IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

NKWELLE LEONARD,)		
)	C.A. No.	K12A-05-004 JTV
Appellant,)		
)		
V.)		
)		
DELAWARE BOARD OF NURSING	(\tilde{t})		
)		
Appellee.)		

Submitted: October 15, 2012 Decided: January 30, 2013

Peter K. Schaeffer, Jr., Avenue Law, Dover, Delaware. Attorney for Appellant.

Patricia D. Oliva, Esq., Department of Justice, Dover, Delaware.

Upon Consideration of Appellant's
Appeal from Decision of
the Board of Nursing
AFFIRMED

VAUGHN, President Judge

Leonard v. Delaware Board of Nursing C.A. No. K12A-05-004 JTV January 30, 2013

OPINION

Nkwelle Leonard ("Leonard") appeals from a decision of the Delaware Board of Nursing ("the Board") finding that he violated Board rules by engaging in unprofessional conduct in the workplace. The Board found the hearing officer's recommended discipline to be too lenient, and modified Leonard's penalty to include: (1) a probationary term of no less than one year, (2) completion of 12 hours of continuing education credits in the area of sexual boundaries in the workplace and (3) the requirement that Leonard report his probationary status to his current employer and future employers. Leonard's probation can only be lifted subject to Board approval after he submits a written application that includes supporting documentation of his continuing education credits and evidence that he has reported his probation to employers.

FACTS

Leonard is a registered nurse who worked at Bayhealth Medical Center ("Bayhealth") in Dover, Delaware as a staff nurse at the time of the incident that gives rise to this appeal. Thaimesha Adkins ("Adkins") was also employed by Bayhealth as a patient care technician. Her primary responsibility was to draw blood samples from patients. On April 11, 2011, both Leonard and Adkins were working on the third floor, East wing of the Medical Center. Around 6:00 a.m., Adkins encountered the appellant at the nurse's station with his cell phone in hand. Leonard repeatedly

¹ The Board also modified the hearing officer's conclusions of law to remove reliance on the testimony of one witness. I have likewise not relied upon the witness's testimony in making the substantial evidence determination. This is explained later in the opinion. *See infra* pp. 10-12.

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asked for Adkins' phone number, but she refused him because her friend already had his number, and she was waiting for God to send her "the right match." After this exchange, Adkins continued on her way to a nearby patient's room to complete a physician ordered blood draw.

This particular patient was in isolation, and hospital policy required staff to change into an "isolation gown" before entering the room. Adkins knew where the gowns were located and donned one, but did not secure its ties tightly.² She was wearing a v-neck and scrub top underneath the gown. Adkins entered the room and stood to the right of the patient's bed, closer to the door, which was on the patient's left side. She began gathering her supplies to perform the blood draw on the patient's left arm when Leonard entered the room behind her.³ Adkins believed that he was going to do something with the patient, so she did not pay attention to him until he grabbed the collar of her gown and pulled it to look down her shirt. Adkins immediately said "stop," nudged him with her left elbow, and moved away to the right. Leonard stopped touching her at that point, but he continued to gesture toward her three or four times, close to her body, as if he was going to do it again. Adkins told him to stop three or four more times and Leonard told her to "shut up" in a low tone of voice. Following the last gesture, Adkins finally "got loud" and said, "Stop,

² Adkins and Leonard comment that the gowns are long and contain strings about ten to fifteen inches long. They tie in the back at both the neck and the waist.

³ Leonard asserts that the reason he entered the room was because Adkins requested that he stop the IV pump. The hearing officer did not find his testimony believable for several reasons. *See In re Nkwelle Leonard*, Del. Bd. of Nursing, Case No. 11-50-11, at 33-34, 37 (Oct. 18, 2011) ("Recommendation").

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Leo," and "I'm not playing with you." Leonard then discontinued his behavior. The two were in the room together for approximately five minutes after which Adkins did not see Leonard at the nurse's station or anywhere else for the rest of the day.

Following the incident, Adkins quickly completed the blood draw and called her sister, and then her pastor on the phone, both of whom advised her to report what happened. Adkins then asked the first nurse that she came across, Gail Mesa, for the name of the charge nurse on duty. Adkins tracked down the charge nurse, Crystal Nichols, but did not have the opportunity to speak with her privately. Mesa and Nichols both submitted written statements that describe Adkins as noticeably upset when they saw her shortly after the event, and they assert that she also made comments to that effect. Adkins next sought out the Nursing Coordinator, Charles Green, and informed him about what occurred between Leonard and herself. Bayhealth then conducted an internal investigation which resulted in the discharge of Leonard from his employment on April 21, 2011. Green also filed a complaint with the Division of Professional Regulation, seeking discipline against Leonard's license for his conduct.

