

**STATE OF VERMONT
SECRETARY OF STATE, OFFICE OF PROFESSIONAL
REGULATION**

In re: Dorothy Malone-Rising

**Docket No. 2013-203
and various ending in
2014-17, 110, 157**

ORDER

I have been appointed as the Appellate Officer for an appeal by Dorothy Malone-Rising [Ms. Malone-Rising or appellant] from the Default Order entered by the Vermont Board of Nursing in these unprofessional conduct proceedings.

The Default Order was entered on January 13, 2015. A copy of the Default Order was sent to Ms. Malone-Rising via certified mail on January 14, 2015 and she signed for it on January 16, 2015. The letter accompanying that Order told her that in order to appeal, she would be required to file a notice of appeal with the Director of the Office of Professional Regulation ["OPR"], and that the **"notice must be received no later than 30 days from the decision's date of entry (see last page of order)." (emphasis/boldface in original)**. The letter also explained that the disciplinary action set forth in the order would not be stopped by an appeal; rather, she

would have to request a stay of the order in writing to have such an action considered.

The last page of the Default Order bore a "Date of Entry" of January 13, 2015. On *February 17*, 2015, OPR received a letter from appellant asking that it be considered as her Notice of Appeal from the Order. Notwithstanding that OPR's receipt of this letter did not occur within 30 days of the entry of the default order, the agency and the State Prosecuting Attorney seem to have treated this appeal as properly filed. The State Prosecuting Attorney, however, has filed a motion to dismiss the appeal on another ground--due to the alleged failure of appellant to file a "statement of questions", required under OPR Administrative Rules of Practice ["OPR Rule"] 4.1(A).

I note that: (a) OPR's procedural rules *explicitly* require filing of a notice of appeal to an appellate officer "within 30 days of the date of entry of the order," OPR Administrative Rules of Practice ["OPR Rule"] 4.1; (b) the OPR Rules also adopt V.R. App. P. 4 which provides for the same time limit, see OPR Rules 2.2 & 2.4 (and see V.R.App.P. 3); and (c) the long-standing rule of law is that the timely filing of a notice of

appeal is a jurisdictional prerequisite to appellate jurisdiction. See In re Guardianship of L.R., 147 Vt. 82, 510 A.2d 1319, 1321 (1986); Badger v. Rice, 124 Vt. 82, 84-85, 196 A.2d 503, 505 (1963). See also In re Town of Killington, 2003 VT 87A (2003)(rule appears applicable as well to intra-administrative appeals).

It is ancient jurisprudence that jurisdiction may not be conferred by a party or parties to a proceeding. Capron v. Van Noorden, 2 Cranch 126, 6 U.S. 126 (1804). Therefore, despite the lack of a motion to dismiss on this ground, I reluctantly dismiss this appeal for lack of jurisdiction.

I will also comment, although it is not required for the disposition of this appeal, on the State Prosecuting Attorney's motion to dismiss, which invoked OPR Rule 4.1(A). I would have denied that motion. The order entered against appellant was based upon a default, as she had not responded to the Specification of Charges or appeared at the default hearing.¹ The "notice of appeal" (her letter, which she typed with the

¹ The notice of default hearing that was sent to appellant by certified mail on November 21, 2014 was marked "unclaimed" and "unable to forward".

date of February 12th but which was received by OPR on February 17th), stated that her husband had suffered a severe stroke in December 2009 and, although he has been found eligible for nursing home care, continued to live at home with her as his primary caregiver. He (“Charlie”)

“has significant cognitive dysfunction, including problems with memory, judgment and executive function. He is known to put mail in a variety of places, like a box of photographs in the top of the closet or a blanket chest that fits under the bed. When I find mail stored in this way he might tell me that he was concerned I would be upset by the mail and he sought to keep it from me.

I have not seen the official **Notice of Charges** sent by certified mail on October 17, 2014. I strongly suspect the October document was signed for and released to my husband.”

Notice of Appeal at 1-2.

The appellant’s words concerning what might have become of the charges seem to square with the signature on the certified receipt for the Notice of Charges—which appears to be that of “C Rising”.² Without rendering any decision on whether these matters, if established, would have provided

² There may be a middle initial; I cannot make it out. In any event, even a cursory examination of other such receipts signed by appellant suggests that the handwriting is not hers.

grounds for a reversal of the default order on appeal, the matters set forth in her letter surely amounted to the statement of a *question* for appeal.

