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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

BRANDON DUCK,

Plaintiff and Appellant,

v.

BOARD OF REGISTERED NURSING,
DEPARTMENT OF CONSUMER
AFFAIRS, STATE OF CALIFORNIA,

Defendant and Respondent.

A135099

(City & County of San Francisco
Super. Ct. No. CPF-11-511662)

Brandon Duck appeals from a judgment denying his petition for writ of administrative mandamus seeking to overturn a disciplinary order by the Board of Registered Nursing, Department of Consumer Affairs, State of California (the board), placing him on probation for a three-year period upon specified terms and conditions. He contends that the board erred by imposing discipline based on his single “aberrational” misdemeanor conviction for driving under the influence. Alternatively, he argues that the penalty imposed was arbitrary and capricious. We shall affirm the judgment.

Factual and Procedural History

Duck is a registered nurse licensed by the board. In November 2009, he was arrested by a California Highway Patrol officer for driving under the influence of alcohol. He was observed weaving, swerving, and crossing highway lines, at one point nearly colliding with a concrete barrier. His blood alcohol level at the time of his arrest was .20 percent. As a result of this incident, he pled guilty and was convicted of a misdemeanor

violation of Vehicle Code section 23152, subdivision (a), for driving under the influence of alcohol. He also admitted the special allegation pursuant to Vehicle Code section 23578 that his blood alcohol level was in excess of .15 percent.

Thereafter, an accusation was filed with the board alleging that Duck was subject to discipline pursuant to Business and Professions Code sections 490, 2761, subdivision (f), and 2762, subdivisions (b) and (c).¹ The matter proceeded to a hearing in December 2010 before an administrative law judge.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

Section 490 provides in relevant part: “(a) In addition to any other action that a board is permitted to take against a licensee, a board may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. [¶] (b) Notwithstanding any other provision of law, a board may exercise any authority to discipline a licensee for conviction of a crime that is independent of the authority granted under subdivision (a) only if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the licensee's license was issued.”

Section 2761, subdivision (f) provides: “The board may take disciplinary action against a certified or licensed nurse or deny an application for a certificate or license for any of the following: . . . [¶] Conviction of a felony or of any offense substantially related to the qualifications, functions, and duties of a registered nurse, in which event the record of the conviction shall be conclusive evidence thereof.”

Under 2762, subdivision (b), it is unprofessional conduct for a person licensed under this chapter to “[u]se . . . alcoholic beverages, to an extent or in a manner dangerous or injurious to himself or herself, any other person, or the public or to the extent that such use impairs his or her ability to conduct with safety to the public the practice authorized by his or her license.”

Under 2762, subdivision (c), it is unprofessional conduct for a person licensed under this chapter to “[b]e convicted of a criminal offense involving the prescription, consumption, or self-administration of any of the substances described in subdivisions (a) and (b) of this section. . . .”

In addition, the accusation also sought to subject Duck to discipline under section 2762, subdivision (d), which authorizes discipline upon a finding of confinement by the court for intemperate use of alcoholic beverages. Although Duck was ultimately found subject to discipline under this subdivision, the board has conceded for purposes of appeal that the provision is not applicable.

At the hearing, Duck testified that on November 12, 2009, he and a friend were at Candlestick Park for a San Francisco 49er football game. They arrived and began drinking around noon in anticipation of a game scheduled to begin at 5:00 p.m. He did not know how much he had to drink because he “wasn't paying attention to [his] drinking.” He drank over the course of “a lot of hours” until the game ended around 8:00 or 9:00 p.m. He knew he was too drunk to drive safely, but did so because he was told that he was not permitted to leave his car in the parking lot overnight.² He agreed his decision to drive nonetheless was irresponsible.

The administrative law judge issued a proposed decision that was ultimately adopted in full by the board. The decision finds that “the evidence did not establish that [Duck] has a history of alcohol or other substance abuse” or that his “practice of nursing was impaired by alcohol or other substance abuse, either with regard to his November 12, 2009 offense or at other times.” The decision recognizes that character witnesses and job evaluations “attested to his good character, lack of an alcohol abuse, dedication to the nursing profession and good work habits” and “good work performance.” The decision observes that this “offense appears to have been aberrational.” Nonetheless, the decision concludes that Duck was subject to discipline under each of the charging statutes. The decision rejects Duck’s argument that his DUI conviction is not substantially related to the qualifications, functions, or duties of a registered nurse. The decision relies on *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 770 in which the court held that “[c]onvictions involving alcohol consumption reflect a lack of sound professional and personal judgment that is relevant to a physician’s fitness and competence to practice medicine” and that driving under the influence of alcohol shows a serious breach of the

