

BEFORE THE
BOARD OF NURSING
STATE OF OREGON

In the Matter of:) FINAL ORDER
)
GARY ROGERS, CNA,) OAH Case No. 1504269
Certificate No. 000028920CNA.) Agency Case No. 15-01148
_____)

HISTORY OF THE CASE

On July 10, 2015, the Oregon State Board of Nursing (Board) issued a Notice of Proposed Suspension of Nursing Assistant Certificate to Gary Rogers. On July 20, 2015, Mr. Rogers requested a hearing.

On July 27, 2015, the Board referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Joe Allen to preside at hearing. The OAH scheduled a prehearing conference for September 28, 2015. The prehearing conference was postponed at the Board's request. On October 13, 2015, Presiding ALJ John Mann convened a telephone prehearing conference. Mr. Rogers did not appear. The Board appeared and was represented by Senior Assistant Attorney General Thomas Cowan. Presiding ALJ Mann scheduled the hearing for July 19, 2016, and set deadlines for submission of motions, witness lists and exhibits.

On January 15, 2016, the Board filed a Motion for Summary Determination (Motion). On February 17, 2016, the OAH assigned ALJ Samantha Fair to rule on the Motion. The record closed on February 19, 2016, without receipt of any response from Mr. Rogers.

On February 22, 2016, ALJ Fair issued her Ruling on Motion for Summary Determination and Proposed Order. The ALJ found that no genuine issues as to any material facts existed and the Board was entitled to a favorable ruling as a matter of law. ALJ Fair recommended that the Board issue an order suspending Mr. Rogers' nursing assistant certificate, and canceled the hearing. Mr. Rogers was notified of his right to file exceptions within 10 days following the date of service of the Proposed Order. The Board did not receive any exceptions from Mr. Rogers within the timeframe allowed.

At its Board meeting on April 13, 2016, the Board deliberated the ALJ's Ruling on Motion for Summary Determination and Proposed Order. The Board voted to accept the Proposed Order and now issues this Final Order. The Board has not made any changes to this Final Order that substantially modifies the ALJ's proposed findings of historical fact or changes the ALJ's recommended outcome or basis therefor. The Board has made changes to the Proposed Order to correct spelling, grammar, and/or textual placement.

ISSUE

Whether Mr. Rogers' certified nursing assistant certificate should be suspended. ORS 678.442(2); OAR 851-063-0080 and OAR 851-063-0090.

EVIDENTIARY RULINGS

The Affidavit of Leslie Kilborn (Affidavit) and Exhibits 1 through 8, offered by the Board, were admitted into the record.

FINDINGS OF FACT

1. In 2004 and 2008, Mr. Rogers was arrested for driving under the influence of intoxicants (DUII). (Ex. 6 at 3.)
2. On March 23, 2014, the Oregon State Police (OSP) received a report from Mr. Rogers' wife that he was driving while intoxicated. (Ex. 1 at 1.) Mr. Rogers' wife reported that Mr. Rogers had been drinking all morning, that he left the home about 2 p.m. after he backed his car into a fence, and had two prior DUII arrests. (*Id.* at 3.) Approximately 5 p.m. that day, an OSP trooper stopped Mr. Rogers while he was driving his car. Mr. Rogers indicated that he had not consumed any alcohol since 3 a.m. The OSP trooper observed signs of intoxication, including a strong odor of an alcoholic beverage, flushed cheeks and glassy eyes. The OSP trooper performed a horizontal gaze nystagmus (HGN) test. The results of the HGN test reflected the effects of intoxicants. Mr. Rogers refused to perform any additional field sobriety tests. The OSP trooper arrested Mr. Rogers for DUII. There were three opened cans of beer in Mr. Rogers' car. Two were empty and the third still contained some beer. After his arrival at the police station, Mr. Rogers admitted to drinking three beers at 7 a.m. Mr. Rogers provided a breath sample that showed a blood alcohol level of 0.05 percent. (*Id.* at 4-9.) The OSP trooper also cited Mr. Rogers for possession of an open container of alcohol. (*Id.* at 1.)
3. On March 24, 2014, the charge of DUII against Mr. Rogers was dismissed when no complaint was filed in court. (Ex. 2 at 1.) On April 17, 2014, Mr. Rogers was convicted of the open container violation following his no contest plea. (*Id.* at 2.)
4. On January 23, 2015, Mr. Rogers filed a renewal application for his nursing assistant certificate. (Ex. 6 at 3.) In his application, he responded "no" to questions about whether he had used alcohol in a way that could impair his ability to perform nursing assistant duties or whether he had been diagnosed with an alcohol condition since his last renewal. (Ex. 3 at 1.) He responded "yes" to a question about whether he had been arrested, cited or charged with an offense, other than a traffic ticket. (*Id.* at 2.) He elaborated that he had been arrested for DUII but "passed all test and complied with all laws no charges were made." (*Id.*)
5. On February 18, 2015, the Board sent Mr. Rogers a letter, instructing him to contact the Board's investigator no later than March 4, 2015 to schedule an appointment to discuss his DUII arrest. The letter further instructed Mr. Rogers to send a copy of his work history and a