Following the Division of Professional Regulation's investigation of Green's complaint, the Delaware Department of Justice filed a formal complaint with the Board. The assigned hearing officer conducted a two-day evidentiary hearing, and on October 18, 2011, issued her findings and recommendations to the Board. Leonard submitted written objections to the recommendation, and on February 8, 2012, the Board issued the disciplinary order that is the subject of this appeal.

STANDARD OF REVIEW

The Court has appellate jurisdiction over final agency decisions pursuant to 29 *Del. C.* § 10142. "An administrative board's final decision should be affirmed as long as there is substantial evidence to support the board's decision and the ruling is free from legal error." Substantial evidence is "more than a scintilla, but less than a preponderance of the evidence." Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." On appeal, the court does not weigh evidence, determine questions of credibility, or make its own factual findings. If there is substantial evidence and no mistake of law, the Board's decision must be affirmed.

DISCUSSION

Leonard claims that the Board's order was clearly against the manifest weight of the evidence in the record. In particular, he contends that Adkins' written complaint stated that she was wearing a lab coat, and not an isolation gown; that Adkins contradicted this statement during her testimony before the hearing officer; that it was physically impossible for him to commit the alleged actions if Adkins was

⁴ Delaware Inst. of Health Scis., Inc. v. Del. State Bd. of Nursing, 2011 WL 3247798, at *2 (Del. Super. July 29, 2011).

⁵ Gillespie v. Del. Bd. of Nursing, 2011 WL 6034789, at *2 (Del. Super. Nov. 17, 2011).

⁶ Majaya v. Sojourners' Place, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003).

⁷ *Id*.

⁸ City of Newark v. Unemployment Ins. Appeal Bd., 802 A.2d 318, 323 (Del. Super. 2002).

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wearing an isolation gown; that uncontroverted testimony established that Leonard did not have a cell phone; that evidence proves that the alleged incident did not occur in the patient's room; that Leonard only entered the patient's room to provide medical care; and that Leonard was inappropriately punished despite the hearing officer's finding that the alleged actions did not constitute a sexual offense. Leonard next posits two legal arguments that he contends demonstrate an abuse of discretion: (1) the hearing officer allowed Cassandra Wilkerson ("Wilkerson"), Adkins' supervisor, to testify in violation of her own sequestration order and Delaware Rule of Evidence 615 over objection of counsel and (2) the hearing officer improperly failed to strike the State's reference during closing to a medical chart that was not entered into evidence. Lastly, Leonard notes that the husband of the hearing officer was an employee of counsel for the appellant, in a business unrelated to the practice of law, approximately twenty-five years ago.

The Board contends that its decision is supported by substantial evidence and is free from legal error. It also argues that Leonard waived any bias challenge regarding the hearing officer by failing to object during the administrative proceedings.

Substantial Evidence

The Board found by a preponderance of the evidence that Leonard's actions on April 11, 2011 constituted a violation of Board rules. Specifically, the Board agreed with the conclusions of the hearing officer that Leonard violated Board of Nursing

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Rules 10.4.1 and 10.4.2.5,⁹ and, by extension, the Board's statute at 24 *Del. C.* § 1922(a)(8). Rule 10.4 deals with unprofessional conduct, and provides in pertinent part:

Nurses whose behavior fails to conform to legal and accepted standards of the nursing profession and who thus may adversely affect the health and welfare of the public may be found guilty of unprofessional conduct. . . . Unprofessional conduct shall include but is not limited to the following: . . . Committing or threatening violence, verbal or physical abuse of patients or co-workers or the public. 10

The Board's authority to discipline licensees for unprofessional conduct is derived from 24 *Del. C.* § 1922(a)(8).¹¹

There is substantial evidence in the record to support the Board's finding that Leonard's conduct was unprofessional and in violation of the aforementioned rules. The fact-finder in the administrative proceedings was the hearing officer, and her findings of fact are binding upon the Board.¹² In the case *sub judice*, the outcome of the administrative proceedings inevitably turned upon the credibility of Leonard, and that of Adkins. Their testimony presented the hearing officer with two irreconcilable

⁹ 24 Del. Admin. C. §§ 10.4.1, 10.4.2.5.

¹⁰ 24 Del. Admin. C. § 10.4.

¹¹ 24 *Del. C.* § 1922(a)(8) (providing that licensees may be sanctioned for "unprofessional conduct as shall be determined by the Board").

¹² 29 *Del. C.* § 8735(v)(1)(d) ("The findings of fact made by a hearing officer on a complaint are binding upon the board or commission.").