² We direct the clerk of this court to send a copy of this decision to the President of the San Francisco Recreation and Park Commission, care of the San Francisco City Attorney, so that the proper authorities may consider whether any change of policy in this regard is necessary or appropriate. Excessive alcohol consumption at such a sporting event undoubtedly is not unusual. Public interest would seem to require discouraging inebriated persons from driving, rather than compelling them to remove their car from the parking lot.

duty owed to society and such conduct by a physician endangers members of the public and tends to undermine public confidence and respect for the medical profession. The decision explains, “Although the statute in the *Griffiths* case involved two or more DUI convictions, its logic is also applicable to a nurse with a single DUI conviction. In this day and age, the dangers of drunk driving are well known, and particularly so for members of the health professions such as [Duck].” Finally, the decision notes, “Sections 2762, subdivisions (b) and (c), moreover, reflect a legislative determination that a DUI conviction demonstrates a danger to the public that is sufficiently related to the duties, qualifications, and functions of a registered nurse as to impose discipline.”

Duck’s license was placed on a three-year term of probation subject to some but not all of the conditions of probation included in the board’s recommended guidelines for disciplinary orders and conditions of probation. (See Cal. Code Regs., tit. 16, § 1444.5.)³ Under the conditions of his probation, Duck is permitted to work as a registered nurse but must be supervised by a registered nurse and may not himself work as a nursing supervisor or instructor, or work for a nurse’s registry, temporary agency, in-house nursing pool or in a float capacity, and must complete a college level nursing course and reimburse the board its costs for enforcement of the disciplinary matter. However, the order provides that “Under the facts and circumstances of the case, and bearing in mind that [Duck] has no prior history of discipline, alcohol abuse, or impaired functioning as a nurse, complainant has not shown that the following requested terms of probation are appropriate: physical examination; participate in a treatment/rehabilitation program for

³ Section 1444.5 of the Code of Regulations provides: “In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), the Board shall consider the disciplinary guidelines entitled: ‘Recommended Guidelines for Disciplinary Orders and Conditions of Probation’ (10/02) which are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the board in its sole discretion determines that the facts of the particular case warrant such a deviation—for example: the presence of mitigating factors; the age of the case; evidentiary problems.”

chemical dependence; abstain from use of psychotropic drugs; submit to tests and samples; mental health examination; and therapy or counseling program.”

Duck filed a petition for writ of administrative mandate challenging the board’s discipline order. Following briefing and oral argument, the trial court denied Duck’s petition, concluding that the “Board did not abuse its discretion or exceed its jurisdiction, nor was there error of law,” and that “[d]iscipline is warranted under B&P Sections 2761(f), 490, and 2762.”

Duck filed a timely notice of appeal.

Discussion

1. *Standard of Review*

“When a trial court rules on a petition for writ of mandate following a license revocation, it must examine the record for errors of law, and exercise its independent judgment to determine whether the weight of the evidence supported the administrative decision. [Citation.] After the trial court has exercised its independent judgment upon the weight of the evidence, an appellate court's function ‘is solely to decide whether credible, competent evidence supports [the trial] court’s judgment.’ [Citation.] The trial court's legal conclusions, however, are open to appellate review for errors of law.” (*Robbins v. Davi* (2009) 175 Cal.App.4th 118, 124.) As to review of the level of discipline imposed, the standard is abuse of discretion. “The propriety of a sanction imposed by an administrative agency is a matter resting in the sound discretion of that agency, and that decision will not be overturned absent an abuse of discretion.” (*Hughes v. Board of Architectural Examiners* (1998) 68 Cal.App.4th 685, 692.)

2. *The board did not err in imposing discipline under sections 490, 2761, and 2762.*

Contrary to Duck’s characterization of the board’s decision, the board found that he was subject to discipline under all three statutory provisions, not just section 2762. For the reasons discussed below, we conclude that discipline was properly imposed pursuant to each of these statutory provisions.

First, as noted, both the board and the trial court concluded that Duck's conviction was "substantially related" to his fitness to practice as required by sections 490 and 2761. The question of whether a conviction is substantially related to one's professional qualifications is one of law, not fact. (*Robbins v. Davi*, *supra*, 175 Cal.App.4th at p. 124; see also *Donaldson v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 955 [section 490 "requires a reasoned determination that the conduct was in fact substantially related to the licensee's fitness to engage in the profession"].)

