

SUPERIOR COURT
Washington Unit

VT SUPERIOR COURT
STATE OF VERMONT

CIVIL DIVISION

Docket No. 392-6-15 Wncv

Carol Auerbach,
Appellant

v.

State of Vermont,
Appellee

2015 AUG -1 P 2:14

Opinion and Order on Appeal

Respondent Carol Auerbach (Auerbach) appeals a decision of the Vermont Board of Nursing (the "Board"), which concluded, *inter alia*, that she had submitted a false application for a nursing license. She raises a number of issues on appeal. The Court held a hearing on this matter on July 7, 2016. In light of that hearing, the record, and the submissions of the parties, the Court makes the following determinations.

Factual and Procedural Background

In or about 1993, the State began an investigation into an allegation that Auerbach had used improper force against a patient. She was eventually charged with disciplinary violations in connection with that allegation. On September 12, 1995, the Board approved a Stipulation and Consent Order (the "Consent Order"), which resolved those charges. The Consent Order stated that Auerbach was not agreeing that she had engaged in the charged conduct but that she would not contest the matter. The Consent Order indicated that Auerbach had agreed to the Order voluntarily and without coercion and that she received the advice of counsel.

The Consent Order concluded that the uncontested allegations supported a finding of unprofessional conduct. As a sanction, Auerbach was reprimanded and, going forward, her license was deemed: "conditioned." Further, the Consent Order provided that she was required to provide future employers with a copy of the Consent Order and that the Board could inform other states of the disciplinary action taken against Auerbach.

In 2012, Auerbach applied for a license as a nursing assistant. In response to a question asking whether any licensing authority had ever taken disciplinary action against her in the past, she wrote: "No." Additionally, she signed the application under the penalties of perjury.

In 2013, Auerbach was charged with unprofessional conduct based on the failure to mention the Consent Order in the 2012 application. The Board held a hearing in February 2014, and found that she had submitted a false application in violation of 26 V.S.A. §§ 1582(a)(7) and 1595(3). Auerbach appealed.

After some procedural detours, she had a hearing before an Appellate Officer. Because a transcript of the 2014 hearing could not be located, the parties agreed that the officer could accept additional evidence, which he did. 3 V.S.A. § 130(a). Auerbach testified at the hearing. She offered a number of excuses as to why she did not reveal the Consent Order in her application. She said that she may have forgotten about it, that she thought it may no longer have been in effect, and that she may have overlooked the question on the application because she was not wearing her glasses when she filled out the application. The hearing officer did not find her excuses credible and affirmed the Board's conclusions. Auerbach appealed to this Court.

Standard of Review

A decision of a professional regulatory board is typically entitled to deference

from this Court. Its findings will be affirmed "as long as they are supported by

substantial evidence, and its conclusions if rationally derived from findings and

based on a correct interpretation of the law." *Braun v. Bd. of Dental Exams*, 167

Vt. 110, 114 (1997). With regard to matters that fall fully outside of its expertise,

determinations of a regulatory board are not entitled to deference. *See In re Porter*,

2012 VT 97, ¶ 9, 192 Vt. 601, 608.

Analysis

On appeal, Auerbach appears to have abandoned the factual excuses she

raised before the Appellate Officer. Instead, she makes a number of attacks on the

validity of the Consent Order itself. She takes nothing from these arguments.

First, any attempt to attack the underlying disciplinary order is largely

irrelevant. Even if Auerbach employed a proper procedural mechanism and the

Court concluded the Consent Order was somehow improper, Auerbach has cited no

principle that would make that conclusion retroactive to 2012. In other words, as of

the time she submitted the 2012 application, the Consent Order was in place and

she did not disclose it.

Second, Auerbach may not stage a collateral attack on the Consent Order in

this proceeding. The only basis for upending that order is through a motion under

Vt. R. Civ. P. 60(b). Rule 60(b) is applicable in administrative proceedings such as

the one where the Consent Order was entered. The Administrative Rules of

Practice for the Office of Professional Regulation provide that the Civil Rules, with some exceptions not relevant here, will apply in circumstances where the Administrative Rules and the APA do not address an issue. Neither the Administrative Rules nor the APA address modification of prior orders outside of an appeal context. See Administrative Rules 2.2 & 2.4; 3 V.S.A. §§ 801-49. Accordingly, any attempt to alter the terms of the Consent Order must proceed via Vt. R. Civ. P. 60(b).

A Rule 60(b) motion would be filed in the docket that resulted in the Consent Order. Auerbach has not filed such a motion in that docket and has not even filed one in this docket.¹

Third, in the absence of such a Rule 60(b) motion, the Consent Order is entitled to *res judicata* effect.² "Although *res judicata* does not apply to administrative proceedings as an inflexible rule of law, *see, e.g., Klein v. Colonial *158 Pipeline Co.*, 55 Md.App. 324, 339, 462 A.2d 546, 555 (1983), the principles of *res judicata* and collateral estoppel generally apply in zoning cases as in other areas of the law." *Application of Carrier*, 155 Vt. 152, 157-58 (1990). That is especially true when an agency acts in an adjudicative capacity. See *Lamb v. Geovjian*, 165

¹ Nor has Auerbach made compelling claims that would fall within the very narrow set of circumstances where the Supreme Court has allowed collateral attacks on underlying judgments in the absence of a Rule 60(b) motion. See *State v. Mott*, 166 Vt. 188, 192 (1997); *State v. Putnam*, 137 Vt. 410, 413 (1979).

² *Res judicata* "bars the litigation of a claim or defense if there exists a final judgment in former litigation in which the 'parties, subject matter and causes of action are identical or substantially identical.'" *Berlin Convalescent Ctr., Inc. v. Stoneman*, 159 Vt. 53, 56 (1992) (quoting *Berisha v. Hardy*, 144 Vt. 136, 138 (1984)).

