

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0979

DEBRA A. LEWIS

VERSUS

THE LOUISIANA STATE BOARD OF NURSING

Ⓟ
UBW by TAW

Judgment Rendered: December 23, 2009

On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 563,300

Honorable Todd W. Hernandez, Judge Presiding

Dan A. Robin, Jr.
Metairie, LA

Counsel for Plaintiff /Appellant
Debra A. Lewis

E. Wade Shows
Jacqueline B. Wilson
Baton Rouge, LA

Counsel for Defendant/Appellee
The Louisiana State Board of Nursing

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

Welch J. concurs without reasons.

HUGHES, J.

In this appeal a registered nurse appeals her suspension by the Louisiana State Board of Nursing (the “Board”). For the reasons that follow, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Debra A. Lewis was employed as a registered nurse from July 2006 through January 2007 at Gulf States Long Term Acute Care of Slidell (GSLTAC). In January 2007, GSLTAC Director of Nursing, Jodi Morgan, R.N., and the GSLTAC Administrator, Tara Roberts, initiated a “Formal Physician Complaint/Concern” letter, purportedly on the basis of information received from Dr. Allan Larcena. Following an investigation, a complaint was filed against Ms. Lewis with the Board, which resulted in Ms. Lewis’s summary suspension. The March 6, 2007 letter of summary suspension cited a pattern of alleged narcotic discrepancies by Ms. Lewis, which included: removing narcotic medication for patients whose conditions did not warrant such medication, removing more medication than ordered and failing to account for the remainder, and requesting orders for narcotic drugs on patients with no prior need for such drugs. The suspension was maintained by the Board on December 21, 2007, after concluding that: Ms. Lewis failed to practice nursing in accordance with the legal standards of nursing in violation of La. Admin. Code 46:XLVII.3405(A)(a); Ms. Lewis failed to utilize appropriate judgment in accordance with La. Admin. Code 46:XLVII.3405(A)(c); and Ms. Lewis demonstrated inappropriate, incomplete, or improper narcotic documentation in violation of La. Admin. Code 46:XLVII.3405(A)(q). The Board further found that the evidence presented constituted sufficient cause to suspend Ms. Lewis’s nursing license pursuant to LSA-R.S. 37:921. The Board ordered Ms. Lewis’s

license suspended until such time as she completed or satisfied the following requirements: refrain from working in any capacity as a registered nurse; (2) submit to a comprehensive outpatient psychiatric, psychological, and substance abuse evaluation; (3) submit to all recommendations of those health care professionals; (4) if treatment recommendations or findings warrant, meet with the Board or Board staff and demonstrate that she poses no danger to the practice of nursing; (5) if found to be chemically dependent, sign an agreement with the Recovering Nurse Program for a minimum period of three years; (6) complete ten hours of Board approved continuing education hours on the legal aspects of nursing and ten hours of documentation; and (7) have no further misconduct.

On January 22, 2008, Ms. Lewis filed the instant lawsuit for judicial review of the Board's decision, pursuant to LSA-R.S. 49:951 et seq., in the Nineteenth Judicial District Court.

Following review by the district court, judgment was rendered affirming the decision of the Board. Ms. Lewis now appeals to this court, contending that the district court erred in: (1) failing to correctly apply the standard of review applicable to administrative actions as set forth in LSA-R.S. 49:964; (2) finding the Board's conclusions were supported by a preponderance of the evidence "when the record clearly shows otherwise;" and (3) failing to set aside the Board's sanctions, which were arbitrary, capricious, and an unwarranted abuse of agency discretion.

DISCUSSION

Judicial review of administrative decisions is governed by LSA-R.S. 49:964, which provides in pertinent part:

G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have

been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

When reviewing an administrative final decision, the district court functions as an appellate court. An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appropriate circuit court of appeal. On review of the district court's judgment, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the court of appeal. Consequently, this court will conduct its own independent review of the record and apply the standards of review provided by LSA-R.S. 49:964(G). **Doc's Clinic, APMC v. State Dept. of Health and Hospitals**, 2007-0480, pp. 8-9 (La. App. 1 Cir. 11/2/07), 984 So.2d 711, 718-19, writ denied, 2007-2302 (La. 2/15/08), 974 So.2d 665. See also LSA-R.S. 49:965.

The grounds for disciplinary proceedings of registered nurses are set out in LSA-R.S. 37:921, which provides:

The board may deny, revoke, suspend, probate, limit, or restrict any license to practice as a registered nurse or an advanced practice registered nurse, impose fines, and assess

costs, or otherwise discipline a licensee and the board may limit, restrict, delay, or deny a student nurse from entering or continuing the clinical phase of nursing education upon proof that the licensee or student nurse:

(1) Is guilty of selling or attempting to sell, falsely obtaining, or furnishing any nursing diploma or license to practice as a registered nurse.

