Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

No. WD75049

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MARY LUSCOMBE,

Appellant,

v.

MISSOURI STATE BOARD OF NURSING,

Respondent.

Appeal from the Cole County Circuit Court
The Honorable Byron Kinder

Brief of Appellant

MARIAM DECKER #37821
JULIA S. GRUS #49727
OLIVER WALKER WILSON LLC
401 Locust St., Suite 406
P.O. Box 977
Columbia, MO 65205-0977
573-443-3134
573-442-6323 – Fax

ATTORNEYS FOR APPELLANT
MARY LUSCOMBE, R.N.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

TABLE OF CONTENTS

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

TABLE OF CASES AND AUTHORITIES

Case Law:

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Constitution:

Statutes:

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

JURISDICTIONAL STATEMENT

This is an appeal by Mary Luscombe, R.N., from an adverse decision rendered on November 24, 2010 by the Administrative Hearing Commission (AHC) finding cause to discipline Mary Luscombe and the March 9, 2011 decision of the Missouri State Board of Nursing (Board) to revoke Mary Luscombe's nursing license. (L.F. Board Certified Record, p. 81-82). Pursuant to § 536.100, aggrieved parties may appeal the AHC and Board's decisions to the Missouri Circuit Court for judicial review. The circuit court sustained the AHC's decision on February 10, 2012. (L.F. Cole County Certified, p. 16-22). Pursuant to §§ 536.100 through 536.140, this Court has jurisdiction of this appeal.

Appellant filed a notice of appeal on March 19, 2012. (L.F. Cole County Certified, p. 10). This Court has jurisdiction pursuant to the general appellate jurisdiction of the Missouri Court of Appeals under Article V, Section 3 of the Constitution of Missouri because Cole County is within the territorial jurisdiction of the Western District and because this case is not within the exclusive jurisdiction of the Missouri Supreme Court.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

STATEMENT OF FACTS

Mary Luscombe ("Luscombe") is a licensed registered nurse in the State of Missouri, License No.: 014098.[1] Her license with the Missouri State Board of Nursing at all times relevant, herein, is current and active.[2] Mary Luscombe has been licensed and practicing as a nurse in the state of Missouri without incident or discipline for over thirty years,[3] until the Board initiated the underlying proceedings against her on May 14, 2008.[4]

In 2004, Luscombe was employed at Columbia Regional Hospital where she worked in the Neonatal Intensive Care Unit ("NICU").[5] While employed in the NICU, Luscombe was responsible for caring for three infants of a six infant pod with two nurses assigned to each pod.[6] Infants in the NICU are those who "(a) are premature, (b) have an infection, (c) are born with birth defects, and (d) become sick after they are born."[7] The infants in the NICU all wear a cardiac monitor unless they are rooming in with their

---

[1] L.F., AHC Certified Record, p.3 and p.49, para. 1.

[2] L.F., AHC Certified Record, p. 49, para.1.

[3] L.F., Cole County Certified Record, p.28.

[4] L.F., AHC Certified Record, p. 48.

[5] L.F., AHC Certified Record, p. 49, para.2.

[6] L.F., AHC Certified Record, p. 51, para. 14.

[7] L.F., AHC Certified Record, p. 49, para. 3.

parents and wearing a home apnea monitor, or are ready for discharge.[8] The infants are monitored for bradycardia and apnea through continuous cardiac monitoring."[9] Columbia Regional's NICU's protocol for cardiac monitors stated the alarms could be suspended if the infant was stable or was breastfeeding, bathing, etc.[10] The protocol did not require the nurse to remain at the infant's bedside while the monitor was suspended.[11] However, the AHC's decision makes an erroneous finding of fact that the "alarm can also be temporarily suspended for three minutes if the nurse is at the bedside watching the baby....When the alarm is suspended, the nurse should not step away from the bedside or turn her back on the infant."[12]

On May 29, 2005, Luscombe was working in the NICU in a pod of six infants with Nurse Koestner.[13] Nurse Koestner had walked away from the pod and Luscombe assisted Nurse Koestner with caring for her three infants.[14] One of Nurse Koestner's infant's cardiac monitor went off several times, and the infant's parents were in the room

---

[8] L.F., AHC Certified Tr., Exhibit 51.

[9] L.F., Board Certified, p. 49, para. 4.

[10] L.F., AHC Certified Tr., Ex. 51.

[11] L.F., AHC Certified Tr., Exhibit 51.

[12] L.F., Board Certified, p.51, AHC's Decision, para.13.

[13] L.F., AHC Certified, p. 512, para. 14.

[14] L.F., Board Certified, p. 51, AHC's Decision, para. 15 and 16.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

with said infant.[15] Luscombe suspended the cardiac monitor for the infant and turned the monitor so that she could see it.[16] Luscombe was not at the bedside of the infant but she was within a few feet of the infant at the nurse's desk in the pod. The infant whose monitor was suspended by Luscombe was in the bed closest to the nurse's desk, only a few feet away. Specifically, the infant was in the bed with the white blanket on it in the picture admitted into evidence during the hearing.[17] Luscombe turned the computer monitor towards her so that it was in her line of sight and she could continue monitoring the infant.[18] The infant was not harmed or injured as a result of Luscombe's suspending the monitor.

Approximately one week before this incident, NICU Supervisor Barb Brucks sent an e-mail regarding the cardiac monitors, stating that the monitors were not to be suspended.[19] Luscombe admitted receiving said email.[20] The email was not admitted into evidence at the hearing and Ms. Brucks could not recall the content of the email.[21] The only protocol in place at the time of this incident was admitted into evidence as

---

[15] L.F., Board Certified, p. 51, AHC's Decision, para. 16 and 17.

[16] L.F., Board Certified, p. 51, AHC's Decision para.16.

[17] L.F., AHC Certified Tr., Exhibit 52.

[18] L.F., AHC Certified Tr., Exhibit FF; p. 412, l. 8-23 and p. 413, l. 9-21.

[19] L.F., AHC Certified Tr., p. 311, l. 20-25 and p. 312, l.1.

[20] L.F., AHC Certified Tr., p. 427, 1.6-9.

[21] L.F., AHC Certified Tr., p. 311, 1.20-25 and 312, 1.1.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

exhibit 51.[22] Luscombe was terminated despite the NICU's written protocol which specifically states that alarms could be suspended if the infant was stable or was breastfeeding, bathing, etc.[23]

From August 2, 2005 through October 17, 2007, Luscombe was employed by Integrity Home Care ("Integrity) as an in-home health care provider.[24] On June 10, 2005, Luscombe separated from her husband and moved off the family farm. On September 30, 2005, the parties filed for divorce. On October 26, 2005, Mr. Luscombe filed an ex parte order against Luscombe for adult abuse/stalking. On September 14, 2006, the ex parte order was dismissed. On May 3, 2007, the divorce was granted. On June 9, 2007, Luscombe was allowed to go to the family farm to pick up nonmarital property.[25]

As a visiting nurse for Integrity, Luscombe had paperwork that needed to be signed by the patient or by the patient's representative to show that the service had been performed.[26] Luscombe had turned in paperwork for her clients in a timely manner but on the incorrect forms.[27] Luscombe also turned in paperwork about her mileage and

---

[22] L.F., AHC Certified Tr., Exhibit 51

[23] L.F., AHC Certified Tr,. Exhibit 51.

[24] L.F., Board Certified, p. 54, AHC's Decision, para. 30.

[25] L.F., Board Certified, p. 54; AHC's Decision, para. 32.

[26] L.F., AHC Certified Tr. p. 177, 1:17- p. 178, 1.25.