Vt. 375, 382 (1996); *United States v. Town of Bolton Landing, N.Y.*, 946 F. Supp.

162, 167 (N.D.N.Y. 1996) (res judicata applies “[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate” (internal quotation omitted)). While consent judgments do not always receive the full benefits of that doctrine, where the intent to have preclusive effect is plain, *res judicata* will apply. See *Lamb*, 165 Vt. at 382; *In re May*, No. 04-70676 MHM, 2006 WL 5940803, at *3 (Bankr. N.D. Ga. Sept. 29, 2006); 18A Charles Wright, *et al.*, *Fed. Prac. & Proc. Juris.* § 4443 (2d ed. April 2016).

Here, the terms of the Consent Order were clearly meant to have a binding and forward-looking effect. The Consent Order provided that Auerbach’s license would continue to be deemed “conditioned” and that she would need to tell future employers about the discipline. In short, the Consent Order was meant to be a final resolution of the significant issues that were raised in that action, its effects were intended to be ongoing, and it is entitled to *res judicata* effect in this proceeding.

Fourth, even if the Court considered her collateral attack, Auerbach’s “legal” arguments against the Consent Order are meritless:

A. Auerbach contends that the Consent Order is invalid because she was not afforded an opportunity to receive formal charges and to have a hearing. But, she specifically waived her rights to formal charges and a hearing in the Consent Order.

B. Auerbach asserts that, because federal officials decided not to discipline her for the same conduct, that the Consent Order does not amount to discipline. But, whether another sovereign with its own set of rules and regulations chose to discipline Auerbach is entirely irrelevant. The federal government may well have different standards, or it may have decided that the state disciplinary process would be sufficient under the circumstances as a matter of discretion. Whatever

that federal investigation process was, it does not undermine the Consent Order.

C. Auerbach maintains that the Board had no actual evidence of misconduct to support the Consent Order. But, Auerbach gave up her right to a hearing where such evidence would have been produced and agreed that she would not contest the allegations against her. The Board then properly concluded that those uncontested allegations amounted to unprofessional conduct.

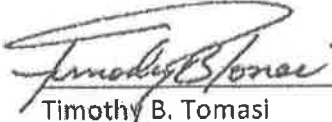
D. Auerbach claims that she was coerced into signing the Consent Order by her attorney. But, the terms of the Consent Order specifically state that she was executing the agreement voluntarily and without coercion. Further, the Appellate Officer heard her testimony supporting that claim and found it was not credible. Appellate Officer Opinion at 3. That finding is due deference from the Court.

Lastly, to the extent raised by Auerbach on appeal, the Court is not persuaded that the Appellate Officer or the Board erred in not accepting her factual explanations for not citing the Consent Order in the 2012 application. The Board and the Appellate Officer heard her inconsistent proffered explanations and viewed her demeanor. They found that she was not credible in stating that she had forgotten about the Consent Order, that she felt it was no longer in effect, or that she overlooked the 2012 question on the subject of discipline. The Court has reviewed the Board's and the Appellate Officer's reasons for disbelieving her testimony and finds them perfectly sound. See Appellate Officer Opinion at 2-3.

Conclusion

In light of the foregoing, the decision of the Board is affirmed.

Electronically signed on July 29, 2016 at 4:03 PM pursuant to V.R.E.F. 7(d).


Timothy B. Tomasi
Superior Court Judge

STATE OF VERMONT
SECRETARY OF STATE
BOARD OF NURSING

IN RE:	)	
CAROL AUERBACH	)	Docket No. 2013-136 (LNA)
Appeal of Decision of the Vermont	)	
Nursing Board dated February 10, 2014	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter was considered on May 14, 2015. The Respondent was present and represented herself. The State was represented by S. Lauren Hibbert, Esq. Evidence was taken.

Findings of Fact

1. The Vermont Nursing Board held a hearing on February 10, 2014 and determined that the Respondent had committed acts of unprofessional conduct by filing a false application for a Nursing Assistant Licensure by Endorsement. The Board found that Ms. Auerbach misrepresented that she had not been previously disciplined by a licensing authority when, in fact, she had a prior discipline case in Vermont. The Vermont Nursing Board determined that the application was fraudulent or deceitful and that she had violated 26 VSA Secs. 1595(3) and 1582(a)(7). The Board then revoked her LNA license by decision dated February 10, 2014. The decision was entered on February 11, 2014. No record was made of the audio portions of the hearing. No transcript could be prepared from the hearing before the Board.
2. The Respondent appealed this decision to an appellate officer. By decision dated May 1, 2014 the appellate officer decided that the appeal should be dismissed because it was not timely filed.
3. The Respondent appealed this decision to the Washington Superior Court. That court reversed the decision of the appellate officer and decided that the case should be remanded to the appellate officer for further decision. See decision of Hon. Mary Teachout dated February 24, 2015
4. After the remand, the parties had a pre-hearing conference before the appellate officer on April 16, 2015. Inasmuch as there was no transcript available from the previous Board hearing, it was resolved, with the approval of the parties, that the appellate officer would take testimony from the parties on the issues which had been presented to the Board and that new, relevant exhibits could be introduced, in addition to those which had been admitted before the Board. The authority for proceeding in this manner is 3 VSA Sec. 130(a) which allows an appellate officer to take proof on issues not shown in the record where procedural irregularities have occurred. Moreover, the parties agreed that this was the most efficient manner of moving forward with this case.

