provider was to provide regular progress reports to the Washington Commission.²¹

Since August 2011, Mr. Rydberg has seen at least three psychological professionals. He testified that his financial situation makes it difficult to maintain a relationship with a provider. Because he has been unable to maintain a relationship, Mr. Rydberg challenges whether any of the providers he has seen can accurately assess his mental state.

These providers observed that Mr. Rydberg has limited insight into his mental disorder, is unwilling to accept his diagnosis, less than forthcoming, and in one instance hostile.²² It has also been reported that Mr. Rydberg was noncompliant with taking prescribed medication and refused a referral. In response, the Washington Commission questioned whether Mr. Rydberg was in compliance with the agreed upon order and has issued a new statement of charges alleging unprofessional conduct for failure to follow an order of the Commission.²³

¹⁹ Exh. A.

²⁰ Exh. A at 4.

²¹ *Id.* at 4.

²² Exh. Q (March 3, 2012 evaluation by Dr. Mikki Barker Diagnosis Psychosis and Mood Disorder not otherwise specified. "Longstanding issues of psychotic symptoms, mood disorder, OCD. Will be in need of ongoing Medication Monitoring and psychotherapy." at 5.); Exh. S (March 29, 2012 evaluation by Dr. Barker non compliant with taking medication, not truthful regarding why he did not get his medication, poor judgment and selective memory. "I don't know that he is really motivated to really confront the issues that are in front of him." at 2.); Exh. U (December 14, 2011 evaluation by Cheryl Toppa, ANP, diagnosis Schizoaffective Disorder, Bipolar type. Mr. Rydberg "is not a reliable historian." at 1. "Throughout the interview he was interruptive, defensive and argumentative . . . Patient liabilities are that he has poor insight into his mental health problems. Prognosis is poor." at 2.); Exh. V (October 24, 2011 evaluation by Joel Young, MSW, diagnosis Mood Disorder Not Otherwise Specified, Bipolar Disorder Most Recent Episode Manic. Recommended further psychiatric assessment, medication management and insight oriented therapy.); Exh. W (November 10, 2011 Mr. Young noted Mr. Rydberg to be making good progress toward goal, was open with therapist and showed some insight.); Exh. X (December 28, 2011 evaluation by Mr. Young reported Mr. Rydberg was making fair progress toward goal but was not forthcoming with all information.); Exh. Y (February 9, 2012 evaluation Mr. Young reports that progress is fair. "Mr. Rydberg continues to show limited insight into his disorder and is not willing to accept that he has a diagnosis and therefore is unwilling to accept treatment for this disorder." at 1.) Exh. Z (April 16, 2012 Mr. Young downgrades Mr. Rydberg's progress to poor because he continues to "show limited insight" into his condition and appeared to be manipulating the flow of information to create a favorable picture of his mental health. Mr. Rydberg was unwilling to continue services with Mr. Young.)

²³ Exh. EE.

In his testimony, Mr. Rydberg acknowledges he was diagnosed with Bipolar Disorder but doubts the accuracy of the diagnosis noting the subjective nature of psychology and the “clear connection” between his divorce, Crohn’s disease, and his two most recent psychotic episodes.²⁴ He also believes the chance of a recurrence is diminished because he has since had surgery for his Crohn’s, which appears to be controlled.

In preparation for hearing, the division asked Dr. Bostwick to review treatment notes generated as a result of his recommendation and the Washington order, and issue an Addendum Report.²⁵ Based on the additional treatment notes Dr. Bostwick now believes that Mr. Rydberg was not capable of working safely as a registered nurse.²⁶

III. Discussion

A. *Legal Standard and Burden of Proof*

Under AS 08.68.270 the Board has the discretion to deny a license if it concludes that the applicant falls within any one of ten disqualifying conditions found at AS 08.68.270.²⁷ Attempting to obtain a license by fraud or deceit is a disqualifying condition, as is attempting to practice nursing while afflicted with a physical or mental illness that interferes with the performance of nursing functions.²⁸ It is important to note that the Board is not required to deny a license when it concludes that an applicant’s activities have been proscribed. Rather, the Board exercises its discretion to grant or deny the license depending on the circumstances. The Board may, depending on the circumstances, select from a range of actions including probation or the placing of limitations or conditions on a license.²⁹ However, when the proscribed action consists of an intentional interference with the Board’s ability to protect the public during the renewal of an application, denial of the application can be the only appropriate response.

Mr. Rydberg has challenged the Board’s denial of his application to reinstate a lapsed license.³⁰ Therefore, the burden of proof is on the division to establish by a preponderance of the

²⁴ Rydberg Testimony; Exh. G at 2.

²⁵ Exh. HH.

²⁶ *Id.*; Bostwick Testimony.

²⁷ See AS 08.68.270, Grounds for denial, suspension, or revocation. AS 08.68.270 is the statutory statement of policy regarding proscribed actions for a nurse.

²⁸ AS 08.68.027(1), (6).

²⁹ The Board’s disciplinary powers derive from AS 08.68.275 and AS 08.01.075.

