

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

In the Matter of:)	
)	
JEROLD FROMM)	OAH No. 14-0214-NUR
<hr style="width:40%; margin-left:0"/>)	Board Case No. 2011-000446

DECISION

I. Introduction

Jerold Fromm applied for the reinstatement of his lapsed registered nurse license. The Board of Nursing denied his application because it concluded that Mr. Fromm had attempted to obtain a license by fraud or deceit and had been convicted of a felony or other crime substantially related to the qualifications, functions, or duties of the licensee.¹ Mr. Fromm requested a hearing to challenge the denial.²

A hearing was held on April 29, 2014. The Division of Corporations, Business and Professional Licensing was represented by Assistant Attorney General Todd Araujo. Mr. Fromm participated in person and was self-represented. Board of Nursing Executive Administrator Nancy Sanders and investigator Colleen Nelson testified on behalf of the Division.

The evidence establishes that Mr. Fromm attempted to renew his license by fraud or deceit and has been convicted of a crime substantially related to the practice of nursing. Accordingly, the Board's decision to deny Mr. Fromm's application for renewal is affirmed. Nothing in the record indicates there have ever been concerns with Mr. Fromm's competence as a practitioner or the quality of care delivered.

II. Facts

A. Licensing and Criminal History

Mr. Fromm was a licensed registered nurse in Alaska.³ He was originally licensed in 2002. His Alaska nursing license was renewed every two years until it lapsed on November 30, 2012.⁴

¹ R. 1. The Board's original February 3, 2014, License Denial letter (R.46) did not give details for the denial. The March 5, 2014, amended letter expanded on the basis of the Board's denial.

² R. 48.

³ R. 788.

⁴ Fromm testimony. Mr. Fromm still holds a valid Minnesota nursing license.

On October 3, 2013, Mr. Fromm submitted an Application for Reinstatement of Nursing License to the Division of Corporations, Business and Professional Licensing and the Board.⁵ On his reinstatement application, Mr. Fromm answered “no” to the following question: “Have you ever been convicted of a misdemeanor or felony (convictions include ‘suspended impositions of sentence’)?”⁶

Mr. Fromm admitted to knowingly marking the incorrect answer.⁷ Mr. Fromm has been convicted on three separate occasions: a 1986 felony weapons conviction in Minnesota,⁸ a 1993 assault III felony conviction in Alaska,⁹ and a 2011 misdemeanor disorderly conduct conviction in Alaska.¹⁰ He was given a suspended imposition of sentence (SIS) for both the 1986 and 1993 convictions. He successfully completed the terms of probations for both SISes.¹¹

Mr. Fromm had disclosed his 1993 assault conviction on his 2002 RN examination application.¹² He provided information on the 1993 assault conviction, even though he believed and was told at the time (falsely) that, after satisfying the conditions of probation, it would be like he was never convicted. The Board granted him licensure beginning in 2002 with full knowledge of the 1993 conviction. At the time, the Board knew nothing of the 1986 weapons conviction.¹³

Mr. Fromm did not disclose the 1986 weapons convictions on any licensing applications.¹⁴ It was through the 2013-2014 licensing investigation that the 1986 conviction surfaced, as well as the 2011 conviction for disorderly conduct.¹⁵

It is not only the Board that investigates licensees’ criminal backgrounds. In 2007, Alaska passed background check regulations, barring persons charged or convicted with listed

⁵ R. 788.

⁶ R. 794. Previous versions of the Alaska nursing license application asked if the applicant had been convicted since the date of the last application, not if the applicant has ever been convicted. *See* R. 697.

⁷ R. 49 – 51; Fromm testimony.

⁸ R. 711.

⁹ R. 763.

¹⁰ R. 56; Fromm testimony. The disorderly conduct was initially charged as assault, but Mr. Fromm pleaded to disorderly conduct, against the advice of counsel, in order to get out of jail. Mr. Fromm testified credibly that the incident occurred during a period of high family stress. He had been let from his job and his 17-year-old son had recently had a stroke.

¹¹ Fromm testimony.

¹² R. 705.

¹³ Nelson testimony. None of Mr. Fromm’s nursing applications in the record disclose the Minnesota conviction. However, it does appear in the record on a background check from 2001. R. 711. Per Ms. Sanders’ and Ms. Nelson’s testimony, the Board was unaware of that conviction when it originally licensed Mr. Fromm.

¹⁴ R. 1.

