

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

KRIS R. KILE, APRN,

*Appellant,*

v.

THE BOARD OF NURSING,

*Appellee.*

Case No. 3AN-19-11118CI

**DECISION AND ORDER**

**I. INTRODUCTION**

Kris R. Kile, APRN (“Kile”), appeals the Board of Nursing’s (“Board”) final decision to suspend her licenses until October 1, 2020, followed by a 14-month probation. Kile challenges the Board’s findings that H.H. was an “opposite-sex domestic partner,” and that she knowingly allowed unauthorized persons access to the Prescription Drug Monitoring Program (“PDMP”) database in violation AS 17.30.200(l)(1)(C). Additionally, Kile asserts that even if these aforementioned violations have been proven, the imposition of a continued suspension of Kile’s nursing licenses until October 1, 2020, is more severe than necessary. The Board asks the court to affirm the Board’s decision. The court affirms the Board’s decision to suspend Kile’s licenses until October 1, 2020, followed by a 14-month probation.

**II. FACTS**

Kile holds Registered Nurse NURR20410, first issued in October 2000, and Advanced Nurse Practitioner License NURU1356, first issued in March 2013.<sup>1</sup> This matter alleges a violation of a prior Consent Agreement, therefore this discussion will begin with a brief history of that agreement.

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<sup>1</sup> See Appellee’s Confidential Excerpt of Record (“Exc”) at 60.

In June 2018, the Division of Corporations, Business & Professional Licensing (“Division”) filed an Accusation against Kile, alleging unprofessional conduct – including unsupported prescribing of controlled substances and inadequate charting in the prescription of those substances – in her treatment of an individual identified as “Patient #1.”<sup>2</sup> After the matter was referred to the Office of Administrative Hearings, the Division and Kile entered into mediation to try and resolve the case.<sup>3</sup>

The Division then issued an Amended Accusation on November 25, 2018, again setting forth a variety of allegations about Kile’s prescribing practices with “Patient #1.”<sup>4</sup> The essence of the amended accusation was an alleged pattern of prescribing without in-person visits, charting, or evidence that Kile had warned or educated her patient about the risks associated with the scheduled substances she was prescribing.

On December 6, 2018, the parties executed a Consent Agreement to resolve the claims against Kile.<sup>5</sup> The Consent Agreement provided that Kile’s license would be placed under probation for 18 months, during which time she would be under the review of a practice monitor, with her patient files subject to quarterly audit, and that the Board would publicly reprimand her “for a single violation of inadequate charting.”<sup>6</sup> The Division and Kile also agreed that she would complete an additional 35 hours of continuing education in “prescriptive medication, ethics, professional boundaries, pain management principles/practice, and substance abuse/addiction process with patients.”<sup>7</sup>

Additionally, the Agreement required Kile to “obey all Federal law and State statutes and regulations governing her license, or relating to her fitness to practice.”<sup>8</sup> As an enforcement mechanism, the Agreement allowed the Division to summarily suspend Kile’s license for failure to comply with the Agreement and provides in relevant part:

If Respondent fails to comply with any term or condition of this consent agreement, the division may enforce this agreement by immediately

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 61.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 61-67.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

suspending Respondent's license, without an additional order from the Board or without a prior hearing, for a violation of this agreement.<sup>9</sup>

The Board adopted the Consent Agreement on March 28, 2019.<sup>10</sup> However, in February 2019 – after the parties had signed the Consent Agreement but before the Board adopted it – the Division received a complaint from a former contract employee of Kile. The complaint alleged:

[T]hat Ms. Kile has been prescribing narcotics/opioids without seeing patients in clinic and also has not completed chart notes to support prescribing. Ms. Kile has prescribed narcotics to her boyfriend, H.H. I believe Ms. Kile prescribes excessive amounts of controlled substances and may be a risk to patient safety.<sup>11</sup>

The Division began an investigation based on this complaint. The Division also shared the complaint with the Medicaid Fraud Control Unit (MFCU) because the complaint potentially implicated billing concerns. At some point, MFCU investigators asked the Division to pause its investigation. The Division's investigation then paused until June 2019, when Division investigator Jennifer Summers (Summers) accompanied MFCU and FBI personnel serving a search warrant on Kile's clinic.

The search warrant sought medical records of 21 patients, including H.H., as well as computers, cell phones, and electronic storage devices, prescription pads, DEA ordering forms, and other records, and indicated that the material sought was believed to be evidence of Misconduct Involving a Controlled Substance and/or Medical Assistance Fraud.<sup>12</sup> During the search of the clinic, after the Consent Agreement was in effect, Summers observed Kile's PDMP database login information on a sticky note inside of an unlocked cabinet door in a hallway accessible to all staff.<sup>13</sup> The Division then submitted a subpoena to the PDMP to determine whether Kile had any delegates authorized in the

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<sup>9</sup> *Id.* at 60.

