

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

In the Matter of)	
)	
SUE BOMA)	OAH No. 19-1179-NUR
_____)	Agency No. 2017-000974

DECISION

I. Introduction

The Division of Business, Corporations, and Professional Licensing filed an accusation against licensed practical nurse Sue Boma after a series of events in which she was terminated from her job after falling asleep at her workstation. After a hearing on the accusation, this decision concludes it is more likely true than not true that Ms. Boma habitually abused alcoholic beverages in a manner that interfered with her nursing functions, violating AS 08.68.270(3) and (7). Disciplinary recommendations are made accordingly.

II. Facts

A. Background

Ms. Boma is from the Central African country of Cameroon and moved to Alaska after previously living in Minnesota and New York. She worked as a certified nurse’s aide before earning her nursing degree.¹

When living in Minnesota in the late 1990s, Ms. Boma had an alcohol problem that led to an arrest for driving under the influence. The DUI charge was dismissed in exchange for a guilty plea on a lesser charge (refusal to take a chemical test). She was ordered to and did complete a chemical dependency evaluation, and following the evaluation completed some classes, although the details are hazy 20 years later. She participated in Alcoholics Anonymous meetings until moving to New York with family.²

When she first applied for licensure in Alaska in 2006, Ms. Boma disclosed her prior conviction, as required.³ In an explanatory letter to the Board, she wrote that she had fallen into excessive drinking during an abusive relationship, but had since sought treatment and counseling

¹ Ex. 19.

² Boma testimony. Ms. Boma contends she did not participate in AA after leaving Minnesota because “nobody around [her] was drinking and it was a very comfortable environment.”

³ Ex. 1, p. 2. Although Ms. Boma disclosed that she had a DUI conviction, her actual conviction was for refusal to take a field sobriety test.

and, “had been clean and sober since and feeling good about [her]self.”⁴ The Board approved a temporary permit in November 2006 and issued a full license in May 2007.⁵ Her license was most recently renewed in October 2018, and will expire September 30, 2020 if not renewed.⁶

In March 2014, Ms. Boma began working at Yukon-Kuskokwim Health Corporation’s Long-Term Care (LTC) facility in Bethel. Ms. Boma was the charge nurse on her unit. She had no serious disciplinary action there prior to the incident at issue in this case.⁷

After more than fifteen years of sobriety, Ms. Boma began drinking again after her older sister died in Cameroon in April 2017. The nature and extent of Ms. Boma’s drinking during 2017 is unclear. During the substance abuse evaluation immediately after her termination, there is a suggestion that she reported having engaged in binge drinking and having missed work because of drinking. But the evaluation is ambiguous and at times self-contradictory on the details of Ms. Boma’s alcohol. At the hearing on this matter, Ms. Boma credibly testified that she only drank on her days off and had never missed work because of drinking.

Also during the period of time leading up to the incident in this case, Ms. Boma was experiencing various physical symptoms related to menopause, including hot flashes, heart palpitations, and insomnia.⁸ She was taking a nightly over the counter sleeping medicine, Unisom, to combat her insomnia.⁹ During her first interview with the Division investigator, Ms. Boma admitted to that she had also been, “using the drink as a self-medication so I’m able to go to sleep instead of getting up in the middle of the night,” adding, “it was stupid.”¹⁰

B. YKHC incident

The events giving rise to Ms. Boma’s termination and the Division’s Accusation occurred on Labor Day weekend of 2017. While Ms. Boma’s official work schedule called for working 12-hour shifts, one week on, one week off, low staffing had led to frequently longer periods without a day off.¹¹ Ms. Boma’s 12-hour shift on Saturday, September 2, 2017, was her 10th or 11th consecutive day of work, and she was scheduled to work the following two days.

⁴ Ex. 5. At the hearing, Ms. Boma clarified that she had not attended any counseling at the time of her arrest, and that by treatment she meant the classes she had taken following her chemical dependency evaluation.

⁵ Ex. 6.

⁶ Ex. 16, 1. 5.

⁷ Ms. Boma told the Division investigator that she had had no disciplinary action other than for coming in late to work. Ex. 19.

⁸ Boma testimony.

⁹ Ex. 9, p. 6; Boma testimony.

¹⁰ Ex. 19.

¹¹ Ex. 19.

It is undisputed that on Saturday, September 2, 2017, Ms. Boma drank in the evening after returning home from work. Ms. Boma consumed an unknown amount of beer while watching TV, then went to bed at midnight.

On Sunday morning, Ms. Boma reported to work at 6:50 for her 7:00 shift. Ms. Boma reports that she was, “extremely exhausted” because of her ongoing insomnia and extended work schedule. She concedes that she, “probably should have called in” sick, but did not do so due to staffing concerns and not wanting to burden her colleagues.