¹⁵ R. 1.

crimes from working in facilities that receive Medicaid or Medicare funding.¹⁶ Potential employers of persons who would ordinarily have barring conditions could apply for a variance that would allow employment.¹⁷ This process, still in place, is separate from the Board's licensure requirements.¹⁸

Mr. Fromm was let go from his nursing job when these regulations went into effect.¹⁹ His employer, Alaska Regional Hospital, underwent the variance application process multiple times in order for Mr. Fromm to obtain a variance.²⁰ The variance was granted with one condition. It required the hospital to screen Mr. Fromm for drug use as a condition of employment.²¹ Once the variance was granted, Mr. Fromm returned to work at Alaska Regional Hospital.²²

Mr. Fromm was fired from his Alaska Regional Hospital nursing job in 2011 because he tested positive for cocaine.²³ The variance was revoked as a result.²⁴ The hospital notified the Board of Mr. Fromm's termination,²⁵ but the Board took no action on Mr. Fromm's license until he applied for reinstatement.²⁶

Mr. Fromm was told by Division staff when he submitted his reinstatement application that, for a recently lapsed license, no fingerprint or background check would be required.²⁷

At the time of the hearing, Mr. Fromm was volunteering with the State's Division of Senior and Disability Services.²⁸ The Division represented to Mr. Fromm that he would be offered a job as a nurse if he was able to practice in Alaska.²⁹

¹⁶ See 7 AAC 10.900 – 10.990; Sanders testimony.

¹⁷ 7 AAC 10.930. Job seekers are not able to apply for a variance on their own; the employer must apply.

¹⁸ Sanders testimony. The Division and the background check unit are regulated by different statutes, regulations, and are housed and operated separately.

¹⁹ Fromm testimony.

²⁰ R. 17-34; Fromm testimony. Mr. Fromm was out of work for nine months during the process.

²¹ R. 27.

²² Fromm testimony.

²³ R. 12.

²⁴ R. 87. Mr. Fromm denied using drugs near the time of the test, but admitted to drug use in the past. Mr. Fromm did not challenge the termination because he did not have counsel. At the time of the drug test, Mr. Fromm had a prescription for Amoxicillin and argues it may have caused a false positive. See Exhibit FF.

²⁵ R. 13.

²⁶ Fromm testimony.

²⁷ Fromm testimony.

²⁸ Fromm testimony.

²⁹ Fromm testimony.

B. Investigation and Denial

Mr. Fromm's application for reinstatement was referred for investigation because the Board knew of the 1993 conviction and had received a report of the positive drug test in 2011.³⁰ Colleen Nelson conducted the investigation.³¹ She met with Mr. Fromm on two occasions, investigated his licensing and criminal history, and presented the Board with her investigation results.³²

Ms. Nelson provided Ms. Sanders and the Board with a history of Mr. Fromm's nursing work, convictions, and licensing, as well as his failure to disclose convictions.³³ She also provided the Board with "additional information involving Domestic Violence."³⁴ This information included Mr. Fromm's November 11, 2011, arrest and charge of assault domestic violence, later reduced to disorderly conduct.³⁵ It referenced six restraining order requests by Mrs. G against Mr. Fromm, dating from 1994 to 2010.³⁶

Ms. Nelson provided the Board with very little positive information regarding Mr. Fromm, omitting past job performance reviews and recommendations.³⁷ Mr. Fromm felt the report to the Board was biased, both because of the "one-sidedness" of the presented material, and because of a note in the record that Ms. Nelson may have been in Bible study with Mr. Fromm's wife.

Ms. Nelson testified credibly that she was not sure if the woman in Bible study was Mr. Fromm's wife, and if she were, she gained no knowledge of Mr. Fromm during any interactions that may have occurred. Ms. Nelson also clarified that her investigation focused on the criminal history because the basis of the denial was the attempt to obtain a license by fraud or deceit and the convictions substantially related to nursing. Mr. Fromm's nursing abilities were not the basis for denial.

³⁰ Nancy Sanders testimony.

³¹ Nelson testimony.

³² Nelson testimony. Mr. Fromm initially objected to consideration of the interviews with Ms. Nelson. He believed they violated his right against self-incrimination and thought he should have been given a Miranda warning. He later withdrew his objection to consideration of the recordings. The division relied on testimony, not the recordings, at hearing. Furthermore, no Miranda rights were required because Ms. Nelson is not a police officer and it was not a criminal investigation.

³³ R. 13 – 43; Nelson testimony.

³⁴ R. 15.