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accounts regarding what occurred at Bayhealth on April 11,2011. The hearing officer explicitly found Adkins to be more credible than Leonard, and accepted her story rather than Leonard's. In support of this finding, she noted that Ms. Adkins' version of the event was fairly consistent, while Leonard's was not; that Adkins was genuine when she stated that it was not her intention to get Leonard fired; and that Leonard lacked credibility due to his absolute denial of the events and evasive responses to certain inquiries. The hearing officer was certainly in a better position than the Court to assess the demeanor and veracity of each witness, and she provided clear reasons for questioning Leonard's testimony. There was no abuse of discretion in the hearing officer's credibility determinations.¹³

Leonard's attempts to poke holes in Adkins' account are unavailing. Adkins did, admittedly, contradict her written statement during her testimony regarding whether she was wearing a lab coat or isolation gown, but the hearing officer found this to be "inconsequential in light of her emotional state at the time she wrote her statement." The hearing officer further stated, "[s]he clarified repeatedly and adamantly during the hearing that she was wearing the gown, and that she was still upset when she wrote 'lab coat' in her statement." Regardless, this distinction really

¹³ See Tesla Indus., Inc. v. Schnee, 2005 WL 1229751, at *1 (Del. Super. May 24, 2005), aff'd, 888 A.2d 232 (Del. 2005) ("When reviewing a decision of an administrative board, this Court's role is not to make factual findings or to revisit the Board's credibility determinations, unless they constitute an abuse of discretion.").

¹⁴ Recommendation, at 31.

¹⁵ *Id*.

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only goes to Adkins' credibility, as the hearing officer ultimately concluded that Adkins was wearing the gown, which is consistent with both accounts. Leonard's contention that it is physically impossible to peer at someone's chest who is wearing an isolation gown is unaccompanied by a citation to the record for evidentiary support. The hearing officer accepted Adkins' testimony that she "tied it loosely," which appears to resolve the "physical impossibility" argument in the absence of evidence to the contrary.

The remainder of Leonard's contentions are largely unsupported by the record and immaterial to the punished conduct. Leonard's "uncontroverted" evidence that he had no cell phone on his person consists of his own testimony, and the fact that it is forbidden under Bayhealth policy. Adkins certainly does not dispute the existence of the policy, but she plainly controverts Leonard's claim. Similarly, Leonard's claim that the incident occurred outside of the patient's room was found incredible by the hearing officer, and is unsupported even by portions of the record to which he cites. Leonard's final contention that he was unfairly punished for a sexual offense lacks merit. The hearing officer may have contradicted herself regarding whether there was actual "sexual contact," but that was not a prerequisite for discipline in this case. 18

The report from Bayhealth to the Division of Professional Regulation states that Leonard "followed [Adkins] *into* a patient room and while standing between her and the door attempted to look down her blouse." State's Ex.1, Del. Bd. Of Nursing, Case No. 11-50-11, at 3 (emphasis added).

¹⁷ See Recommendation, at 39-40.

Clearly, there exists a sexual component to Leonard's actions that was important to the finding that his conduct was severely unprofessional. Any suggestion otherwise would be

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The Board was throughly apprised of the facts as determined by the hearing officer, and disciplined Leonard accordingly for unprofessional conduct in violation of Board Rules 10.4.1 and 10.4.2.5. ¹⁹ I find that the Board's decision was clearly based upon substantial record evidence.

Legal Error

Initially, it is important to note that it is well-settled that "administrative agencies operate less formally than courts of law"²⁰ and, it follows that the Delaware Supreme Court "has recognized that the Rules of Evidence do not strictly apply to administrative hearings."²¹ Nonetheless, the adversarial nature of such proceedings requires the Board to apply the rules of evidence "insofar as practicable."²²

Leonard's first legal argument is that the hearing officer committed legal error when she allowed Cassandra Wilkerson, Adkins' supervisor, to testify in violation of the sequestration order and Delaware Rule of Evidence 615. The decision of whether

disingenuous. Adkins is still subject to discipline notwithstanding the hearing officer's finding that he did not physically touch Adkins' breasts.

¹⁹ 24 Del. Admin. C. §§ 10.4.1, 10.4.2.5.

²⁰ Conley v. Capitol Homes, Inc., 2006 WL 2997535, at *7 (Del. Super. Aug. 31, 2006) (quoting Walden v. Georgia-Pacific Corp., 1999 WL 1611419, at *5 (Del. Super. Mar. 8, 1999)).

²¹ *Tenaglia-Evans v. St. Francis Hosp.*, 913 A.2d 570, 2006 WL 3590385, at *3 (Del. Dec. 11, 2006) (TABLE).

²² See Standard Distrib., Inc. v. Hall, 897 A.2d 155, 157 (Del. 2006) (discussing the application of the Delaware Rules of Evidence to Industrial Accident Board appeals).

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to enter a sequestration order lies within the discretion of the trial court.²³ "The purpose of sequestration is to prevent one witness from shaping his testimony in accordance with testimony given by other witnesses." The Delaware Supreme Court has held that the "[v]iolation of a sequestration order does not automatically result in the disqualification of a witness. . . . A defendant must show not only that a violation occurred but that it actually had a prejudicial effect." To demonstrate prejudice in this context, "the [appellant] must establish that the testimony of a witness was shaped or influenced by another witness."