On the day in question Ms. Boma was the only nurse on the unit. She and two CNAs were caring for a full unit of nine patients. At the start of her workday, she went through the standard shift change procedures with the nurse from the prior shift and the CNAs on staff. About four hours into her Sunday shift, while the CNAs were setting up patients’ lunches and during a lull in her own duties, Ms. Boma, “dozed off” at the charge desk.¹²

Coworkers of Ms. Boma contacted the LTC Administrator, Gerald Hodges, to report that she was asleep at the desk and possibly under the influence.¹³ As Mr. Hodges was not in Bethel, he contacted YKHC social worker Katrina Wilson, who went to the LTC center with a security guard to confront Ms. Boma.

Ms. Boma was asleep when Ms. Wilson arrived; Ms. Wilson described her as being “knocked out.”¹⁴ At the time of these events, Ms. Wilson had known Ms. Boma for about a year and had a high opinion of her. Ms. Wilson described Ms. Boma as, “a rock – always very consistent, very thorough,” and described this behavior as very unusual for her. She suspected Ms. Boma might be impaired only because of the unusualness of Ms. Boma being asleep at the desk, but none of Ms. Boma’s other actions or mannerisms during this encounter made her suspect Ms. Boma was intoxicated.¹⁵

Ms. Wilson rubbed Ms. Boma’s arm and said her name to wake her up. Ms. Boma was initially confused by the presence of Ms. Wilson and the security guard, and Ms. Wilson explained they had been called to her unit because of a report that Ms. Boma was under the influence at work.¹⁶

¹² Boma testimony.

¹³ Ex. 21; Wilson testimony.

¹⁴ Ex. 21.

¹⁵ Wilson testimony; Ex. 21.

¹⁶ Wilson testimony.

Ms. Wilson asked Ms. Boma if she had been drinking at work, and that Ms. Boma denied doing so.¹⁷ Ms. Wilson and the security guard asked Ms. Boma to let them into the medication room because of a reported suspicion by other staff that Ms. Boma might be keeping alcohol there. Their search of that room and Ms. Boma’s belongings did not produce any signs of alcohol being stored or used on YKHC grounds.

When asked about whether she’d been drinking, Ms. Boma told Ms. Wilson that she had consumed alcohol the previous night.¹⁸ Ms. Boma told Ms. Wilson she was exhausted and that she probably should have called in, but felt guilty about doing so given staffing shortages and having residents who needed her.¹⁹

There is some factual dispute about the brief conversation between Ms. Boma and Ms. Wilson before Ms. Boma clocked out and left the YKHC campus.²⁰ Ms. Wilson told the Division Investigator that she told Ms. Boma that, “if she had had anything to drink, she needed to clock out,” and that Ms. Boma then clocked out²¹. However, Ms. Wilson clarified that she did not ask and did not know whether Ms. Boma meant anything more than that she had been drinking the previous night.²² At the hearing, Ms. Wilson testified that she told Ms. Boma to clock out, “because she’d been drinking the night before and was sleeping.”²³

In her initial interview with the Division investigator, Ms. Boma reported that Ms. Wilson told her she needed to go home because she smelled of alcohol.²⁴ Neither woman testified to this exchange at the hearing (and Ms. Wilson denied that Ms. Boma presented any indicia of impairment, including smelling of alcohol). Ms. Boma testified that she and Ms. Wilson discussed YKHC’s zero tolerance policy for sleeping during work hours, and that, because she was aware the policy called for automatic termination of an employee caught sleeping on the job, she clocked out.²⁵

¹⁷ Ex. 21; Wilson testimony.

¹⁸ Ex. 19; Boma testimony.

¹⁹ Ex. 19; Boma testimony.

²⁰ In speaking with the Division investigator, Ms. Wilson indicated that no more than 15 minutes elapsed between when she was first called at home about the situation and when Ms. Boma clocked out and left. Ex. 21.

²¹ Ex. 21.

²² Ex. 21.

²³ Wilson testimony.

²⁴ Ex. 19.

²⁵ Boma testimony.

In any event, it is undisputed that Ms. Wilson told Ms. Boma to clock out and go home, and that Ms. Boma did so.²⁶ At some point after Ms. Boma had already left, the YKHC Human Resources department contacted Ms. Wilson to ask her to have Ms. Boma take an alcohol test. By this time however, Ms. Boma had already left the YKHC campus, and no test was ever requested of her.²⁷

C. ER Visit and Substance Abuse Assessment

Ms. Boma was devastated by the events just described. She felt deeply embarrassed and gravely worried. She knew she was going to lose her job because of YKHC's zero-tolerance policy for sleeping at work. In addition to despair over her own future, she felt overwhelmed with guilt for letting down family in Cameroon who rely on her for financial support.

