

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON STATE BOARD OF NURSING**

IN THE MATTER OF:

MARK MITCHELL, CMA, CNA

Certificate Nos. 201110214CNA,
201320069CMA

) **FINAL ORDER AND RULING**
) **GRANTING MOTION FOR**
) **SUMMARY DETERMINATION**
)
) OAH Case No.: 1403590
) Agency Case No.: 14-00266

HISTORY OF THE CASE

On January 22, 2014, the Board of Nursing (Board) issued a Notice of Proposed Revocation of Certificate to Mark Mitchell, proposing to revoke Mr. Mitchell's Certified Medication Aid (CMA) and Certified Nursing Assistant (CNA) certificates. On February 11, 2014, Mr. Mitchell requested a hearing. On February 24, 2014, the Board referred the case to the Office of Administrative Hearings (OAH).

The OAH assigned the case to Senior Administrative Law Judge (ALJ) Monica A. Whitaker. ALJ Whitaker convened a telephone prehearing conference on May 21, 2014. Senior Assistant Attorney General Lori Lindley represented the Board. Mr. Mitchell did not participate in the prehearing conference. ALJ Whitaker scheduled a hearing for August 14 and 15, 2014.

On June 30, 2014, Ms. Lindley, on the Board's behalf, filed a Motion for Summary Determination (motion). Mr. Mitchell did not file a response to the motion. ALJ Whitaker closed the record on July 15, 2014 and took the matter under advisement. ALJ Whitaker issued the Proposed Order Granting the Motion for Summary Determination on July 17, 2014 and notified Mr. Mitchell that he could file exceptions within 10 days. No exceptions were filed by Mr. Mitchell.

ISSUES

1. Whether there is a genuine issue as to any material fact and whether the Board is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.
2. Whether Mr. Mitchell engaged in conduct unbecoming a nursing assistant and a medication aide by engaging in the following conduct:
 - a. Documenting the administration of narcotic medications to patients BK and DC, but not actually administering the medications to the patients.

b. Failing to sign the narcotic ledger for the medications allegedly administered to patients BK and DC.

c. Falsely documenting that the nurse in charge had instructed him to provide the narcotic medication to patient DC.

ORS 678.442(2)(f) and OAR 851-063-0090(3)(a)-(c) and (6)(a), and OAR 851-063-0100(2), (3), (7), and (11).

3. Whether Mr. Mitchell failed to cooperate with the Board during an investigation, thereby engaging in conduct unbecoming a nursing assistant and a medication aide. OAR 851-063-0090.

4. Whether the Board may revoke Mr. Mitchell's nursing assistant and medication aide certifications. OAR 851-063-0080 and 851-063-0100.

DOCUMENTS CONSIDERED

The Board's motion, the Affidavit of Charlee Furrow and its supporting Exhibit A, and the Affidavit of Liz Murvihill, were considered.

FINDINGS OF FACT

1. Mr. Mitchell has been licensed as a CMA and CNA with the Board since June 18, 2013. (Affidavit of Murvihill at 1.)

2. Avamere Rehabilitation (Avamere) employed Mr. Mitchell as a CNA/CMA from October 2, 2010 until September 9, 2013. (Affidavit of Furrow at 1.) In August 2013, a CMA reported to Avamere's Director of Nursing, Charlee Furrow, that two patient Medication Administration Records (MARs) showed that Mr. Mitchell administered narcotics to two patients. When the CMA questioned the two patients, they denied receiving the medications. (Affidavit of Furrow at 1.)

3. Avamere conducted an investigation and concluded that on August 18, 2013, Mr. Mitchell documented that he gave narcotic pain medications to a patient, BK, but he never actually gave BK the medications. Mr. Mitchell did not sign the narcotic ledger for a third dose of medication he allegedly gave the patient. (Affidavit of Furrow at 1.)

4. Also on August 18, 2013, Mr. Mitchell documented that he gave a patient, DC, a narcotic medication, but he never actually gave DC that medication. Mr. Mitchell did not sign the narcotic ledger when he withdrew the medication for DC. Mr. Mitchell also falsely documented that the nurse in charge had instructed him to provide DC the medication. (Affidavit of Furrow at 2.)

5. As a result of its investigational findings, Avamere ordered Mr. Mitchell to take a "for cause" drug screen, which was conducted on August 21, 2013. The drug screen results showed that Mr. Mitchell tested positive for oxycodone. (Affidavit of Furrow at 2; Ex. 1.) Mr. Mitchell did not provide Avamere with documentation showing that he had a valid prescription for oxycodone. (Affidavit of Furrow at 2.)