³⁰ Cf: *In re Herwick*, OAH No. 08-0244-NUR (January 2009). In *Herwick* the Board concluded that when applying AS 08.68.270 to an application for reinstatement after voluntary surrender of a nursing license, the applicant has the burden of proving that it is more likely than not that they did not engage in or perform one of the

evidence that Mr. Rydberg's actions fit within one of the two reasons given for denial and that denial of the application is warranted.³¹

B. Mr. Rydberg Attempted To Obtain A License By Fraud Or Deceit

To establish that Mr. Rydberg attempted to obtain a license by fraud or deceit, the division must establish that Mr. Rydberg intended to provide an incorrect answer on his application or that he had doubts as to the accuracy of his answer.³² Whether he had doubts as to the accuracy of his of his answer can be determined by examining the circumstances surrounding the incorrect answer.³³

Mr. Rydberg answered "no" to the following question:

Within the past five years, have you been or are you currently being treated, or on medication for, bipolar disorder, schizophrenia, paranoia, psychotic disorder, substance abuse, depression (excluding situational or reactive depression) or any other mental or emotional illness?³⁴

It is undisputed that Mr. Rydberg was hospitalized in 2008 and 2010 for bipolar disorder. Each time he was placed on medication. Therefore, the correct answer to this question was "yes."

The circumstances surrounding how he came to answer "no" establish that he had doubts as to the accuracy and went to great lengths to convince himself he was answering correctly.

proscribed behaviors listed at AS 08.68.270. Here, at issue is the denial of an application for reinstatement of lapsed license. The Board's regulations treat reinstatement of a surrendered license differently than a lapsed license. Before returning a voluntarily surrendered license, the board must find the licensee competent to resume practice. AS 08.68.275(e). Reinstatement of a license that has been lapsed for less than five years requires no such finding. It may be reinstated by payment of license fees and a penalty fee in addition to meeting the continuing competency requirements of the Board. AS 08.68.251(a); 12 AAC 44.317.

³¹ Mr. Rydberg is a "respondent" as defined in AS 44.62.640(b)(5) and, as an applicant for renewal, he does not have the burden of proof. See AS 44.62.460(e); see also § 8, ch. 63 SLA 1995; the testimony of AAG Teresa Williams to the Senate Judiciary Committee regarding HB 234 (4/29/95); *Malcolm v. Alaska ABC Board*, 391 P.2d 441 (Alaska 1964); and *State, ABC Board v. Decker*, 700 P.2d 483 (Alaska 1985). Cf: *In re Herwick*, OAH No. 08-0244-NUR (January 2009).

³² "An incorrect answer on an application is only fraudulent deceitful or an intentional misrepresentation if the applicant knew it was wrong or had doubts about the accuracy of the answer." *In re Susan Taylor*, OAH No. 10-0409-CNA at 4 (December 2010) *aff'd Taylor v. Alaska Board of Nursing*, 3AN-11-0763CI at 10 (July 5, 2012). Although this standard was stated by the board of nursing in the context of an initial application for licensure as a certified nurse aide because the statutory language contains the same proscription on obtaining a license through fraud or deceit, it is reasonable to apply this same test to Mr. Rydberg's situation. Compare AS 08.68.270 ("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. . . .") with AS 08.68.334 ("the board may deny a certification to . . . a person who (1) has obtained or attempted to obtain certification as a nurse aide by fraud, deceit, or intentional misrepresentation. . . .").

³³ *Id.*

³⁴ Exh. H at 3.

Indeed, Mr. Zuyus testified that he and Mr. Rydberg spent several weeks discussing how to answer question four. Notably, Mr. Rydberg never provided Mr. Zuyus with a copy of question four to read. Had he done so, Mr. Zuyus testified that it is unlikely he would have supported Mr. Rydberg's decision because he would have understood that, as written, the exclusion of situational or reactive episodes was limited to depression. His struggle over how to answer question four establishes that Mr. Rydberg initially had doubts as to the accuracy of his answer.

However, his doubts have since been replaced with a steadfast belief that he was correct in answering "no." What Mr. Rydberg fails to grasp is that what is relevant is his state of mind at the time he completed the application.

Mr. Rydberg's attempt to rationalize his answer is not persuasive. Initially, he admitted he answered incorrectly but felt justified because the need for treatment, he believed was necessitated by his personal situation at the time. Later he disagreed with the diagnosis. He did not believe he suffered a bipolar episode, but rather the psychosis was a side effect of the steroids he was taking to treat his Crone's disease.

The overwhelming weight of the evidence establishes that Mr. Rydberg intended to answer deceptively to question four. He knew the question was asking whether he had been diagnosed or treated for bipolar disorder in the last five years, and he knew he had been diagnosed and treated for Bipolar I Disorder. He had taken medication within the 10 months prior to his application that was prescribed to treat his Bipolar I Disorder. This is not a case of a negligent omission on an application. Mr. Rydberg testified that he disagreed with the diagnosis and the recommended treatment. He testified that he did not want to reveal the reasons given for hospitalization because he was concerned that he would be labeled. He also stated in his closing argument that he intended to answer in the negative in December 2010 and if asked the question today he would still answer "no" because the hospitalization was situational or reactive and therefore not reportable as directed in question four.³⁵ This is incorrect and not a reasonable reading of the question. In short, the circumstances surrounding Mr. Rydberg's application establish by a preponderance of the evidence that he knew his answer to number four was wrong or had doubts as to its accuracy.