The hearing officer allowed Wilkerson to testify over the objection of Leonard's counsel despite the fact that she had been present for the entirety of Adkins' testimony.²⁷ This decision, and the hearing officer's subsequent reliance on Wilkerson's testimony in her recommendation was, perhaps, in error, but, the Board was mindful of the alleged impropriety. In the Board's decision, it modified the hearing officer's conclusions of law to omit any reliance on the testimony of

D.R.E. 615 ("the court *may* order witnesses excluded so that they cannot hear the testimony of other witnesses") (emphasis added); *Taylor v. State*, 849 A.2d 405, 408 (Del. 2004).

²⁴ Scott v. State, 577 A.2d 755, 1990 WL 84692, at *2 (Del. June 7, 1990) (TABLE) (quoting Martin v. State, 433 A.2d 1025, 1034-35 (Del. 1981)).

²⁵ Jenkins v. State, 413 A.2d 874, 875 (Del. 1980) (quoting Fountain v. State, 382 A.2d 230, 231 (Del. 1977)).

²⁶ Fountain, 382 A.2d at 231.

²⁷ In pertinent part, the hearing officer said, "I don't think I can forbid you to not testify. You are here. You are willing to testify. And I think I can give it what weight I deem appropriate." Hearing Tr. at 138 (Sept. 14, 2011).

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Wilkerson. The Board found that after "[r]emoving any weight afforded to the testimony of Ms. Wilkinson [sic], the recommended conclusions of law . . . remain sufficiently supported by the findings of fact, and discipline remains appropriate... .."²⁸ Leonard is appealing the final decision of the Board. I find that the Board's refusal to consider Wilkerson's testimony in reaching its decision rendered the hearing officer's "error" harmless.²⁹ Substantial evidence exists apart from her testimony that supports the conclusion that Leonard's actions violated the Board's rules on unprofessional conduct. Moreover, Leonard has not demonstrated that Wilkerson's testimony was shaped or influenced in any way by Adkins' testimony. Wilkerson predominantly testified about the physical structure of an isolation gown, whether Adkins gossiped with the staff, hospital policy regarding IVs, blood draws, and when an isolation gown must be used. When asked, she acknowledged that Adkins had told her about the incident of April 11, 2011, but she did not discuss it further because she wasn't there. There is no indication or allegation that Wilkerson's testimony was tainted by Adkins' testimony. Accordingly, Leonard has not shown the existence of prejudice which would require a reversal of the Board's decision.

²⁸ In re Nkwelle Leonard, Del. Bd. of Nursing ,Case No. 11-50-11, at 3 (Feb. 8, 2012) ("Final Board Order").

²⁹ See Conley, 2006 WL 2997535, at *7 (holding, in an Industrial Accident Board appeal, that the potentially mistaken admission of inadmissible evidence was "harmless error" when "the Board's opinion d[id] not indicate it considered th[e] collateral evidence in rendering its decision").

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Similarly, Leonard's contention that the hearing officer committed legal error by refusing to strike the State's reference to a medical chart³⁰ not admitted into evidence during closing must fail. The Board explained that it is keenly aware that the arguments of counsel during closing statements are not evidence, and may not be relied upon in reaching findings.³¹ It also criticized the hearing officer for discussing openings and closings in her recommendation, but found that the recommendation did not rely upon the contents of the un-introduced medical record in any appreciable way.³² Leonard cites no legal authority to support his contention that the statement of counsel—in and of itself— constituted reversible error. I am inclined to agree with the Board. The statement may have been legally improper, but there is no indication that it influenced the hearing officer's or the Board's conclusions.³³

Alleged Bias

Leonard "notes" in his opening brief that the husband of the hearing officer was an employee of his counsel approximately twenty-five years ago. This single-sentence statement is not in the argument section of the brief, but to the extent that it suggests the hearing officer is biased, it can be summarily dismissed. Leonard makes no attempt to substantiate the merits of the bias claim, and, having never

³⁰ The State attempted to discredit Leonard by saying that if he really went in the room to turn off the IV pump, he would have recorded that in the patient's medical chart. The chart was never introduced into evidence.

³¹ Final Board Order at 3.

³² *Id*.

³³ See Conley, 2006 WL 2997535, at *7.

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objected or raised the issue during administrative proceedings, cannot maintain such an argument for the first time during this appeal.³⁴

CONCLUSION

Based on the foregoing, the decision of the Delaware Board of Nursing is *affirmed*.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary

cc: Order Distribution

File

³⁴ Buchanan v. Unemployment Ins. Appeal Bd., 1993 WL 331167, at *2 (Del. Super. July 28, 1993) (finding that failure to object to Unemployment Insurance Appeals Board member's participation in hearing meant issue was waived on appeal).