

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

IN THE MATTER OF:

CINIMON DEROWITSCH
Cert. No. 200110162CNA

) **RULING ON MOTION FOR SUMMARY**
) **DETERMINATION AND FINAL**
) **ORDER**
)
) OAH Case No.: 1303341
) Agency Case No.: 13-00841

HISTORY OF THE CASE

On June 25, 2013, the Oregon State Board of Nursing (Board) issued a Notice of Proposed Revocation of Nursing Assistant Certificate to Cinimon Derowitsch. On July 15, 2013, Derowitsch requested a hearing.

On July 15, 2013, 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. A prehearing conference convened on September 6, 2013, at which time a hearing date of November 19, 2013 was set and deadlines were set for the submission of exhibits and witness lists.

On September 13, 2013, the Board issued a Motion for Summary Determination (Motion). On September 30, 2013, the record closed without receipt of any response from Derowitsch. On October 3, 2013 ALJ Samantha Fair issued the Ruling on Motion for Summary Determination and Proposed Order granting the Board's motion. In the Proposed Ruling it stated that exceptions were to be filed within 10 days, by October 14, 2013. Derowitsch did not file any exceptions.

ISSUES

1. Whether there is a genuine issue as to any material fact. OAR 137-003-0580.
2. Whether Derowitsch was convicted of a crime bearing a demonstrable relationship to the duties of a nursing assistant. ORS 678.442.
3. Whether Derowitsch engaged in conduct unbecoming a nursing assistant in the performance of her duties. OAR 851-063-0090.
4. Whether Derowitsch's nursing assistant certificate should be revoked. ORS 678.442.

EVIDENTIARY RULING

The Declaration of Shanon Rahimi (Declaration) and Exhibits A and B, offered by the Board, were admitted into the record without objection.

FINDINGS OF FACT

1. Derowitsch holds a certificate as a nursing assistant, issued by the Board, scheduled to expire on May 3, 2014. (Declaration.)
2. Ideal Partners in Home Care (IPHC) employed Derowitsch to provide in-home care for its clients, including Client A, a 88-year-old man. (Declaration and Ex. B at 3.) After noticing multiple thefts of cash from Client A's wallet, Client A's daughter hid a motion-activated surveillance camera in his home, trained on her father's wallet, on August 29, 2012. (Ex. B at 3-4.) On August 31, 2012, Derowitsch took a 10-dollar bill from the wallet. (*Id.* at 4.)
3. On September 11, 2012, Derowitsch was charged with Theft in the Third Degree in the Circuit Court of the State of Oregon for Baker County based upon the allegation of theft of the cash from Client A. On March 27, 2013, she was convicted of Theft in the Third Degree, placed on probation, and required to pay restitution to Client A. (Ex. A at 1-3.)
4. During May and June 2012, two other clients of IPHC also reported repeated thefts of cash from their homes during time periods when its employees, one of whom was Derowitsch, were in the homes. (Ex. B at 8-18.)

CONCLUSIONS OF LAW

1. There are no genuine issues of material fact.
2. Derowitsch was convicted of a crime bearing a demonstrable relationship to the duties of a nursing assistant.
3. Derowitsch engaged in conduct unbecoming a nursing assistant in the performance of her duties.
4. Derowitsch's nursing assistant certificate should be revoked.

OPINION

The Board proposed to revoke Derowitsch's nursing assistant certificate, based on an allegation that she was convicted of a theft in which the victim was her elderly patient. 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 revocation of her certificate is the appropriate sanction. 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 the ALJ's ruling, the ALJ considered the Board's Motion, the Declaration and Exhibits A and B. Pursuant to OAR 137-003-0580(7), the ALJ reviewed the evidence in the light most favorable to Derowitsch, the non-moving party, and determined there were no genuine issues as to the material facts of the Board's allegations that were relevant to resolution of the legal issues. Because the ruling on the Motion resolved all issues in this matter, a proposed order was issued and the hearing was canceled.

