

BEFORE THE BOARD OF NURSING
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2014-NUR-LIC-1091 REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 1757-2016
TREATMENT OF THE LICENSE OF)
MARK PEPIN,)
Practical Nurse, License No. 8215.)
)

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

On March 3, 2016, the Montana Board of Nursing (Board) issued A Notice of Proposed Disciplinary Treatment of the License of Mark Pepin. In the notice, the Board asserted that certain criminal conduct that Pepin pled guilty to amounted to unprofessional conduct for which disciplinary action would be taken. On March 28, 2016, Pepin requested a hearing regarding the proposed board action.

On April 5, 2016, the department transferred the matter to the Office of Administrative Hearings for the purposes of conducting the hearing and issuing a recommended order. On April 7, 2016, OAH issued a Notice of Hearing. On April 21, 2016, the hearing officer and the parties held a telephone scheduling conference and agreed that the hearing would be held on August 2, 2016.

On July 5, 2016, the department filed a Motion to Compel Discovery and a Motion for Partial Summary Judgment. Both motions were granted on July 22, 2016. As a result of granting the Motion for Partial Summary Judgment, the issue of whether Pepin committed unprofessional conduct was resolved leaving for hearing only the issue of the appropriate sanction. On July 29, 2016, the hearing was rescheduled for August 10, 2016.

At the final pre-hearing conference in this matter, Pepin did not dispute the Department's Proposed Uncontested Facts Nos. 1-7 and 9-13. Pepin objected to that part of Proposed Uncontested Fact No. 8 which describes Count I of the Acknowledgment and Waiver of Rights Pepin signed in conjunction with his Binding Plea Agreement. Pepin also did not dispute the Department's Proposed Factual

Contentions Nos. 14 and 15. Exhibits 1-16 were admitted. Exhibits 15 and 16 are sealed from public disclosure as the privacy interest in Pepin's financial information outweighs the public's right to know. Pepin, Joyce Slaigle, Terra Hall, Jeremy Ewan, and Heidi Kaufman presented sworn testimony. Cynthia Gustafson, RN, PhD presented sworn expert testimony.

II. STIPULATED FACTS

1. Mark Pepin is licensed by the Montana Board of Nursing (Board) as a practical nurse (LPN), holding license number 8215. Ex. No. 1.
2. Pepin's LPN license lapsed on January 1, 2015 after he failed to renew it on or before December 31, 2014. Pepin's LPN license is currently expired. Id.
3. Pepin's LPN license will terminate on January 1, 2017 if he does not renew it on or before December 31, 2016. Id.
4. Pepin served as the administrator of Bluebird and Meadowlark Assisted Living facilities in Great Falls, Cascade County. Ex. Nos. 3, 8.
5. In his capacity as administrator, Pepin collected rent payments from residents of Bluebird and Meadowlark Assisted Living facilities. Id.
6. On May 20, 2014, the State of Montana (State) filed criminal charges against Pepin in the Eighth Judicial District Court in Great Falls, Cascade County. Ex. Nos. 2-5.
7. On May 5, 2015, the State amended the criminal charges filed against Pepin. Ex. Nos. 6-7. The State reduced the criminal charges from eight offenses to two offenses: Count I - theft (common scheme), a felony; and Count III - deceptive practices, a felony. Id.
8. As stated in the Binding Plea Agreement, Pepin agreed to pay restitution on Count I in the amount of \$2,200.00 to the Estate of David Jenkins; \$600.00 to C.G.; and \$1,000.00 to the Estate of Shirley Hamilton. Ex. No. 9. Pepin also agreed to pay restitution on Count III in the amount of \$2,343.50 to the Estate of Shirley Hamilton. Id. Further restitution in the amount of \$57,371.38 to Robert Bartram was stayed by the Court, pending civil litigation. Ex. Nos. 8-12.
9. The Court sentenced Pepin to concurrent six-year sentences for each of the two criminal offenses to which he pled guilty. Id. The Court deferred the imposition

of both six-year sentences. *Id.* Pepin's sentence also requires him to undergo a gambling assessment and follow all treatment recommendations. *Id.*

10. The Court's oral pronouncement of Pepin's sentence occurred on June 23, 2015, and the Court issued its written Sentence on June 29, 2015. Ex. No. 12. The Court's Sentence states that Pepin "stole money through various means from tenants of his employer as Administrator of Montcare, Inc." *Id.*

11. On September 1, 2015, the Board's Screening Panel reviewed the completion of Pepin's criminal case, finding reasonable cause to believe he committed unprofessional conduct under Mont. Code Ann. § 37-1-316(1), (13) justifying disciplinary proceedings. Ex. No. 13.