As I have ruled a number of times, Rule 4.1(A) does not contain language that states or implies that the failure to include a statement of questions in the notice of appeal will result in the dismissal of the appeal. Nor does any other OPR rule of practice speak to the question. It is black letter law that appellate jurisdiction is properly invoked when a timely notice of appeal is filed. The failure to satisfy ancillary requirements for an appeal do not deprive an appellate court of jurisdiction if a timely appeal is noted. See V.R.App.P. 3. Reporter's Notes to Rule 3(b).

The function of the statement of questions is to focus the respective arguments in the appeal on only those claims of error involving a board's "finding, inferences, conclusions or decisions". See 3 V.S.A. §130a. The statement is designed as a roadmap for the parties to submit briefs offering their respective arguments (OPR Rule 4.4) and, in some cases, to engender discussions that may resolve the case. See OPR Rule

4.3. Where a notice of appeal (or letter noting an appeal) contains an assertion that may reasonably be taken as raising an arguable issue, this function is satisfied, in my view.

I am also constrained to say that given the circumstances suggested in her letter, appellant ought to consider (despite the dismissal of her appeal) requesting the Board of Nursing to consider a motion for relief from the default order. V.R.Civ.P. 60(b) (adopted by OPR Rule 2.4) permits such a motion, which may be made within a “reasonable time” after judgment, and may be based upon various grounds including excusable neglect or the voidness of a judgment.³ If she still wishes to pursue her goal of achieving license renewal, this may give her an opportunity to do so.

For the foregoing reasons, the appeal is dismissed.

SO ORDERED.

³ I do not express any opinion on whether any such ground exists here; voidness of a judgment might exist where notice was not sufficient to satisfy due process requirements. I would observe that although OPR also used first-class mail also to send the charges to appellant, it is possible that mail also was intercepted by her husband. It also strikes me as unusual that in a proceeding the State brought and then dismissed prior to including those earlier charges in this case, the State Prosecuting Attorney sent the January 2014 dismissal order to appellant via email; I’d assume that email address would have been an effective (although supplemental) way to communicate with her about the more recent charges.

DATED: 5/21/15

Michael H. Lipson

Michael H. Lipson
Appellate Officer

Date of Entry: 5/22/15

APPEAL RIGHTS

This is a final administrative determination by the Appellate Officer of the Office of Professional Regulation.

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 Docket Clerk of the Office of Professional Regulation, Vermont Secretary of State, 89 Main Street, 3rd Floor, Montpelier, Vermont 05620-3402 within 30 days of the entry of the order. A filing fee of \$265.00, payable to Washington County Superior Court, must accompany the notice of appeal.

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/admnrule.pdf>, and the Rules are also available at the Office of Professional Regulation.

**STATE OF VERMONT
BOARD OF NURSING**

In re: Dorothy Malone-Rising	}	
License No. 101-13373	}	Docket No's: 2013-203, 290, 637,
	}	638, 688 2014-17, 110, 157(APRN)

Appearances:

Prosecutor: S. Lauren Hibbert
Respondent: Did not appear.

Presiding Officer: Larry S. Novins

DEFAULT ORDER

The Board of Nursing held a hearing on the above matter on January 12, 2015 at the Office of Professional Regulation Conference Room at the City Center in Montpelier, Vermont. Ms. Malone-Rising did not attend and was not represented by counsel.

Findings of Fact

1. Ms. Malone-Rising was licensed as an advanced registered nurse and registered nurse and is therefore subject to the regulatory authority of this Board. 3 V.S.A. §§ 129, 129a, 814(d), 26 V.S.A. § 1582(a), the Administrative Rules of the Board of Nursing, and the Rules of the Office of Professional Regulation. Her licenses expired on March 31, 2013.
2. On October 17, 2014 Ms. Malone-Rising was sent a Notice of Charges in this matter by certified mail and first class mail to her last known address. A copy of the Specification of Charges is attached to this Default Order.
3. OPR Rule 3.3 requires that an Answer be filed within 20 days of the date on which the notice of charges was mailed by the Director.
4. Licensees are required to notify the Board of any change of address within 30 days. 3 V.S.A. § 129a(a)(14).
5. The return receipt shows that Ms. Malone-Rising received the notice of charges.
6. Ms. Malone-Rising has not filed an answer to the charges.
7. On November 20, 2014 notice of the Default Hearing scheduled for this date was mailed to Ms. Malone-Rising at that same address by certified mail and first class mail. That notice was returned "Unclaimed."
8. Ms. Malone-Rising has still not answered the charges.
9. Upon hearing the Prosecution's presentation and taking notice of its own file, the Board finds Ms. Malone-Rising to be in Default. The allegations contained in the Specification of Charges are therefore treated as the facts on which the Board's Order is based. OPR Rule 3.4, 3 V.S.A. § 809(d), and 3 V.S.A. § 814(c).

