

STATE OF VERMONT
OFFICE OF THE SECRETARY OF STATE
PROFESSIONAL REGULATION
BOARD OF NURSING

IN RE APPLICATION FOR REGISTERED NURSE LICENSE BY DAVID KIRK

Application Tracking No. LI-355326

Docket No. 2020-1

Participating Board Members:

Ellen Watson, APRN
Deborah Swartz, RN,
Jennifer Laurent, APRN
Wendy Thurston, RN
Kelly Sinclair, LNA
Luana Tredwell, LPN
Douglas Sutton, RN
Virginia Hudson, RN
Krystal Bernier, LPN
Daniel Coane, Public Member

Appearances:

Prosecuting the case: Jennifer B. Colin, Esq.
Petitioner: was not present and was not represented

Presiding Officer:

George K. Belcher

**FINDINGS AND ORDER CONCERNING APPEAL OF PRELIMINARY DENIAL
OF APPLICATION FOR LICENSURE**

This matter was considered on March 9, 2020 pursuant to Section 12.1 of the Vermont Board of Nursing Administrative Rules. The application for license as a Registered Nurse of David Kirk (“the Applicant”) was denied by Notice of Preliminary Denial dated January 2, 2020. A letter of appeal by the Applicant was filed with the Board on January 14, 2020. A notice of hearing dated February 3, 2020, was sent to the Applicant.

The Applicant did not appear at the scheduled hearing on his appeal. The Prosecutor, Jennifer B. Colin, represented the Board that she had learned from the Petitioner that he did not intend to pursue his appeal.

Inasmuch as the Petitioner bears the burden to establish that he is entitled to the issuance of the license (and that he is qualified to receive the same) and inasmuch as the Petitioner did not appear or present any evidence in support of his appeal, the appeal was dismissed by the Board.

The Preliminary Denial Appeal of the Petitioner is Denied and Dismissed.



Ellen Watson, APRN, Chair
Vermont Board of Nursing

 10th March 2020

Date of Entry

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 the decision by filing a written Notice of Appeal with the Director of the Office of Professional Regulation, Secretary of State's Office, 89 Main St, 3rd floor, Montpelier, Vermont 05620-3402 within 30 days of the entry of the order. For more information about the procedure for filing an appeal. Please see the Administrative Rules for the Office of Professional Regulation, which you can find at [http:// www.vtprofessionals.org/opr1/opr/admrule.pdf](http://www.vtprofessionals.org/opr1/opr/admrule.pdf) The Rules are also available at the Office of Professional Regulation.

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IN RE:)
David C. Kirk) Docket No. 2020-1
Application Tracking No. LI-355326)

NOTICE OF PRELIMINARY DENIAL

A Renewal Application for licensure as a Registered Nurse ("RN") submitted by David C. Kirk ("Applicant") was received by the Office of Professional Regulation on December 11, 2019 ("Application"). The Application was complete on December 18, 2019. The Application has been **preliminarily denied** by the State of Vermont for the following reasons:

Board Authority

1. The Vermont Board of Nursing (the "Board") has authority to deny an applicant's license if it finds that the applicant has engaged in unprofessional conduct in any jurisdiction. 3 V.S.A. §129(a); 26 V.S.A. §1582; the Vermont Board of Nursing Administrative Rules; and the Rules of the Office of Professional Regulation.

Basis for Denial

Basis for Denial One: 3 V.S.A. §129a(a)(10) Conviction of a crime related to the practice of the profession or conviction of a felony, whether or not related to the practice of the profession.

2. Applicant was first licensed as a Registered Nurse in the State of Vermont with a Temporary Permit on May 27, 2009. The temporary permit expired on August 12, 2009. On April 1, 2011, the State of Vermont issued an RN license to Applicant. Applicant's Vermont RN license expired in March 2013 and has not been renewed for six years.
3. In the Application filed in 2019 for renewal of his RN license, Applicant answered "Yes" to the Question "Have you been convicted of a crime other than a minor traffic violation?"
4. Applicant also answered "Yes" to the Question: "Are you currently participating in a supervised program or professional assistance program which monitors you in order to assure that you are not engaging in the use of alcohol or controlled substances?"