6. On or about August 28, 2013 the Board received a report that Mr. Mitchell was terminated by Avamere for alleged narcotic diversion. As a result, the Board opened an investigation into the matter. On October 3, 2013, Mr. Mitchell met with Board investigator Liz Murvihill to discuss the allegations. (Affidavit of Murvihill at 1.)

7. During the investigation, Mr. Mitchell told Ms. Murvihill that he had tested positive for morphine on a "for cause" employment drug screen. Mr. Mitchell stated that he had an expired prescription for morphine. (Affidavit of Murvihill at 4.) Ms. Murvihill asked Mr. Mitchell to provide the Board with a copy of the results of the "for cause" drug screen, along with a copy of a valid prescription for opioids. Ms. Murvihill also requested that Mr. Mitchell complete a chemical dependency assessment by a Board-approved evaluator. (*Id.* at 1-2.)

8. On October 15, 2013, Ms. Murvihill contacted Mr. Mitchell and reminded him to provide the documentation that she had requested during the October 3, 2013 meeting. She also reminded Mr. Mitchell that he needed to complete a chemical dependency assessment. Ms. Murvihill set a deadline of November 15, 2013 for Mr. Mitchell to provide the documentation and to complete the assessment. (Affidavit of Murvihill at 2.)

9. On November 8, 2013, Ms. Murvihill left a message for Mr. Mitchell, reminding him to provide the requested documents and to complete the assessment by November 15, 2013. Mr. Mitchell did not provide the Board with the requested documents and did not complete a chemical dependency assessment by the November 15, 2013 deadline. (Affidavit of Murvihill at 2.)

10. On December 6, 2013, Ms. Murvihill left Mr. Mitchell a message to contact her regarding the ongoing Board investigation. Mr. Mitchell did not contact Ms. Murvihill. (Affidavit of Murvihill at 2.)

11. On December 10, 2013, the Board issued a Notice of Proposed Suspension of Nursing Assistant and Medication Aide Certificates (Suspension Notice). The Suspension Notice proposed to suspend Mr. Mitchell's CNA and CMA certificates for a minimum of two weeks and until he fully cooperated with the Board's investigation. The Suspension Notice provided Mr. Mitchell 20 days within which he could appeal and request a hearing. Mr. Mitchell did not appeal the Suspension Notice. (Affidavit of Murvihill at 2-3.). On January 15, 2014, the Board issued a Final Order of Suspension by Default to Mr. Mitchell, suspending his CNA and CMA certificates. (*Id.* at 3.)

CONCLUSIONS OF LAW

1. There are no genuine issues as to any material facts in this case; therefore, the Board is entitled to a favorable ruling as a matter of law.

2. Mr. Mitchell engaged in conduct unbecoming a nursing assistant and a medication aide by engaging in the following conduct:

- a. Documenting the administration of narcotic medications to patients BK and DC, but not actually administering the medications to the patients.
- b. Failing to sign the narcotic ledger for the medications allegedly administered to patients BK and DC.
- c. Falsely documenting that the nurse in charge had instructed him to provide the narcotic medication to patient DC.

3. Mr. Mitchell failed to cooperate with the Board during an investigation, thereby engaging in conduct unbecoming a nursing assistant and a medication aide.

4. The Board may revoke Mr. Mitchell's nursing assistant and medication aide certifications.

OPINION

1. Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

* * * * *

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling * * *.

Pursuant to OAR 137-003-0580(6)(a), in making my ruling, the ALJ considered the Board's Motion for Summary Determination, the Affidavit of Charlee Furrow and its supporting Exhibit A, and the Affidavit of Liz Murvihill. After considering the facts of the case in a light most favorable to Mr. Mitchell, the non-moving party, the ALJ concluded and the Board agrees, for the reasons discussed below, that the Board is entitled to a favorable ruling as a matter of law, which resolves all issues. Therefore, the Board's Motion is granted and this Ruling and Final Order is issued.

2. *Conduct unbecoming a nursing assistant and a medication aide*

The Board contends that Mr. Mitchell documented the administration of narcotic medications to patients BK and DC, but that he did not actually administer the medications to the patients. The Board further contends that Mr. Mitchell failed to sign the narcotic ledger for the medications he allegedly administered to patients BK and DC. Finally, the Board alleges that Mr. Mitchell falsely documented that the nurse in charge had instructed him to provide DC the medication. These acts, the Board argues, constitute conduct unbecoming a nursing assistant and warrant revocation of Mr. Mitchell's CNA and CMA certificates.

