

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

IN THE MATTER OF:

IRMA LEWIS, CNA

Certificate No. 000044483CNA

) **RULING ON MOTION FOR SUMMARY
) DETERMINATION AND FINAL
) ORDER**

)
) OAH Case No.: 1504021
) Agency Case No.: 14-01810

HISTORY OF THE CASE

On November 25, 2014, the Oregon State Board of Nursing (Board) issued a Notice of Proposed Revocation of Nursing Assistant Certificate (Notice) to Irma Lewis. On December 15, 2014, Ms. Lewis timely requested a hearing.

On January 27, 2015, the Board referred the matter to the Office of Administrative Hearings (OAH). The OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside at hearing. On March 4, 2015, ALJ Fair convened a telephone prehearing conference. Ms. Lewis did not appear. The Board appeared and was represented by Senior Assistant Attorney General Lori Lindley. Kathleen Simpson and Dante Messina also appeared on the Board's behalf. ALJ Fair scheduled the hearing for June 5, 2015, and set deadlines for submission of motions, witness lists and exhibits.

On April 2, 2015, the Board filed a Motion for Summary Determination (Motion). On May 4, 2015, the record closed without receipt of any response from Ms. Lewis.¹ On May 8, 2015, ALJ Samantha Fair issued her Ruling on Motion for Summary Determination and Proposed Order granting the Board's motion and revoking the certificate of Ms. Lewis. In that order ALJ Fair cancelled the hearing set for June 5, 2015 and notified Ms. Lewis of her exceptions to the proposed order and that they were due in 10 days following the date of service of the Proposed Order. Ms. Lewis did not file any exceptions to the Proposed Order.

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.

¹ Ms. Lewis's response normally would have been due at the OAH no later than April 21, 2015; however, because the Board advised her in its Motion that she had until April 30, 2015 to respond, the record was left open until May 4, 2015.

2. Whether Ms. Lewis engaged in conduct unbecoming a nursing assistant by use of alcohol in a manner dangerous or injurious to the nursing assistant or others or to an extent that such use impaired the ability to conduct safely the duties of a nursing assistant. ORS 678.442 and *former*² OAR 851-063-0090(7).³

3. Whether the Board may revoke Ms. Lewis's nursing assistant certificate. ORS 678.442(2) and *former* OAR 851-063-0080.

EVIDENTIARY RULINGS

The Affidavit of Dante Messina, Investigator, Board of Nursing, and Exhibits A through G, offered by the Board, were admitted into the record.

FINDINGS OF FACT

1. Ms. Lewis has worked at Good Samaritan Regional Medical Center (Good Sam) since May 26, 2006. (Ex. D at 2.) During the following events, Ms. Lewis held a nursing assistant certificate issued by the Board. (Messina Aff. at 1-3.)

Events of May 2014

2. On May 24, 2014, Ms. Lewis was scheduled to work the evening shift, which began at 7 p.m., in the Intensive Care Unit (ICU) at Good Sam. A couple of hours prior to the start of her shift, she called Good Sam and reported that she would not be able to work that day because she was ill. Good Sam removed her from the shift schedule for that evening. (Ex. A at 1.)

3. At 7 p.m. on May 24, 2014, Ms. Lewis arrived to work her ICU evening shift. When confronted by a supervisor about her earlier call to Good Sam, Ms. Lewis initially denied making the call. Subsequently, she acknowledged the call and indicated that she took some medication and came to work because she was feeling better. (Ex. A at 1.)

4. After her arrival, Ms. Lewis began performing quality control tests on glucometers. She was initially unable to recall how to perform quality control tests, spending much time staring at the glucometers. All the glucometers failed the quality control tests performed by Ms. Lewis. Other staff then performed the quality control tests, and the glucometers passed the tests without incident. While working on the glucometers, Ms. Lewis's speech was slurred and her walk was unsteady. At one point, Ms. Lewis walked into a wall. (Ex. A at 5.)

² The administrative rules cited herein are those rules applicable at the time of the issuance of the Notice and the alleged conduct. Effective January 1, 2015, the Board amended these administrative rules. The changes to the administrative rules would not effect this decision.

³ In its Notice, the Board also alleged that Ms. Lewis engaged in conduct unbecoming a nursing assistant by failing to cooperate with the Board and by failing to provide the Board requested documentation, violations of OAR 851-063-0090(9); however, the Board withdrew these allegations at the time it filed its Motion.