Despondent, ashamed, and, "just want[ing] it to end," Ms. Boma drank heavily and consumed over the counter sleep aids. At some point during this episode, Ms. Boma was admitted to the YKHC Emergency Department with suicidal thoughts but was released a few hours later.²⁸

Sometime in the next few days, Ms. Boma contacted the YKHC Behavioral Health Center to request a referral for substance abuse treatment out of state.²⁹ She was informed she would first need a Substance Use Assessment however, so on September 7, 2017, she underwent a voluntary Substance Use Assessment.³⁰ Ms. Boma's assessment was performed by then-Clinical Associate Evelyn Yazzie, who is no longer employed at YKHC and did not testify at the hearing.

The assessment described Ms. Boma as, "self referred for substance use treatment," and as stating, "that she recently lost her position with Yukon Kuskokwim Health Corporation due to her alcohol use."³¹

²⁶ In Ms. Boma's statement to the Division investigator, she reported that Katrina Wilson "told me to get my bags and leave because they could smell alcohol on me." Ex. 19. Ms. Wilson denied – in speaking to the investigator and in her hearing testimony – that she had smelled alcohol on Ms. Boma or observed any behavior suggestive of intoxication.

²⁷ Ms. Wilson also testified that the YKHC personnel who told her to have Ms. Boma take a test then told her that, because Ms. Boma had not taken one before leaving, that YKHC would treat the situation as a presumptive positive. Ms. Wilson expressed her disapproval of this approach, given that Ms. Boma had never been offered a test before she left the campus.

²⁸ Boma testimony.

²⁹ Ex. 9, p. 8.

³⁰ Ex. 9, pp. 4-17.

³¹ Ex. 9, p. 4.

According to the assessment, Ms. Boma described herself as, “a drunk,” “drink[ing] too much,” engaging in “binge drinking,” being unable to stop drinking once she starts, and experiencing “negative consequences due to her alcohol use.”³² The assessment also indicates that Ms. Boma endorsed both drinking in the morning to prevent withdrawal and missing work due to alcohol use, as well as experiencing symptoms of moderately severe depression.³³ The assessment describes Ms. Boma’s drinking habits as periods of sobriety during ten-day shifts, followed by drinking, “until she blacks out” on her days off.³⁴ The assessment reported Ms. Boma’s current longest period of sobriety as ten days, characterizing her as, “able to work 10 days straight sober,” but did not mention that she was frequently working more than ten consecutive days.

At the hearing in this case, Ms. Boma took issue with some of the statements in the assessment, such as that she had been drinking during mornings.³⁵ As for why the assessment would contain that information, Ms. Boma testified that she recognized her need for a certain level of inpatient treatment and, “told Evelyn what to write down” based on what she believed was necessary to obtain a referral to that level of treatment. Ms. Boma declined – on advice of counsel – to answer whether she had “lied” on her assessment. She emphatically denied ever having missed work due to drinking, noting that the facility was too short staffed for her to miss work. She also denied ever drinking before work or on days when she would be going to work.³⁶ However, she declined to fully explain the answers reported on the assessment.

D. Treatment and eventual return to Alaska

The results of Ms. Boma’s substance abuse assessment led to a diagnosis of severe alcohol dependence and a finding that she qualified for residential treatment.³⁷ The assessment also recommended that Ms. Boma receive an integrated assessment in light of her dual diagnosis of depression and alcoholism.³⁸ It is unclear whether she has ever done so.³⁹

³² Ex. 9, p. 4.

³³ Ex. 9, p. 4.

³⁴ Ex. 9, p. 5. Of course, this statement is not entirely accurate, as Ms. Boma has admitted in this case to having consumed alcohol during a work week in the incident in question.

³⁵ Boma testimony.

³⁶ Boma testimony.

³⁷ Ex. 9, pp. 5, 8.

³⁸ Ex. 9, p. 9.

³⁹ Ms. Boma indicated she was unaware of whether Crossroads is a dual diagnoses treatment program and does not know whether the assessment she received would qualify as an integrated assessment. The Division never obtained Ms. Boma’s full treatment records from Crossroads, only her aftercare plan.

At the time of the YKHC assessment, Ms. Boma indicated she would like to leave Bethel and possibly Alaska itself for treatment, perhaps returning to Maine to be near family.⁴⁰ Soon afterwards, Ms. Boma traveled to Maine to participate in residential treatment at Crossroads.

Ms. Boma completed the Crossroads Residential Rehabilitation Program on October 20, 2017.⁴¹ Her Crossroads aftercare plan called for her to live with family members in Maine, where she was awaiting nursing licensure, and to attend counseling and daily 12-step meetings.⁴² However, Ms. Boma was unable to find employment in Maine, and in early 2018 she returned to Alaska.