[27] L.F., AHC Certified Tr., p. 173, l. 18-25 – p. 174, l. 11.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

nurse visits with Integrity on time which Integrity used to pay its employees.[28] Luscombe's supervisor approved her paperwork when she was employed at Integrity.[29]

The Board's expert, Don Lock, testified that it was highly probable that six signatures were signed by Luscombe.[30] Two of the six signatures identified as highly probable that they were not signed by the patients were actually original signatures as testified by two of the patients.[31] The AHC found that four clients – J.B., T.W., L.F., and K.S. – signatures were signed by Luscombe.[32] Luscombe attempted to enter into evidence affidavits with original signatures for Lock to review but the Court denied her offer. Luscombe made an offer of proof regarding the four affidavits with original signatures.[33]

After leaving Integrity, Luscombe was contacted by Randa Kullman about missed visits for some of her former patients.[34] Integrity pays for missed visits.[35] Ms. Kullman

---

[28] L.F., AHC Certified, Tr., p. 176, l. 5-20, Exhibit K.

[29] L.F., AHC Certified, Tr., p. 175, l. 7-16 and p. 180, l. 22-24.

[30] L.F., AHC Certified, Tr., p. 248, l.2-4.

[31] L.F., Board Certified, p. 65 and 68, AHC Decision.

[32] L.F., Board Certified p. 56, AHC Decision, para. 28.

[33] L.F., AHC Certified, Tr., p. 263, l. 6-12; Exhibits AA, BB, CC, and Z.

[34] L.F., AHC Certified Tr., p. 186. l. 5- p. 188, l.10.

[35] L.F., AHC Certified Tr., p. 182, l. 12-13 and L.F. Board Certified, p. 56, AHC Decision, para. 42.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

never was Luscombe's supervisor.[36] Luscombe met with Ms. Kullman and completed the requested missed visit forms as indicated on the calendar provided to Luscombe from Ms. Kullman.[37] Ms. Kullman did not compare the telephony system data with any other data that Luscombe had previously submitted.[38]

Integrity was not investigated by Medicaid as a provider in the State of Missouri for any of the allegations against Luscombe.[39] No allegation was made in the First Amended Complaint that Luscombe had violated a CSR and the AHC's decision does not address the CSR.[40]

[36] L.F., AHC Certified Tr., p. 97, 110, 112-13 and 118.

[37] L.F., AHC Certified, Tr., Exhibits 46, 47, 48, 49, and 50.

[38] L.F., AHC Certified Tr., p. 186, l. 5- p. 188, l. 10.

[39] L.F., ACH. Certified Tr., p. 87, l. 25- p. 88, l. 4.

[40] L.F., Board Certified, p. 29-31 and p. 48-72.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

STANDARD OF REVIEW

> *In an action involving initial license discipline, the Board assesses an appropriate level of discipline after the Administrative Hearing Commission has independently determined, 'on the law and the evidence submitted by both the Board and the licensee, that cause for discipline exists.' In such a case, section 621.145, directs that we review the 'AHC's decision as to the existence of cause and the Board's subsequent disciplinary order 'as one decision,' and proceed to review that combined decision, not the circuit court's judgment.'*

Moore v. Mo. Dental Bd., 311 S.W.3d 298, 302 -303 (Mo. App. 2010) (internal citations omitted).

As such, this court is to review the decision of the administrative agency – not the decision of the circuit court. *HTH Companies, Inc. v. Mo. Dept. of Labor and Industrial Relations*, 154 S.W.3d 358, 361 (Mo. App. 2004); *Lewis v. Dept. of Soc. Serv.*, 61 S.W.3d 248, 252-253 (Mo. App. 2001). The scope of judicial review in such cases requires the court to determine whether the underlying agency actions were:

(A) is in violation of constitutional provisions;

(B) in excess of statutory authority and/or jurisdiction of the agency;

(C) unsupported by competent and substantial evidence from the whole record;

(D) unauthorized by law;

(E) is made upon unlawful procedure or without a fair trial;

(F) is arbitrary, capricious and unreasonable;

(G) is an abuse of agency discretion; or

(H) otherwise contrary to law.

Section 536.140.2, RSMo.

The lawfulness of an agency's order is determined by whether statutory authority for the order exists. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm.*, 120 S.W.3d 732, 734 (Mo. banc 2003). Where the agency decision involves interpretation of the law and the application of the law, review is *de novo* and the Appellate Court must form its own independent conclusions – the court is not bound by the interpretation of the agency. *Collins v. Dept. of Soc. Serv.*, 141 S.W.3d 501, 504 (Mo. App. 2004). The court has a duty to correct erroneous interpretations of law. *HTH Companies*, 154 S.W.3d at 361. The court must look at the whole record in reviewing the agency's decision, not merely the evidence that supports the decision. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222 -223 (Mo. banc 2003).

If an agency's order is lawful, the court must determine if it is reasonable. *State ex rel. Koffman v. Pub. Serv. Comm'n.*, 154 S.W.3d 316, 320 (Mo. App. 2004). Reasonableness depends on whether the order is supported by competent and substantial evidence on the whole record; whether the decision was arbitrary, capricious or unreasonable; or whether the agency abused its discretion. *Id.*

In this case, the disciplinary decision is contrary to law; arbitrary, capricious, and unreasonable; constitutes an abuse of agency discretion; is not supported by competent

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

and substantial evidence in the administrative record as a whole; based upon unlawful proceedings; and a violation of Mary Luscombe's constitutional rights to due process and equal protection for the following reasons:

(A) The Board has the burden of proof to show its action against Mary Luscombe is lawful pursuant to Section 335.066, RSMo, and to date the Board has failed to produce evidence or argument to show its action is lawful;

(B) The AHC's Decision is not supported by competent and substantial evidence in the record before it; and in particular lacks necessary expert testimony to prove negligence, injury, causation or a breach of the nursing standard of care;

(C) The AHC failed to consider competent and substantial evidence presented by Mary Luscombe;

(D) The facts found by the AHC in its Decision are unsupported and not based on evidence in the record presented;

(E) The AHC and Board Decisions are *ultra vires*, without legal basis and violations of both state and federal laws;

(F) The Missouri State Board of Nursing's decision is based on discriminatory motive, facts not in the administrative record and constitutes a punitive sanction against Mary Luscombe; and,

(G) The Board's Decision was issued to punish Mary Luscombe arbitrarily and not to protect the citizens of Missouri.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

For these reasons, the AHC's finding of violation of §335.066.2 (4), (5), and (12), RSMo, and the Board's decision to revoke should be reversed.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

POINTS RELIED ON

POINT I

THE ADMINISTRATIVE HEARING COMMISSION ("AHC") ERRED IN FINDING CAUSE TO DISCIPLINE MARY LUSCOMBE, BECAUSE THE DECISION IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE PURSUANT TO §536.140, RSMO, IN THAT THE AHC RELIED UPON AN INCORRECT FACT IN REACHING ITS DECISION AND THE STATE BOARD OF NURSING FAILED TO PRESENT EXPERT TESTIMONY REGARDING STANDARD OF CARE WHICH IS NECESSARY TO FIND A VIOLATION OF SECTIONS 335.066.2(5) and (12), RSMO, SPECIFICALLY, THAT LUSCOMBE WAS GROSSLY NEGLIGENT.