written statement describing the DUII arrest to the Board no later than March 4, 2015. (Ex. 4 at 1.) Mr. Rogers did not contact the Board's investigator by March 4, 2015. (Affidavit at 1.)

6. On March 9, 2015, the Board sent Mr. Rogers a letter, advising him that he had failed to call the Board to schedule an appointment to discuss his DUII arrest. In the letter, the Board warned Mr. Rogers that he had an obligation to cooperate with the Board during an investigation and a failure to cooperate was grounds for disciplinary action. The Board instructed Mr. Rogers to contact its investigator within five business days of the letter to schedule an interview. The Board again reminded Mr. Rogers to provide his work history and written statement regarding the DUII arrest. (Ex. 4 at 3.)

7. On March 18, 2015, the Board sent Mr. Rogers a letter, advising him that he had again failed to call the Board to schedule an interview. In the letter, the Board instructed Mr. Rogers to call the investigations department within five business days of the letter and provide his work history and written statement regarding the DUII arrest. (Ex. 4 at 5.)

8. On March 29, 2015, Mr. Rogers emailed the Board's investigator a written statement regarding the DUII arrest and his work history. This email was his first response to the Board's letters. (Ex. 5 at 1; Affidavit at 1.) In his statement, Mr. Rogers indicated:

I stopped for lunch at a restaurant and ate lunch and had 2 beers with lunch. * * * A state trooper pulled me over and asked for my license, he said he could smell alcohol and asked if I had been drinking. I said yes that I had 2 beers with my lunch. * * *. He had me do a field sobriety test and I refused. I told him I did not feel safe parked on the freeway. He then arrested me for DUII * * *. I took a breathalyzer test two times at the station and passed them both. He then told me he was taking me to jail and let the DA decide. I spent the weekend in jail and was released with no charges filed.

(Ex. 5 at 1.)

9. The Board's investigator interviewed Mr. Rogers on April 7, 2015. (Affidavit at 2.) During the interview, Mr. Rogers acknowledged that his wife did not like him drinking alcohol, that he usually consumed it when she was not present, that he used to binge drink alcoholic beverages, and that he believed his alcohol consumption was under control because he no longer engaged in binge drinking alcohol. (Ex. 6 at 3.) When the investigator mentioned a chemical dependency evaluation, Mr. Rogers responded that he did not have the time to comply with a chemical dependency evaluation or any potential requirements of a monitored practice or probation because of the recurrence of his cancer. (Ex. 6 at 3; Affidavit at 2.)

10. On April 28, 2015, the Board received confirmation from Mr. Rogers' oncologist that he was undergoing treatment for colon cancer. (Affidavit at 2.)

11. Based upon his history of DUII arrests and history of alcohol consumption, the Board issued Mr. Rogers an Order for Chemical Dependency Evaluation (Order) on June 22,

2015. The Order required Mr. Rogers to submit to a chemical dependency evaluation by requiring him to contact a Board-approved evaluator within 10 days of the Order's mailing date; to notify the Board of the name of the evaluator and the date and time of the appointment at least 7 days before the evaluation; and to complete the evaluation within 30 days of the Order's mailing date. (Ex. 6 at 1-3.) The Order further provided that "Failure to schedule and attend this evaluation within the allotted time is grounds for revocation of your certificate." (*Id.* at 1.) The Board mailed the Order to Mr. Rogers by certified mail on June 23, 2015. He signed the return receipt for the Order on June 24, 2015. (*Id.* at 4.)

12. On July 18, 2015, Mr. Rogers mailed a letter to the Board, informing it that he had failed to contact the Board to do an evaluation "since I am currently undergoing treatment for cancer and will not be able to attend any classes or treatment program while I am going through this." (Ex. 8 at 1-2.)