5. Registered Nurse (RN) Kazmaier requested Ms. Lewis to move Patient A into the ICU room and put the patient's information in the cardiac computer in preparation for lab tests. At that time, Ms. Lewis was performing the quality control tests on the glucometers. RN Kazmaier repeated the request for assistance with Patient A three times. After each request, Ms. Lewis indicated that she would perform the task but failed to do so. RN Kazmaier moved Patient A into the room. While doing so, Ms. Lewis then attempted to log into the cardiac computer. Ms. Lewis abruptly stood and almost ran into the nearby wall, spoke with slurred speech, exited the room and headed to another room, but then turned around and returned to Patient A's room. Upon returning, Ms. Lewis asked RN Kazmaier if Patient A was in the room, even though Patient A was directly in front of her. RN Kazmaier again informed Ms. Lewis that Patient A's information needed to be in the computer. Ms. Lewis attempted to log into the computer. While attempting to log into the computer, Ms. Lewis again asked RN Kazmaier if Patient A was in the room. Over the course of the next 15 to 20 minutes, Ms. Lewis continued to have trouble logging into the computer and she could not remember how to put Patient A's name into the computer. Ms. Lewis's speech remained slurred during these attempts. (Ex. A at 4.)

6. After receiving reports of Ms. Lewis's behavior from staff, House Supervisor RN Paul met with Ms. Lewis. Ms. Lewis was cooperative and calm during the meeting and appropriately dressed. Her eyes were irritated and glassy. Her verbal responses were slow with some slurring of words. Her sentences were often broken and incomplete. There was the odor of an alcoholic beverage on her breath. After Ms. Lewis agreed to submit to a breath analysis and urine tests for alcohol and drugs, she informed RN Paul that she had not been drinking alcohol or taking any drugs or medications that would be reflected in the drug screen. Shortly before the test samples were taken, RN Paul again asked about Ms. Lewis's alcohol consumption. Ms. Lewis stated she had three shots of rum after her last shift ended, which was that same morning at 7:30 a.m. After the test samples were taken, RN Paul sent Ms. Lewis home. (Ex. A at 2-3.)

7. The test results were positive for alcohol. (Exs. A at 8; D at 1.) The breath sample indicated a blood alcohol level of 0.242 percent. (Messina Aff. at 2.) Good Sam discharged her for violating its drug and alcohol policy. (Ex. A at 3.)

Subsequent Events

8. On August 28, 2014, Ms. Lewis drove her motor vehicle and parked in the street in front of a local market. Her speech was slurred, her eyes were bloodshot and glassy, and she smelled of an odor of an alcoholic beverage. She provided a breath sample that reflected an alcohol content of 0.33 percent. A police officer arrested her for driving under the influence of intoxicants (DUII). (Ex. C at 6.) At the time of the arrest, Ms. Lewis insisted she did not have a drinking problem. (*Id.* at 8.)

9. In September 2014, Ms. Lewis began treatment following a diagnosis for alcohol dependence. During the initial placement for treatment, Ms. Lewis reported that she consumed at least three to six shots of vodka, three to four times per week, and sometimes as much as three-quarters of a bottle of vodka. She continued to consume alcohol even though it caused her to vomit; her son had asked her to stop consuming alcohol; she had been arrested for DUIIs; and she had been to a prior treatment program. When she ceased alcohol consumption, she became

shaky, had an upset stomach and diarrhea, and got headaches. (Ex. E at 1.)

10. In December 2014, Ms. Lewis's attendance at group treatment was unsatisfactory as she failed to attend the two scheduled meetings. On December 12, 2014, she provided a breath sample that reflected an alcohol content of 0.22 percent. She had driven her vehicle to the location to provide the breath sample. (Ex. F at 1.)

11. In February 2015, Ms. Lewis's attendance at group treatment was unsatisfactory as she had only attended 7 of 11 meetings. She failed to take a scheduled urine analysis test on February 23, 2015. Her attendance improved in March 2015. (Ex. G at 1.)

Past Behavior

12. On August 15, 2010, a police officer stopped Ms. Lewis, driving in her motor vehicle. Ms. Lewis provided a breath sample that reflected an alcohol content of 0.18 percent. The police officer arrested her for DUII. (Ex. B at 1.)

CONCLUSIONS OF LAW

1. There is no genuine issue as to any material fact and the Board is entitled to a favorable ruling as a matter of law.

2. Ms. Lewis engaged in conduct unbecoming a nursing assistant by use of alcohol in a manner dangerous or injurious to the nursing assistant or others or to an extent that such use impaired the ability to conduct safely the duties of a nursing assistant.

3. The Board may revoke Ms. Lewis's nursing assistant certificate.

OPINION

The Board proposes to revoke Ms. Lewis's 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 allegation is correct and that it is entitled to revoke her certificate. 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).