5. The State presented two exhibits: (1) the Stipulation and Consent Order, *In re Carol Chaffey Auerbach*, Docket No NU09-1093 dated September 11, 1995 and entered on September 12, 1995 [State's Exhibit 2], and (2) the Application of the Respondent for Nursing Assistant Licensure by Endorsement dated June 4, 2012 [State's Exhibit 3].
6. The testimony of the Respondent established the following facts.
7. Between 1987 and 1993 the Respondent was licensed as a Licensed Practical Nurse in New Jersey, New York, and New Hampshire. In 1993 she was a Licensed Practical Nurse in Vermont.
8. In September of 1993 there was an incident in which the Respondent was involved at the Thompson House in Brattleboro, Vermont. An allegation was made that she used force on a patient. She denied the allegations. An investigation was made by the state. Charges were brought and the Respondent hired David Gibson, Esq. as her counsel.
9. On August 20, 1995, the Respondent signed a Stipulation and Consent Order. (State Exhibit 2) That stipulation stated that the Respondent did not admit the allegations, but that she chose not to contest them (see paragraph 9 of Stipulation). Based upon the failure to contest the allegations, the Board found that there was a factual basis for discipline (paragraph 11), it reprimanded her license (paragraph 12a.) and it ordered that the Respondent should provide a copy of the stipulation and consent order to "... all employers in any current or future setting in which she practices as a nurse ..." (paragraph 12d). The respondent acknowledged in the stipulation that she entered the stipulation voluntarily, without coercion and with the advice of legal counsel (paragraph 15).
10. According to the Respondent, Attorney Gibson advised that she could seek an annulment of the Stipulation and Consent Order at a later date.
11. Following the entry of the order, she did not arrange for Mr. Gibson seek the annulment. She had a hard time getting in touch with him. She ended the attorney/client relationship with Mr. Gibson owing to Mr. Gibson an unpaid legal bill.
12. In 2012, the Respondent had been working as a Certified Home Health Aid and was licensed as a Certified Nurses Aid in New Jersey. She applied for licensure in Vermont as a Licensed Nursing Assistant (LNA) by endorsement on June 4, 2012. (See State Exhibit 3)
13. Her application form asked the following question on Page 2, block #2: "Has Vermont or any other state, federal authority, or other jurisdiction (U.S. or Elsewhere) ever restricted, suspended, revoked or taken any other disciplinary action against a license, certificate, or registration that you hold or held in any profession or occupation?" To this question, the Respondent answered, "No".
14. The final certification on the application, Page 5, stated that, "I certify, under pains and penalties of perjury, that all the information I have provided in this application is true and accurate. I understand that furnishing false information may constitute unprofessional conduct and result in the denial of my application for licensure/certification/registration." The Respondent signed her signature directly below this language on the application.
15. Clearly, the application contained false information because the Respondent had, in fact, been disciplined in the State of Vermont in 1995.
16. When she was asked how this false answer to the application question could have occurred, the Respondent gave three explanations. First, she stated that she simply forgot about the prior Vermont disciplinary action. Second, she stated that the prior Vermont disciplinary action had been diminished in her mind because Mr. Gibson had indicated that it could be

- annulled. Finally, she indicated that she might have overlooked the question in issue or she “might not have had her glasses on”. Each explanation is not credible and unpersuasive.
17. The Stipulation and Consent Order was a major event in the professional life of the Respondent. She vehemently contested the charges, hired counsel, and was involved in the case for a two-year period. The stipulation reprimanded her license and required that she disclose the discipline to all future employers. It seems highly unlikely that such an important event for a licensed practical nurse would be easily “forgotten”. It may have seriously impeded her career as an LPN.
 18. It also seems unlikely that the prior discipline was diminished due to the advice of Mr. Gibson. While he told her that it might be annulled, the Respondent knew that she had not sought the annulment through Mr. Gibson or anyone else.
 19. Finally, it seems extremely unlikely that she simply overlooked the question at issue since the application was quite clear and the final certification emphasized the importance of accurate information.
 20. In short, the explanation that the Respondent forgot the prior discipline, or overlooked the question, is simply not credible on the evidence presented.
 21. When the Vermont Nursing Board considered this unprofessional conduct case in February of 2014, the Board found, “Her hearing testimony explaining how she happened to answer the question incorrectly was not credible.” (See paragraph 4 of decision of February 10, 2014) The appellate officer reaches the same conclusion based upon the evidence presented to him.

Conclusions of Law

22. The State seeks a finding of unprofessional conduct based upon 26 VSA Sec.1582(a)(7) and 1595(3).
23. Under 26 VSA Sec. 1582(a)(7) a Licensed Practical Nurse may be disciplined if she engages in conduct of a character likely to deceive, defraud, or harm the public. The blatant misrepresentation of facts concerning prior professional discipline on a license application fits within the scope of “conduct or a character likely to deceive”.
24. Under 26 VSA Sec. 1595(3) the Board may deny a license or suspend, revoke, discipline or condition the license of a Licensed Nursing Assistant when the LNA or applicant has been fraudulent or deceitful in procuring or attempting to procure a license or in submitting any information or records to the board. The conduct of the Respondent falls within the scope of this statute as well.
25. The Respondent sought to establish that the initial charges in 1993 were groundless and that she was duped or coerced into signing the stipulation. This defense is unpersuasive where she later took no action to amend or annul the prior discipline. Likewise, the terms of the stipulation recite that there was no coercion and that the stipulation was made voluntarily.
26. The Respondent also sought to establish that the prior discipline by the Vermont Nursing Board was insignificant since she had been warned of exclusion from Federal Health Care programs by the Office of the Inspector General in March of 2014. She was later informed that the exclusion would not take place, “After a complete review of all information in the file...” See Respondent’s Exhibit B and C. This argument is unpersuasive for several reasons. First, the Respondent’s case was on appeal while the two exhibits were being drafted and issued. Second, the criteria for Federal health care program exclusion is separate and

distinct from a state agency's application of licensing rules and statutes. Finally, we have no clear picture of what "information in the file" was the basis of the Federal decision. The Respondent was free to submit all relevant information and documents into evidence before the appellate officer, so the value of another agency decision (using other criteria) is of questionable relevance.