12. The United States Department of Health and Human Services' Office of Inspector General has excluded Pepin from participating in any Medicare, Medicaid, and all federal health care programs because of his criminal convictions in the Eighth Judicial District Court in Great Falls, Cascade County.

13. An independent payee, Joyce Slaigle, was assigned to manage the personal finances of Bluebird Assisted Living resident David Jenkins. Slaigle opened an account for Jenkins at Wells Fargo in Great Falls. During 2012 and 2013, Jenkins received annuity payments from Beneficial Life in the form of several checks. Rather than turning the annuity payments over to Slaigle or depositing them in his account at Wells Fargo, Jenkins and Pepin opened a joint account at Montana Federal Credit Union (MFCU), where Pepin banked and continues to do so at present day. Jenkins cashed annuity payments at various locations in Great Falls, including Wal-Mart, MFCU, and Barrel O' Bucks Casino.

14. Jenkins, as a Medicaid recipient, was required to make monthly incurment payments to cover his assisted living services after he began receiving annuity payments. Jenkins fell behind in making these monthly incurment payments and lost his eligibility as a Medicaid recipient.

III. FINDINGS OF FACT

15. On May 5, 2015, Pepin and the State entered into a Binding Plea Agreement wherein Pepin agreed to plead guilty to the amended criminal charges. Ex. Nos. 9-10. In the Acknowledgment and Waiver of Rights Pepin signed and filed in conjunction with the Binding Plea Agreement, he stated the following:

I agree with the facts alleged in the Amended Information and the original Affidavit in Support of Motion for Leave to File Information, as

those facts pertain to the Amended Information (See pages I to 39 of Aff. of Chris McConnell in Support of Mot. For Leave to file an Info. (May 20, 2014)). Furthermore:

a. COUNT I: From approximately July 2010 to December 2013, in Cascade County, State of Montana, I, by a common scheme, purposely or knowingly obtained or exerted unauthorized control over property of Meadowlark and Bluebird Assisted Living facility residents, namely David Jenkins, C.G., and Shirley Hamilton, and property of Meadowlark and Bluebird Assisted Living facility owner Robert Bartram, and purposely or knowingly used or concealed the property in a manner that deprived said residents and Robert Bartram of the property. The aggregate value of the property at issue exceeded \$1,500.

In sum, I purposely or knowingly obtained or exerted unauthorized control over \$2,200 worth of David Jenkins' money, \$600 worth of C.G.'s money, \$1,000 worth of Shirley Hamilton's money, and \$57,371.38 worth of rent money paid by Meadowlark and Bluebird Assisted Living facility residents, namely David Jenkins (\$5,000.00), R.B. (\$835.00), E.B.J. (\$12,896.38), G.P. (\$545.00), C.G. (\$26,650.00), E.G. (\$9,810.00), T.H. (\$1,635.00), and owed to Robert Bartram. I purposely or knowingly used or concealed the monies in a manner that deprived the residents and Robert Bartram of the monies.

b. COUNT III: In March 2013, in Cascade County, Montana, I caused David Wilsey, by deception, to execute a check disposing of \$2,343.50. The check was from the estate of Bluebird Assisted Living resident Shirley Hamilton and made payable to me. David Wilsey had power-of-attorney over Shirley Hamilton and was executor of Shirley Hamilton's estate. I deposited said check into my personal Montana Federal Credit Union account in Great Falls, Montana. I deceived David Wilsey into writing this check, and I was not owed this money. The value of the check exceeded \$1,500.

Ex. No. 8.

16. Shirley Hamilton loaned Pepin \$1,000.00 while he was administrator of Meadowlark. Testimony of Pepin.

17. Resident RB thought Pepin was the owner of the facility so he began issuing checks directly to Pepin, which he used to fund his gambling. Id.