Case law:

Albanna v. State Brd. of Reg. for the Healing Arts,

293 S.W.3d 423 (Mo. banc 2009)

Dine v. Williams,

830 S.W.2d 453 (Mo. App. 1992)

Oakes v. Mo. Dept. of Mental Health,

254 S.W.3d 153 (Mo. App. 2008)

Tendai v. State Bd. of Reg. for the Healing Arts,

161 S.W.3d 358 (Mo. banc 2005)

Statutes:

Section 335.066.2 (4), (5), and (12), RSMo.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

POINT II

THE ADMINISTRATIVE HEARING COMMISSION ("AHC") ERRED IN FINDING CAUSE TO DISCIPLINE MARY LUSCOMBE BECAUSE THE AHC'S DECISION IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE PURSUANT TO §536.140, RSMO, IN THAT AHC'S REFUSAL TO ADMIT EVIDENCE OF ORIGINAL SIGNATURES WAS ERROR AND THE MISSOURI STATE BOARD OF NURSING FAILED TO PRESENT EXPERT TESTIMONY REGARDING STANDARD OF CARE WHICH IS NECESSARY TO FIND A VIOLATION OF SECTION 335.066.2 (4), (5), AND (12) RSMO.

Case law:

Boroughf v. Bank of America, N.A.,

159 S.W.3d 498 (Mo. App. 2005)

Boyd v. State Brd. of Reg. for the Healing Arts,

916 S.W.2d 311 (Mo. App. 1995)

Hampton v. Big Boy Steel Erection,

121 S.W.3d 220 (Mo. banc 2003)

Statutes:

Section 335.066.2 (4), (5), and (12), RSMo.

Section 536.130.4, RSMo.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

POINT III

THE STATE BOARD OF NURSING ERRED IN FINDING THAT MARY LUSCOMBE'S LICENSE SHOULD BE REVOKED, BECAUSE THE BOARD'S DECISION IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE PURSUANT TO §536.140, RSMO, IN THAT THE TESTIMONY AND EVIDENCE SUBMITTED BY LUSCOMBE AT THE DISCIPLINE HEARING WAS NOT REFUTED AND THAT THE REVOCATION OF HER LICENSE IS NOT REASONABLE.

Boyd v. State Brd. of Reg. for the Healing Arts,

916 S.W.2d 311, 316 (Mo. App. 1995)

State ex rel. Koffman v. Pub. Serv. Comm'n.,

154 S.W.3d 316 (Mo. App. 2004)

Gard v. State Brd. of Reg. for the Healing Arts,

747 S.W.2d 726 (Mo. App. 1988)

Schnell v. Zobrist,

323 S.W.3d 403 (Mo. App. 2010)

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

ARGUMENT

POINT I

THE ADMINISTRATIVE HEARING COMMISSION ("AHC") ERRED IN FINDING CAUSE TO DISCIPLINE MARY LUSCOMBE, BECAUSE THE DECISION IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE PURSUANT TO §536.140, RSMO, IN THAT THE AHC RELIED UPON AN INCORRECT FACT IN REACHING ITS DECISION AND THE STATE BOARD OF NURSING FAILED TO PRESENT EXPERT TESTIMONY REGARDING STANDARD OF CARE WHICH IS NECESSARY TO FIND A VIOLATION OF SECTIONS 335.066.2 (5) and (12), RSMO, SPECIFICALLY, THAT LUSCOMBE WAS GROSSLY NEGLIGENT.

Standard of Review:

This Court's review is de novo in determining whether the AHC correctly interpreted and applied Section 335.066.2 (5) and (12), RSMo, which is a question of law, and this Court is to independently determine. *Psychare Mgmt., Inc. v. Dept. of Social Services, Division of Medical Services*, 980 S.W.2d 311, 312 (Mo. banc 1998). Review is de novo, and this Court has a duty to correct erroneous interpretations of law. *Miller v. Dunn*, 184 S.W.3d 122, 125-126 (Mo. App. 2006).

This Court must review the AHC's decision to find whether it is supported by a preponderance of substantial evidence on the record and if not supported then it is arbitrary and capricious. This Court must look at the whole record in reviewing the

agency's decision, not merely the evidence that supports its decision. *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 222 (Mo. banc 2003).

Argument:

A) The Board did not prove by preponderance of evidence in the administrative record that Luscombe was grossly negligent.

The Board has the burden of proving by a preponderance of the evidence that Luscombe was grossly negligent in her performance of her nursing duties while employed with University Hospital and Integrity.[41] Section 335.066 states,

> *2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:*
>
> * * *
>
> *(4) Obtaining or attempting to obtain any fee, charge, tuition or other compensation by fraud, deception or misrepresentation;*

[41] L.F., Board Certified, p. 63, AHC's Decision.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;

* * *

(12) Violation of any professional trust or confidence[.][42]

The AHC decision should be reversed because (1) there was no evidence that the protocol was the standard of care or that Luscombe violated the protocol; and, (2) there was no expert testimony that she breached the standard of care.

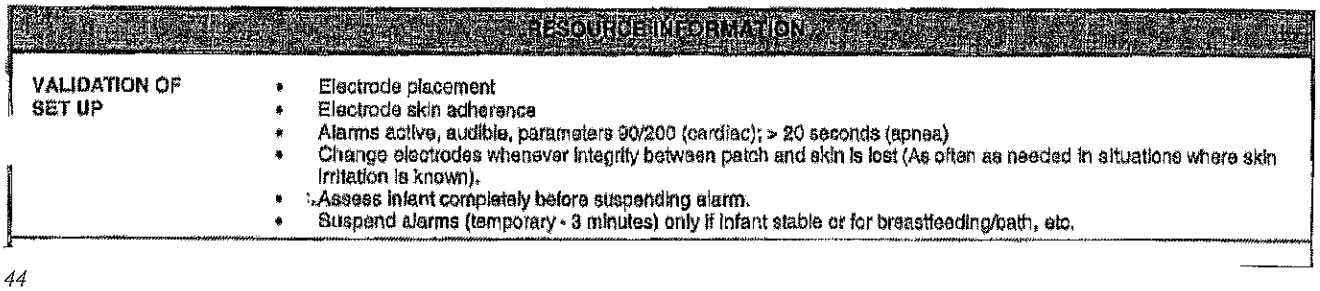
1) The AHC arbitrarily and wrongfully interpreted and expanded the University Hospital NICU Protocol.

The case before the AHC pertained to specific conduct by Luscombe when she suspended an infant's cardiac monitor while working at Columbia Regional Hospital's Neonatal Intensive Care Unit ("NICU"). First, the protocol at issue pertained to cardiac monitors for infants in the NICU that are used to monitor bradycardia and apnea.[43] The pertinent section of the written protocol in place in 2005 reads:

[42] Section 335.066.2, RSMo.

[43] L.F., Board Certified, p. 49, AHC's Decision, paras. 2 and 4.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT



RESOURCE INFORMATION	
VALIDATION OF SET UP	• Electrode placement • Electrode skin adherence • Alarms active, audible, parameters 90/200 (cardiac); > 20 seconds (apnea) • Change electrodes whenever integrity between patch and skin is lost (As often as needed in situations where skin irritation is known). • Assess infant completely before suspending alarm. • Suspend alarms (temporary - 3 minutes) only if infant stable or for breastfeeding/bath, etc.

44

The protocol allows for the suspension of the cardiac monitor alarm for three minutes and does not require that the nurse remain bedside during the suspension.[45] The AHC's decision incorrectly summarizes the protocol as a finding of fact in paragraph 13,

> *The alarm can also be temporarily suspended for three minutes if the nurse is at the* ***bedside*** *watching the baby. When the alarm is suspended, it prevents all the alarms from making an audible noise for three minutes. The nurse can still see what is going on by looking at the monitor.* ***When the alarm is suspended, the nurse should not step away from the bedside or turn her back on the infant.***[46]

The AHC's summary and finding of fact regarding the protocol is incorrect. The plain language of the protocol did not require that the nurse stay bedside or prohibit the nurse

---

[44] L.F., AHC Certified Tr., Petitioner's Exhibit 51.