13. As of January 8, 2016, Mr. Rogers has not obtained or completed a chemical dependency evaluation. (Affidavit at 2.)

CONCLUSIONS OF LAW

It is appropriate that the certified nursing assistant certificate of Gary Rogers should be suspended.

OPINION

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 her ruling, the ALJ considered the Board's Motion, the Affidavit, and Exhibits 1 through 8. Pursuant to OAR 137-003-0580(7), the ALJ reviewed the evidence in the light most favorable to Mr. Rogers, the non-moving party, and she determined there were no genuine issues as to the material facts of the Board's allegation that are relevant to resolution of the legal issues and the Board is entitled to a favorable ruling. Because the ruling on the Motion resolved all issues in this matter, the ALJ issued a proposed order and canceled the hearing.

Suspension of Nursing Assistant Certificate

The Board proposes to suspend Mr. Rogers' certified nursing assistant certificate, based on an allegation of conduct unbecoming a nursing assistant. As the proponent of the allegation, the Board has the burden to establish, by a preponderance of the evidence, that the allegations are correct and that it is entitled to assess the civil penalty. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

ORS 678.442(2) provides, in part:

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 851-063-0080 provides, in part:

Under the contested case procedure in ORS 183.310 to 183.550 the Board may impose a range of disciplinary sanctions including, but not limited to 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.

Pursuant to the authority granted by ORS 678.150 and ORS 678.442, the Board promulgated an administrative rule to define conduct unbecoming a nursing assistant. OAR 851-063-0090 provides, in part:

A CNA, regardless of job location, responsibilities, or use of the title "CNA," whose behavior fails to conform to the legal standard and accepted standards of the nursing assistant profession, or who may adversely affect the health, safety or welfare of the public, may be found guilty of conduct unbecoming a nursing assistant. Such conduct includes but is not limited to:

* * * * *

(10) Conduct related to the certification holder's relationship with the Board:

(a) Failing to fully cooperate with the Board during the course of an investigation, including but not limited to waiver of confidentiality, except attorney-client privilege[.]

Based upon his acknowledgement of his March 2014 DUII arrest in his renewal application, the Board sought to investigate the circumstances of the arrest and sent Mr. Rogers three letters, all directing him to contact the Board's investigator to schedule an interview and provide details of the arrest. Mr. Rogers failed to comply with the Board's first two letters and was late complying with the Board's final letter.

Because of Mr. Rogers' history of DUII arrests and past alcohol consumption issues, pursuant to the authority granted by ORS 678.113(1), the Board issued Mr. Rogers the Order, requiring him to submit to a chemical dependency evaluation to be completed no later than 30 days after the June 22, 2015 issuance of the Order. As of January 8, 2016, Mr. Rogers had still not complied with the Order's requirement to complete a chemical dependency evaluation. Although Mr. Rogers was undergoing cancer treatment in early 2015, there is no evidence that his cancer treatment commitments prevented him from participating in a chemical dependency evaluation.

By his failures to timely respond to the Board's investigative communications and his failure to comply with the Order, Mr. Rogers failed to fully cooperate with the Board during the course of its investigation. Mr. Rogers engaged in conduct unbecoming a nursing assistant as defined by OAR 851-063-0090(1).

Because Mr. Rogers has engaged in conduct unbecoming a nursing assistant, the Board may revoke or suspend his certificate pursuant to ORS 678.442(2)(f). Without Mr. Rogers' completion of the chemical dependency evaluation, the Board is unable to evaluate whether Mr. Rogers suffers from a chemical dependency that may negatively impact his ability to practice as

a nursing assistant with reasonable skill and safety to patients. Therefore, it is appropriate for the Board to suspend Mr. Rogers' certified nursing assistant certificate until such time as he fully cooperates with the Board's investigation by complying with the Order.

ORDER

Gary Rogers' certified nursing assistant certificate is suspended until such time as he fully cooperates with the Oregon State Board of Nursing's investigation by complying with the Order for Chemical Dependency Evaluation and completing a chemical dependency evaluation by a Board-approved evaluator.

The Oregon State Board of Nursing is not precluded from initiating further disciplinary action if an investigation determines that Gary Rogers has committed other violations of the Nurse Practice Act or any of the Board's administrative rules.

DATED this ____ day of April 2016.

FOR THE OREGON STATE BOARD OF NURSING

Bonnie Kostelecky, MS, MPA, RN
Board President

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.*