³⁵ R. 15.

³⁶ R. 15 -16.

³⁷ Nelson testimony. The record contains multiple positive reviews of Mr. Fromm (R. 20-23, 207-214, 338-345, 646-655), but all are dated prior to his 2011 termination. Mr. Fromm did not provide recent recommendations.

The Board denied Mr. Fromm’s application for two reasons: (1) attempting to obtain a license by fraud or deceit; and (2) for being convicted of a crime substantially related to the practice of nursing. The Board based its second reason for denial on the 1993 assault III conviction and the 2011 conviction.³⁸

Ms. Sanders testified that historically the Board has granted licenses to very few applicants with felony convictions.³⁹ Ms. Sanders testified that the Board would likely have denied Mr. Fromm’s application even if he had answered the conviction question accurately. Ms. Nelson and Ms. Sanders testified that the license denial was partially based on the Board’s adoption of a new barrier crime matrix in January 2013.⁴⁰ Under the newly adopted matrix, an assault III charge would be a permanent ban to licensure, without exception.⁴¹ Ms. Sanders did not know if Mr. Fromm would have been “grandfathered in” if he held a current license at the time of the Board’s adoption of the matrix.⁴² The Board also relied on the fact that Mr. Fromm was previously granted a variance based on this conviction, and failed to uphold the variance condition.⁴³

The basis of the Board’s denial also included Mr. Fromm’s 2011 disorderly conduct conviction, stating it “noticed a conviction with jail time and probation for domestic violence related charges later reduced to disorderly conduct in 2011. This does not demonstrate that the actions that caused the initial convictions are in your past. The Board found that domestic violence is a crime substantially related to the qualifications, functions, or duties of an RN.”⁴⁴

³⁸ R. 1 -2.

³⁹ Sanders testimony. The record also contains an email from Alaska Regional Hospital that the state grants very few variances to persons with a permanent bar to licensure. R. 201.

⁴⁰ Nelson testimony; Sanders testimony.

⁴¹ Sanders testimony. The Board adopted the disciplinary matrix as policy at the January 16 – 18, 2013 meeting. R. 1043-1070. Because the matrix is policy, not a regulation with the force of law, it is not binding on the Board and this decision does not rely on it as a basis for upholding the denial. *See* AS 44.62.640(a)(3); *In re: redacted*, OHA No. 09-FH-2146, at 4 (February 2010). Furthermore, an assault conviction has been listed as a basis for denial since 2001. *See* 12 AAC 44.705(4). For purposes of this decision, reliance on the matrix is unnecessary.

⁴² Ms. Sanders was asked specifically whether Mr. Fromm would have been able to continue practicing as a nurse if he had answered the conviction accurately. Ms. Sanders could not say for sure what the result would be since it that situation has not occurred yet, but testified that it was likely he would not be able to remain licensed. Mr. Fromm challenged this as an illegal *ex post facto* law. Because this is not the situation in the current case, this decision declines to address the potential implications for licensees.

⁴³ R. 2.

⁴⁴ R. 2.

III. Discussion

A. *Legal Standard and Burden of Proof*

The Board has the discretion to deny a license if it concludes that the applicant falls within any of the disqualifying conditions found at AS 08.68.270.⁴⁵ Attempting to obtain a license by fraud or deceit is a disqualifying condition, as is conviction of a crime substantially related to the practice of nursing.⁴⁶ The Board has discretion to grant or deny a license⁴⁷ and must seek consistency in the application of discipline.⁴⁸ 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.⁴⁹

Per the Board's regulations, Mr. Fromm's reinstatement application is more like a renewal than an application for a new license.⁵⁰ A respondent seeking to renew a license does not carry the burden of proof under the Administrative Procedures Act.⁵¹ Therefore, the burden of proof is on the Division to establish by a preponderance of the evidence that Mr. Fromm's actions fit within one of the two reasons given for denial and that denial of the application is warranted.⁵²

B. *Mr. Fromm Attempted to Obtain a License by Fraud or Deceit*

To establish that Mr. Fromm attempted to obtain a license by fraud or deceit, the Division must establish that Mr. Fromm intended to provide an incorrect answer on his application or that

⁴⁵ 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.

⁴⁶ AS 08.68.270(1), (2).

⁴⁷ AS 08.68.270.

⁴⁸ AS 08.68.275(f).

⁴⁹ The Board's disciplinary powers derive from AS 08.68.275 and AS 08.01.075.