The Board bears the burden of proving its allegations by a preponderance of the evidence. ORS 183.450(2) and (5); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard of proof in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

ORS 678.442 provides, in part:

(2) In the manner prescribed in ORS chapter 183, the board may revoke or suspend a certificate issued under this section or may reprimand a nursing assistant for the following reasons:

* * * * *

(f) Conduct unbecoming a nursing assistant in the performance of duties.

OAR 851-063-0090, titled "Conduct Unbecoming a Nursing Assistant," provides, in part:

A CNA, regardless of job location, responsibilities, or use of the title "CNA," who, in the performance of nursing related duties, may adversely affect the health, safety or welfare of the public, may be found guilty of conduct unbecoming a nursing assistant. Conduct unbecoming a nursing assistant includes but is not limited to:

* * * * *

(3) Conduct related to communication:

(a) Inaccurate recordkeeping in client or agency records;

(b) Incomplete recordkeeping regarding client care; including but not limited to failure to document care given or other information important to the client's care or documentation which is inconsistent with the care given;

(c) Falsifying a client or agency record; including but not limited to filling in someone else's omissions, signing someone else's name, recording care not given, fabricating data/values;

* * * * *

(6) Conduct related to achieving and maintaining clinical competency:

(a) Failing to competently perform the duties of a nursing assistant;

OAR 851-063-0100, titled "Conduct Unbecoming a Certified Medication Aide," provides, in part:

Certified Medication Aides are subject to discipline as CNAs as described in these rules. In addition, CMAs are subject to discipline for conduct unbecoming a medication aide. Conduct unbecoming a medication aide includes but is not limited to:

* * * * *

(2) Failing to document medications as administered, medications withheld or refused and the reason a medication was withheld or refused.

(3) Altering/falsifying medication administration record;

* * * * *

(7) Performing acts beyond the authorized duties for which the individual is certified;

* * * * *

(11) Failing to conform to the standards and authorized duties in these rules.

On August 18, 2013, Mr. Mitchell documented that he gave patient BK narcotic pain medications, but he never administered the medications to BK. Mr. Mitchell did not sign the narcotic ledger when he withdrew a third dose of the medication he allegedly administered to BK. Also on August 18, 2013, Mr. Mitchell documented that he gave patient DC narcotic medication, but he never administered the medication to DC. Mr. Mitchell did not sign the narcotic ledger when he withdrew the medication for DC. In addition, Mr. Mitchell falsely documented that the nurse in charge had instructed him to provide DC the medication.

Based on the above, the Board has established that Mr. Mitchell violated OAR 851-063-0090(3)(a)(inaccurate recordkeeping), (b)(incomplete recordkeeping), (c)(falsifying a client or agency record), and (6)(a)(failing to competently perform the duties of a nursing assistant). The Board has also established that Mr. Mitchell violated OAR 851-063-0100(2)(failing to document medications as administered), (3)(altering/falsifying medication administration records), (7)(performing acts beyond the authorized duties for which the individual is certified), and (11)(failing to conform to the standards and authorized duties). As such, the Board established that these violations resulted in conduct unbecoming a CNA and CMA, in violation of ORS 678.442(2)(f), OAR 851-063-0090, and OAR 851-063-0100.

3. Failure to cooperate with a Board investigation

The Board alleges that Mr. Mitchell failed to provide requested documents to the Board and that he failed to undergo a chemical dependency evaluation as directed by the Board. The Board contends that Mr. Mitchell's failure to do so constitutes conduct unbecoming a certified nursing assistant and certified medication aide.

OAR 851-063-0090 provides, in part:

A CNA, regardless of job location, responsibilities, or use of the title "CNA," who, in the performance of nursing related duties, may adversely affect the health, safety or welfare of the public, may be found guilty of conduct unbecoming a nursing assistant. Conduct unbecoming a nursing assistant includes but is not limited to:

* * * * *

(9) Conduct related to the certificate holder's relationship with the Board:

(a) Failing to cooperate with the Board during the course of an investigation. The duty to cooperate does not include waiver of confidentiality privileges, except if a client is harmed. This waiver of confidentiality privileges does not apply to client-attorney privilege.