Ms. Boma's aftercare plans were further disrupted upon her return to Alaska. Shortly after her initial return, Ms. Boma went to Cameroon to help family members with an emergency. During this time, she contracted malaria and was hospitalized after her return to Anchorage. Once finally healthy, she found a position at the Pioneer Home in Anchorage. During her time in Anchorage, she attended AA meetings three times per week, but did not attend counseling.⁴³

After a year in Anchorage, she again returned to Bethel in July 2019 and was rehired by YKHC.⁴⁴ At the time of the hearing in this matter, she was working at the YKHC Elders Home, with Ms. Wilson as her supervisor.⁴⁵ She does not attend AA meetings in Bethel, nor does she participate in either substance abuse counseling.⁴⁶

E. YKHC Complaint and Division investigation

Ms. Boma did not self-disclose any of the foregoing events – including her leaving the state for residential substance abuse treatment – to the Division or the Board. However, the Board's statutes require employers to report any incident in which a licensee is discharged, suspended, or restricted in his or her practice.⁴⁷ Accordingly, in September 2017, the Division received a formal complaint against Ms. Boma filed by Cindy Christian, Chief Nurse Executive for YKHC, regarding Ms. Boma's termination.⁴⁸

⁴⁰ Ex. 9, p. 8.

⁴¹ Ex. 10, p. 1.

⁴² Ex. 10, p. 2.

⁴³ Boma testimony.

⁴⁴ Boma testimony.

⁴⁵ Boma testimony; Wilson testimony.

⁴⁶ Boma testimony. In light of the pandemic, meetings are currently held online, which is a challenge for Ms. Boma. She previously attended a monthly online meeting using a friend's computer, but the friend has since left Bethel. Boma testimony.

⁴⁷ AS 08.68.277(a).

⁴⁸ The complaint is in the agency record, but was not offered into evidence during the hearing, so is not relied on in this decision.

The Board's statutes require the Division to investigate employer reports under AS 08.68.277(a).⁴⁹ Accordingly, Division investigator Amber Whaley began an investigation during which she interviewed Ms. Boma and Ms. Wilson, and gathered various documents from Ms. Boma, YKHC, and Crossroads.⁵⁰

On December 8, 2017, Ms. Whaley mailed Ms. Boma a Notice of Complaint and requested Ms. Boma provide certain documents and a letter of explanation by December 30, 2017.⁵¹ On February 1, 2018, Ms. Boma provided the following description of the incident:

I had been working a lot and was extremely tired, the night of 9-3-2017 I had difficulties sleeping. That night I drank some beer and finally was able to sleep. I got up at 5 am, my usual routine, but I was still very exhausted. Due to a lack of substitute staff, I was not able to call in sick. I took the report from the night shift and did my narcotic counts with the night shift. I also discussed with the CAN the plans and activities that we had for the residents. The residents were still sleeping so I sat at the front desk and fell asleep. The social worker was called in by staff to say I had been sleeping and they were not able to wake me up. The social worker woke me up and told me to clock out and go home, which I did. The social worker stated I will be getting a call; however, I never got the call. Instead, the administrator came to my apartment on 9-5-2017 with a letter stating I was fired, and asked me to sign the letter, which I did. I was never asked to do a drug test.⁵²

Ms. Boma also returned a 5-page questionnaire from the Division.⁵³ In it, she indicated that she had been intoxicated roughly a dozen times in the past year, listed her "sobriety date" as September 5, 2017, and said she was attending AA twice per week.⁵⁴ Ms. Boma answered no to the question, "have you ever been counseled, disciplined or terminated from a job because of alcohol/drug use?"⁵⁵ She also wrote "No" in the space provided for response to the question: "How has your ability to practice been [a]ffected by your substance use? (i.e. missed days of work, tardiness, hung over, impaired on duty, mood swings, focus, and energy)."⁵⁶

On July 30, 2018, the Division sent Ms. Boma an official Notice of Investigation, declaring her, "the subject of an official investigation by the Alaska Board of Nursing."⁵⁷

⁴⁹ AS 08.68.277(b).

⁵⁰ Ex. 11, 19, Ex. 20, Ex. 21.

⁵¹ Ex. 11.

⁵² Ex. 13.

⁵³ Ex. 12.

⁵⁴ Ex. 12, pp. 3-5.

⁵⁵ Ex. 12, p. 3.

⁵⁶ Ex. 12, p. 4.

⁵⁷ Ex. 15.