[45] L.F., AHC Certified Tr., Petitioner's Exhibit 51.

[46] L.F., Board Certified, p. 51, AHC's Decision para.13 (emphasis added).

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

from walking away from the infant upon suspending the monitor.[47] The AHC erroneously expands the protocol and subjectively determines what the protocol was at the time of this incident, contrary to the evidence in the Protocol itself.[48] The Board's own witness and supervisor of the NICU Barb Burcks testified the protocol does not require the nurse be standing directly bedside if the alarm is suspended.[49] The AHC's decision and the Board's subsequent revocation order are based upon an erroneous finding of fact because the protocol as stated in the AHC's decision is not supported by the evidence in the record as a whole; therefore, it is arbitrary and capricious and must be reversed.

a) **The Board did not produce or enter into evidence the email allegedly sent by the NICU's supervisor modifying the cardiac monitor protocol.**

During the AHC hearing, testimony was solicited by both the Board and Luscombe about an email that had been sent one week prior to the May 29, 2005 incident when Luscombe suspended the cardiac monitor of an infant in the NICU. However, the email provided to staff and sent out approximately a week before this incident could not be located and was not admitted into evidence.[50] The AHC did not have the email

---

[47] L. F., AHC Certified Tr., Petitioner's Exhibit 51.

[48] L.F., Board Certified, p. 51, AHc's decision, para. 13 and L.F. AHC Certified Tr., Exhibit 51.

[49] L.F., AHC Certified Tr., p. 326, l. 5-8.

[50] L.F., AHC Certified Tr., p.311, l. 20 -25 and p. 312, l. 1.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

available to it to evaluate and determine if the substance of the email was as stated at the hearing. Furthermore, the Board's own witness, Ms. Brucks could not remember the contents of the alleged email that allegedly changed a hospital protocol regarding cardiac monitors in the NICU.[51] Since there is no evidence of a change in the protocol, the official NICU protocol for cardiac monitors in place at the time of the incident allowed for the suspension and silencing of monitors and did not require the nurse remain bedside.[52] The fact an email was sent does not amend or change the "official" protocol that was in place at the time of this incident. The AHC's erroneous finding of fact regarding the cardiac monitor and subsequent finding that Luscombe violated the protocol is not supported by the evidence in the record as a whole, is arbitrary and capricious and must be reversed.

2) **Expert testimony is necessary for finding gross negligence.**

The AHC's decision states:

> *Luscombe admits that she suspended an NICU baby's cardiac monitor, but she also testified that she did not intend to harm the baby. We find that this action displayed a 'conscious indifference to her professional duty' and thus constituted*

[51] Id.

[52] L.F., AHC Certified Tr., Exhibit 51.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

> *gross negligence rather than misconduct.* ***There is no expert testimony about the monitor.***"[53]

The Board did not present any expert testimony about the necessary standard of care for a nurse in Luscombe's position. The AHC finds that "[t]his Commission is capable of concluding that failure to obey hospital directives or protocol may constitute 'indifference to professional duties' without expert testimony."[54] The AHC continued to make a finding of gross negligence.[55]

a) *Perez* is distinguishable from the facts in the present case and does not apply.

The AHC adopts the Board's case *Perez v. Mo. State Brd. of Reg. for the Healing Arts*, 803 S.W.2d 160 (Mo. App. 1991) for its position that no expert testimony was needed. *Perez* should not be relied upon in this case because the statute in *Perez* pertained to the licensing of physicians and states:

> *Section 334.100.1(10) provides that the Board can undertake disciplinary proceedings against a physician for 'engaging in dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud or harm the public.'*

Id. at 164.

---

[53] L.F., Board Certified, p. 59, AHC's Decision (emphasis added).

[54] L.F., Board Certified, p. 63.

[55] Id.

Whereas, the statute for determining discipline for Luscombe requires a finding of,

> *(5) Incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by sections 335.011 to 335.096;*

Section 335.066.2(5).

The statutes examined in *Perez* and Luscombe are not even similar, as the statute in *Perez* does not include gross negligence. Therefore, in *Perez*, there was no finding of gross negligence; rather, the AHC found Dr. Perez had engaged in "dishonorable, unethical and unprofessional conduct of a character likely to harm the public." *Perez*, 803 S.W.2d 160, 165.

The facts in *Perez* are also distinguishable from the present case before the Court because Dr. Perez was an infertility specialist who had a sexual relationship with his patient, Mrs. F. *Id.* at 162-163. The patient saw Dr. Perez because of her difficulty in becoming pregnant and over the course of a year they had a sexual relationship. *Id.* at 164. The complaint against Dr. Perez pertained to professional or ethical standards governing his conduct, not his skill as a doctor or any finding of negligence. Such is not the case before the Court. Therefore, *Perez* should not be relied upon in this case.

3) Expert standard of care testimony is necessary to find gross negligence.

In determining gross negligence, the AHC must first examine ordinary negligence and then incorporate ordinary negligence in the gross negligence standard. The Missouri Supreme Court decision in *Tendai v. Mo. Bd. of Reg. for the Healing Arts* is controlling.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

161 S.W.3d 358 (Mo. banc 2005) (overruled on other grounds). The Missouri Supreme Court held in *Tendai* that:

> *[a]n act or course of conduct which demonstrates a conscious indifference to a professional duty that constitutes a gross deviation from the* ***standard of care*** *which a reasonable person would exercise in the situation.*

Id. at 367.

The Board did not present expert testimony about the appropriate standard of care that Luscombe failed to meet. That is, the Board never presented expert testimony on what the ordinarily prudent nurse would do in the same or similar circumstances as required by Missouri law. Without that evidence, the AHC is not capable of finding negligence.

In *Dine v. Williams*, the Appellate Court held, "[t]he rules and regulations of the hospital dealing with the requirements of attending physicians may very well be admissible *if and only when* the proper standard of care is proven by expert medical testimony." 830 S.W.2d 453, 457 (Mo. App. 1992) (emphasis added). As a matter of law the hospital protocol is not the standard of care unless proven by expert testimony. There was no expert testimony that failure to follow the protocol was a breach of the standard of care. As noted above, the protocol allows for alarm suspension if the infant is stable. There was no testimony that the infant was not stable. There is simply nothing in the record to support the AHC finding of negligence or gross negligence.

"Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty." *Albanna v. State Brd. of*

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Reg. for the Healing Arts, 293 S.W.3d 423 (Mo. banc 2009). Stated another way, it is an "extreme departure" from the ordinary standard of care. *Duncan v. Mo. Brd. for Architects, Prof. Engineers and Land Surveyors*, 744 S.W.2d 524, 532 (Mo. App. 1988). The Board failed to provide evidence about or identify the legal standard of care. Expert opinion testimony **must** include a definition of the standard of care to be applied to the evidence and failure to identify that standard of care leaves the Board's evidence and proof short of any legal significance. *Tendai*; *Hickman v. Branson Ear, Nose & Throat, Inc.*, 256 S.W.3d 120 (Mo. 2008). Without any testimony of the standard for general negligence there is definitively no basis for the AHC to determine "gross negligence." The AHC's decision is not supported by competent or legally substantial evidence on the record, therefore, its decision is arbitrary and capricious and must be reversed.