<sup>10</sup> *Id.* at 69.

<sup>11</sup> *Id.* at 83.

<sup>12</sup> *Id.* at 87-93.

<sup>13</sup> *Id.* at 142.

program to access the database with relation to her practice. The documentation received from the PDMP indicated that no delegates<sup>14</sup> were assigned to Kile.<sup>15</sup>

The requested medical records showed that 71 controlled substance prescriptions had been written for H.H. by Kile between March 28, 2018 and July 22, 2019.<sup>16</sup> Further, the PDMP records revealed that in addition to the prescriptions to H.H., Kile wrote prescriptions for controlled substances to two relatives.<sup>17</sup> These prescriptions included a single weight loss prescription for one relative and seven scheduled prescriptions for the other.<sup>18</sup>

Summers obtained and reviewed two recordings of interviews that Kile had with the Federal Bureau of Investigation (FBI) and the (MFCU) on June 26, 2019 and July 25, 2019. In the June interview, Kile admitted that H.H. was her live-in boyfriend, and that she was prescribing narcotics to him. In the July interview, Kile was questioned about the post-it note and who had access to check the PDMP for Kile. During the July interview, Kile indicated that two medical assistants in her office were authorized to check the PDMP, but that she was not sure how the process worked except that they needed to go online to get a password for it.<sup>19</sup> Kile further indicated that her business manager took care of that process. Kile stated in the interview that she understood her medical assistants were checking the PDMP with their own passwords, and claimed to be unaware of the presence of the sticky note with her username and password on the cabinet door.<sup>20</sup> Kile also claimed to be unaware that she had no registered delegates under the PDMP program who could access the PDMP for her.<sup>21</sup>

The Consent Agreement Kile signed in December 2018 provided explicitly that Kile “shall obey all Federal laws and state statutes and regulations governing her license,

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<sup>14</sup> A delegate is an agent or employee the medical provider as authorized to access the PDMP as the provider’s delegate. Only an individual licensed under AS 08 may serve as such a delegate.

<sup>15</sup> *Id.* at 146.

<sup>16</sup> *Id.* at 120-140.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See* Appellee’s Brief at 7.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.*

or relating to her fitness to practice.” The Consent Agreement contained an enforcement mechanism in Section G of the Agreement, which provided that if Kile failed to comply with any term of condition of the Agreement, the Division may enforce the agreement by “immediately suspending [Kile’s] license, without an additional order from the Board or without a prior hearing.”<sup>22</sup> On July 31, 2019, the Division applied this provision and suspending Kile’s Registered Nurse license (NURR20410) and Advanced Nurse Practitioner License (NURU1356).<sup>23</sup> In its suspension letter, the Division alleged that Kile violated the Consent Agreement’s “catch-all” legal compliance provision by (1) prescribing controlled substances to her live-in boyfriend in violation of 12 AAC 44.770(9) and AS 08.68.270(7); and (2) by leaving her PDMP information in a common workspace accessible to clinic staff in violation of AS 17.30.200(1)(1)(C).<sup>24</sup>

A hearing to address Kile’s noncompliance with her consent agreement was held on October 14, 2019. At the hearing, the Division presented testimony from Summers. Additionally, multiple exhibits and two audio interview recordings of law enforcement interviews were entered into evidence by the Division. Kile did not submit any exhibits into evidence at the hearing, nor did Kile present any witnesses.

The Administrative Law Judge issued a decision on October 21, 2019<sup>25</sup>, and the Board adopted the decision as final on October 28, 2019.<sup>26</sup> The Board upheld the suspension, finding that the Division had met its burden of showing by a preponderance of evidence that Kile had violated the consent agreement by violating 12 AAC 44.770(9) and by knowingly allowing unauthorized persons to access the PDMP database in violation of AS 17.30.200(d)(3). The Board determined that the evidence supported suspension of Kile’s nursing licenses until October 1, 2020—the remainder of Kile’s

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<sup>22</sup> See Exc. At 77.

<sup>23</sup> *Id.* at 56-58.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 008.

<sup>26</sup> *Id.* at 036

original 18-month probation term outlined in the Consent Agreement, followed by a 14-month probationary term.<sup>27</sup>

Kile filed her Notice of Appeal on November 8, 2019. Briefing was completed by the parties on June 4, 2020. In accordance with Kile's request, the court held oral argument on July 8, 2020.