Ms. Boma applied to renew her LPN license in August 2018.⁵⁸ She accurately answered yes to the question whether she had been under investigation since her last renewal. She also answered yes to whether she had participated in alcohol or substance abuse treatment or been diagnosed with a substance abuse disorder which in any way currently affects or limits her ability to safely practice.⁵⁹ Ms. Boma’s written explanation read, “Yes attended a treatment program for substance abuse. I was diagnosed however I have completed treatment and [am] attending AA meetings.”⁶⁰ Ms. Boma attached a letter from Patricia Siza, MD, who indicated she had seen Ms. Boma at Providence Family Medical Center on May 1, 2018 and Ms. Boma had requested, “a letter from a physician stating she was of sound mind to perform her nursing duties.”⁶¹ Dr. Siza opined, based on Ms. Boma’s self-reported history, appearance and affect at the May 1 appointment, and lack of ED visits for intoxication, that Ms. Boma, “is qualified to perform her nursing duties as she presented to me in my office with the qualifier that she continues to be monitored occasionally for resumption of alcohol use.”⁶²

F. Procedural history

The Division filed an Accusation on November 26, 2019 based on the foregoing events. Ms. Boma, through counsel, requested a hearing.

The Division’s Amended Accusation seeks disciplinary sanctions against Ms. Boma’s license on two counts. Count I alleges that Ms. Boma, “violated AS 08.68.270(3) by habitually abusing alcoholic beverages.” Count II alleges that Ms. Boma’s conduct constituted unprofessional conduct under AS 08.68.270(7) – specifically, a violation of 12 AAC 44.770(8) which prohibits using alcohol to the extent that the use interferes with nursing functions.

The hearing was initially scheduled for March 2020 but was cancelled due to the onset of a global pandemic. After further COVID-related delays, the hearing was eventually held via videoconference on August 21, 2020.

Ms. Boma was represented by Rex Butler; the Division was represented by Assistant Attorney General Megyn Weigand. In addition to Ms. Boma, testimony was taken from

⁵⁸ Ex. 16.

⁵⁹ Ex. 16, p. 2. Ms. Boma also answered yes to the question whether she was under a consent agreement. This appears to be a misunderstanding of either the question or the surrounding circumstances. Her explanatory answer reads: “consent agreement still pending with State of Alaska.” Ex. 16, p. 4. While the Division and Ms. Boma discussed a possible consent agreement, none was ever finalized.

⁶⁰ Ex. 16, p. 5.

⁶¹ Ex. 14.

⁶² Ex. 14.

Division Investigator Amber Whaley, YKHC Behavioral Health Clinician Gregory Bell, and YKHC Social Worker Katrina Wilson, as well as, by affidavit, Dr. Patricia Siza.

At the hearing,

- Ms. Boma credibly denied drinking before work on the day of the incident, and credibly denied having ever consumed alcohol in the morning before work or during a workday.
- Ms. Boma refused to testify fully about the substance use assessment conducted by Ms. Yazzie prior to her enrollment at Crossroads. Ms. Boma denied the accuracy of certain statements in the assessment report but did not deny telling Ms. Yazzie to write those things down in her report. Ms. Boma stated that she needed treatment and told Ms. Yazzie what she needed to put down in order to get the treatment Ms. Boma felt she needed. On the advice of counsel, Ms. Boma then declined to answer more questions about the assessment or its contents.
- In her capacity as Ms. Boma's current supervisor, Ms. Wilson offered a glowing assessment of Ms. Boma's nursing abilities, work ethic, and cultural competency with her elderly Yupik patient base (as well as reiterating that Ms. Boma neither appeared, smelled, nor acted under the influence during the incident giving rise to her termination).

The parties filed post-hearing briefing, and the record closed on September 18, 2020.

III. Discussion

A. Applicable law

Alaska Statute 08.68.275 identifies the range of disciplinary sanctions that the Board may take, singly or in combination, in exercising its disciplinary powers under AS 08.01.075. These range from imposition of probation to permanent license revocation. Alaska Statute 08.68.270(f) requires the board to, "seek consistency in the application of disciplinary sanctions." Accordingly, "a significant departure from prior decisions involving similar situations shall be explained in the findings of fact or order."

Alaska Statute 08.68.270(3) provides that the Board may discipline a licensee who habitually abuses alcoholic beverages. In addition to AS 08.68.270(3), the Board may also discipline a licensee for any of numerous types of unprofessional conduct.⁶³ Included in the regulatory definition of unprofessional conduct is, "using alcohol or other drugs to the extent that the use interferes with nursing functions."⁶⁴

⁶³ AS 08.68.270(7).

⁶⁴ 12 AAC 44.470(8).

The Division has the burden of proving, by a preponderance of the evidence, that Ms. Boma committed the alleged violations.⁶⁵ Ms. Boma's post-hearing brief attempts to locate the evidence within framework of either the substantial evidence test or the reasonable basis test. But neither standard applies to the Board's decision here. Rather, these are standards by which an appellate court might later evaluate the sufficiency of evidence on which the Board made its decision. Here, however, the Board is charged with determining whether, on the evidence before it, the charges set out in the Division's Accusation are more likely true than not true.

During the hearing, Ms. Boma objected to several exhibits and certain lines of questioning, and those objections were addressed on the record at the hearing. In brief, when a hearing is held under the Administrative Procedure Act (APA), the technical rules of evidence do not apply.

Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action.⁶⁶

Hearsay that is not admissible in court is still admissible in APA proceedings, but its use is restricted based on whether or not it is corroborated by other evidence: "Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil finding."⁶⁷

Lastly, Ms. Boma was cautioned during the hearing that her refusal to testify about the circumstances surrounding her statements in the substance abuse assessment could result in adverse factual inferences being drawn. The Alaska Supreme Court has held that a party asserting a Fifth Amendment privilege in a civil case may be subjected to adverse evidentiary inferences.⁶⁸ And at least one Alaska professional licensing board has applied this rule to draw adverse factual inferences against a party who refuses to testify.⁶⁹

B. Did the Division meet its burden of showing that Ms. Boma's license is subject to discipline?

Alaska Statute 08.68.270(3) provides that the Board may discipline a licensee who habitually abuses alcoholic beverages. The Division contends that, for purposes of discipline

⁶⁵ AS 44.62/360; *Odom v. State*, 421 P.3d 1, 7 (Alaska 2018).

⁶⁶ AS 44.62.460(d).

⁶⁷ AS 44.62.460(d)

⁶⁸ *Nelson v. State*, 273 P.3d 608, 611-612 (Alaska 2012) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

⁶⁹ *Matter of Hicks*, OAH No. 18-0539-GUI (Big Game Commercial Svcs Board, 2019).

under this provision, it is not required to prove that the licensee’s habitual use of alcohol is tied to any impact on nursing functions. Thus, the Division argues, even if the Board is not satisfied that Ms. Boma’s workplace somnolence arose from alcohol misuse, it can still impose discipline in this case if it concludes that Ms. Boma engaged in the habitual abuse of alcohol.

While the “habitual use” statute is silent on a required nexus between that use identified and a licensee’s performance of nursing functions, the Board’s disciplinary regulations about alcohol use all address situations in which that use impacts nursing functions. Historically, however, the Board has disciplined licensees under this provision without a required showing of an impact on nursing functions, approving consent agreements arising out of a licensee’s self-disclosure of entry into an alcohol rehabilitation program, or of incurring a DUI conviction.⁷⁰

Unlike the arguable ambiguity presented by Count I, however, the second Count on which the Division seeks discipline in this case unmistakably requires a nexus between the alcohol use and the licensee’s nursing functions. Alaska Statute 08.68.270(7) permits the Board to discipline a licensee for committing unprofessional conduct as defined by the Board’s regulations. Those regulations include 12 AAC 44.770(8), which defines unprofessional conduct to include use of alcohol or other drugs to the extent that the use interferes with nursing functions.

This decision concludes it is unnecessary to address the possible limitations of the scope of .270(3) in a situation where no impact can be shown because, here, the evidence supports a finding that Ms. Boma’s 2017 relapse led to habitual use that did impact her nursing functions.

The Division’s main argument in this case has been that Ms. Boma drank to excess on the night before her termination and that this conduct led to her falling asleep at work the next day. In response, Ms. Boma has argued that she was sober while at work, that she fell asleep because of physical exhaustion caused by overwork and menopause-induced insomnia, and that, even though she briefly “dozed” at the charge desk, all of her patients were being cared for at the time by the CNA staff and she never failed to perform a necessary nursing function.

It is impossible to determine with absolute certainty the impact of alcohol on the events giving rise to Ms. Boma’s termination. As a threshold matter however, it is not necessary to determine with “certainty” what impact alcohol had on the events in question. Rather, the

⁷⁰ See, e.g., *Matter of M.W.*, Case No. 2014-001305 (Consent Agreement and Order, Adopted Jan. 2015); *Matter of J.W.*, Case No. 2014-002318 (Consent Agreement and Order, Adopted Oct. 2015); *Matter of C.H.*, Case No. 2016-001156 (Consent Agreement and Order, Adopted Jan. 2017); *Matter of M.S.*, Case No. 2016-001140 (Consent Agreement and Order, Adopted Feb. 2017).

Division must only prove its claim by a preponderance of the evidence – that is, the Division must prove that alcohol more likely than not interfered with Ms. Boma’s performance of her nursing duties.

Moreover, the impairment of Ms. Boma’s nursing functions by her alcohol abuse does not necessarily require that she was inebriated while at work.⁷¹ Rather, if Ms. Boma’s between-shift drinking caused her to be so sleepy that she nodded off while on shift, her nursing functions were impaired by her alcohol abuse.