In *Oakes v. Mo. Dept. of Mental Health*, no evidence was presented before the Department of Mental Health's hearing officer about the appropriate standard of care for the healthcare provider. 254 S.W.3d 153, 158 (Mo. App. E.D. 2008). The Eastern District Court of Appeals held the *Oakes* hearing officer used her own standard of care which was arbitrary, untrained and therefore, unreasonable. *Id.* Such is the case before the Court. There is no evidence in the record of the appropriate standard of care Luscombe was required to meet, therefore, the AHC commissioner used her own standard of care, which is untrained and unreasonable, in determining that Luscombe should be disciplined. Therefore, the AHC decision must be reversed.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

B) There is insufficient evidence in the administrative record to support the Board's decision regarding Luscombe's violation of a professional trust or confidence.

"Professional trust is the reliance on special knowledge and skills the professional licensure evidences."[56] The AHC's decision holds that Luscombe violated the relationship of professional trust or confidence with her employer and patients by "suspending a monitor in violation of the hospital's protocol."[57] As argued above, the AHC's decision incorrectly interprets and adds provisions to the protocol that are not stated. The protocol explicitly allows for the suspension of the cardiac monitor.[58] Therefore, mere suspension of the monitor by Luscombe did not violate the protocol. There is no evidence Luscombe violated any professional trust or confidences on May 29, 2005 that the patient may have placed with her as a nurse. The AHC's finding of violation of professional trust pursuant to §335.066.2 (12) is based on an incorrect finding of fact regarding the cardiac monitor protocol, as argued above; therefore, no breach of the professional trust occurred and the AHC's decision is arbitrary and capricious and is not supported by a preponderance of substantial evidence on the record and must be reversed.

---

[56] L.F., Board Certified, p. 63, AHC's Decision, citing *Trieseler v. Heimbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

[57] L.F., Board Certified, p. 63, AHC's Decision.

[58] L.F., AHC Certified Tr., p. 326, l. 5-8 and Petitioner's exhibit 51.

Further, in the case before the Court, the AHC did not have any expert testimony regarding the standard of care, therefore, it did not have a basis to determine Luscombe's conduct was unprofessional or violated a professional trust since there was no standard to judge that conduct against. The Board did not provide nursing expert testimony that Luscombe breached any standard of care as a practicing nurse that would result in a violation of professional trust or confidence. There is no substantial or competent evidence in the record as a whole that Luscombe breached any standard of care when treating the infant on May 29, 2005. Therefore, no evidence exists to support the AHC and Board's attempt to use chapter 335 to discipline Luscombe. The AHC's decision must be reversed.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

POINT II

THE ADMINISTRATIVE HEARING COMMISSION ("AHC") ERRED IN FINDING CAUSE TO DISCIPLINE MARY LUSCOMBE BECAUSE THE AHC'S DECISION IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE PURSUANT TO §536.140, RSMO, IN THAT AHC'S DENIAL TO ADMIT EVIDENCE OF ORIGINAL SIGNATURES WAS PREJUDICIAL ERROR AND THE MISSOURI STATE BOARD OF NURSING FAILED TO PRESENT EXPERT TESTIMONY REGARDING STANDARD OF CARE WHICH IS NECESSARY TO FIND A VIOLATION OF SECTION 335.066.2 (4), (5), AND (12) RSMO.

Standard of Review:

This Court's review is de novo in determining whether the AHC correctly interpreted and applied Section 335.066.2 (4), (5) and (12), RSMo, which is a question of law, and this Court is to independently determine. *Psychare Mgmt., Inc. v. Dept. of Social Services, Division of Medical Services*, 980 S.W.2d 311, 312 (Mo. banc 1998). Review is de novo, and this Court has a duty to correct erroneous interpretations of law. *Miller v. Dunn*, 184 S.W.3d 122, 125-126 (Mo. App. 2006).

This Court must review the AHC's decision to find whether it is supported by a preponderance of substantial evidence on the record and if not supported then it is arbitrary and capricious. This Court must look at the whole record in reviewing the

agency's decision, not merely the evidence that supports its decision. *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 222 (Mo. banc 2003).

This Court may review claims of error regarding exclusion of evidence when an offer of proof is made. This rule applies to administrative agencies. *Boyd v. State Brd. of Reg. for the Healing Arts,* 916 S.W.2d 311 (Mo. App. 1995).

Argument:

A) The AHC's finding that Luscombe forged patients' signatures is not supported by substantial evidence.

The AHC erroneously concluded that Luscombe forged patient signatures on documentation turned into Integrity Home Care ("Integrity"). The AHC's finding was based on the sworn testimony from two witnesses: (1) Randa Kullman, an employee of Integrity Home Care who was previously disciplined for fraud and record-keeping by the board; and, (2) Don Lock, forensic document examiner.[59] The AHC concluded the documents gathered by Kullman and analyzed by Lock contained forged signatures from patients.[60] The AHC further concluded Luscombe forged the patients' signatures. Because the AHC's conclusion in this regard is not supported by substantial competent evidence in the record, finding grounds to discipline Luscombe's license for fraud should be reversed.

---

[59] L.F., Board Certified, p. 55, para.38 and p. 56, para.39, 40 and 41, and p. 64-68; L.F. AHC Certified Tr., Exhibit F.

[60] L.F., Board Certified, p. 64-68.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

An agency's decision must be supported by substantial evidence in the administrative record. §536.130.4, RSMo; see also, *Gard v. State Brd. of Reg. for the Healing Arts*, 747 S.W.2d 726, 729 (Mo. App. 1988). Substantial evidence is "evidence which, if true, would have a probative force upon the issues." S*tate ex rel. Rice v. Public Service Comm'n.*, 220 S.W.2d 61, 64 (Mo. banc 1949). The term "substantial evidence" requires a finding to be supported by competent, not incompetent, evidence. *Id.* at 64. Where the overwhelming weight of the evidence admitted into the agency record as a whole is contrary to the agency's findings, substantial competent evidence is missing such that the agency's decision should not stand. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222-23 (Mo. banc 2003). The standard of "substantial evidence" is not met in the situation where an agency's decision is contrary to the overwhelming weight of the evidence. *Lagud v. Kansas City Brd. of Police Comm'rs.*, 136 S.W.3d 786, 791 (Mo. banc 2004).

1) The Board's expert's testimony was merely speculation and does not provide substantial evidence necessary for the Board to meet its burden of proof.

In its first amended complaint, the Board claimed Luscombe fraudulently forged the patient signatures of clients J.B., L.F., E.J., M.N., K.S. and T.W.[61] In support of its forgery allegations the Board called Forensic Document Examiner Don Lock ("Lock") who testified that copies of signatures provided to him as identified by counsel for the Board with regard to signatures of patients J.B., L.F., E.J., M.N., K.S. and T.W., had

[61] L.F., Certified AHC Tr., P. 2-249 and Exhibits 30, 31, 32, 33, 34 and 35.

certain qualities which raised questions as to the authenticity of these signatures in Integrity's records.[62] Although Lock questioned the authenticity of the patient signatures identified, he could not say with certainty that the signatures were forged, could not identify any individual who purportedly forged the signatures nor say that Mary Luscombe forged any signatures.[63] Lock further could not say that the "known" signatures given to him by the Board's counsel were, in fact, the authentic signatures of J.B., L.F., E.J., M.N., K.S. and T.W.[64] He specifically testified that the individuals who signed the "questionable" signatures could have been an authorized representative of the patient.[65] Lock's opinion testimony about the authenticity of the signatures was without merit and resulted in mere speculation and conjecture.