As to the division's second reason for denial, attempting to practice nursing while afflicted with a mental illness, it is doubtful that simply applying for an application is an attempt

³⁵ Rydberg Testimony.

to practice of the type contemplated by the legislature when it adopted AS 08.68.270(6). It is uncertain whether the simple act of requesting permission to participate in a licensed activity would subject an unsuccessful applicant to discipline for an attempt to practice.³⁶ Moreover, there is nothing in the record to suggest that Mr. Rydberg's illness was active. On April 15, 2010 it was reported to the Washington Commission that Mr. Rydberg's current mental status was stable and "appropriate to his need to work."³⁷ On June 24, 2011 Dr. Bostwick opined that Mr. Rydberg was, at that time, capable of working as a Registered Nurse with reasonable skill and safety.³⁸ Therefore, if the simple act of applying for a license rises to the disciplinable offense of attempting to practice nursing, it is unlikely that the record would support such a finding.

C. The Board's Denial Of Mr. Rydberg's Application

The legislature has given the Board the discretion to deny a license where the applicant has attempted to obtain the license through fraud or deceit. This means that the Board may, but is not required to, refuse licensure. When granting or denying a license, the Board weighs 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.³⁹

The Board denied Mr. Rydberg's application not because he did something wrong as a nurse, but because he did something wrong in the application process. The action taken by the Board is a direct result of Mr. Rydberg's intentional interference with the Board's ability to protect the public.

Because Mr. Rydberg was less than forthright and was unwilling to provide all information requested by the Board, the Board is unable to determine whether Mr. Rydberg can practice nursing with reasonable skill and safety. Over time, the professionals who were treating him under the Washington Commission's Order have changed their outlook from fair to poor, primarily part because of Mr. Rydberg's inability to be honest with himself.

Additionally, Mr. Rydberg is under investigation in Washington for failure to comply with the terms of his probation agreement. This casts doubt on whether this Board could craft

³⁶ This legal question was not raised at hearing and the parties have not had an opportunity to fully brief the issue. Therefore, it is questionable whether it is ripe for adjudication.

³⁷ Exh. M at 3.

³⁸ Exh. K at 15.

³⁹ See *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.")

conditions appropriate to ensure Mr. Rydberg would be in compliance with what the Board would recommend.

It is also unlikely that Mr. Rydberg is complying with his self-prescribed plan for assuring mental hygiene. A key component of this plan is Mr. Rydberg's talking with his friends. His friends testified at the hearing. While it was apparent they think highly of Mr. Rydberg, it was also apparent that Mr. Rydberg had not informed them of his hospitalizations, his diagnosis, the reason why his application had been denied, or the status of his Washington license.

Mr. Rydberg's failure to be open with unfavorable information is also cause for concern. The public must be able to trust that those on the front line of health care will quickly report an error such as giving the wrong medication or dose. Mr. Rydberg has demonstrated through his actions with the division that rather than be upfront with negative information, he would wait to see if it was discovered. This is troubling. Mr. Rydberg's actions go beyond a failure to accurately answer a question. Rather, in this instance, Mr. Rydberg's actions were aimed at depriving the Board of information it required to fulfill its obligation to protect the public. It is the Board, not Mr. Rydberg, who is tasked with this obligation.

Unfortunately, Mr. Rydberg's deception overshadows his record of nursing post-hospitalization. The relationship between a licensee and the oversight organization works when there is trust and full disclosure. Mr. Rydberg's actions destroy the trust that is given to a professional.

D. Alternatives to Denial of Licensure.

If the Board finds that, in its opinion, there are certain conditions that could protect the public, it could offer a license subject to conditions such as continuing education, probation, fines, etc. However, it is unlikely that Mr. Rydberg would willingly abide by conditions of licensure when he lacks insight into his mental health and the need for monitoring and treatment. On the surface, Mr. Rydberg's plan for dealing with his illness outlined in his 11.5 page letter to the division appears reasonable. However it is unlikely to be successful when he is less than forthcoming with the friends and support network he plans to rely upon. Similarly, Mr. Rydberg's insistence that his "episodes" were situational or reactive shows a lack of insight.

IV. Conclusion

Under Alaska law, the holder of an existing license, even one that is considered lapsed, who meets the qualifications for reinstatement is generally entitled to renewal unless the division proves misconduct that would justify disciplining or denying the license. The division has met its burden of proving that it is more likely true than not true that Mr. Rydberg knew his answer on his application was wrong or had doubts about the accuracy of the answer. Therefore, Mr. Rydberg attempted to obtain a license to practice nursing by fraud or deceit and his application for reinstatement is denied. This decision does not preclude Mr. Rydberg from reapplying.

DATED this 12th day of September, 2012.

Signed _____
Rebecca L. Pauli
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 24th day of October, 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.]