18. In 2012, David Jenkins began receiving the proceeds from his recently deceased mother's life insurance policy. Id. Jenkins lived first at Meadowlark and

then at Bluebird and was receiving Medicaid benefits due to some medical infirmities. Id. Ex. 3. Pepin would take Jenkins to various locations to cash Jenkins' annuity checks using the Meadowlark van. Id; Testimony of Hall. One of those locations was Barrel O' Bucks Casino where Pepin would gamble for hours after receiving money from Jenkins. Testimony of Pepin and Ewan. Jenkins would gamble too but in much smaller amounts. Ex. 3. Jenkins was also spending large amounts of money on electronic equipment for his apartment at Meadowlark. Testimony of Pepin. Pepin also took Jenkins to Wal-Mart to cash his insurance checks. Testimony of Ewan. Pepin had set up a debit card at Wal-Mart. Id. Ex. 3. When Pepin was driving Jenkins around and gambling, other employees had to take residents to doctors' appointments using their own vehicles. Testimony of Hall.

19. Joyce Slaigle was Jenkins' payee, the person assigned by Medicare to oversee his payment of various bills. Testimony of Slaigle and Pepin. When a person receives housing benefits from Medicaid, they must meet certain minimum income requirements and are allowed only \$100.00 per month for incidental costs including prescriptions. Id. If a person receives additional income, they must pay incurment costs based on the amount they are receiving and Medicaid's costs. Testimony of Slaigle. Slaigle was initially unaware that Pepin and Jenkins had created a separate bank account at MFCU where Pepin banked because she, as payee, had created an account with Jenkins in 2008. Id. In November 2012, Slaigle became aware of Jenkins' insurance checks. Id. Slaigle informed Medicaid of the additional income Jenkins was receiving, which led to Jenkins being charged incurment costs that went unpaid because he was spending the money on other things and because Pepin was receiving some of Jenkins' money as well. Id. Slaigle stopped serving as Jenkins' payee in January 2013 because Pepin was now handling Jenkins' rent payments, which Jenkins gave to him in cash. Id. Ex. 3. Few, if any, of these cash payments ever made it to the facilities' owner, Bartram. Id. Ex. 3. Testimony of Ewan.

20. Only one of Jenkins' insurance checks was ever deposited in Jenkins' checking account while Pepin was on the account, although many were cashed there. Ex. 3.

21. In October 2013, Medicaid notified the Medicaid Fraud Unit of the Montana Department of Justice of some financial issues regarding Jenkins. Ex. 3. State investigator Jeremy Ewan was assigned to investigate and interviewed Pepin on two occasions. Testimony of Ewan. During the first interview, Ewan instructed Pepin not to contact the residents of either facility about the investigation. Id. Nonetheless, Pepin contacted BG, RB, and at least two other residents. Id. Pepin denied contacting these residents when Ewan interviewed Pepin the second time. Id.

22. Pepin is still fulfilling his continuing education requirements. Testimony of Pepin.

23. Pepin has made the restitution payment he was required to make under his plea agreement and sentence. Id.

24. Pepin has seen counselor Bonnie Huestis to assess his gambling issues on two occasions. Id. Pepin is unaware of any report she may have provided to his probation officer. Id. She has not indicated to him what course of action he should take with regard to his gambling problem. Id. Pepin has attended some Gambler's Anonymous meetings but found they focused more on alcohol issues so he has not continued going. Id.

25. Pepin believes that nursing ethics are "common sense really." Id. He also believes it is not appropriate to take gifts or to borrow money from patients. Id. Pepin felt he was more than a nurse for the residents, he was their friend. Id.

26. Throughout the hearing and in pretrial conferences, Pepin has expressed sincere regret for the damage he has done to the victims of his misconduct and to those involved in this proceeding. Id. He understands that his crimes were serious issues. Id. He has become more involved in church activities and listens to a lot of self-help and motivational audio tapes. Id. He feels blessed that he was caught because he knew he was doing wrong. Id. He believes his license should not be revoked because "everyone deserves a second chance." Id.

27. Pepin continually denies he stole money from his patients. Id.

28. The Board of Nursing considers previous disciplinary history, patient safety, public harm, and the egregiousness of the unprofessional conduct when determining the appropriate sanction. Testimony of Kaufman. Pepin has no prior disciplinary history. Testimony of Kaufman.

29. A nurse's primary commitment is to the patient. Testimony of Gustafson. Boundaries between the nurse and the patient are important because nurses have greater power due to their authority and influence as a health care professional, their specialized knowledge, access to privileged information about the health consumer, and their role in supporting health consumers and those close to them when receiving care. Id. A nurse cannot be the patient's friend because it indicates the boundary has been crossed and their influence over the patient may be even greater. Id.