### III. STANDARD OF REVIEW

The Alaska Supreme Court "recognize[s] four standards to review administrative decisions," applying a "substantial evidence standard to questions of fact, a reasonable basis standard to questions of law involving agency expertise, a substitution of judgment standard to questions of law not involving agency expertise, and a reasonable and not arbitrary standard to an agency's interpretation of its own regulations."<sup>28</sup>

Review of the Board's factual findings is limited to whether there was substantial evidence in the record to support the Board's findings.<sup>29</sup> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>30</sup> Under this standard, the reviewing court does not evaluate the strength of the evidence or choose between competing inferences, it need only determine whether such evidence exists.<sup>31</sup>

With regard to questions of law involving agency expertise, courts apply the reasonable basis standard and will defer to the Board's interpretation of its own regulations.<sup>32</sup> Administrative agencies are given wide latitude when they are interpreting statutes that they have been charged to administer.<sup>33</sup> Because this appeal concerns a disciplinary statute authorizing the Board to exercise its own discretion in sanctioning license holders, the court will apply the "reasonable basis" test to the Board's

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<sup>27</sup> *Id.*

<sup>28</sup> *Gottstein v. State, Dep't of Natural Res.*, 223 P.3d 609, 620 (Alaska 2010).

<sup>29</sup> *Halter v. State, Dep of Commerce & Econ. Dev., Med. Bd.*, 990 P.2d 1035, 1037 (Alaska 1999).

<sup>30</sup> *Keiner v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963).

<sup>31</sup> *Handley v. State, Dept. of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

<sup>32</sup> *State, Bd. of Marine Pilots v. Renwick*, 936 P.2d 526, 530 (Alaska 1997).

<sup>33</sup> *Id.* at 531.

interpretation of statutes, and a “reasonable and not arbitrary” standard will be applied to the Board’s interpretation of its own regulations.<sup>34</sup>

#### IV. DISCUSSION

**a. The Board’s determination that Kile prescribed controlled substances to her live-in boyfriend, H.H., is supported by substantial evidence and the Board’s finding that Kile’s actions violated nursing licensing regulation 12 AAC 44.770(9) was reasonable and not arbitrary.**

i. The Board had sufficient evidence to determine that Kile prescribed controlled substances to her live-in boyfriend, H.H.

A determination of fact by an agency will stand if it is supported by substantial evidence. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>35</sup> Under this standard, the court’s role is only to determine whether such evidence exists and not reweigh the evidence or choose between competing inferences.<sup>36</sup>

Whether Kile prescribed controlled substances to her live-in boyfriend, H.H., is a question of fact. The relevant evidence to support the Board’s factual finding is detailed and uncontested by Kile. The relevant evidence includes the fact that Kile admitted in an interview with FBI and MFCU investigators that (1) H.H. was her boyfriend, (2) that she had been prescribing controlled substances to him since March of 2018, and (3) that H.H. lived with her. Since there is sufficient evidence to support the Board’s conclusion that Kile prescribed controlled substances to H.H., who was her boyfriend and did live with her, the court affirms the Board’s factual findings.

ii. The Board’s determination that Kile violated nursing licensing regulation 12 AAC 44.770(9) and therefore her Consent Agreement when she prescribed controlled substances to H.H. was reasonable and not arbitrary.

An agency’s interpretation of its own regulation presents a question of law. The Alaska Supreme Court has noted that the “reasonable and not arbitrary” test is used for

<sup>34</sup> *Gottstein*, 223 P.3d at 620.

<sup>35</sup> *Keiner*, 378 P.2d at 411.

<sup>36</sup> *Handley*, 838 P.2d at 1233.

review of administrative regulations.<sup>37</sup> Where an agency interprets its own regulation, as in the present case, a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue.<sup>38</sup> Accordingly, the courts inquiry will be limited to determining whether there is a reasonable and not arbitrary basis to the Board's interpretation of the regulation.

The specific provision at issue, 12 AAC 44.770(9), provides in relevant part that:

Nursing conduct that could adversely affect the health and welfare of the public constitutes unprofessional conduct under AS 08.68.270(7) and includes the following:

...(9) violating state or federal laws regulating drugs, including forging prescriptions or unlawfully distributing drugs or narcotic, or prescribing controlled substances for self or the nurse's immediate family members; in this paragraph, "immediate family member" means a parent, sibling, spouse, child, parent-in-law, sibling-in-law, stepchild, or same-sex or opposite-sex domestic partner[.]<sup>39</sup>

Kile does not dispute that she was prescribing controlled substances to her live-in boyfriend, H.H. Instead, Kile disputes the Board's interpretation and application of the aforementioned regulation regarding controlled substance prescriptions to immediate family members. Kile argues that her relationship with H.H. needed to be "like a marriage" in order for H.H. to be deemed her "opposite sex domestic partner."<sup>40</sup> In its decision, the Board discussed Section 770(9) in depth, and concluded that Kile's reading of the regulation was too narrow.

