

STATE OF VERMONT  
SECRETARY OF STATE, OFFICE OF PROFESSIONAL REGULATION  
State Board of Nursing

In re: Theresa F. Bruno  
License No. 025-0004622

Dkt. No. AO-NU39-1105

**DECISION ON APPEAL**

On May 3, 2006, the State of Vermont issued a Specification of Charges against Theresa F. Bruno ["Appellant"], a licensed practical nurse. The State alleged that Appellant, who was employed at the Green Mountain Nursing Home during a night shift on October 30 and 31, 2005, failed to notify an on-call physician or a nurse on duty when an 84 year-old patient in her care experienced symptoms of cardiac distress. The patient had a history of heart-related problems. Shortly after the day-shift nurse came on duty on October 31st, the patient was transferred to an emergency room. The patient died later the same day.

Appellant filed a written response to the Specification of Charges in July, 2006; a prehearing conference was held in September, 2006 in which she participated by telephone; and a hearing on the merits was scheduled for December 11, 2006 in Montpelier, Vermont. Appellant was notified of the hearing date, time and place by certified mail, which she received in early October, 2006.

On the Thursday before the hearing date, Appellant left a telephone message for the State Prosecuting Attorney advising that, "it doesn't look like I'm going to be able to make it up to the hearing on Tuesday. . . ." The message did not specify any reason.

Her message also contained other remarks concerning the factual allegations that were to be the subject of the upcoming hearing. Insofar as the record reveals, Appellant did not communicate with the Office of Professional Regulation or with the State Board of Nursing ["Board"] otherwise concerning any problem she would have in attending the scheduled hearing, or any basis for rescheduling it.

The State Prosecuting Attorney did not receive the telephone message until the weekend as he was not in his office on the Friday preceding the December 11th hearing date. December 11, 2006 was a Monday, not a Tuesday. When the hearing convened at 9:15 a.m. on that Monday, the State Prosecuting Attorney played the telephone message for the Board of Nursing and its presiding officer. The presiding officer requested the Board to decide whether to invite Appellant to participate in the hearing via telephone, including giving her the opportunity to testify. The Board indicated that it desired to hear from her. Accordingly, the presiding officer called the telephone number that Appellant had left, but was connected with an answering machine.<sup>1</sup> He left a message for appellant indicating that the hearing would proceed and that she would be notified of the Board's decision.<sup>2</sup>

The Board then heard from two witnesses who testified under oath, responding to questions from the State Prosecuting Attorney and some Board members. After deliberating, the Board issued its "Findings of Fact, Conclusions of Law & Order" on January 23, 2007. It concluded, based on the fact that Appellant "failed to notify the on-

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<sup>1</sup> Appellant's basic reason for not being able to attend the hearing, explained in oral argument held on August 13, 2007, was that someone who was going to give her a ride to the hearing backed out suddenly. See also, note 2 below. Given that circumstance, it seems odd that the Board's presiding officer was not able to reach her at her home by telephone on the morning of the hearing.

<sup>2</sup> One might think that consideration should have been given to rescheduling the hearing. However, appellant had not made that request, had provided no basis for rescheduling, and the Board (consisting of eight members on that date, one of whom recused herself) had convened from various parts of the state to spend their time hearing her case. I do not believe in these circumstances that there was any need for the Board to consider a continuance sua sponte.

call doctor or the nurse of [the resident's] condition, even though [the resident] was exhibiting clear signs of cardiac distress with no improvement during the six hours she was in Respondent's care"<sup>3</sup>, that Appellant had committed unprofessional conduct by "being unable to practice nursing competently by reason of any cause" under 26 V.S.A. §1582(a)(3), in this particular instance, by reason of a lack of knowledge concerning proper cardiac care. The Board declined to decide against Appellant on two other, similar charges contained in the Specification of Charges.

On the basis of its findings and conclusions, the Board ordered Appellant's license to be suspended until she successfully completed a remedial course in cardiac care, and conditioned her license for a two year period on various terms relating to supervision, disclosure of the order to employers, the submission of reports and the like.