(2) Is convicted of a crime or offense which reflects the inability of the nurse to practice nursing with due regard for the health and safety of clients or patients or enters a plea of guilty or nolo contendere to a criminal charge regardless of final disposition of the criminal proceeding, including, but not limited to, expungement or nonadjudication.

(3) **Is unfit or incompetent by reason of negligence, habit, or other cause.**

(4) Has demonstrated actual or potential inability to practice nursing with reasonable skill and safety to individuals because of use of alcohol or drugs; or has demonstrated inability to practice nursing with reasonable skill and safety to individuals because of illness or as a result of any mental or physical condition.

(5) Is guilty of aiding or abetting anyone in the violation of any provisions of this Part.

(6) Is mentally incompetent.

(7) Has had a license to practice nursing or to practice as another health care provider denied, revoked, suspended, or otherwise restricted.

(8) Is guilty of moral turpitude.

(9) Has violated any provision of this Part.

(Emphasis added.)

“Other causes” that may render a registered nurse “unfit” or “incompetent” have been delineated by the Board in La. Admin. Code, Title 46, Part XLVII, § 3405(A), as including the following:

a. **failure to practice nursing in accordance with the legal standards of nursing practice;**

b. possessing a physical impairment or mental impairment which interferes with the judgment, skills or abilities required for the practice of nursing;

c. **failure to utilize appropriate judgment;**

d. failure to exercise technical competence in carrying out nursing care;

e. violating the confidentiality of information or knowledge concerning the patient;

f. performing procedures beyond the authorized scope of nursing or any specialty thereof;

g. performing duties and assuming responsibilities within the scope of the definition of nursing practice when competency

- has not been achieved or maintained, or where competency has not been achieved or maintained in a particular specialty;
- h. improper use of drugs, medical supplies or equipment, patient's records, or other items;
 - i. misappropriating items of an individual, agency, or entity;
 - j. falsifying records;
 - k. failure to act, or negligently or willfully committing any act that adversely affects the physical or psychosocial welfare of the patient, including but not limited to, failing to practice in accordance with the Federal Centers for Disease Control recommendations for preventing transmission of Human Immunodeficiency Virus (HIV), Hepatitis B Virus (HBV), and Hepatitis C Virus (HCV);
 - l. delegating or assigning nursing care, functions, tasks, or responsibilities to others contrary to regulations;
 - m. leaving a nursing assignment without properly notifying appropriate personnel;
 - n. failing to report, through the proper channels, facts known regarding the incompetent, unethical, or illegal practice of any health care provider;
 - o. failing to report to the board one's status when one performs or participates in exposure-prone procedures and is known to be a carrier of the hepatitis B virus or human immunodeficiency virus, in accordance with LAC 46:XLVII.4005;
 - p. has violated a rule adopted by the board, an order of the board, or a state or federal law relating to the practice of professional nursing, or a state or federal narcotics or controlled substance law;
 - q. *inappropriate, incomplete or improper documentation*;
 - r. use of or being under the influence of alcoholic beverages, illegal drugs or drugs which impair judgment while on duty, to include making application for employment;
 - s. failure to cooperate with the board by:
 - i. not furnishing in writing a full and complete explanation covering a matter requested by the board; or
 - ii. not responding to subpoenas issued by the board in connection with any investigation or hearing;
 - iii. not completing evaluations required by the board;
 - t. exceeds professional boundaries, including but not limited to sexual misconduct; and
 - u. use of any advertisement or solicitation which is false, misleading, or deceptive to the general public or persons to whom the advertisement or solicitation is primarily directed.
 - v. attempted to or obtained a license (including renewals), permit or permission to practice as a registered nurse, nurse applicant, or student nurse by fraud, perjury, deceit or misrepresentation;
 - w. false statement on application;

x. failure to comply with an agreement with the board.

(Emphasis added.)

The Board, after holding a trial in this matter, found Ms. Lewis to have been unfit or incompetent by reason of La. Admin. Code, Title 46, Part XLVII, § 3405(A), paragraphs (a), (c), and (q). Barbara L. Morvant, Executive Director of the Board, issued findings of facts and conclusions, in pertinent part as follows:

[Findings of Fact:]

* * *

...On January 18, 2007, while Respondent was employed at [G.S], Slidell Campus, a call was made to the Director of Nursing by a staff physician regarding Respondent, who had worked the previous night shift of January 17-18, 2007. The physician advised that, on the previous night shift,

- Respondent telephoned him requesting [pain] medication on patient #5 who was in a comatose state; and
- Respondent called another time that night requesting pain medication on patient #6 who was not on any pain medication

...On December 6, 2006, for patient #1, who had no documented need for increased pain medication prior to or subsequent to Respondent's shift, Respondent contacted the physician and received an order for Demerol 25 mg IV every 6 hours. Subsequently, Respondent:

- At 9:02 p.m. removed a Demerol 25 mg vial and wasted said vial after documenting that administration was unsuccessful due to spray-back while Respondent was attempting to push it via the patient's PICC central line;
- At 10:12 p.m. removed Demerol 25 mg and at 10:15 p.m. documented administration of the Demerol; and
- At 3:44 a.m. on December 7, 2006, removed Demerol 25 mg and at 3:50 a.m. documented administration of the medication.