30. Pepin is still in contact with some of the residents at the facilities because he considers them friends and because at least some of them feel he did nothing to hurt them. *Id.* This contact may be in violation of his Sentence at ¶ 9 which reads:

The Defendant shall not knowingly have any contact, oral, written, electronic or through a third party, with the victim(s) unless such contact is voluntarily initiated by the victim(s) through the Department of Corrections.

Ex. 12.

31. Pepin has been excluded from participation in any capacity in the Medicare, Medicaid, and all federal health programs. Ex. 14. Such an exclusion would make it very difficult for Pepin to find work as a nurse. Testimony of Gustafson.¹

IV. CONCLUSIONS OF LAW

1. The Board of Nursing has jurisdiction of this matter. The Board of Nursing is empowered to bring disciplinary action against a licensed nurse for unprofessional conduct. Mont. Code Ann 37-1-307, 37-1-312.

2. The department bears the burden of proving by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126. The department must also show that any sanction which it seeks is appropriate under the circumstances of the case.

3. The hearing officer may utilize his experience, technical competence, and specialized knowledge in evaluating the evidence. *Durbin v. Ross* (1996), 276 Mont. 463, 476- 77, 916 P.2d 758, 766; Mont. Code Ann. § 2-4-612(7).

4. Black's Law Dictionary defines "misappropriation" as, "The unauthorized, improper, or unlawful use of funds or other property for purpose other than that for which intended." Black's Law Dictionary 998 (6th ed. 1990).

¹ The hearing officer found the exclusion had limited relevance and gave it no weight in making his recommendation. It does not appear to be based on any separate misconduct and the department did not allege that the exclusion was in and of itself a separate act of professional misconduct. The fact that Pepin might have a difficult time finding work also does not appear to be justification for any particular sanction, if any.

5. The department's evidence in this matter establishes preponderantly that Pepin's criminal convictions constitute unprofessional conduct as defined by Mont. Code Ann. § 37-1-316. Pepin's felony criminal convictions for theft and deceptive practices constitute unprofessional conduct, as defined by Mont. Code Ann. § 37-1-316(1) ("conviction, including conviction following a plea of nolo contendere, of a crime relating to or committed during the course of the person's practice or involving violence, use or sale of drugs, fraud, deceit, or theft, whether or not an appeal is pending"). Moreover, Pepin's admitted criminal conduct of stealing from residents of Bluebird and Meadowlark Assisted Living facilities constitutes unprofessional conduct, as defined by Mont. Code Ann. § 37-1-316(13) ("misappropriating property or funds from a client or workplace or failing to comply with a board rule regarding the accounting and distribution of a client's property or funds").

6. Under the circumstances of this case, discipline is appropriate under Montana law, Mont. Code Ann. §§ 37-1-307, 37-1-309, 37-1-312, 37-1-316.

7. The Board has a range of disciplinary options available upon proof of a violation. A sanction may be imposed only after first considering sanctions that are necessary to protect the public. Only after such a determination may the Board consider and include in the order any requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312.

8. Imposition of substantial sanctions in this matter is necessary in order to both protect the public and to impress upon Pepin the need to reconsider his ethical duties to his patients. The sanctions must include revoking his license and remedial education prior to any subsequent reinstatement.

V. PROPOSED ORDER

1. Based on the foregoing findings of fact and in consideration of the above conclusions of law, the hearing officer recommends that the Board of Nursing revoke the license of Mark Pepin with the following terms:

2. Pepin shall surrender his suspended license within 24 hours of receiving notification of the suspension. Mont. Code Ann. § 37-1-312(4).

3. Pepin must complete all requirements to maintain licensure. See Mont. Code Ann § 37-1-141 and companion regulations. In addition, he shall obey all statutes and rules applicable to nurses as prescribed in Title 37, Chapters 1 and 8.

4. After completion of probation and parole supervision and a determination by the Court that Pepin has fulfilled the terms of his sentence, Pepin may petition the Board for reinstatement of his license under Mont. Code Ann. § 37-1-314. The Board at that time may impose such restrictions, limitations, or probation on Pepin's license as permitted by law. Pepin must present evidence to the Board that he has successfully completed coursework recommended by the Board to improve Pepin's understanding of the proper nurse/patient relationship; that he has successfully undergone therapy for his gambling problem; and that his financial records demonstrate he is no longer gambling.

DATED this 29th day of August, 2016.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.