

BEFORE THE BOARD OF NURSING
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2013-NUR-LIC-563 REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 2118-2016
TREATMENT OF THE LICENSE OF)	
KRISTINA WELCH,)	
Registered Nurse, License No. 31446.)	
)	

**PARTIAL SUMMARY JUDGMENT ORDER;
FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

After Kristina Welch (Welch) self-reported that she was incarcerated for the death of her husband, the Screening Panel of the Montana Board of Nursing (Screening Panel) reviewed her RN license at a June 11, 2013 meeting. The Screening Panel directed an investigation regarding the circumstances relating to the death of her husband, her incarceration and rehabilitation. On December 1, 2015, the Screening Panel reviewed the investigative report. The Screening Panel concluded there was reasonable cause to believe Welch committed unprofessional conduct that justified disciplinary proceedings. On April 29, 2016, the Board of Nursing (Board) issued a Notice of Proposed Board Action and Opportunity for Hearing to Welch. On May 17, 2016, Welch requested a contested case hearing.

On May 27, 2016, this matter was transferred to the Office of Administrative Hearings (OAH). On June 6, 2016, a Notice of Hearing and Telephone Conference was mailed to the parties setting the scheduling conference for June 20, 2016. Both parties appeared for the scheduling conference. Kevin Maki, attorney at law, appeared on the Board's behalf. Welch represented herself.

On June 21, 2016, Hearing Officer Debra Wise issued a scheduling order setting pre-hearing deadlines and dates for the final pre-hearing conference and contested case hearing in this matter.

On August 24, 2016, the Department timely filed a Motion for Partial Summary Judgment on the issue of whether Welch had committed sanctionable

unprofessional conduct. On September 6, 2016, Welch filed a timely response and requested oral arguments regarding the Department's Partial Summary Judgment Motion. On September 7, the parties were informed the oral argument on this issue would be held on September 15, the date of the final pre-hearing conference.

Both Maki and Welch participated at the September 15, 2016 final pre-hearing conference. Both parties presented oral arguments concerning the Department's request for Partial Summary Judgment. During the September 15, 2016 conference, the parties agreed to reschedule the hearing to October 26 so Welch and two witnesses could participate via video conferencing. Welch was granted additional time to obtain documents she had been attempting to secure. Welch was also granted additional time to review the Department's proposed uncontested facts that she had just received.

During the September 15 conference, Welch agreed she was currently incarcerated for the crime of negligent homicide, shooting and killing her husband with a firearm. As a result, the Hearing Officer concluded Welch committed unprofessional conduct and granted the Department's Motion for Partial Summary Judgment. The parties were informed the written Partial Summary Judgment Order would be issued with this decision. On September 16, 2016, the Hearing Officer issued an order indicating that the Department's request for Partial Summary Judgment was granted. The September 16 Order also stated that the October 26, 2016 hearing would only deal with what, if any, sanctions should be imposed on Welch.

On October 26, 2016, the Hearing Officer convened a hearing in Helena, Montana. Welch appeared by Vision Net video conferencing from the Montana Women's Prison in Billings. Kevin Maki, attorney at law, appeared in person on the Department's behalf. The Department's witnesses included Justin Green, Detective Duane Rhodes, and Heidi Kaufman. Green, Welch's former neighbor, and Rhodes, the detective who investigated the death of Welch's husband, appeared by Vision Net at their respective locations. Kaufman, a compliance specialist with the Business Standards Division (BSD), appeared in person. Lindsey Slead, a paralegal, observed the hearing. Welch, Green, Rhodes, and Kaufman presented sworn testimony.

The parties stipulated to the admission of Department's Documents 1 through 11. Welch's additional documents were identified as Respondent Documents A through F. During the hearing, Welch requested that Document F be admitted, but Maki objected and this document was not admitted. Welch did not offer Respondent Documents A through E. Welch did not object to the Department's Proposed Uncontested Facts 1 through 3, and 5 through 8. Welch did not agree with the Department's Proposed Uncontested Facts 4, 9, and 10.

The parties agreed simultaneous post-hearing briefs would be submitted on December 1, 2016. The Department submitted a post-hearing brief on December 1, 2016. As of December 9, Welch had not submitted a post-hearing brief. The Hearing Officer deemed this matter closed as of December 9, 2016.¹

Based on the evidence and arguments presented by the parties, the Hearing Officer makes the following summary judgment, findings of fact, conclusions of law, and recommended order.

II. ISSUE

Whether disciplinary action should be taken against licensee Kristina Welch, and, if so, the proper discipline that should be taken.

III. FINDINGS OF FACT

A. Uncontested Facts

1. Montana Board of Nursing (Board) licensed Welch as a registered nurse, license number 31446.

2. As of October 26, 2016, Welch's RN license is active and renewed through December 31, 2016.

3. On January 3, 2012, Welch was charged with deliberate homicide regarding the death of Charles Bryan Welch, her husband, by shooting him in the chest with a firearm on December 7 or 8, 2011.