...On December 14, 2006, for patient #2, who had orders for Demerol 25 mg IVP every 4 hours PRN severe pain, Respondent requested and received orders to increase the amount of Demerol to 50 mg IV every 4 hours PRN pain and Fentanyl patch every three (3) days. The patient had not

received Demerol during the previous 36 hours[.] Respondent administered Demerol six ... (6) times in a 32-hour period:

On December 14, 2006,

- At 8:43 a.m. removed Demerol 25 mg and documented administration at 8:00 a.m., 43 minutes prior to the time that the medication was removed;
- At 12:37 p.m. removed Demerol 50 mg and documented administration at 12:15 p.m., 22 minutes prior to the time that the medication was removed;
- At 4:13 p.m. removed Demerol 50 mg and documented administration at 4:30 p.m.

On December 15, 2006,

- At 8:10 a.m. removed Demerol 50 mg and documented administration at 8:10 a.m.
- At 12:28 p.m. removed Demerol 50 mg and documented administration at 12:28 p.m.
- At 4:17 removed Demerol 50 mg and documented administration at 4:20 p.m.

...On the listed dates for patient #3, who had orders for Lortab 10 mg PO every 4 hours PRN pain and Demerol 50 mg IM every 4 hours PRN pain, but who had infrequent need for IV Demerol, Respondent documented administration of Demerol six times in ... 22 hours. The physician expressed concern about the amount of IV Demerol administered by Respondent just two days prior to patient's discharge when the patient's minimal pain had been well controlled by Lortab:

On January 13, 2007,

- At 10:16 a.m. removed Demerol 50 mg and documented administration at 10:16 a.m.
- At 2:36 p.m. removed Demerol 50 mg and documented administration at 2:36 p.m.
- At 6:08 p.m. removed Demerol 50 mg and documented administration at 6:20 p.m.

On January 14, 2007,

- At 7:58 a.m. removed Demerol 50 mg and documented administration at 7:58 a.m.
- At 11:59 a.m. removed Demerol 50 mg and documented administration at 12:00 p.m.
- At 3:59 p.m. removed Demerol 50 mg and documented administration at 4:00 p.m.

...On January 17, 2007, for patient #4, who had orders for Lortab 5 mg PO every 4 hours PRN pain and intravenous Morphine Sulfate (MS) 1 mg every 4 hours PRN pain[.]

- At 6:55 p.m. removed MS 4 mg, documented administration of MS 4 mg – instead of the ordered dose of MS 1 mg – at 7:00 p.m.;
- At 10:26 p.m. removed Lortab 5 mg PO and documented administration at 10:00 p.m., 26 minutes prior to the time that the medication was removed; and

- At 4:09 a.m. on January 18, 2007, removed MS 4 mg and documented administration of MS 4 mg – instead of the ordered dose of MS 1 mg – at 4:10 a.m.

...On the night shift which began on January 17, 2007, for patient #5, comatose with no previously documented need for pain medication, Respondent requested and received an order for intravenous MS[:]

- At 9:18 p.m. removed MS 4 mg and documented administration at 9:20 p.m.; and
- At 1:27 a.m. on January 18, 2007, removed MS 4 mg and documented administration at 1:30 a.m. A subsequent drug test of a urine specimen of patient #5 collected on January 18, 2007, was negative for opiates.

...On the night shift which began on January 17, 2007, for patient #6, the respondent requested an order for pain medication, received an order for Lortab 10 mg per PEG tube every 4 hours PRN pain, and documented administration twice during Respondent's shift:

- At 10:57 p.m. removed Lortab 10 mg and documented administration at 10:55 p.m.; and
- At 6:01 a.m. on January 18, 2007, removed Lortab 10 mg and documented administration at 5:30 a.m., 30 minutes prior to the time that the medication was removed.

A drug test of a urine specimen of patient #6 collected on January 18, 2007, and results were unreliable [sic].

...On May 23, 2007, the board office received Respondent's written statement addressing the charges. Also received was a letter of support from Respondent's former coworker.

...On December 18, 2007, an administrative board hearing was held; the board members reviewed documentary evidence and heard the testimonial evidence.