First, the Board noted that the regulation's reference to domestic partners "must mean something other than 'spouse,'" because spouses are separately identified in the regulation as immediate family members.<sup>41</sup> Second, the Board's decision noted that the regulation also identified "various more distant relatives—parents-in-law and siblings-in-law" as "other 'immediate family members,'" such as parents and siblings, are not the

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<sup>37</sup> *Gottstein*, 223 P.3d at 620.

<sup>38</sup> *Rose v. Commercial Fisheries Entry Com'n*, 647 P.2d 154, 161 (Alaska 1982).

<sup>39</sup> 12 AAC 44.770(9).

<sup>40</sup> See Brief of Appellant at 5-6.

<sup>41</sup> See Exc. At 046-047



type that “typically reside with adult professionals.”<sup>42</sup> As such, the Decision concluded that “[t]he inclusion of this range of relatives supports an interpretation of the regulation as broad, not narrow.” Ultimately, the Board determined that Kile’s arguments, that in order for a live-in boyfriend to be determined to be an “opposite-sex domestic partner” there must be findings that the relationship shared the “various attributes of a legal marriage,” was too narrow. The court agrees.

The Board’s determination that Kile violated nursing licensing regulation 12 AAC 44.770(9) was not arbitrary or unreasonable. There is ample evidence to satisfy the division’s burden or showing that Kile’s relationship to H.H. was of the type contemplated within the scope of the regulation. As previously mentioned, Kile admitted that H.H. was her boyfriend. Kile admitted, and evidence demonstrated, that they were living together in July 2019, and H.H.’s PDMP records show him having had the same physical address since July 2018. Additionally, Kile described their incomes as intermingled, telling investigators that H.H. “works for free because he lives with me,” and that they were working together to start a wound care business, as well as complaining that, due to the confiscation of his computer, “we have no income.”<sup>43</sup>

Since the evidence supports the conclusion that H.H. was Kile’s opposite-sex domestic partner, the Board’s determination that her prescribing controlled substances to him violated 12 AAC 44.770(9) and therefore her Consent Agreement were not arbitrary or unreasonable. Nursing licensing regulation 12 AAC 44.770(9) flatly prohibits prescribing controlled substances to an opposite-sex domestic partner. The Division clearly met its burden in demonstrating that H.H. was Kile’s opposite-sex domestic partner. Medical records showed that 71 controlled substance prescriptions had been written for H.H. by Kile between March 28, 2018 and July 22, 2019 in direct violation of this regulation. Additionally, Kile’s Consent Agreement was executed on December 6, 2018 and PDMP records indicate that the last prescription for controlled substances for H.H. was written on July 22, 2019. Therefore, the Board’s determination that Kile’s

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<sup>42</sup> *Id.* at 047.

<sup>43</sup> *Id.*

violation of 12 AAC 44.770(9) constituted a breach of her Consent Agreement to obey all laws governing her license or relating to her fitness to practice is upheld.

**b. The Board's determination that Kile knowingly allowed unauthorized persons access to the PDMP database was supported by substantial evidence and the Board's finding that Kile's actions violated AS 17.30.200(1)(1)(c) satisfies the "reasonable basis" test.**

i. The Board had sufficient evidence to determine that Kile allowed persons access to the PDMP database.

As previously discussed, a determination of fact by an agency will stand if it is supported by substantial evidence. Under this standard, the court's role is only to determine whether such evidence exists and not reweigh the evidence or choose between competing inferences.

Whether Kile allowed persons access to the PDMP database is a question of fact. The relevant evidence to support the Board's factual finding is detailed and substantial. The relevant evidence includes the fact that in June 2019, after the Consent Agreement was signed, Kile's PDMP login information was found on a sticky note that was posted in a common work space where it was accessible to all clinic staff and potentially to others who were in that area of the office. Additionally, Kile herself made statements in the July 2019 interview with investigators that her two medical assistants had access to the PDMP. Since there is sufficient evidence to support the Board's conclusion that Kile was "more likely than not" allowing and relying on personnel to access the PDMP, the court affirms the Board's factual findings.

ii. The Board's determination that Kile's actions violated AS 17.30.200(1)(1)(c) and therefore her Consent Agreement satisfies the "reasonable basis" test.