In considering whether the Division has met its burden, several pieces of evidence stand out. First, Ms. Boma’s own statements in the substance abuse assessment just days after the incident strongly suggest a more significant alcohol problem – and a close nexus between alcohol and her employment woes – than she now admits. The assessment contains numerous statements by Ms. Boma about the nature of her alcohol problem and its negative impacts on her work and her employment. These include a specific admission that she had lost her job because of her alcohol use, as well as descriptions of binge drinking, drinking to the point of blacking out, missing work due to drinking, and other clear markers of habitual misuse.⁷² The assessor also quoted Ms. Boma as stating, “I’m a drunk;” “I drink too much;” and “when I start drinking I cannot stop.”⁷³

At the hearing, Ms. Boma attempted to disavow these statements by stating (apparently for the first time) that she had told Ms. Yazzie to write them down, but that they weren’t true. Rather, according to Ms. Boma, these were statements she believed were necessary to qualify her for the level of care she required. But Ms. Boma then declined to give full testimony on this claim, making it impossible to evaluate its veracity. Weighing the very limited testimony offered to support the “intentionally inaccurate assessment” claim against Ms. Boma’s reported statements in the assessment itself, and particularly given the available evidentiary inferences that accompany her refusal to testify in full detail about statements’ supposed inaccuracies, this decision accepts on face value Ms. Boma’s self-reported account of alcohol use provided in the assessment.

⁷¹ No witnesses support the narrative that Ms. Boma was acting impaired (other than by sleeping at the charge desk), and the only contemporaneous witness to the events testified that Ms. Boma did not otherwise appear or act impaired. Although the original YKHC complaint to the Division alleged that Ms. Boma was impaired, no witnesses from YKHC testified to support that narrative, Ms. Wilson’s testimony raises troubling questions about the credibility of the YKHC report, and ultimately the Division did not seek to admit the YKHC complaint or any other personalized employment records into evidence.

⁷² Ex. 9, pp. 3-5.

⁷³ Ex. 9.

Also noteworthy is that Ms. Boma initially told Investigator Whaley that Ms. Wilson had told her to go home because she smelled of alcohol. The closeness in time of this report to the actual incident, and the adverse impact this admission would presumably have on Ms. Boma's livelihood, increase the likelihood that this exchange occurred, despite later iterations of these events omitting this very specific detail.

In addition, Ms. Boma's prior DUI and self-disclosed alcoholism, as well as her self-professed self-assessment of needing treatment (the reason she gave at the hearing for allegedly "telling" Ms. Yazzie "what to put on the form") all further support the conclusion that at the time of the YKHC incident, Ms. Boma had more likely than not fallen into an unhealthy pattern of habitual use.

In short, although it is impossible to make a finding that Ms. Boma was drunk or under the influence of alcohol while on shift, the totality of the evidence supports a finding that habitual alcohol abuse negatively impacted Ms. Boma's nursing functions.⁷⁴

C. What level of sanction is appropriate?

The Board is charged with employing consistency in the application of disciplinary sanctions.⁷⁵ As to the allegations here, the Board's regulations offer disciplinary guidance for the habitual use of alcohol where that use interferes with nursing functions.⁷⁶ The Board's regulations offer a sliding scale of discipline applicable where use interferes with nursing functions, depending on the licensee's willingness to participate in Board-approved rehabilitative programs.⁷⁷ The Board's regulations also identify specific probationary terms available where probation is imposed due to habitual use of alcohol.⁷⁸

The Board has not previously decided a contested case involving habitual use of alcohol. However, the Board has addressed this issue in multiple consent agreements – including multiple

⁷⁴ It is disappointing that neither party offered into evidence the records of Ms. Boma's treatment at Crossroads, given that those records would presumably shed considerable light on this situation. Both parties had equal access to those records, as Ms. Boma had signed a Release, giving the Division access, and also could have obtained them herself. While the Division has the burden of proof, Ms. Boma is the party seeking to refute the Division's evidence – namely, her September 7 substance use evaluation. Her failure to offer evidence from Crossroads further undermines the persuasiveness of her claim that the September 7 evaluation was inaccurate.

⁷⁵ AS 08.01.075(f); AS 08.68.275(f) ("The board shall seek consistency in the application of disciplinary sanctions. A significant departure from prior decisions involving similar situations shall be explained in the findings of fact or order.").

⁷⁶ 12 AAC 44.720(a), (b).

⁷⁷ 12 AAC 44.720(a)(5), (b)(1).

⁷⁸ 12 AAC 44.740

cases in which the Board did not require a nexus between the habitual use and the licensee's nursing functions.