Conclusions of Law

Ms. Malone-Rising has received notice of the charges in this matter as indicated by the Board's file and the Prosecution's presentation. Because Ms. Malone-Rising has failed to answer the charges, the factual allegations in the Specification of Charges are treated as if proved. O.P.R. Rule 3.4. Accordingly, the Board finds, in this Default Hearing held pursuant to 3 V.S.A. §809(d), that Ms. Malone-Rising has engaged in the unprofessional conduct alleged in the Specification of Charges.

Order

In accordance with the above Findings of Fact and Conclusions of Law, Ms. Malone-Rising's right or privilege to reinstate her **RN and APRN licenses is hereby Suspended Indefinitely**, effective as of the date of the hearing. Should Ms. Malone-Rising apply for reinstatement, the Board at that time will determine whether any conditions can permit her to resume practice while protecting public health and safety.

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, 89 Main St., Fl. 3, Montpelier, VT 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: January 12, 2015

OFFICE OF PROFESSIONAL REGULATION

DATE OF ENTRY:

1/13/15

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

IN RE:	)	
DOROTHY MALONE-RISING	)	Docket Nos.
License No. 101.0013373	)	2013-203, 290, 637, 638, 688
	)	2014-17, 110, 157

SPECIFICATION OF CHARGES

NOW COMES the State of Vermont, by State Prosecuting Attorney Gabriel M. Gilman, and makes the following Charges against the Respondent, Dorothy Malone-Rising:

Board Authority

1. The Vermont State Board of Nursing (the "Board") has authority to issue warnings or reprimands; suspend, revoke, limit, or condition current licenses; or prevent the renewal of lapsed licenses if, after disciplinary hearing, the Board finds that the Respondent has engaged in unprofessional conduct. 3 V.S.A. § 129(a); 3 V.S.A. § 129a; 3 V.S.A. § 814(d); 26 V.S.A. § 1582; the Administrative Rules of the Board of Nursing (the "ARBN"); and the Rules of the Office of Professional Regulation.
2. "A person practicing a regulated profession without authority may, upon the complaint of the attorney general or a state's attorney or an attorney assigned by the office of professional regulation, be enjoined there from by the superior court where the violation occurred or the Washington County superior court and may be assessed a civil penalty of not more than \$1,000.00. The attorney general or an attorney assigned by the office of professional regulation may elect to bring an action seeking only a civil penalty of not more than \$1,000.00 for practicing a regulated profession without authority before the board having regulatory authority over the profession." 3 V.S.A. § 127(b).

Statement of Facts

I. Background

3. Dorothy Malone-Rising ("Respondent") of Johnson, Vermont is licensed by the State of Vermont as an Advanced Practice Registered Nurse (APRN) under license number 101.0013373. Respondent first received a Registered Nurse license in 1992. On or about January 14, 1997, Respondent became licensed as an Adult Nurse Practitioner with Prescriptive Authority. The license became inactive on March 31, 2013.

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4. Beginning in 2009, Respondent suffered a number of personal setbacks and tragedies. These included the sudden and serious illness of a loved one, followed by unexpected caregiving obligations; destruction of property by weather events; familial discord; setbacks in Respondent's own health; and financial difficulties aggravated by those events.
5. By 2010, Respondent's difficulties began to significantly affect her ability to maintain an orderly independent nursing practice. In 2010, family members endeavoring to provide bedroom space in Respondent's home office disrupted Respondent's files and records, moving those to what Respondent described as "random unlabeled boxes." By 2011, Respondent was unable or too distracted to file tax returns. In the same year, Respondent's residence flooded and her mother was diagnosed with a terminal illness. Respondent reported having to relocate five times between April 2011 and January 2012.
6. As Respondent's personal circumstances deteriorated, her independent APRN practice became unmanageable. Respondent did not have access to the institutional support afforded an APRN affiliated with a hospital or practice group. Respondent also did not have access to document imaging equipment or adequate support staff to assist in distributing patient records to successor providers.
7. Respondent made efforts to enlist the assistance of an APRN colleague and an area physician in providing some semblance of continuity of care, but those efforts substantially failed. Respondent has since taken important steps toward improving her own health, welfare, and stability.