* * * * *

(c) Failing to provide the Board with any documents requested by the Board[.]

On October 3, 2013, the Board's investigator requested Mr. Mitchell provide a copy of the "for cause" drug screen, along with a copy of a valid prescription for opioids. The investigator also requested that Mr. Mitchell complete a chemical dependency assessment by a Board-approved evaluator. On October 15, 2013, the Board's investigator contacted Mr. Mitchell and reminded him to provide the documents and to complete the assessment. The Board's investigator set a deadline of November 15, 2013 for Mr. Mitchell to provide the documents and complete the assessment. On November 8, 2013 the Board's investigator again contacted Mr. Mitchell to remind him of the upcoming deadline. On December 6, 2013, the Board's investigator again contacted Mr. Mitchell and asked him to contact her to discuss the ongoing Board investigation.

Mr. Mitchell never contacted the Board's investigator, did not provide the requested documents, and did not complete the assessment. Therefore, Mr. Mitchell failed to cooperate with the Board during the course of its investigation. The Board established that Mr. Mitchell's conduct violated OAR 851-063-0090(9)(a) and (c).

4. Revocation

OAR 851-063-0080 provides:

Under the contested case procedure in ORS 183.310 to 183.550 the Board may deny, reprimand, suspend, place on probation or revoke the certificate to perform duties as a CNA for the following causes:

* * * * *

(6) Conduct unbecoming a nursing assistant in the performance of duties ORS 678.442(2)(f).

The Board proposes revoking Mr. Mitchell's CNA and CMA certifications based on the above violations. As a CNA and CMA, Mr. Mitchell has access to narcotics. The Board, in its duty to protect the public, must be able to trust Mr. Mitchell in his capacity as a certificate holder. Mr. Mitchell falsified documentation related to the dispensation of narcotics and failed to cooperate with the Board during its investigation. Because the Board established that Mr. Mitchell engaged in conduct unbecoming a CNA and CMA, and in light of the seriousness of Mr. Mitchell's conduct, it is appropriate to revoke his certifications.

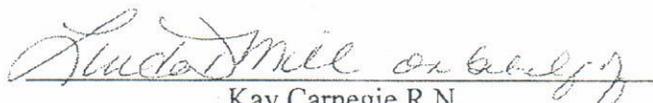
RULING AND ORDER

The Motion for Summary Determination, filed by the Oregon State Board of Nursing on June 30, 2014, is GRANTED.

The Oregon State Board of Nursing issues the following order:

The Notice of Proposed Revocation of Certificate, issued by the Oregon State Board of Nursing on January 22, 2014, is AFFIRMED. Mark Mitchell's Certified Nursing Assistant and Certified Medication Aide certificates, numbered 201110214CNA and 201320069CMA, are hereby REVOKED.

Note: The hearing scheduled for August 14 and 15, 2014 is hereby CANCELLED.


Kay Carnegie R.N.
President Oregon Board of Nursing

FINAL ORDER

After considering all the evidence, the proposed order, and the timely filed exceptions, if any, the Board will issue the final order in this case. This final order may adopt the proposed order prepared by the Administrative Law Judge as the final order or modify the proposed order and issue the modified order as the final order. *See* OAR 137-003-0655.

APPEAL

If you wish to appeal the final order, you must file a petition for review with the Oregon Court of Appeals within 60 days after the final order is served upon you. *See* ORS 183.480 *et seq.*

CERTIFICATE OF MAILING

On _____, 2014, I mailed the foregoing FINAL ORDER AND RULING GRANTING MOTION FOR SUMMARY DETERMINATION issued on this date in OAH Case No. 1403590.

By: First Class Mail

Mark Mitchell
3604 SE Powell Valley Rd. #202
Gresham OR 97080

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Jessica Vanhorn
Investigator, Board of Nursing

CERTIFICATE OF MAILING

I certify that on the 19th day of August, 2014 I mailed or emailed a copy of the Final Order to :

Mark Mitchell, CMA
3604 SE Powell Valley Rd 202
Gresham, OR 97080

Via email:
Lori Lindley
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By mailing to the person(s) designated as above an exact copy thereof contained in a sealed envelope with postage pre-paid, addressed to said individual at the address stated above, and deposited in at the United States Postal Service in Portland, Oregon between the same post office and address to which said copy of this mail via certified communication by U.S. Mail.

Dated this 19th day of August, 2014.



Pat Harmon
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