27. Ordinarily, the appellate authority reviews the decision of the board who heard the case below based upon the appellate review statute, 3 VSA Sec. 130a. That statute allows reversal only if there has been abuse of discretion, error of law, unlawful procedure, violation of constitutional or statutory provisions, *ultra vires* action by the board, clearly erroneous action by the board, or arbitrary or capricious action by the board. The appellate officer here cannot find that any of these grounds for reversal exist since the appellate officer would have reached the same result after rehearing all of the evidence in this matter. The Respondent has not pointed to any reversible error by the Board.
28. Usually, the appellate officer does not use his or her own judgement as to the weight of the evidence on questions of fact. See 3 VSA Sec. 130a(b). In this case, it is important to note that the appellate officer here, who held a full rehearing of the merits, would have reached the same decision as the Board if he were to weigh the evidence on questions of fact. The State proved its case by a preponderance of the evidence, and the Respondent failed to establish any credible defense. Likewise, the factual conduct of the Respondent is sufficient to conclude that the false answer on the application for LNA license was made with intent to deceive.

ORDER

The decision of the Vermont Board of Nursing of February 10, 2014, and its findings of unprofessional conduct by the Respondent are affirmed on appeal. Its decision revoking the Respondent's LNA license is also affirmed.

Dated this 21st day of May, 2015.


George K. Belcher
Appellate Officer

5/21/15
Date of Entry

Appeal Rights

A party may appeal a decision of an Appellate Officer or an Administrative Law Officer to the Vermont Superior Court, Washington Unit, Civil Division, by filing with the Docket Clerk a written notice of appeal within 30 days of the date of entry of the order, in the manner provided in the Vermont Rules of Appellate Procedure 3 and 4. A check for the court filing fee, made payable to the Clerk of the Vermont Superior Court, Washington Unit, Civil Division must accompany the filing. Any request for stay pending appeal should be filed with the Superior Court.

VT SUPERIOR COURT
STATE OF VERMONT

SUPERIOR COURT
Washington Unit

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CIVIL DIVISION
Docket No. 359-6-14 Wncv

CAROL AUERBACH
Appellant

v.

FILED

STATE OF VERMONT, OFFICE
OF PROFESSIONAL REGULATION
Appellee

DECISION ON APPEAL

In the course of applying for her Vermont licensed nursing assistant license, which was granted, Ms. Auerbach reported that she had not been professionally disciplined before. The Board of Nursing later discovered that it had disciplined her licensed practical nurse license many years earlier. Several charges were specified against Ms. Auerbach due to the alleged misrepresentation. After a hearing, the Board found that she had misrepresented her disciplinary history and revoked her license.¹

Ms. Auerbach then appealed to an Office of Professional Regulation (OPR) appellate officer. Before the appeal was heard, however, the OPR prosecuting attorney (the State) filed a motion to dismiss arguing that Ms. Auerbach's notice of appeal was not filed in a timely fashion because it was not *received* by OPR within the appeal period. The appellate officer agreed and dismissed the appeal. Ms. Auerbach then appealed to this court. The sole issue here is whether Ms. Auerbach filed her notice of appeal with OPR within the 30-day appeal period following the Board's disciplinary decision.

Facts

The appellate officer took evidence on this issue.² Both Ms. Auerbach and Ms. Amaral, the OPR docket clerk, testified. The appellate officer found that Ms. Amaral told Ms. Auerbach that she could file her notice of appeal by fax and, if she did, she should follow up with a hardcopy. A few days before the 30-day appeal period ran, Ms. Auerbach faxed her notice of appeal to OPR's fax machine but did not follow up the fax with a hardcopy. That she faxed her notice of appeal was documented both by her testimony at the hearing and a printed fax receipt

¹ Due to a technical malfunction, no transcript of the hearing before the Board exists.

² Evidence was taken at a "preliminary pre-hearing conference." Conference Transcript 2. The parties were not warned that the motion to dismiss would be addressed or that evidence would be taken. For that reason, the appellate officer sought the parties' assent to address the motion at that time rather than later when they would have known to be prepared. As the transcript reflects, most of the conference then was consumed by Ms. Auerbach's confusion or indecision about how to proceed and her ambiguous responses to the appellate officer's repeated requests for assent. Ms. Auerbach eventually appeared to assent.

showing that she successfully sent a fax to OPR's fax machine within the appeal period. However, at the time the fax was transmitted, Ms. Amaral was on vacation. When she returned, there was no evidence in the office that anyone had Ms. Auerbach's faxed notice of appeal. Ms. Auerbach, upon learning this, immediately sent in a hardcopy of her notice of appeal but by then the appeal period had expired. The late notice of appeal did not include a statement of questions. Based on these facts, the appellate officer concluded that Ms. Auerbach had failed to file her notice of appeal in a timely fashion and granted the motion to dismiss.

In arguing the motion to dismiss, the State took the position that there was no timely notice of appeal because the faxed notice was not *received*. The lack of receipt was documented by Ms. Amaral's testimony that the faxed notice of appeal was not placed in Ms. Auerbach's file or otherwise brought to Ms. Amaral's attention.

Analysis

Ms. Auerbach had 30 days to file her notice of appeal. 3 V.S.A. § 130a(a). OPR's Administrative Rules of Practice provide: "Regardless of the method of delivery employed, filing occurs only upon receipt by the Docket Clerk or the hearing authority, as the case may be." Vt. Admin. Code 20-4-3:3.6(c) (emphasis added).