In *Matter of J.T.W.*, the Board considered a consent agreement arising out of a licensee answering yes (as Ms. Boma has) to a license renewal question about recent substance abuse treatment. In light of the licensee's recent participation in substance abuse treatment, the Board imposed a one-year suspension, stayed in its entirety, pending successful completion of a five-year probationary term. As requested by the Division here, the probation in *J.T.W.* consisted of required abstinence from alcohol, participation in rehabilitative counseling, random urinalysis tests, attendance at 3 AA or NA meetings per week, supervised employment, and quarterly reports to the Division.⁷⁹

Matter of M.R.W. similarly involved a self-reported relapse, with the licensee participating in a 90-day inpatient rehabilitation program.⁸⁰ The Board approved a consent agreement identical to that described above. And the Board approved the same terms in *Matter of M.S.*, involving a licensee's second DUI and subsequent termination.⁸¹ Less frequently, the Board has also occasionally approved probationary terms without a suspension. In *Matter of C.A.H.*, which arose from a registered nurse's participation in a dual diagnosis residential treatment program, the board approved a five-year probationary term (as described above) without a suspension.⁸²

Here, the Division seeks a suspension of one year, stayed subject to completion of a five-year period of probation that includes required abstinence from alcohol and drugs, participation in rehabilitative counseling, random urinalysis testing, attendance at three AA or NA meetings per week, supervised employment, and quarterly reports to the division from Ms. Boma's counselors, employer, and Ms. Boma herself. The Division urges consideration of Ms. Boma's failure to self-report these events to the Board, her failure to complete an aftercare program, her current non-participation in AA, and her having recently returned to the site of her relapse. The Division also notes that the fitness to practice letter submitted by Ms. Boma conditions the fitness to practice finding on an assumption of ongoing monitoring.

Ms. Boma does not make a disciplinary recommendation, instead arguing (1) that she has now been sober for three years, and (2) that the Division has not proven a nexus between her

⁷⁹ *Matter of J.T.W.*, Case No. 2014-002318 (Consent Agreement and Order, Adopted Oct. 2015).

⁸⁰ *Matter of M.R.W.*, Case No. 2014-001305 (Consent Agreement and Order, Adopted Jan. 2015).

⁸¹ *Matter of M.S.*, Case No. 2016-001140 (Consent Agreement and Order, Adopted Feb. 2017).

⁸² *Matter of C.A.H.*, Case No. 2016-001156 (Consent Agreement and Order, Adopted Jan. 2017).

2017 relapse and any nursing functions. But Ms. Boma’s arguments ignore the Board’s responsibility to regulate and prevent the misuse of alcohol in the profession, as well as the evidence, addressed above, that Ms. Boma’s relapse into alcohol misuse more likely than not did impact her nursing functions.

In light of the evidence presented and previous consent decisions by this Board, this decision follows prior Board precedent by imposing a one-year period of suspension, stayed in its entirety pending the successful completion of a five-year period of probation, during which Ms. Boma will be subject to the following terms:

- (1) Ms. Boma shall obey all laws pertaining to practice of nursing in this state;⁸³
- (2) Ms. Boma shall fully comply with the probation program established by the board, and cooperate with representatives of the board;⁸⁴
- (3) Ms. Boma shall notify the board in writing of the dates of departure and return if she leaves Alaska to reside or practice outside the state;⁸⁵
- (4) Ms. Boma shall submit written reports and verification of actions as are required by the board during the period of probation;⁸⁶
- (5) During all times of nursing employment during the period of probation, Ms. Boma shall have her employer submit to the board verification that the employer understands the conditions of probation;⁸⁷
- (6) Ms. Boma shall participate in an ongoing program of rehabilitative counseling, alcoholics anonymous, or an impaired nurse group, or a substantial equivalent approved by the Division, which includes progress reports from the care provider when requested by the board;⁸⁸
- (7) Ms. Boma shall abstain from the personal use of alcohol;⁸⁹
- (8) Ms. Boma shall submit to periodic tests for the detection of alcohol at the request of the board or the board’s representative.⁹⁰

The evidence presented suggests that Ms. Boma is a thoughtful and caring nurse who relapsed during a period of great personal turmoil. The discipline outlined above and imposed herein is not intended as a punishment, but rather as a tool to assist Ms. Boma in maintaining her sobriety as to maximize her potential in her chosen profession.

⁸³ 12 AAC 44.730(1)
⁸⁴ 12 AAC 44.730(2)
⁸⁵ 12 AAC 44.730(3)
⁸⁶ 12 AAC 44.730(5)
⁸⁷ 12 AAC 44.730(6)
⁸⁸ 12 AAC 44.740(2).
⁸⁹ 12 AAC 44.740(3).
⁹⁰ 12 AAC 44.740(5).

IV. Conclusion

The Division met its burden of proving that in 2017 Ms. Boma more likely than not engaged in the habitual misuse of alcohol in a manner that adversely affected her nursing functions. In order to assure public safety and to assist Ms. Boma in continuing in the safe practice of nursing, this decision imposes a one-year license suspension, stayed in its entirety, and a five-year probationary term as set forth above.

Dated: October 20, 2020

Signed _____
Cheryl Mandala
Administrative Law Judge

Adoption

The ALASKA 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 distribution of this decision.

DATED this 5th day of November, 2020.

By: *Signed* _____
Signature
Danette M. Schloeder
Name
Chair, Alaska Board of Nursing
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]