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 of Dante Messina, and Exhibits A through G. Pursuant to OAR 137-003-0580(7), the ALJ reviewed the evidence in the light most favorable to Ms. Lewis, the non-moving party. The ALJ determined there are 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 resolves all issues in this matter, a proposed order is issued and the hearing is cancelled. The Board agrees with the ALJ.

Conduct Unbecoming a Nursing Assistant

ORS 678.442(1) grants the Board the authority to establish standards for the certification of nursing assistants. Former OAR 851-063-0090 defined conduct unbecoming a nursing assistant. It provided, 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:

* * * * *

(7) Conduct related to impaired function:

(a) Use of drugs, alcohol or mind-altering substances to an extent or in a manner dangerous or injurious to the nursing assistant or others or to an extent that such use impairs the ability to conduct safely the duties of a nursing assistant[.]

On May 24, 2014, Ms. Lewis reported to work as a certified nursing assistant when her blood alcohol level was 0.242 percent.⁴ During her shift, she was unable to remember how to complete assigned nursing assistant tasks, such as the quality control tests or data entry in the cardiac computer; she failed to provide the requested assistance with the physical transfer of a patient to an assigned room; she was unaware of her surroundings, as demonstrated by her walking into walls and inability to see and remember that Patient A was in the room; she performed assigned tasks incorrectly, such as failing all the glucometers in the quality control tests she performed; and her speech was slurred and her eyes were glassy. The evidence demonstrated that Ms. Lewis was under the influence of alcohol during her evening shift on May 24, 2014. Because of her inability to perform nursing assistant tasks correctly or provide the necessary assistance for Patient A, her ability to conduct safely the duties of a nursing assistant were impaired by her use of alcohol. Ms. Lewis's engaged in conduct unbecoming a nursing assistant in violation of *former* OAR 851-063-0090(7)(a).

Revocation of Nursing Assistant Certificate

ORS 678.442(2) 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:

* * * * *

(d) Violation of any provisions of ORS 678.010 to 678.445 or rules adopted thereunder.

* * * * *

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

Former OAR 851-063-0080 further provided, in part:

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:

⁴ ORS 813.010 defines driving under the influence of intoxicants to include having a blood alcohol content of 0.08 or higher.

* * * * *

(3) Use of any controlled substance or intoxicating liquor to an extent or in a manner injurious to the certificate holder or others or to an extent that such use impairs the ability to conduct safely the duties of a nursing assistant; ORS 678.442(2)(c).

(4) Violation of any provision of ORS 678.010 to 678.445 or rules adopted thereunder; ORS 678.442(2)(d).

* * * * *

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

As determined above, Ms. Lewis engaged in conduct unbecoming a nursing assistant when she reported to work as a nursing assistant while under the influence of alcohol. In its Notice, the Board seeks to revoke Ms. Lewis's nursing assistant certificate, a disciplinary action authorized by ORS 678.442(2)(f) and *former* OAR 851-063-0080.

Ms. Lewis has a known history of excessive alcohol use, beginning as early as 2010 when she received her first DUII. She continued to consume excessive quantities of alcohol despite multiple DUII arrests, unpleasant physical side effects, loss of her job, and her son's request for her to cease the alcohol consumption. Although she entered treatment for her alcohol dependence in September 2014, she failed to attend multiple meetings and continued to consume excessive quantities of alcohol as demonstrated by the 0.22 percent blood alcohol level from the December 2014 breath sample test. As further support for the Board's decision to revoke Ms. Lewis's nursing assistant certificate, Ms. Lewis drove her car to the location to provide the December 2014 breath sample. Thus, Ms. Lewis continues to demonstrate poor judgment and a lack of understanding of the dangerousness of her behavior. Ms. Lewis's persistent history of excessive alcohol consumption and her inability to modify her behavior support the Board's decision to revoke her nursing assistant certificate.

The Board revokes Ms. Lewis's nursing assistant certificate.

RULING AND ORDER

The Oregon State Board of Nursing's Motion for Summary Determination is granted. The hearing, scheduled for June 5, 2015, is cancelled. The certificate of Ms. Lewis is revoked.

The Oregon State Board of Nursing issues the following order:

Irma Lewis's nursing assistant certificate, Certificate Number 000044483CNA, is revoked.

Gary Hickman, R.N. Board President
Oregon Board of Nursing

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 June , 2015, I mailed the foregoing Ruling on Motion for Summary Determination and Final Order issued on this date in OAH Case No. 1504021.

By: First Class Mail

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