⁵⁰ See AS 08.68.251(a); 12 AAC 44.317. Reinstatement of a license that has been lapsed for less than five years requires payment of license fees and a penalty fee in addition to meeting the continuing competency requirements of the Board. New applicants have additional requirements. Those with revoked or voluntarily surrendered licenses are treated differently in terms of discipline. See AS 08.68.275(d),(e).

⁵¹ AS 44.62.640(b)(5).

⁵² At hearing, the Division argued and the ALJ accepted that Mr. Fromm had the burden of proof because his license had expired and it was as if he was a new applicant for a nursing license. This was inaccurate. Mr. Fromm 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); *In Re Rydberg*, OAH No. 12-0049-NUR (October 2012).

Burden of proof was not the determinative factor in this case. Under this set of facts, the outcome would be the same regardless of which party bore the burden.

he had doubts as to the accuracy of his answer.⁵³ There are no doubts that Mr. Fromm knew he had been convicted; he admitted he failed to disclose those convictions. The question clearly asks whether the applicant has ever been convicted of a felony or misdemeanor, and includes SIS.⁵⁴ Mr. Fromm's history includes two SISes and a 2011 conviction.

Mr. Fromm argues that the Board already knew about his convictions. But this is inaccurate. Mr. Fromm never disclosed the 1986 felony conviction. He also failed to disclose the most recent 2011 disorderly conduct conviction, which the Board would not have known about because it occurred after his latest recertification. Mr. Fromm's statement that he did not read the question to include "misdemeanor" is not persuasive.

Much of Mr. Fromm's challenge to the Board's licensure denial focused on the suspended impositions of sentence and how Alaska treats an SIS differently than other states. Mr. Fromm testified and provided evidence that Minnesota and other jurisdictions treat SISes differently than Alaska.⁵⁵ Mr. Fromm also testified that he honestly believed that the 1986 SIS was not considered a conviction and did not have to report it as such.⁵⁶ However, Mr. Fromm's denial was not based solely on his SIS status. It was based on both his failure to answer the conviction question truthfully and his previous convictions. As to the status of an SIS in Alaska, it is well established that a Board may consider an applicant's SIS in making licensing determinations.⁵⁷

Mr. Fromm testified that he was not attempting to get a license by fraud or deceit. He was simply hurried and trying to shortcut the process.⁵⁸ Mr. Fromm knew that he would have to go through the background and variance process after his license reinstatement, and he knew the

⁵³ *In re Rydberg*, OAH No. 12-0049-NUR (October 2012). "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." *Citing, 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. Fromm'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 . . .").

⁵⁴ R. 794.

⁵⁵ Exhibit A – EE; Fromm testimony.

⁵⁶ Fromm testimony; Exhibits A – CC. However, Mr. Fromm also believed that the 1993 SIS was not considered a conviction, but did report it.

⁵⁷ *State, Division of Corporations, Business, and Professional Licensing v. Platt*, 169 P.3d 595, 600 (Alaska 2007).

⁵⁸ R. 49 – 51; Fromm testimony.

Board had previously granted him a license while knowing of the 1993 conviction.⁵⁹ He argued that, without the variance, the license would be no benefit.⁶⁰ On the other hand, Mr. Fromm was told that he would not have to submit to a fingerprint test for a recently lapsed license, and apparently believed the Board would not run a background check.⁶¹ This suggests a potential motive to provide false information. Regardless of why he chose to provide an inaccurate answer, however, Mr. Fromm submitted a signed, notarized application stating that “the information contained in this application is true and correct to the best of my knowledge...” The evidence establishes that Mr. Fromm intended to provide an incorrect answer on his application.

C. Mr. Fromm Was Convicted of a Felony or Other Crime Substantially Related to the Qualifications, Functions, or Duties of the Licensee

The Board’s second basis for denying Mr. Fromm’s application was his 1993 and 2011 convictions. Under Board regulations, an assault conviction is grounds for denial.⁶² The Board’s reliance on Mr. Fromm’s 1993 assault conviction may seem troubling, given that it previously granted him licensure knowing of this conviction. However, the Board has different information now than it did when it initially granted Mr. Fromm licensure. In 2011, Mr. Fromm was discharged from employment for violating the terms of the variance he was employed under and convicted of another crime. The Board is aware of multiple restraining orders issued against Mr. Fromm and is aware of the 1986 conviction that was not previously disclosed. It is within the Board’s discretion to consider all of these circumstances when determining whether to grant reinstatement of the lapsed license.