After Lock's testimony, Patients E.J. and M.N. testified live before the AHC. Both patients identified the signatures that Lock found "questionable" as their own.[66] The Board's own expert, Lock, testified the signatures of Patients E.J. and M.N. were not authentic; when in fact they were authentic, as testified to by the signers themselves.[67] Lock's own inconsistent testimony by finding questionable signatures that were affirmed

---

[62] L.F., Certified AHC Tr., pp. 218-281.

[63] L.F., Certified AHC Tr., p. 253 lines 5-17; p. 277 lines 13-21.

[64] Id.

[65] L.F., Certified AHC Tr., p. 278 lines 6-9.

[66] L.F., Certified AHC Tr., pp. 372-374; 377-378.

[67] L.F., Certified AHC Tr., pp. 372-374; 377-378.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

by the individual testimony of the signer as genuine brings into question the reliability and accuracy of Lock's testimony. Lock's testimony is mere speculation and the Board has not provided substantial evidence in the record to support a finding for discipline of Luscombe.

2) The AHC's decision to exclude the admittance of original signatures was error.

At the AHC hearing, Luscombe tendered affidavits from J.B. and L.F. which identified the purported "questionable" signatures as their own.[68] The affidavits offered contained the **original, notarized signature** of each patient. The AHC, however, erroneously excluded the affidavits from use during Lock's **cross-examination** even though he testified that having the original signatures of the patient might change his opinions with regard to the case.[69] An offer of proof was made at the hearing preserving this matter for review.[70] *Boyd v. State Brd. of Reg. for the Healing Arts*, 916 S.W.2d 311, 316 (Mo. App. 1995). Lock testified that an original signature, as opposed to a photocopied signature would make his analysis more definite.[71] Lock in his own previous testimony as an expert testified that the original signature is better to evaluate

---

[68] L.F., Certified AHC Tr., Exhibits AA, BB, CC and Z.

[69] L.F., Certified AHC Tr., p. 287 lines 5-24.

[70] L.F., Certified AHC Tr., pp. 263, l. 6 – p. 268 and p. 287, l. 25 – p. 288, l.10; Exhibits AA, BB, CC and Z.

[71] L.F., Certified AHC Tr., p. 254 lines 13-16.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

and examine when determining forgery. *Boroughf v. Bank of America, N.A.*, 159 S.W.3d 498 (Mo. App. 2005). Specifically in *Boroughf*, Lock testified, "[h]ad I had the originals, then it would have been a positive opinion." *Id.* at 502. The Court also summarized Lock's testimony that "because he did not have the original to the Boroughf photocopy to examine, he could not positively identify the signature on the Boroughf photocopy as being Decendent's." *Id.* Yet, the AHC refused to allow Lock to examine the best document available, even though Lock, by his own admission and Missouri law, stated the original signature in the excluded affidavit would positively assist in the identification.

The AHC found Luscombe had forged the signatures for J.B. and L.F. because Lock's testimony was not "rebutted by evidence other than Luscombe's testimony."[72] Luscombe attempted to admit evidence from both J.B. and L.F. in the form of affidavits, testimony from the notary who witnessed the signatures or telephone testimony and was erroneously denied such an opportunity.[73] The refusal of admittance of the affidavits from J.B. and L.F was prejudicial to Luscombe as J.B. and L.F. were not able to travel or attend the hearing because of their physical disabilities.[74]

Further, the AHC's rulings were prejudicial to Luscombe as the very signatures that the Board relied upon in its decision were from her patients while employed with

---

[72] L.F., Board Certified, p. 20.

[73] L.F., Certified AHC Tr., p. 274, l. 22 – p. 275, l.1-21.

[74] Id.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Integrity Home Care. Luscombe's Integrity patients were often homebound because of medical conditions; such that they did not have the means or wellbeing to travel to Jefferson City to attend the hearing.[75] Therefore, the affidavits were the only way to have these patients testify at the hearing and the only way for Lock to examine an original signature. Both reasons for the admittance of the evidence by Luscombe were denied. Allowing the AHC to refuse evidence and then make a finding that Luscombe forged the signatures based on her failure to rebut the Board's evidence is prejudicial error. The AHC has great discretion when deciding what evidence will or will not be admitted into evidence. Admittance of the affidavits and/or allowing the witnesses to appear by telephone is within the AHC's discretion. However, the evidence that was excluded was competent evidence, was the type of evidence routinely heard or accepted by the AHC and its rejection in this case was clearly erroneous and an abuse of discretion.

Based on the testimony in the record, as well as affidavits erroneously excluded from the record by the AHC, the AHC's finding that Luscombe forged patient signatures is not supported by competent and substantial evidence in the record. Accordingly, the AHC's finding that Luscombe committed forgery and fraud must be reversed.

3) Luscombe did not violate § 335.066.2 (4), RSMo, when she received payment from Integrity Home Care.

The AHC found that Luscombe intentionally did not timely turn in the records for visits while employed with Integrity and therefore, she obtained a fee by fraud, deception

[75] L.F., AHC Certified Tr., p. 264, l. 10-24.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

and misrepresentation.[76] Luscombe admitted to turning in certain documents to Integrity late but she turned in other necessary documentation timely including nurse visit time and mileage summary which determines if a nurse is paid.[77] The nurse visit time and mileage summary is the document that insures nurses are timely and accurately paid.[78] The Board's witness, Ms. Kullman, started working for Integrity in March 2008 after Luscombe resigned from Integrity.[79] Ms. Kullman admitted that she did not review other documentation that was completed and turned in by Luscombe beside the telephonyny records.[80]

Evidence at the hearing showed Luscombe had turned in documentation, but such documentation was on "incorrect forms."[81] The information and documentation, although not in the correct form, was timely provided, in Integrity's possession and in the client's files.[82] Additionally, documentation regarding mileage and nurse visits that are required by Integrity in order for the nurse to be paid was not requested by Ms. Kullman;

---

[76] L.F., Board Certified, p. 71.

[77] L.F., AHC Certified Tr., p. 90, l. 8-p. 91, l. 6, Exhibit J.

[78] L.F., AHC Certified Tr., p. 90, l.19-23, Exhibit. J.

[79] L.F., AHC Certified Tr., p. 100, l. 3-6; L.F. Board Certified, p. 70.

[80] L.F., AHC Certified Tr., p. 186, 1.5- p. 188, 1.10.

[81] L.F., AHC Certified Tr., p. 173,l. 18-25 – p. 174, l. 11.

[82] L.F., AHC Certified Tr., p. 174, l. 4-11.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

which demonstrates that Integrity had timely documentation from Luscombe supporting the payments received by herself and Integrity.[83]

Integrity pays for "missed visits."[84] Ms. Kullman met with Luscombe and instructed her to complete the missed visit forms for visits identified on the telephony list that Ms. Kullman provided to Luscombe.[85] However, Ms. Kullman did not compare the telephony list with the nurse visit time and mileage summaries which would include clients who are not on the telephony system.[86] The missed visits that Luscombe completed and turned in August 2008 were completed based upon information provided to her from Integrity by Ms. Kullman.[87] Luscombe did not have any reason to question Ms. Kullman's direction or to question whether she had reviewed her nurse visit and mileage summaries with the dates that Ms. Kullman was requesting a "missed visit" form to be completed. Luscombe did not intend to falsify or deceive Integrity.