An agency's interpretation of a statute presents a question of law. The Alaska Supreme Court has noted that the deferential "reasonable basis" standard of review is appropriate where a question of law implicates the agency's expertise as to complex

matters or as to the formulation of fundamental policy.<sup>44</sup> Here, the statute at issue outlines who is authorized to access the PDMP database and is clearly a regulation best interpreted by the agency that has been charged to administer it. Accordingly, the courts inquiry will be limited to determining whether there is a reasonable basis to the Board's interpretation of the statute.

The specific statute at issue, AS 17.30.200(l)(1)(c), provides in relevant part:

A person with authority to access the database under (d) of this section who knowingly allows another person who is not authorized to access the database to access the database commits a class C felony.<sup>45</sup>

Additionally, AS 17.30.200(d)(3) provides that the database may only be accessed by "a licensed practitioner having authority to prescribe controlled substances or an agent or employee of the practitioner whom the practitioner has authorized to access the database on the practitioner's behalf," but that such a delegate "must be licensed or registered under AS 08."<sup>46</sup> As discussed previously, the evidence establishes the Kile's medical assistants were accessing the PDMP on her behalf. As the Board correctly noted in its decision, this evidence is problematic for two separate reasons. First, because medical assistants are not licensed professionals under AS 08, Kile would not have been able to authorize her medical assistants as delegates. Second, Kile had no authorized PDMP delegates able to access the database on her behalf.

Since the factual evidence supports the conclusion that Kile was "more likely than not" allowing her medical assistants access the PDMP database, the Board's determination that her allowing her medical assistants to access the PDMP database violated AS 17.30.200(l)(1)(c) satisfies the "reasonable basis" test.

The requirements of AS 17.30.200(d)(3) are clear – the PDMP database may only be accessed by a licensed practitioner having the authority to prescribe controlled substances, like Kile, or a delegate, who is also licensed or registered under AS 08, that the practitioner has authorized to access the database on the practitioner's behalf. The

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<sup>44</sup> *Rose*, 647 P.2d at 161.

<sup>45</sup> AS 17.30.200(l)(1)(c).

<sup>46</sup> AS 17.30.200(d)(3).

evidence presented establishes that medical assistants were accessing the PDMP database with Kile's approval both before and after her Consent Agreement had been signed. However, the medical assistants who were accessing the PDMP were not and could not be legally authorized delegates. Therefore, Kile was improperly allowing and relying on unlicensed personnel to access the PDMP in direct violation of AS 17.30.200(l)(1)(c) which expressly prohibits unauthorized persons access to the PDMP.

The Board's determination that Kile's violated AS 17.30.200(l)(1)(c) and ultimately the terms of her Consent Agreement to obey all laws governing her license or relating to her fitness to practice is upheld.

**c. The suspension of Kile's license to October 1, 2020 is an appropriate consequence of the violation of her Consent Agreement.**

The Board's interpretation of the law was reasonable and not arbitrary, and the decision was supported by substantial evidence. At the time of the violations at issue, Kile was already practicing on probation under a Consent Agreement for improper prescribing methods. Kile's violation of her Consent Agreement, and characterization of the violations as merely "technical," continues to demonstrate her lack of willingness to comply with nursing regulations and statutes as well as a lack of understanding of their importance as it relates to patient safety. The court agrees that both of these violations reflect a carelessness in the prescription of controlled substances that are particularly concerning on the heels of an earlier Consent Agreement. Therefore, the court affirms the Board's ongoing suspension until October 1, 2020, followed by a 14-month probationary term.

**V. CONCLUSION**

The court finds there is sufficient relevant evidence to support the Board's factual conclusions that that Kile prescribed controlled substances to her live-in boyfriend, H.H., and allowed unauthorized persons to access the PDMP database. Therefore, the Board's determination that Kile violated 12 AAC 44.770(9), AS 17.30.200(l)(1)(c), and thus her Consent Agreement are upheld.

Additionally, the court agrees with the Board's decision to suspend her licenses for the remainder of the 18-month term of probation to which she originally agreed followed by probation for a period equal to the probationary term that she initially failed to complete.

Therefore, the court AFFIRMS the Board's decision, and AFFIRMS the Board's decision to suspend Kile's licenses until October 1, 2020, followed by a 14-month probation

**IT IS SO ORDERED.**

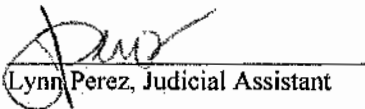
DATED at Anchorage, Alaska this 15<sup>th</sup> day of Sept 2020.



CATHERINE M. EASTER  
Superior Court Judge

I certify that on 9/15/20  
a copy of the above was mailed to:

Kevin Fitzgerald  
Ashley Christen



Lynn Perez, Judicial Assistant