There is no dispute that the notice of appeal was faxed to the correct fax number (as the fax receipt documents) with OPR's express permission within the appeal period. Nevertheless, the State argued and the appellate officer ruled that the notice was not *received* because it did not, for whatever reason, get placed in Ms. Auerbach's file or otherwise make it into the actual possession of the docket clerk. This understanding of "receipt" is foreclosed by *Coles v. Coles*, 2013 VT 36, ¶¶ 7-8, 193 Vt. 605 (concluding that "receipt" for purposes of V.R.A.P. 4 means when the thing arrives at its destination, not when the person to whom it is addressed takes actual possession of it). Receipt refers to delivery. The court sees no reason that the concept of receipt should be any different here. See Vt. Admin. Code 20-4-3:2.4 (incorporating V.R.A.P. 4). The notice of appeal was received when it was successfully faxed. That it might have gotten lost thereafter and not made it to the file or the docket clerk is irrelevant.³ That it was successfully faxed was established as a matter of fact.

The appellate officer also noted that Ms. Auerbach did not submit a statement of questions, did not send copies of her filings to the OPR prosecuting attorney, and did not follow up the faxed notice of appeal with a paper notice of appeal as instructed. None of these issues appears to be jurisdictional, however. Statements of questions generally are not jurisdictional. *In re Guardianship of L.B.*, 147 Vt. 82, 84 (1986) (noting that the failure to timely file a statement of questions for appellate review does not require dismissal on jurisdictional grounds). Pro se parties often fail to copy other parties on their filings yet their cases typically are not

³ To the extent that one might question whether the fax, though successfully sent to the OPR fax machine, nevertheless did not arrive there (if that is possible), the issue would be akin to a paper notice getting lost in the mail. Lost mail is an ordinary, legitimate basis for excusable neglect. See *Abueyaman v. Illinois State Univ.*, 667 F.3d 800 (7th Cir. 2011) ("The term 'excusable neglect' . . . refers to the missing of a deadline as a result of such things as misrepresentations by judicial officers, lost mail, and plausible misinterpretations of ambiguous rules." (citation omitted)). Ms. Auerbach filed her paper notice of appeal as soon as she learned that OPR did not have her faxed notice.

dismissed as a result. The failure to file a paper notice of appeal as a follow up to the faxed notice of appeal did not comply with Ms. Amaral's instructions but was not jurisdictional. There is no dispute that Ms. Auerbach was given permission to file her notice of appeal by fax. OPR was not required to allow that, but it chose to do so.

Ms. Auerbach's notice of appeal was timely. The State's motion to dismiss was granted in error.

ORDER

For the foregoing reasons, the decision of the appellate officer dismissing the appeal is reversed. This case is remanded to the appellate officer for further proceedings consistent with this decision.

Dated at Montpelier, Vermont this 24th day of February 2015.


Mary Miles Teachout,
Superior Judge

STATE OF VERMONT
SECRETARY OF STATE
BOARD OF NURSING

IN RE:	)	
CAROL AUERBACH	)	Docket No. 2013-136 (LNA)
Appeal of Decision of the Vermont	)	
Nursing Board dated February 10, 2014	)	

ORDER OF DISMISSAL OF APPEAL

This matter was considered on April 29, 2014 at a pre-hearing conference. The Respondent was present and represented herself. The State was represented by Gabriel Gilman, Esq. Evidence was taken. The State's Motion to Dismiss Appeal was argued and considered.

Findings of Fact

1. The Vermont Nursing Board held a hearing on February 10, 2014 and determined that the Respondent had committed acts of unprofessional conduct by filing a false application to renew her Vermont Nursing Assistant license. The Board found that Ms. Auerbach misrepresented that she had not been previously disciplined by a licensing authority when in fact she had a prior discipline case in Vermont. The Vermont Nursing Board determined that the application was fraudulent or deceitful and that she had violated 26 VSA Secs. 1595(3) and 1582(a)(7). The Board then revoked her LNA license by decision dated February 10, 2014. The decision was entered on February 11, 2014. The decision contained the standard information about how to appeal including the statement that "A party aggrieved by a final decision of a board may appeal this decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, 89 Main St., Fl. 3, Montpelier, Vermont 05620-3401 within 30 days of the entry of this Order."
2. The Respondent had a telephone conversation with Liz Amaral, the Office of Professional Regulation Docket Clerk sometime before March 7, 2014. In that conversation the Respondent requested information about how to appeal. Ms. Amaral told her that her notice of appeal should be filed with the Docket Clerk. She also told the Respondent that she could file the notice of appeal by fax and follow it up with a "hard copy". The Respondent attempted to fax a "Request for a Notice of Appeal" by letter dated March 7, 2014. The letter and fax cover sheet were transmitted by fax to the OPR fax number on March 7, 2014 at 4:21 PM from a Staples Copy and Print Center. See State Ex. A attached to Motion to Dismiss.
3. The fax of March 7, 2014 was not received by the Office of OPR.

4. On March 27, 2014 the Respondent filed with the Docket Clerk a copy of the March 7, 2014 letter of appeal along with the Fax Transmission Verification report of March 7, 2014 and the March 7, 2014 cover sheet (See Exhibit A).
5. To date, no statement of questions for the appeal has been filed by the Respondent.
6. The Appellate Officer was assigned on March 31, 2014. The case was set on April 3, 2014 for a pre-hearing conference to be held on April 29, 2014. A Motion to Dismiss Appeal was filed by the State on April 1, 2014. By letter dated April 13, 2014 the Respondent replied to the Motion to Dismiss Appeal. In her letter Ms. Auerbach explained that she incorrectly answered a question on the license application because the prior case was "unintentionally forgotten".
7. The Motion to Dismiss Appeal was heard on April 29, 2014 after much discussion about possible continuance of consideration of that motion. Both parties eventually agreed to go forward and argue the Motion to Dismiss.
8. The Motion to Dismiss Appeal argues that the appeal is untimely because it was not filed within the statutory and regulatory time frame. The Motion also argues that the filing of March 27, 2014 was materially incomplete because it did not contain a statement of questions or other indications of what parts of the order were being appealed.
9. The Respondent has acted as her own attorney (pro se) throughout this proceeding.
10. It was clear that the Respondent felt that she had tried her best to file the appeal by sending the fax on March 7, 2014.
11. Ms. Amaral was clear in her testimony that she had told the Respondent prior to March 7, 2014 that the Respondent needed to follow up any fax with a hard copy. The Respondent could not recall whether or not she had been told this by Ms. Amaral.