The Board brings up the issue of Medicaid and the Missouri Code of State Regulations (CSR) regarding Medicaid providers. No allegation was made in the First Amended Complaint that Luscombe violated a CSR, and the AHC's decision does not

---

[83] L.F., AHC Certified Tr., p. 176, l. 5-20.

[84] L.F., AHC Certified Tr., p. 182, l. 12-13 and L.F. Board Certified, p. 56, para.42.

[85] L.F., AHC Certified Tr., p. 184, l. 10 – p. 185, l. 8.

[86] L.F., AHC Certified Tr., p. 186, l. 5 – p. 188, l. 10.

[87] L.F., AHC Certified Tr., Exhibits 46, 47, 48, 49 and 50.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

address the CSR.[88] There was no evidence that Integrity was investigated by Medicaid or in trouble as a provider.[89]

B) Luscombe's conduct does not constitute incompetency and misconduct pursuant to §335.066.2(5) because the evidence does not support such a finding.

The record shows that Ms. Kullman admitted that timely documentation had been provided to Integrity by Luscombe but was not in the proper form.[90] Ms. Kullman further testified that she did not review all of the documentation in Integrity's possession regarding Luscombe's patient visits when she compiled the list of "missed visits."[91] There were no allegations or evidence of any harm to Luscombe's patients, only a paperwork issue which Luscombe worked with Integrity to fix. The Board did not provide any expert testimony that Luscombe breached a standard of care for its finding of incompentency and misconduct. The lack of expert testimony is discussed previously in this brief and Appellant directs the Court to that portion of her brief. The AHC's decision finding a violation of §335.066.2(5) is not support by the record as a whole, is arbitrary and capricious and should be reversed.

---

[88] L.F., Board Certified, p. 29-31 and p. 48- 72.

[89] L.F., AHC Certified Tr., p. 87, l. 25 – p. 88, l.4.

[90] L.F., AHC Certified Tr., p. 173,l. 18-25 – p. 174, l. 11.

[91] L.F., AHC Certified Tr. p. 186, l. 5 – p. 188, l. 10.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

C) Luscombe did not breach her professional trust while working at Integrity.

"Professional trust is the reliance on special knowledge and skills the professional licensure evidences."[92] The AHC's decision holds that Luscombe violated the relationship of professional trust or confidence with her employer and patients by "defrauding her employer."[93] As argued above, the AHC's decision is not supported by the record as a whole because Luscombe had submitted documentation necessary for the care of the patients. No patient was harmed. Further, Luscombe did not defraud her employer because she timely submitted documentation and continued to work with Integrity to provide all requested documentation. There is no expert testimony that Luscombe's failure to complete paperwork in a timely manner was a breach of the standard of care and therefore a violation of professional trust.

The AHC's finding of violation of professional trust pursuant to §335.066.2 (12) is not supported by the record as a whole and the AHC's decision is arbitrary and capricious and is not supported by a preponderance of substantial evidence on the record and must be reversed.

---

[92] L.F., Board Certified, p.63, AHC's Decision, citing *Trieseler v. Heimbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

[93] L.F., Board Certified, p. 72, AHC's Decision.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

POINT III

THE STATE BOARD OF NURSING ERRED IN FINDING THAT MARY LUSCOMBE'S LICENSE SHOULD BE REVOKED, BECAUSE THE BOARD'S DECISION IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE UPON THE WHOLE RECORD AND IS ARBITRARY, CAPRICIOUS AND UNREASONABLE PURSUANT TO §536.140, RSMO, IN THAT THE TESTIMONY AND EVIDENCE SUBMITTED BY LUSCOMBE AT THE DISCIPLINE HEARING WAS NOT REFUTED AND THAT THE REVOCATION OF HER LICENSE IS NOT REASONABLE.

Standard of Review:

This Court must review the agency's order to find whether it is supported by a preponderance of substantial evidence on the record and if not supported then it is arbitrary and capricious. This Court must look at the whole record in reviewing the agency's decision, not merely the evidence that supports its decision. *Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 222 (Mo. banc 2003).

If an agency's order is lawful, the court must determine if it is reasonable. *State ex rel. Koffman v. Pub. Serv. Comm'n.*, 154 S.W.3d 316, 320 (Mo. App. 2004). This Court must review the Missouri State Board of Nursing's disciplinary action to determine whether it is arbitrary, capricious, unreasonable and excessive or unreasonable. *Gard v. State Brd. of Reg. for the Healing Arts*, 747 S.W.2d 726 (Mo. App. 1988).

This Court must determine whether the Board in its order for revocation of Luscombe's nursing license abused its discretion under the facts of this case. *Gard v. State Brd. of Reg. for the Healing Arts*, 747 S.W.2d 726 (Mo. App. 1988). The evidence presented by Luscombe at the Board hearing was undisputed. *Schnell v. Zobrist,* 323 S.W.3d 403, 415 (Mo. App. 2010).

Argument:

A) The Board's revocation of Luscombe's nursing license is punitive.

The Board's disciplinary order revokes Luscombe's license to practice as a nurse in the state of Missouri.[94] Luscombe has been a licensed and practicing nurse in Missouri for over thirty years. She has never been subject to disciplinary action until now. Luscombe depends upon her nursing license to support herself and her family.

The purpose of licensing discipline is to protect the public not punish the licensee. *Boyd v. State Brd. of Reg. for the Healing Arts,* 916 S.W.2d 311, 316 (Mo. App. 1995); *Wasem v. Mo. Dental Brd.*, 405 S.W.2d 492, 497 (Mo. App. 1966). The discipline imposed by a licensing board must have some rational basis for preventing public harm. *Id.* Although agencies have discretion in assigning the level of discipline against the licensee, that discretion is not unlimited. See *Boyd v. State Brd. of Reg. for the Healing Arts*, 916 S.W.2d 311 (Mo. App. 1995). A reviewing court is empowered to reject the agency's discipline where it is against the weight of the evidence or is arbitrary,

[94] L.F., Board Certified, p. 81-82.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

capricious, and unreasonable. § 536.1400 .2 (6) RSMo.; See also, *Perry v. City of St. Louis Civil Service Comm'n*, 924 S.W.2d 861, 865 (Mo. App. 1996).

In *Boyd*, Missouri Court of Appeals explores the nature of punitive licensing discipline. 916 S.W.2d 311 (Mo. App. 1995). The court determined that suspension was too harsh of a discipline based on the evidence in the administrative record. *Id.* at 317. The facts of the case, in short, showed that Dr. Boyd practice medicine in Missouri without a valid license for two months. *Id.* After a disciplinary hearing, the board suspended Dr. Boyd's license for six months followed by probation for five years. Because substantial competent evidence in the record was absent to support the drastic discipline of suspension, the court of appeals reversed the board's imposition of discipline.

In support of its decision, the *Boyd* court explained that the primary purpose of statutes authorizing the board to discipline the licensee is to safeguard the public health and welfare. *Id. at 317*, citing *State Brd. of Reg. for the Healing Arts v. Levine*, 808 S.W.2d 440, 442 (Mo. App. 1991). An agency is required to make a decision based on "some kind of objective data rather than mere surmise, guesswork or 'gut feeling'." *Barry Service Agency Co. v. Manning*, 891 S.W.2d 882, 893 (Mo. App. 1995). An agency may not act in a totally subjective manner without guidelines or criteria, or without substantial evidence to support their determination. *Id.* at 893-94. Because the board presented no evidence in *Boyd* to indicate suspension was needed to protect the public, the court overturned the discipline imposed.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

1)The Board's revocation is an abuse of discretion.