4. On December 17, 2012, the State amended the criminal charge filed against Welch to one count of negligent homicide, a felony. Mont. Code Ann. § 45-4-104.

¹ On January 17, 2016, the Hearing Officer received Welch's Motion for Reconsideration of the Department's Proposed Findings of Fact, Conclusions of Law & Recommended Order. She had mailed this response on January 7, 2017. The Hearing Officer did not receive Welch's January 7, 2017 response until January 17. Her response had been mailed to the Board of Nursing, not the Office of Administrative Hearings. Since Welch had not contacted the Hearing Officer for additional time for her response or brief, her Motion for Reconsideration of the Department's Proposed Findings of Fact, Conclusions of Law & Recommended Order has not been considered. The Hearing Officer notes the primary purpose of Welch's Reconsideration was to correct the record or present her version of certain facts. Welch did not provide her own Proposed Findings of Fact, Conclusions of Law and Recommended Order.

5. On December 17, 2012, Welch signed an Acknowledgment of Rights and entered into a Plea Agreement. The Court initially rejected the Plea Agreement. Before accepting the Plea Agreement, the Court indicated that it must have authority to sentence Welch to 20 years as authorized by law before accepting Welch's guilty plea to one felony count of negligent homicide by negligently causing the death of Charles Bryan Welch.

6. The Plea Agreement executed by the parties stated in part:

The Defendant agrees the facts contained in the Motion and Affidavit in support of Motion for Leave to File Information establishes a factual basis to support the Defendant's plea of guilty. Welch also agreed to the following statement of facts:

I committed the offense of Negligent Homicide by negligently causing the death of Charles Bryan Welch when, under the duress of our continuing arguments over money, Bryan smoking marijuana, and the end of our marriage, I consciously disregarded the risk of death when I overreacted and too quickly pointed a loaded gun in Bryan's direction and pulled the trigger.

7. The Plea Agreement further stated that the State agreed to recommend a 20-year sentence with all but three years suspended.

B. Findings of Fact

1. Welch has no prior discipline against her Montana nursing license.

2. Since 1988, Welch has practiced nursing. Before moving to Montana, Welch worked as a licensed practical nurse and registered nurse (LPN and RN) in other states. After moving to Montana, Welch worked a couple of months in Libby for the Health Department and then at the Libby Care Center for 18 to 24 months. Welch semi-retired in March 2011.

3. After the Court entered its Judgment and Sentence on March 28, 2013, Welch received a 20-year sentence at the Montana Women's Prison in Billings for committing negligent homicide. The Court also ordered Welch to pay \$15,000.00 in restitution, obtain a chemical dependency evaluation, obtain a mental health evaluation, successfully complete Cognitive Principles & Restructuring or similar cognitive and behavior modification program, and complete an Anger Management program.

4. Welch self-reported to the Board that she was incarcerated for the negligent death of her husband by shooting him with a firearm.

5. On October 21, 2016, Welch appeared before the Montana Board of Pardons and Parole (Parole Board). The Parole Board denied her request for parole because of the nature or severity of the offense and strong objections from criminal justice authorities and/or citizens. Welch is not eligible to appear before the Parole Board again until 2019.

6. The Parole Board informed Welch she needed to complete an anger management class, obtain chemical dependency counseling, and attend cognitive-based programming. Just prior to October 26, 2016, Welch completed a chemical dependency assessment and a mental health evaluation.

7. Welch is currently incarcerated and unable to practice nursing.

8. Since her incarceration, Welch has completed continuing education courses required for a nursing license.

9. As of October 26, 2016, Welch was still in the process of completing terms of the Judgment and Sentence imposed upon her in the criminal case.

10. Welch showed remorse for shooting and killing her husband.

11. Welch has no idea when she may be released from prison.

IV. DISCUSSION

A. Partial Summary Judgment Should Be Granted On Whether Welch Committed Unprofessional Conduct When There Are No Contested Issues Of Fact.

Summary judgment is an appropriate method of dispute resolution in administrative licensing proceedings when the requisites for summary judgment are met. In the Matter of Peila (1991), 249 Mont. 272, 815 P.2d.139, summary judgment should be granted where the “pleadings . . . and admissions on file, together with the affidavits . . . show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Mont. R. Civ. P. 56(c).

The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party meets this burden, the burden shifts to the party

opposing the motion to establish otherwise by more than mere denial or speculation. *Ravalli County Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042.

Mont. Code Ann. § 37-1-316(1) provides that unprofessional conduct is:

a conviction, including a conviction following a plea of *nolo contendere*, of a crime relating to or committed in the course of the person's practice **OR** involving violence, . . . , whether or not an appeal is pending (Emphasis supplied.)