Conclusions of Law

1. 3 VSA Sec. 130a(a) provides that "A party aggrieved by a final decision of a board may, within 30 days of the decision, appeal that decision by filing a notice of appeal with the director who shall assign the case to an appellate officer."
2. Office of Professional Regulation Rule 4.1 states that "A party may appeal a decision of a board or commission (except the Board of Real Estate Appraisers, 26 VSA Sec. 3323(c)) to an Appellate Officer by filing with the Docket Clerk a written notice of appeal within 30 days of the date of entry of the order. The notice of appeal shall include a statement of questions to be determined by the Appellate Officer."
3. Office of Professional Regulation Rule 3.6(c) states that "Filing shall be accomplished by delivery to the Docket Clerk at the Office of Professional Regulation or by delivery during the course of a hearing to a hearing authority and later delivery to the Docket Clerk. *Regardless of the method of delivery employed, filing occurs only upon receipt by the Docket Clerk or the hearing authority as the case may be.*" (emphasis added) The rule goes on to state that a filing with the Docket Clerk constitutes a representation that the documents have been sent by first class mail to the other parties on the same date as the date of filing. Clearly, the filing requirement was not met within the 30 day period since the fax was never received and there was no "follow-up" copy filed or served within the 30 day period.

4. Under Office of Professional Regulation Rule 3.1 (B) parties may appear without counsel but such parties are not relieved "from the necessity of compliance with any applicable rule, law, practice, procedure or other requirement."
5. Under Office of Professional Regulation Rule 2.5 the rules are to be "liberally construed to secure just and timely determination of all issues presented to a hearing authority". Liberal construction of rules does not normally include waiver of a clear rule.
6. Office of Professional Regulation Rule 1.2 states, "To prevent unnecessary hardship, delay, or injustice, or for other good cause, a hearing authority may waive the application of a rule upon such conditions as it may require, unless precluded by rule or by statute."
7. Under OPR Rule 2.4 the Vermont Rules of Appellate Procedure 3(a), 3(b) and 4 can be applied where the procedures outline in the Vermont Administrative Procedure Act or the Office of Professional Regulation Rules do not specifically govern a procedure. This is important here because the Appellate Officer must decide whether an untimely-filed notice of appeal constitutes a jurisdictional obstacle to the appeal.

The Fax Filing

8. It is clear that the attempt by the Respondent to perfect an appeal by faxing her notice of appeal to the Docket Clerk was inadequate. It was not "received" as required by Rule 3.6(c). Moreover, there was no service of a copy of the filing upon the other party (counsel for the State) as required by that rule. Finally, despite the express direction to follow up the fax with a hard copy, no such follow up occurred during the appeal period.
9. While some administrative agencies in other states allow fax filing of appeals, there is no provision in the Vermont Office of Professional Regulation rules for fax filing of notices of appeal. In a similar case where a fax was sent but not received by an agency during the appeal period, the court determined that no timely appeal had been made since the fax had not been received. See King v. Metropolitan Airports Commission, 2004 WL 61052 (Minn. App., 2004)
10. It has long been our law concerning appeals that the timeliness of the filing of a notice of appeal is jurisdictional. In re Guardianship of L.B., 147 Vt. 82, 510 A.2d 1319 (1986). Although there are provisions in the appellate rules for moving the trial court for extensions of the appeal period under VRAP 4(d), it appears that no such motion to extend the appeal period was filed with the Board within the applicable periods under VRAP 4(d).
11. The "jurisdictional" character of timely appeals is generally applied in administrative appeals. "Proper service of a petition for judicial review of an administrative decision is generally a threshold requirement for a court to obtain subject matter jurisdiction over the case. All parties must be served when an appeal from an agency decision is taken and failure to properly serve the petition for judicial review necessitates dismissal of the action." 2 Am. Jur 2d, *Administrative Law*, Sec. 531, p. 449-450. Concerning the jurisdictional nature of timely appeal in administrative cases see generally Wisconsin Power and Light Co. Public Service Comm. of Wisc., 2006 Wi. App. 221, 725 N.W.2d 423 (Wisc. App 2006); Calnon v. Planning Bd. of Lynn, 63

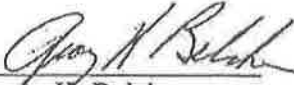
Mass. App. Ct. 384, 826 N.E.2d 258 (2005); Pieren-Abbott v. Kansas Bd. Of Revenue, 279 Kan. 83, 106 P.3d 492 (Kan. 2005); Blauer v. Dept. of Workforces Services, 2007 Ut. App. 280, 167 P.3d 1102 (Utah App. 2007)