To determine if the discipline assigned by the agency is an abuse of discretion, a reviewing court must look to see if the agency's decision is "against the logic of the circumstances" and indicates a "lack of careful consideration." *Mo. Real Estate Comm'n v. McCormick,* 778 S.W.2d 303, 308 (Mo. App. 1989). An abuse of discretion means a decision that defies reason and works an injustice. *Jennings v. City of Kansas City*, 812 S.W.2d 724, 736 (Mo. App. 1991). Where a licensing board ignores facts and circumstances in the record without consideration, such discipline should be overturned. *Gard v. State Brd. of Reg. for the Healing Arts,* 747 S.W.2d 726, 729 (Mo. App. W.D. 1988). "An agency which completely fails to consider an important aspect or factor of the issue before it acts arbitrarily and capriciously." *See Barry Service Agency Co. v. Manning*, 891 S.W.2d 882, 893 (Mo. App. 1995).

In the present case, evidence was presented by Luscombe at the disciplinary hearing; whereas the Board only filed the AHC's Decision.[95] Luscombe presented testimonial evidence through seven live witnesses including herself and two letters of support at the Board's hearing.[96]

Luscombe provided testimony from live witnesses regarding her character and professionalism. Tammy Cerny who was the grandmother of an infant who Luscombe cared for while working at Integrity testified that Luscombe did not miss any visits when

---

[95] L.F., Board Certified Tr., pp. 12-90.

[96] L.F., Board Certified Tr., pp. 12-90 and Exhibits 1, pp. 111 and 121.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

she provided care to her grandchild.[97] Judy Luscombe is Luscombe's daughter in law and licensed registered nurse who testified that she has worked with Luscombe in the past when providing in-home care and she has had positive experiences with Luscombe.[98] Anita Bosslet has known Luscombe almost her entire life and is also a nurse.[99] Ms. Bosslet testified that Luscombe has moral upstanding and integrity.[100] Conradine Gerling who knows Luscombe from Church testified that she had never known Mary to lie or commit fraud.[101] Katie Felten who is Luscombe's sister knows Luscombe to be morally upstanding and forthright.[102]

Monte Hanson was the former nursing home administrator at Riverdell Care Center when Luscombe worked there in 2007 as the Director of Nursing.[103] Mr. Hanson testified that Luscombe, "[w]as a DON that I knew that I could count on to take care of my residents on the floor. And that when problems came up, she would be there, be they with the residents, with the families or with the staff."[104] Specifically, Dr. Charles

---

[97] L.F., Board Certified Tr., p. 13, l. 3-23 and p. 14, 1.3-11.

[98] L.F., Board Certified Tr., p. 34, l. 14-21.

[99] L.F., Board Certified Tr., p. 40, l. 11-20.

[100] L.F., Board Certified Tr., p. 40, l. 21-25.

[101] L.F., Board Certified Tr., p. 32, l.21- p. 33, l.2 and p. 33. L. 19-23.

[102] L.F., Board Certified Tr., p. 41, l. 9 – 21.

[103] L.F., Board Certified Tr., p. 16, l. 5-16.

[104] L.F., Board Certified Tr., p. 31, l. 23-25, p. 32, l.1.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Abromovich stated in his correspondence that Luscombe "is an extensively experienced, dependable, and competent nurse. She has always displayed good judgment and compassion. I have trusted Mary in the past and would continue to do with any of my patients without hesitation."[105]

Luscombe has been licensed and practicing as a nurse for over thirty years without incident, until this action taken by the Board on May 14, 2008.[106] Luscombe's evidence as a practicing nurse does not support the Board's revocation of her license as there is no evidence necessitating the need to protect the public by revoking Luscombe's license.

"An administrative agency cannot disregard unimpeached or undisputed evidence unless the agency makes a specific finding that such testimony is not credible or not worthy of belief. *Schnell v. Zobrist*, 323 S.W.3d 403, 415 (Mo. App. 2010), citing *Lagud v. Kansas City Bd. of Police Comm'rs.*, 272 S.W.3d 285, 292 (Mo. App. 2008). No such finding was made by the Board with regard to testimony from Luscombe's supervisors, patients and colleagues. Therefore, the Board is required to take said evidence as true. The revocation of Luscombe's license is excessive, arbitrary, not rationally related to the evidence, is punitive in nature and there is no justification for such order in the certified record. The Board is charged with protecting the public, not punishment of its licensees. The Board's disciplinary order is excessive for Luscombe who has no prior violations or disciplinary actions and has never caused harm to any patient.

---

[105] L.F., Board Certified Tr., p. 117, Exhibit 1.

[106] L.F., Court Certified, p. 26 and 28.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

As argued above, the AHC's Decision's finding of fact incorrectly finds that the protocol requires the nurse to remain bedside which is not required in the protocol.[107] The AHC's decision is based on an erroneous fact and the subsequent discipline is baseless. This court should reverse the AHC's Decision but at a minimum, this matter should be remanded so that the Board can apply the corrected facts of the AHC Decision

C) The revocation of Luscombe's license was not reasonable.

Even if this court finds that there does exist some grounds to discipline, the Court must examine whether the discipline imposed is reasonable. *State ex rel. Koffman v. Public Serv. Comm'n.*, 154 S.W.3d 316, 320 (Mo. App. 2004). Luscombe had never had a complaint filed with the Board until 2007, thirty years after she was first licensed. There was no concern for public safety as Luscombe continued to be licensed as a registered nurse and work in such capacity without the Board asking the court to enjoin her license. The hearing before the AHC did not occur until September 8, 2009 over the course of three days and the decision by the AHC was not made until November 24, 2010. The Board held its hearing on March 4, 2011 and rendered its discipline order March 9, 2011. There was no urgency or emergency injunction requiring Luscombe to stop working as a nurse. Luscombe is not a threat to public safety. She is a caring nurse who has not harmed any patient and who has practiced without incident for over thirty years. The record does not support a revocation of Luscombe's license for failure to complete paperwork.

---

[107] L.F., Board Certified, p.48-72, AHC's Decision, para. 13.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

CONCLUSION

For the foregoing reasons, Mary Luscombe. respectfully requests this court to enter its order reversing the decision of the AHC, and vacating the Board's disciplinary order, or, in the alternative, reversing the Board's disciplinary order and remanding the case to the Board for reconsideration of the order considering the court's legal and factual findings inconsistent with the previous order. Mary Luscombe further requests an award of all costs incurred herein including attorney's fees as a result of the Board's actions and such other and further relief as the court deems just and proper under the circumstances.

MARIAM DECKER #37821
JULIA S. GRUS #49727
OLIVER WALKER WILSON LLC
401 Locust St., Suite 406
P.O. Box 977
Columbia , MO 65205-0977
573-443-3134
573-442-6323 – Fax
ATTORNEYS FOR APPELLANT
MARY LUSCOMBE.

Electronically Filed - Western Appellate - August 14, 2012 - 03:06 PM CDT

CERTIFICATE OF COMPLIANCE AND SERVICE

STATE OF MISSOURI)
) SS.
COUNTY OF BOONE)

Julia Grus, of lawful age, first being duly sworn, states upon her oath that on August 14, 2012, she served the foregoing Brief of Appellant on Respondent's attorney by efiling said Brief with the Missouri District Court of Appeals, Western District to: Margaret Landwher, Assistant Attorney General, P.O. Box 899, Jefferson City, MO.

I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 8605 words, excluding the title page, table of authorities, appendix, certificate of service and compliance and signature page and that the brief contains words in 13-point Times New Roman.

Julia Grus
Attorney

Subscribed and sworn to before me this 14th day of August, 2012 here in my