The fact that the Board previously granted Mr. Fromm a license does not preclude it from reconsidering the 1993 conviction and the rest of Mr. Fromm’s history. The Board carefully considers whether it believes an applicant has been rehabilitated since a past conviction. When the Board allowed Mr. Fromm to practice despite the 1993 conviction, it did just that.

While the Board can rely on the 1993 assault as a basis for denial, Mr. Fromm’s 2011 disorderly conduct conviction is not a basis for denial. Disorderly conduct is not listed as a

⁵⁹ Fromm testimony.

⁶⁰ Though this argument has initial appeal, in a two-part process it is likely that having the license would ease the variance process.

⁶¹ Sanders testimony. Mr. Fromm did not need to be fingerprinted again, but every application goes through a background check.

⁶² 12 AAC 44.705(4).

crime “substantially related to the qualifications, functions, or duties of a...registered nurse” in regulation.⁶³ The Board’s denial letter states that “[t]he Board found that domestic violence is a crime substantially related to the qualifications, functions, or duties of an RN.”⁶⁴ Mr. Fromm was not convicted of domestic violence.⁶⁵ He was convicted of disorderly conduct.⁶⁶

Once the Board determined that Mr. Fromm was convicted of a crime substantially related to the qualifications, functions, or duties of an RN, it had discretion in determining whether licensure was appropriate.

D. The Board’s Denial of Mr. Fromm’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.⁶⁷

The Board denied Mr. Fromm’s application not because he did something wrong acting in his capacity as a nurse, but because he has been convicted of a crime substantially related to nursing and he chose to provide an inaccurate question on his application. Mr. Fromm’s decision to deny past convictions was intentional. Mr. Fromm testified he was not trying to obtain licensure by deceit; he was simply hoping to shortcut the process. But that is not how the process works.

A licensee is called upon to self-report activities and complete renewal forms throughout the course of his or her career.⁶⁸ Applicants and licensees are required to provide accurate information at every step. The relationship between a licensee and the oversight organization works when there is trust and full disclosure. Mr. Fromm’s actions undermined that trust. The evidence supports the Board’s decision finding that Mr. Fromm attempted to obtain a license by fraud or deceit.

⁶³ 12 AAC 44.705.

⁶⁴ R. 2.

⁶⁵ Domestic violence is also not listed in 12 AAC 44.705.

⁶⁶ R. 49; R. 56. The Judgment states that it is not a “DV offence per AS 18.66.990(3)&(5).

⁶⁷ 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”).

⁶⁸ See e.g. AS 08.01.100; *In re Deborah Lynn Wilson*, OAH No. 07-0199-DEN, at 9 (September 2007).

The Board's denial based on convictions related to the practice of nursing is also supported by the record. Mr. Fromm argues that he has a long history of providing quality nursing care with no negative information regarding patient care. His assault and disorderly conduct were family affairs during times of stress and not indicative of his professional qualifications. The record supports these assertions. However, the regulations listing disqualifying crimes do not distinguish based on the status of the assault victim, whether family, patient, or stranger. Per Alaska law, Mr. Fromm was convicted of a crime substantially related to the qualifications, functions, or duties of a nurse. The Board granted him licensure in the past, despite this conviction, but chose not to do so again. It was within the Board's discretion to deny Mr. Fromm's licensure based on his 1993 assault conviction.

E. Alternatives to Denial of Licensure.

If the Board finds that there are certain conditions under which it would be comfortable granting Mr. Fromm a license, it could offer a license subject to conditions such as continuing education, probation, fines, etc. Mr. Fromm expressed deep regret for his failure to check "yes" to the conviction question in an attempt to shortcut the licensing process. He appears willing to work under any consent agreement imposed by the Board that would allow him to reenter the workforce as a registered nurse. Although these alternatives are within the range of the Board's discretion, the administrative law judge has not found a persuasive basis to recommend them at this time.

IV. Conclusion

The Division has met its burden of proving that Mr. Fromm attempted to obtain a license to practice nursing by fraud or deceit. Likewise, the Division established that Mr. Fromm has been convicted of a crime substantially related to nursing. The Board's denial of Mr. Fromm's license is affirmed. This decision does not preclude Mr. Fromm from reapplying.

DATED: June 25, 2014.

Signed

Bride Seifert
Administrative Law Judge

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 22nd day of October, 2014.

By: Signed
Signature
Denise C. Valentine
Name
Board Chair
Title

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