Unnecessary Hardship or Other Good Cause

12. Office of Professional Regulation Rule 1.2 allows the hearing authority the discretion to waive the application of a rule upon such conditions as it may require to prevent unnecessary hardship, delay, or injustice, or for other good cause, unless to do so would be precluded by rule or statute. The following considerations bear upon this point.
13. While not precisely on point, the case of In re James Lund, 857 A.2d 279, 2004 VT 55 (2004) is helpful. There a notice of appeal was filed one day late and the trial judge granted a motion to extend the appeal period for excusable neglect under VRAP 4 (d). The Vermont Supreme Court reversed because neither a mistake of law nor ignorance of the law can be found to be excusable neglect. Although in the case at bar we are past the time periods to extend the appeal period under VRAP 4(d), the principle remains the same: the interests of finality of judgments cannot be swept away when a party fails to follow the rules, or fails to learn the rules and fails to comply with them.
14. In the case of Ms. Auerbach, she has had her hearing before the Vermont Nursing Board and dismissal of the appeal will not deny her of a merits hearing as might happen if she were defaulted. Her April 13, 2014 letter concerning the Motion to Dismiss did not identify any issue in the appeal which would have constituted reversible error by the Nursing Board. In fact, the letter admitted most of the facts found by the Board. Her only issue seems to be an issue of her own credibility which the Board determined against her. Moreover, it is hard to find that there is "good cause" to waive a jurisdictional time limit under OPR Rule 2.1 where Ms. Auerbach did not follow the process in filing the appeal; nor did she follow the express direction of the Docket Clerk to follow up her fax with a hard copy.
15. In the case of King v. Metropolitan Airports Commission, *supra*, the court considered various mitigating factors including the appellant's hospitalization for mental illness during the appeal period and confusion by the appellant's wife in faxing the documents. Despite these issues, the court determined that "Untimely appeals must be dismissed for lack of jurisdiction, regardless of any alleged mitigating circumstances or inequities" *id.* at page 2. See also Hood v. Fla. Unemployment Appeals Comm. 72 So.3d 272(Fla. App. 1 Dist, 2011, where unemployment commission adjuster's statement to appellant did not justify extension of appeal period.)
16. There is nothing in this case to establish that the appeal period must or should be extended under OPR Rule 1.2. To the extent that the Appellate Officer has discretion to waive the timeliness of the filing of the notice of appeal, the Appellate Officer declines to do so in this case.

**THE APPEAL OF THE APPELLANT, CAROL AUERBACH, IS HEREBY
DISMISSED.**

Dated this 1st day of May, 2014.


George K. Belcher
Appellate Officer

5/2/2014
Date of Entry

Appeal Rights

A party may appeal a decision of an Appellate Officer or an Administrative Law Officer to the Vermont Superior Court, Washington Unit, Civil Division, by filing with the Docket Clerk a written notice of appeal within 30 days of the date of entry of the order, in the manner provided in the Vermont Rules of Appellate Procedure 3 and 4. A check for the court filing fee, made payable to the Clerk of the Vermont Superior Court, Washington Unit, Civil Division must accompany the filing. Any request for stay pending appeal should be filed with the Superior Court.

STATE OF VERMONT
BOARD OF NURSING

In re: Carol Auerbach
License No. 025-6034

}
} Docket No. 2013-136(LNA)
}

Decision on
Respondent's Request for Stay of Revocation

Participating Board Members:

Jeanine Carr, RN, Chair
Ellen Watson, APRN, Vice Chair
Alan Weiss, Public Member
William G. White, Jr., Public Member
Deborah Swartz, RN
Douglas Sutton, RN
Virginia Hudson, RN
Luana Tredwell, LPN
Stephen Morse, LNA

Appearances:

Prosecuting the case: Gabriel Gilman
for Respondent: pro se

Presiding Officer: Larry S. Novins

The Vermont Board of Nursing held a hearing in the above matter on April 14, 2014 at the Capitol Plaza in Montpelier, Vermont.

Ms. Auerbach was a licensed nursing assistant and is therefore subject to the regulatory authority of this Board. 3 V.S.A. §§ 129, 129a, 26 V.S.A. §§ 1595 and 1598, the Administrative Rules of the Board of Nursing, and the Rules of the Office of Professional Regulation. She was previously licensed as an LPN. Her LPN license expired in September, 1995.

At the Board's February 10, 2014 meeting, it conducted a hearing in this matter. The Board concluded that Ms. Auerbach had engaged in unprofessional conduct. It revoked Ms. Auerbach's LNA license.

By facsimile dated March 7, 2014 Ms. Auerbach requested that the Board's Order be stayed pending her appeal. The facsimile was not received by the docket clerk at the time. Ms. Auerbach sent a copy of it which is now in the file.

The prosecution did not receive a copy of the request for stay until after March 28, 2014.

It responded to the Request and filed a memorandum opposing it.

There is no recording of the Board's prior hearing in this matter. The lack of a recording may affect the appeal Ms. Auerbach has filed. The Appellate Law Officer may decide the appeal on its merits, if such a decision can be rendered without the recording of the hearing. Or, the Appellate Law Officer could remand the matter back to the Board for a re-hearing to assure an adequate record from which Ms. Auerbach will have the right to appeal an adverse Board Decision.

OPR Rule 3.26 provides:

3.26 Stay of Decisions

(A) Requesting a stay. No decision of a hearing authority is automatically stayed by the filing of an appeal. A party aggrieved by a final order of a hearing authority may request a stay by written motion filed with the Director. The request must identify the order or portion of the order for which a stay is sought and must state in detail the grounds for the request. The party requesting the stay has the burden of proof.

(B) Criteria for evaluating request for a stay. In deciding whether to grant a stay, the hearing authority considers the likelihood of success on the merits of the requesting party's appeal, whether the party seeking the stay will suffer irreparable injury if the stay is not granted, whether the issuance of a stay will substantially harm other parties, and the location of the best interest of the public.

We consider each factor below:

1. Likelihood of success on the merits of Ms. Auerbach's appeal: We do not decide whether Ms. Auerbach's appeal was timely or properly filed. Because there exists no recorded record of the hearing, it is possible that, if the appeal is proper, the matter could be remanded to the Board for a hearing de novo. However, there is no reason to expect that the evidence at a second hearing would differ from the last hearing. In that case, Ms. Auerbach would not likely succeed on any appeal. A stay of the Board's decision at this time would not be appropriate.
2. Whether Ms. Auerbach will suffer irreparable injury if the stay is not granted: Ms. Auerbach has not shown that the revocation of her license will cause her irreparable injury. She has not used her Vermont license for some time. That there may be a possible O.I.G. action prohibiting her from working in other fields as a result of the Board's decision is speculative.
3. Whether the issuance of a stay will substantially harm the other parties: Ms. Auerbach has not shown that there will be harm to anyone else. The Board's Order was issued to protect the public. Harm to others, if any, does not flow from the revocation of her license.
4. The best interest of the public: The revocation of Ms. Auerbach's license came as a direct result of her intentional misrepresentations to the Board. The public's best interest is best protected by maintaining the Board's Order of revocation.