[Conclusions of Law:]

1. That pursuant of [LSA-]R.S. 37:911, et seq., the [Board] has jurisdiction over this matter.
2. That Respondent was properly notified of the charges and date of hearing.
3. That based on the foregoing Findings of Fact, Respondent did violate [LSA-]R.S. 37:921 as set forth in the complaint as filed, including, but not limited to the following subsections:
 - Respondent failed to practice nursing in accordance with the legal standards of nursing practice; [La. Admin. Code] 46:XLVII.3405(a);

- Respondent failed to utilize appropriate judgment; [La. Admin. Code] 46:XLVII.3405(c);
 - Respondent demonstrated inappropriate, incomplete or improper documentation; [La. Admin. Code] 46:XLVII.3405(q);
4. That the evidence presented constitutes sufficient cause pursuant to [LSA-]R.S. 37:921 to suspend Respondent's license to practice as a Registered Nurse in Louisiana. This is a public record and will be reported to the Healthcare Integrity and Protection Data Bank (**HIPDB**) as **99 Other: Narcotic administration irregularities and narcotic documentation discrepancies.**

HIPDB Narrative: After Respondent's license was Summarily Suspended for narcotic discrepancies and a Board hearing was held, the Board ordered continuance of license suspension with eligibility to request reinstatement after submission to comprehensive evaluations and other stipulations.

[Order:]

In an open meeting of the Louisiana Board of Nursing, on December 19, 2007, the following Order was rendered:

It is **ORDERED, ADJUDGED, AND DECREED** that the license of Respondent remain suspended and Respondent shall not be able to request license reinstatement until satisfaction of reinstatement application requirements and upon completion of the following:

1. Refrain from working in any capacity as a Registered Nurse. Failure to do so shall cause further disciplinary action and/or criminal charges.
2. Submit to a comprehensive **outpatient** psychiatric, psychological and substance abuse evaluation by a psychiatrist, clinical psychologist and addictionist who have been approved by the Board; Shall authorize and cause a written report of the said evaluation to be submitted to the Board; Shall include the entire evaluation report including diagnosis, course of treatment, prescribed or recommended treatment, prognosis, and professional opinion as to Respondent's capability of practicing nursing with reasonable skill and safety to patients.
3. Immediately submit to all recommendations thereafter of the therapist, physician, or treatment team, and cause to have submitted evidence of

continued compliance with all recommendations by the respective professionals. This stipulation shall continue until the registrant is fully discharged by the respective professionals and until approved by the Board staff.

4. If the evaluations give any treatment recommendations or findings to warrant concern for patient safety, shall meet with Board or Board staff. Must demonstrate to the satisfaction of the Board that she poses no danger to the practice of nursing or to the public and that she can safely and competently perform the duties of a Registered Nurse.
5. If found to be chemically dependent, immediately sign an agreement with the Recovering Nurse Program, and cause to have submitted evidence of compliance with all program requirements for a minimum of 3 years.
6. Submit written evidence of completion of LSBN staff approved continuing education hours to include: ten (10) hours on legal aspects of nursing and ten (10) hours on documentation.
7. Not have any misconduct, criminal violations or convictions, or violations of any health care regulations reported to the Board related to this or any other incidents.

After completion of above-listed requirements, and if approved by the evaluator and Board staff, Respondent is eligible for reinstatement, with the following stipulation:

1. Within 12 months of license reinstatement, submit payment of \$300.00 to the Board as a fine.
2. Within 2 years, submit payment of \$4,800.00 as cost of Board Hearing.

After a thorough review of the testimony and evidence presented to the Board in this case, we are unable to say the Board erred in either its findings of fact, decision, or the action taken. There is a reasonable basis in the record for concluding that, at a minimum, Ms. Lewis: in numerous instances, entered inaccurate information in patient records concerning the details of the administration of narcotic pain medication; and on two

occasions administered 4 milligram doses of Morphine to a patient who had only been prescribed 1 milligram of this narcotic drug. Even though Ms. Lewis submitted evidence to the Board defending against these allegations, the decision of the Board to give no credence to the defense evidence cannot be reassessed on appeal. See LSA-R.S. 49:964(G)(6); **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Furthermore, the decision of the Board to impose conditions on the reinstatement of Ms. Lewis's nursing license, which are calculated to ensure that she "pose[s] no danger to the practice of nursing," though onerous, are necessary for the protection of the public welfare.

CONCLUSION

For the reasons assigned, we affirm the ruling of the district court upholding the decision of the Louisiana State Board of Nursing, suspending the nursing license of Debra A. Lewis and imposing the specified conditions on reinstatement of the license. All costs of this appeal are to be borne by Debra A. Lewis.

AFFIRMED.