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Prosecuting Attorney
Office of
Professional Regulation
89 Main Street
3rd Floor
Montpelier, VT
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5. As part of his Application, Applicant disclosed that in 2018 while working as an RN at a health care facility in Wisconsin, Applicant diverted, for his own personal use, unused fentanyl that he was responsible for wasting as part of his RN duties. Applicant disclosed that he diverted unused fentanyl for a period of at least six months and that he was addicted to fentanyl at that time.
6. In December 20, 2018, Applicant entered an Agreement for Participation in the Professional Assistance Procedure of the Wisconsin Department of Safety and Professional Services, as Applicant is an RN licensed by the State of Wisconsin.
7. The Wisconsin Professional Assistance Procedure Agreement requires Applicant to comply with various drug and alcohol conditions for a period of five (5) years, including drug/alcohol treatment, individual and/or group therapy, AA and/or NA meetings random alcohol/drug screening through blood, urine, hair, nail and/or breath specimens that are witnessed, quarterly employer reports, limited practice setting where Applicant has no access to controlled substances and prohibition against home care nursing, pool nursing, correctional/school nursing, and travel nursing, pre-approval requirement for work setting, and direct supervision by a pre-approved licensed health care professional.
8. In 2019, Applicant was criminally charged in United States District Court for the Western District of Wisconsin with a violation of 21 U.S.A. §843(a)(3), Obtain Controlled Substances by Fraud, a Class E Felony, for the conduct described in Paragraph 5 above.
9. Applicant pleaded guilty and in September 2019 was sentenced to thirty (30) months of probation, with conditions, and a fine.
10. In the Application materials, Applicant accepted full responsibility for his conduct and, as part of his Application, self-reports that he has maintained his sobriety for the past sixteen (16) months.
11. Applicant continues to be licensed and practice as an RN in Wisconsin.
12. Applicant also self-reported in the Application that he is a Veteran having actively served as an infantry soldier in the U.S. Army in Iraq.
13. Paragraphs 2 through 9 above demonstrate Applicant was convicted of a crime related to the practice of the professional that was also a felony.

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Violation Two: 3 V.S.A. §129a(a)(15) Failing to exercise independent professional judgment in the performance of licensed activities when that judgment is necessary to avoid action repugnant to the obligations of the profession.

14. The State re-alleges and incorporates Paragraphs 2 through 13 above.
15. As a nurse, Applicant is required to exercise independent professional judgment in the performance of licensed activities when that judgment is necessary to avoid action repugnant to the obligations of the profession.
16. Paragraphs 2 through 9 above demonstrate that Applicant failed to exercise independent professional judgment in the performance of licensed activities when that judgment was necessary to avoid action repugnant to the obligations of the profession when he diverted controlled substances that he was responsible for wasting as part of his RN duties.
17. The unprofessional conduct in Paragraphs 2 through 9 above would constitute unprofessional conduct in Vermont. Pursuant to 3 V.S.A. §129(a)(5), the Board may discipline any licensee or refuse to license any person who has had a license application denied or license revoked, suspended, limited, conditioned or otherwise disciplined by a licensing agency in another jurisdiction for conduct which would constitute unprofessional conduct in this state, or has surrendered a license while under investigation for unprofessional conduct.

As a result of the foregoing, the Application for licensure is **PRELIMINARILY DENIED**. If you would like this decision to be reviewed, please refer to the appeal rights at the bottom of this notice.

DATED at Montpelier, Vermont this 2nd day of January, 2020.

By: _____

Jennifer B. Colin
State Prosecuting Attorney
Enforcement Unit
(802)828-1219
Jennifer.Colin@sec.state.vt.us

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To appeal this preliminary denial, you must file a written appeal with the Docket Clerk within 30 days of the date of this notification. In order to expedite the appellate process, your appeal shall include a statement of issues, that is, why the preliminary denial should be reversed and that the license should be granted.

Please send your appeal to the address below:

Elizabeth Kneen, Docket Clerk
Office of Professional Regulation
89 Main Street, 3rd Floor
Montpelier, VT 05602-3402

A hearing will then be scheduled. The State will be represented by the state prosecutor. At the hearing you will have the burden of showing that this preliminary denial should be reversed and that your license should be granted. 3 V.S.A. §129(e). The tribunal may uphold the denial, in whole, or in part, or may issue an unrestricted license, or may issue a license that is sanctioned. 3 V.S.A. §129(a)(3).

If you do not appeal this preliminary denial it will become final in 30 days. As a final disciplinary decision it will be reported to all required national data banks and shall be public pursuant to 3 V.S.A. §131.

Once the decision is final, it may be appealed pursuant to 3 V.S.A. §130a.

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