Ms. Auerbach has not met her burden to show that a stay of the Board's Order is appropriate. For the reasons set forth above, Ms. Auerbach's Request for Stay is denied.

Appeal Rights

This is a final administrative determination by the Vermont Board of Nursing. A party aggrieved by a final decision of a board may appeal this decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, Office of Professional Regulation, 89 Main Street, Fl. 3, Montpelier, Vermont 05620-3402 within 30 days of the entry of this Order.

Vermont Board of Nursing

By:

Jeannie Carr
Jeannie Carr, RN, Chair

Date: April 14, 2014

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 4/17/14

**STATE OF VERMONT
BOARD OF NURSING**

In re: Carol Auerbach
License No. 075-88012

}
} Docket No. 2013-136(LNA)
}

**Decision on
UNPROFESSIONAL CONDUCT CHARGE**

Participating Board Members:

Jeanine Carr, RN, Chair
Ellen Watson, APRN, Vice Chair
Alan Weiss, Public Member
William G. White, Jr., Public Member
Deborah Swartz, RN
Douglas Sutton, RN
Virginia Hudson, RN
Luana Tredwell, LPN
Stephen Morse, LNA
Sheri Brown, APRN

Appearances:

Prosecuting the case: Gabriel Gilman
for Respondent: pro se

Presiding Officer: Larry S. Novins

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

The Vermont Board of Nursing held a hearing in the above matter on February 10, 2014 at the Office of Professional Regulation conference room at the City Center in Montpelier, Vermont.

The prosecution has the burden of proof in this matter. To prevail on any unprofessional conduct charge, it must prove the charge by a preponderance of the evidence.

Background

The Specification of Charges alleges that Ms. Auerbach, in violation of Vermont Statutes, 1) failed to disclose to this Board prior disciplinary action taken by this Board against her now expired LPN license.

Findings of Fact

Based on the evidence presented, the Board finds as follows:

1. Ms. Auerbach is a licensed nursing assistant and is therefore subject to the regulatory authority of this Board. 3 V.S.A. §§ 129, 129a, 26 V.S.A. §§ 1595 and 1598, the Administrative Rules of the Board of Nursing, and the Rules of the Office of Professional Regulation. She was previously licensed as an LPN. That license expired in September, 1995.
2. In her application to renew her license in July, 2012, was the question, "Has Vermont or any other state, federal authority, or other jurisdiction (US or elsewhere) ever restricted, suspended, revoked, or taken any other disciplinary action against a license, certificate, or registration that you hold or held in any profession or occupation?" In response, followed by her certification under the pains and penalties of perjury, Ms. Auerbach wrote, "No."
3. In fact, Ms. Auerbach had been disciplined in Docket No. NU09-1093 where she was found to have provided unacceptable patient care and to have been unable to practice nursing competently by reason of any cause. The Board Order in that case, issued in September, 1995, was Stipulated.
4. Ms. Auerbach stated that she answered the question in the affirmative and that in response she was contacted by the Board or its representative. Her hearing testimony explaining how she happened to answer the question incorrectly was not credible.
5. Ms. Auerbach's answer to the question was incorrect. Her explanation of her error leads us to conclude that her answer was intentional and done with an intent to deceive the Board into issuing her LNA license.

Conclusions of Law

Based on the evidence presented and Facts found above we conclude as follows:

1. **Re: Alleged Violation of 26 V.S.A. § 1582(a)(7):** The Prosecution has proved by a preponderance of the evidence that Ms. Auerbach has engaged in conduct of a character likely to deceive, defraud, or harm the public. This is unprofessional conduct. 3 V.S.A. § 129a(a)(3).
2. **Re: Alleged violation of 26 V.S.A. § 1595(2)** The prosecution has proved that Ms. Auerbach was disciplined as a registered or licensed practical nurse by a competent authority in any jurisdiction. This statute permits the board to take action against a licensee who was disciplined. It does not make the prior discipline a new violation of law. Therefore, as a separate charge of unprofessional conduct, this charge is dismissed.
3. **Re: Alleged Violation of 26 V.S.A. § 1595(3):** The Prosecution has proved by a preponderance of the evidence that Ms. Auerbach (3) has been fraudulent or deceitful in procuring or attempting to procure a license, in filing or completing patient records, in signing reports or records or in submitting any information or records to the board. This is unprofessional conduct. 3 V.S.A. § 129a(a)(3).

Order

For the violations above, to protect the public, health, safety and welfare, the following sanction is necessary.

Ms. Auerbach's LNA license is revoked, effective the date of this decision. Because Ms. Auerbach's LPN license expired 20 years ago, we decline to take specific action against it. Should Ms. Auerbach apply for licensure in any profession within the jurisdiction of the Board, the unprofessional conduct found herein will be considered at that time.

APPEAL RIGHTS

This is a final administrative determination by the Vermont Board of Nursing. A party aggrieved by a final decision of a board may appeal this decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, Office of Professional Regulation, 89 Main Street, Fl. 3, Montpelier, Vermont 05620-3402 within 30 days of the entry of this Order.

If an appeal is filed, the Director of the Office of Professional Regulation shall assign the case to an appellate officer. The review shall be conducted on the basis of the record created before the board. In cases of alleged irregularities in procedure before the board, not shown in the record, proof on that issue may be taken by the appellate officer. 3 V.S.A. §§ 129(d) and 130a.

To request a stay of the Board's decision, please refer to the attached stay instructions.

Vermont Board of Nursing

By:

Jeanine Carr
Jeanine Carr, RN, Chair

Date: February 10, 2014

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY: 2/11/14