Conviction of Crime Which Bears Demonstrable Relationship to the Duties of a Nursing Assistant

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:

(a) Conviction of the certificate holder of a crime where such crime bears demonstrable relationship to the duties of a nursing assistant. A copy of the record of such conviction, certified to by the clerk of the court entering the conviction, shall be conclusive evidence of the conviction.

* * * * *

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

On March 27, 2013, Derowitsch was convicted of Theft in the Third Degree based upon her removal of a 10-dollar bill from Client A's wallet. ORS 164.043 provides the following definition for this crime:

(1) A person commits the crime of theft in the third degree if:

(a) By means other than extortion, the person commits theft as defined in ORS 164.015; and

(b) The total value of the property in a single or an aggregate transaction is less than a 10-dollar bill [.]

ORS 164.015 provides, in part:

A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

(1) Takes, appropriates, obtains or withholds such property from an owner thereof[.]

ORS 164.035(1) provides, in part:

In a prosecution for theft it is a defense that the defendant acted under an honest claim of right, in that:

(a) The defendant was unaware that the property was that of another; or

(b) The defendant reasonably believed that the defendant was entitled to the property involved or had a right to acquire or dispose of it as the defendant did[.]

Derowitsch asserted that she took the 10-dollar bill with the intent to buy Client A some fruit. Despite her assertion, Derowitsch was unable to present any evidence that she had

purchased fruit for Client A. Additionally, based upon the statutory definitions for the crime of Theft in the Third Degree, Derowitsch's conviction means that Derowitsch took the 10-dollar bill with intent to deprive Client A of the cash and that she had no reasonable belief that she was entitled to the cash.¹ Finally, because she has been convicted of the Theft in the Third Degree, Derowitsch cannot argue in the current matter that she did not commit the crime.

OAR 851-063-0030 details an extensive list of the duties of a certified nursing assistant (CNA), which involve providing for the care of patients in all their activities of daily living. As such, a CNA is responsible for the daily needs of the patient and stealing from the patient is an aberration of the CNA's responsibilities. A conviction for theft from a client bears a demonstrable relationship to the duties of a nursing assistant.

Derowitsch has been convicted of a crime that bears a demonstrable relationship to the duties of a nursing assistant.

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," 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:

* * * * *

(2) Conduct related to other federal or state statutes/rule violations:

* * * * *

(g) Using the client relationship to exploit the client by gaining property or other items of value from the client either for personal gain or sale, beyond the compensation for services[.]

Derowitsch unlawfully took cash from Client A, an elderly man for whom she was hired to provide care. She exploited her caregiving employment relationship to take the cash. She engaged in conduct unbecoming a nursing assistant.

¹There were additional similar thefts of cash from Client A and other IPHC clients during periods when Derowitsch provided care. She also was caught on camera taking a 10-dollar bill within two days of its placement. It is not credible that the only time Derowitsch ever took money from clients was the one time she was caught on a camera two days after its placement. Instead, these facts support a conclusion that Derowitsch repeatedly stole cash from IPHC clients despite her assertion that the August 31, 2012 incident was the only time she took cash from the clients.

Revocation of Nursing Assistant Certificate

Pursuant to ORS 678.442(2), the Board may revoke or suspend a certificate when a CNA is convicted of a crime that bears a demonstrable relationship to the duties of a nursing assistant or when a CNA engages in conduct unbecoming a nursing assistant. Stealing from a client is a reprehensible act, especially against an elderly client who relies on the care received from the CNA to meet his daily needs. The theft is also a dishonest act, demonstrating that the Board cannot rely on representations Derowitsch may make in any future interactions with the Board. The Board does not have the ability to prevent Derowitsch from engaging in such actions in the future except by revoking her certificate. Therefore, Derowitsch's nursing assistant certificate should be revoked.

RULING AND ORDER

The Oregon State Board of Nursing's Motion for Summary Determination is granted. The hearing, scheduled for November 19, 2013, is cancelled.

The Oregon State Board of Nursing issues the following order:

Cinimon Derowitsch's nursing assistant certificate is revoked.

Dated:

Kay Carnegie, RN, MS
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.

SIGNATURES & DATED COPY ON FILE IN BOARD OFFICE