On February 21, 2007, Appellant filed a letter noting her appeal from the Board's order. She was subsequently advised that pursuant to the rules governing appeals, she would be required to file a statement of questions to be determined by the Appellate Officer, and to file her brief or written outline within thirty days after she had received notice that the record (including a CD or written transcript of the hearing) was complete. She submitted a statement of questions by letter dated March 17, 2007, which also contained written argument and documentation that was not part of the Board's record. Then on May 3, 2007, she submitted a brief, consisting of similar argument and additional extra-record documentation. The State Prosecuting Attorney submitted his responsive brief on May 21, 2007.

Appellant argues at length concerning several of the factual findings made by the Board, disputing them on various bases and pointing out other alleged facts contained

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<sup>3</sup> Findings of Fact, Conclusions of Law & Order at 1 (January 19, 2007).

in documents that are not in the record, or that are based on her report of conversations that took place either during the investigation of these charges or during the prosecution of them. She did not appear and present and testify about any of this matter under oath, subject to cross-examination. None of this material is appropriate for presentation at this appellate stage of these proceedings, and I will not consider it in reviewing the Board's ruling. See Administrative Rules of the Office of Professional Regulation ["OPR Administrative Rules"] §4.5.

Appellant complains as well of the violation of her due process rights, and that certain allegedly exculpatory material possessed by the State Prosecuting Attorney was withheld from the Board. The hearing to review the charges against Appellant was scheduled, after consultation with her, approximately three months in advance. She failed to contact the State Prosecuting Attorney (other than by leaving a vague message the Thursday beforehand), the Board or the Office of Professional Regulation to seek to reschedule it, or to arrange to testify via telephone without making a personal appearance. The OPR Rules contemplate that a Board or its presiding officer may continue a hearing or allow telephonic testimony. See OPR Administrative Rules §§1.2, 3.12, 3.19. Due process requires only the "opportunity to be heard". Perry v. Department of Employment and Training, 147 VT 621, 624 (1987). It is fair to observe in this instance that Appellant was given that opportunity, but failed to avail herself of it.<sup>4</sup>

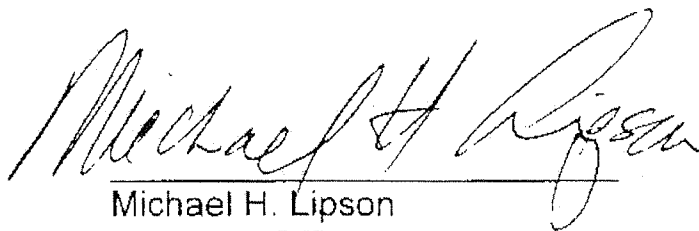
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<sup>4</sup> Appellant's brief claims for the first time that due to two traffic accidents, the first of which occurred before the events that led to these unprofessional conduct charges and the last of which occurred approximately three months prior to the scheduled hearing, she "no longer drives long distances because of fear of driving. . . ." She did not mention this in her telephone message to the State Prosecuting Attorney nor did she raise this as part of a request to continue the hearing, change its location or request permission to participate by telephone. It cannot now be a basis for overturning the Board's decision.

Regarding the allegedly exculpatory material, there is nothing in the record to show that this material, other than one document from the Department of Health and Human Services ["HHS"], even was possessed by the State Prosecuting Attorney. Indeed, some of the documentation that appellant presents was not in existence until after the Board's decision. And the one document that the State does acknowledge having possessed (the HHS report) appears to this Appellate Officer to support the Board's finding that Appellant should have notified the on-call physician concerning the patient's cardiac symptoms, the very deficiency on which the Board ruled that she had committed unprofessional conduct. See Findings of Fact, Conclusions of Law & Order at 1 (January 19, 2007). Thus, even if I might consider this material as evidentiary, it does not suggest that the Board's view of what occurred on October 30-31, 2005 was ill-founded.

For the foregoing reasons, the Board's Order entered January 23, 2007 is affirmed.

Dated: 7/18/2007



Michael H. Lipson  
Appellate Officer

## APPEAL RIGHTS

This is a final administrative determination by the Appellate Officer.

A party aggrieved by a final decision of the Appellate Officer may appeal the decision to the Superior Court in Washington County by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Vermont Secretary of State, 26 Terrace Street, Montpelier, Vermont 05609-1101 within 30 days of the entry of the order.