II. Licensing Representations; 2013-637

8. On or about March 26, 2013 Respondent completed and signed an Advanced Practice Registered Nurse Renewal Application (the "Application"), received by the Board on March 29, 2013.
9. Section B of the Application included Vermont Mandatory "Good Standing" Declarations required by 32 V.S.A §3113(b), among other statutes. Respondent indicated "I am in good standing" with respect to tax compliance.
10. Respondent was not in good standing with the Vermont Department of Taxes on March 26, 2013, and has not come into good standing since.
11. By letter dated March 29, 2013, OPR notified Respondent that her license could not be renewed because she failed to submit a renewal application fee, and because "The Tax Department has notified this office that you are not in good standing with regard to Vermont taxes." The letter additionally reminded Respondent, "It is your responsibility to determine the status of your application.

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You can see that status online ..." using a website, user number, and password provided.

12. By letter dated April 25, 2013 and received April 25, 2013, Respondent advised OPR, "The Vermont Department of Taxes has been paid for delinquent taxes owed by my business as of today. Your office should receive notice of that by the beginning of the week. Enclosed is the renewal fee and the \$30 late fee for renewing my license."
13. Respondent was not in good standing with the Vermont Department of Taxes on April 25, 2013, and has not come into good standing since.
14. Respondent's Application of March 26, 2013 was submitted in the course of attempting to procure renewal of her license to practice nursing. Respondent knew or should have known that her tax-compliance answer was false and misleading.
15. Respondent's letter of April 25, 2013 was submitted in the course of attempting to procure renewal of her license to practice nursing. Respondent knew or should have known the text of the letter was false and misleading.

III. Unauthorized Practice; 2013-203 & 290

16. Respondent's license was not renewed because of tax non-compliance and failure to pay licensing fees. The license became inactive on March 31, 2013 and remains so at this writing. Respondent knew or should have known that her license was inactive and that she had no authority to practice nursing.
17. After March 31, 2013, Respondent continued seeing patients in her Johnson clinic. This activity continued through mid-May, 2013.
18. After March 31, 2013, Respondent continued prescribing for patients until area pharmacies noticed that her Medicaid number had been inactivated and began inquiring into her licensure status. Eventually, an insurer and a pharmacy independently contacted OPR to convey concerns that Respondent had continued to practice despite non-renewal of her license.
19. OPR Detective Karl Packer obtained from the Morrisville, Vermont branch of Kinney Drugs records showing that Respondent had issued nineteen narcotic scripts received by that pharmacy between April 1, 2013 and May 25, 2013. Respondent prescribed the following, delineated by patient initials, medication prescribed, and date of script:

<u>Patient Initials</u>	<u>Prescription</u>	<u>Date Written</u>
JH	546 Oxycodone 10mg	04/16/2013
KW	240 Percocet 10mg	04/16/2013

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JT	84 MS Contin 60mg	04/17/2013
JT	196 Percocet 5mg	04/17/2013
JT	84 Methylphenidate 10mg	04/17/2013
DJ	224 Oxycodone 10mg	04/19/2013
GB	84 Percocet 5mg	04/19/2013
LJ	112 Adderal 10mg	04/19/2013
SB	168 Oxycodone 15mg	04/19/2013
JB	90 Percocet 5mg	04/27/2013
JH	450 Oxycodone 10mg	05/01/2013
SJ	84 Adderal 10mg	05/03/2013
KW	240 Oxycodone 10mg	05/14/2013
JT	168 Methylphenidate 10mg	05/14/2013
DJ	224 Oxycodone 10mg	05/15/2013
AF	140 Methadone 10mg	05/15/2013
SB	168 Oxycodone 15mg	05/15/2013
LJ	112 Adderal 10mg	05/15/2013
JB	90 Percocet 5mg	05/25/2013

20. In a letter to OPR Investigator Marie Beland, Respondent explained her difficulties and the slow effort to unwind her practice:

I stopped seeing patients in early May 2013, and began working on alternatives for care of my patients. I continued prescribing medications into mid-May. Patients of the practice received a letter in mid-May advising them I could not continue practice until the licensing issue was resolved and sharing the plans we could offer for ongoing care.