The statutory provision "involving violence" applies to this case. Welch admitted she shot her husband with a firearm that resulted in his death. Mont. Code Ann. § 46-18-1042(2) defines a crime of violence as a crime where the offender uses a deadly weapon during the commission of a crime, or when the offender causes serious bodily injury or death to a person. In this case, Welch admitted she shot and killed her husband.

Welch has not been designated as a violent offender and Mont. Code Ann. §37-1-316(1) does not require a licensee to be designated a violent offender to have committed unprofessional conduct. The statute states unprofessional conduct requires a conviction that relates to a crime "involving violence." Since Welch pled guilty to and was convicted of negligent homicide, this as a matter of law constitutes a crime "involving violence." Therefore, Welch committed unprofessional conduct.

B. What Sanctions Should Welch Have Imposed Upon Her?

A licensee is subject to discipline for unprofessional conduct. Mont. Code Ann. §§ 37-1-309, 312. The Department must establish the sanction that is appropriate under the facts of the case.

Welch's criminal conviction for negligent homicide constitutes unprofessional conduct as defined under Mont. Code Ann. § 37-1-316. To determine which sanctions are appropriate, it must be determined what sanctions are necessary to protect or compensate the public. No licensing authority shall refuse to license a person solely on the basis of a previous criminal conviction; however, where a license applicant has been convicted of a criminal offense and such criminal offense relates to the public health, welfare, and safety as it applies to the occupation for which the license is sought, the licensing agency may find that the applicant so convicted has not been sufficiently rehabilitated as to warrant the public trust and deny the issuance of a license. *Ulrich v. St. ex rel. Bd. of Funeral Serv.*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126.

As of October 26, 2016, the Parole Board denied Welch's parole request in part because of the nature or severity of the offense and strong objections from criminal justice authorities and/or citizens. Since Welch is currently incarcerated and has not been released on parole, she did not establish that she has been sufficiently rehabilitated to warrant the public's trust. Therefore, the Hearing Officer recommends that the Board revoke her nursing license. After Welch has been paroled, she may petition for her license to be reinstated. At that time the Board may deny or accept her application with or without restrictions, limitations, or conditions.

V. CONCLUSIONS OF LAW

1. The Board has subject matter jurisdiction and legal authority to bring this action. Mont. Code Ann. §§ 37-1-131, 37-1-136, 37-1-307, 37-1-309, 37-8-202(1)(f), (g).
2. This matter was properly referred to the Office of Administrative Hearings for a contested case hearing. Mont. Code Ann. §§ 37-1-131(1)(b); 37-1-121(1). This is a licensing disciplinary case subject to the Montana Administrative Procedure Act. Mont. Code Ann. §§ 37-1-136(2), 37-1-310.
3. The Department, for the Board, bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-1-311; Ulrich v. St. ex rel. Bd. of Funeral Serv., 1998 MT 196, 289 Mont. 407, 961 P.2d 126.
4. The Department proved Kristina Welch committed unprofessional conduct when she shot her husband with a firearm, which resulted in his death and her incarceration for negligent homicide. Mont. Code Ann. § 37-1-316(1).
5. In determining which sanctions are appropriate, the Board must first consider sanctions that are necessary to protect the public and then the Board may then consider and implement requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).
6. Kristina Welch's license to practice as a registered nurse should be sanctioned under Mont. Code Ann. § 37-1-312 because she has committed unprofessional conduct.
7. The Board of Nursing is charged with the responsibility to "safeguard life and health" of the public by assuring that those practicing nursing are properly qualified. Mont. Code Ann. § 37-8-101. Based on Welch's incarceration for the

negligent homicide of her husband and because she has not been released from prison, the evidence does not establish she has been rehabilitated to warrant the public's trust that she is qualified to safeguard the life and health of the public.

8. Kristina Welch's nursing license is revoked to protect the public and should be continued through the final determination of this action. Mont. Code Ann. § 2-4-631(3).

9. When Kristina Welch is paroled, she may petition the Board for reinstatement of her nursing license. The Board can then re-evaluate her nursing license and decide if she is properly rehabilitated and qualified to safeguard the life and health of the public. Mont. Code Ann. § 37-8-101.

VI. RECOMMENDED ORDER

1. It is recommended that the Board revoke Kristina Welch's nursing license.

2. If Kristina Welch currently has an active nursing license, she shall surrender her nursing license within 24 hours of receiving notification of the revocation. Mont. Code Ann. § 7-1-312(4).

3. Kristina Welch may not reapply for a nursing license until she is paroled.

4. After Kristina Welch has been released by the Parole Board, the Board shall consider her petition for reinstatement of her nursing license pursuant to Mont. Code Ann § 37-1-314 and Admin. R. Mont. 24.159.1253. The Board may then deny Kristina Welch's reapplication or accept it with or without restrictions, limitations, or conditions.

DATED this 25th day of January, 2017.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DEBRA L. WISE
DEBRA L. WISE
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.