IV. Failure to Provide Medical Records 2013-638, 688; 2014-17, 110, 157

21. As a consequence of Respondent's circumstances, disruption to her filing system, and lack of access to imaging equipment and support staff, Respondent on scores of occasions failed to make available promptly the medical records of her former patients.
22. On or about December 2, 2013, the office of Paul Rogers, MD notified OPR of inability to obtain written requests for records of approximately 24 former patients of Respondent. The office reported waiting more than three months before filing a complaint. The office noted, "It is extremely difficult to maintain continuity of care without patients' prior records."
23. On or about January 9, 2014, Anna Carey, MD notified OPR of inability to obtain requested records relative to at least 10 patients transferred from Respondent, including patients requiring high-dose insulin and chronic pain management. Dr. Carey explained, "I have received no past medical records from [Respondent's] office. I am concerned because of the compromise of pt's medical care."

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24. On or about February 11, 2014, patient M.M. sought help from the Board of Medical Practice because the patient had been unable—despite sending two letters, multiple voicemail messages, and multiple faxed authorizations—to obtain her medical records for transfer to a successor provider. M.M.'s physician also had requested the records without effect.
25. On or about February 25, 2014, the Richford Health Center notified OPR that it had been unable to obtain requested records relative to two identified patients transferred from Respondent. The successor office had faxed complete authorizations in November, 2013 and followed up with multiple phone messages continuing through February, 2014, by which time Respondent's telephone ceased accepting new messages.
26. On or about July 3, 2014, patient K.H. wrote the Executive Director of Nursing explaining that she returned from extended travel to find that Respondent's clinic had closed. K.H. received no written notice of closing and no information concerning how to obtain records. K.H. could not reach Respondent on the phone. K.H. subsequently mailed to Respondent's post office box a written request for transfer of records to a successor provider. After four weeks without a response, K.H. wrote the Board.

Charges

27. The act(s), omission(s), and/or circumstance(s) described above establish that Respondent has engaged in unauthorized practice in violation of 3 V.S.A. § 127(b) and constitute grounds for discipline because Respondent has committed unprofessional conduct in violation of:
 - a. 3 V.S.A. § 129a(a)(3) ("Failing to comply with provisions of federal or state statutes or rules governing the practice of the profession.");
 - b. 26 V.S.A. § 1584(a)(3) ("It shall be a violation of this chapter for any person ... to ... practice nursing unless duly registered and currently licensed to do so.");
 - c. 3 V.S.A. § 129a(a)(8) ("Failing to make available promptly to a person using professional health care services, that person's representative, or succeeding health care professionals or institutions, upon written request and direction of the person using professional health care services, copies of that person's records in the possession or under the control of the licensed practitioner, or failing to notify patients or clients how to obtain their records when a practice closes.");
 - d. 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.");

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- e. 26 V.S.A. § 1582(a)(1) ("Has made or caused to be made a false, fraudulent, or forged statement or representation in procuring or attempting to procure registration or renew a license to practice nursing");
- f. 26 V.S.A. § 1582(a)(3) ("Is unable to practice nursing competently by reason of any cause.");
- g. 3 V.S.A. § 129a(b) ("Failure to practice competently by reason of any cause on a single occasion or on multiple occasions may constitute unprofessional conduct, whether actual injury to a client, patient, or customer has occurred. Failure to practice competently includes:
(1) performance of unsafe or unacceptable patient or client care; or
(2) failure to conform to the essential standards of acceptable and prevailing practice.").

Relief Requested

WHEREFORE, the license of Dorothy Malone-Rising, should be revoked, suspended, reprimanded, conditioned, or otherwise disciplined.

DATED at Montpelier, Vermont this 16th day of October, 2014.

STATE OF VERMONT
SECRETARY OF STATE

By: 
Gabriel M. Gilman
State Prosecuting Attorney

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