In *Griffiths v. Superior Court*, *supra*, 96 Cal.App.4th at page 770, the court explained, "Convictions involving alcohol consumption reflect a lack of sound professional and personal judgment that is relevant to a physician's fitness and competence to practice medicine. Alcohol consumption quickly affects normal driving ability, and driving under the influence of alcohol threatens personal safety and places the safety of the public in jeopardy. It further shows a disregard of medical knowledge concerning the effects of alcohol on vision, reaction time, motor skills, judgment, coordination and memory, and the ability to judge speed, dimensions, and distance. [Citation.] [¶] Driving while under the influence of alcohol also shows an inability or unwillingness to obey the legal prohibition against drinking and driving and constitutes a serious breach of a duty owed to society." As noted by the administrative law judge, although the court in *Griffiths* was deciding whether more than one misdemeanor conviction involving alcohol consumption has a logical connection to the fitness to practice medicine, its reasoning is equally applicable to whether a single misdemeanor conviction is substantially related to the practice of nursing. Like the board and the trial court and for the reasons stated in *Griffiths*, we conclude that Duck's single misdemeanor conviction is substantially related to the practice of nursing within the meaning of sections 490 and 2761.

In addition, the trial court upheld the board's disciplinary action pursuant to section 2672, subdivisions (b) and (c). Duck acknowledges that after the filing of this appeal, Division Five of this district issued an opinion holding that a single misdemeanor DUI conviction is cause for disciplinary action against a registered nurse under section

2672, subdivisions (b) and (c). (*Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195.) In doing so, the court also concluded that “there is a nexus or logical relationship between the professional fitness of a registered nurse and the alcohol-related misconduct defined by section 2762, subdivisions (b) and (c).” (*Sulla*, p. 1204.) Duck argues that the decision in *Sulla* is wrong and urges this court to reject its reasoning. Much of Duck’s argument, however, centers on the interplay between sections 490 and section 2762 and the conclusion in *Sulla* that discipline may be imposed under section 2762 even if the board finds, as it did there, that there was no substantial relationship between the nurse’s single alcohol-related conviction and the practice of nursing. (*Sulla*, pp. 1204-1205 [administrative law judge’s “finding that Sulla’s conduct was not substantially related to his professional qualifications for purposes of the allegations under sections 490 and 2761, subdivision (f) cannot be used to circumvent the conclusive presumption that the conduct described by section 2762 amounts to unprofessional conduct”].) Unlike the situation in *Sulla*, the board in the present case made the “nexus” finding required under section 490. The board found a substantial relationship between Duck’s offense and the practice of nursing, the trial court found the evidence sufficient to uphold that finding, and we have upheld the trial court’s determination. Hence, we need not consider here whether discipline may be imposed under section 2762 absent such an express finding.

3. *The board’s decision did not violate Duck’s equal protection rights.*

Duck contends that the imposition of discipline based on a single, misdemeanor alcohol-related conviction violates his right to equal protection because section 2239, subdivision (a), applicable to physicians, requires two or more misdemeanor alcohol-related convictions to impose discipline. This argument was also rejected in *Sulla*. (*Sulla v. Board of Registered Nursing*, *supra*, 205 Cal.App.4th at p. 1207.) The court explained, “We give great deference to a legislative decision to treat members of one profession differently from members of another, and apply a ‘rational basis’ standard to such equal protection claims. [Citation.] . . . [¶] Physicians and nurses both provide health care, but their education, licensing requirements, and day-to-day duties are not the same. The

Legislature has developed comprehensive regulatory schemes for both groups, but there is no constitutional requirement that these schemes be identical. Appellant has not carried his threshold burden of showing that the state has adopted a classification that treats two or more *similarly situated* groups in an unequal manner. [Citation.] [¶] Assuming for the sake of argument that physicians and nurses are similarly situated when it comes to discipline for alcohol-related convictions, Sulla's conviction was not the sole basis for the discipline in his case. The Board found that he had used alcohol in a manner dangerous to himself or others, in violation of section 2762, subdivision (b), conduct that would also support a disciplinary action against a physician under section 2239, subdivision (a). Because even a single instance of using alcohol in a manner that is dangerous to oneself or others constitutes unprofessional conduct by a physician, a single conviction for driving under the influence (an act that is necessarily dangerous to self or others) could support a disciplinary proceeding against a physician. Sulla has not demonstrated that he has been treated more harshly than a physician would have been under similar circumstances, and we reject his equal protection claim." (*Sulla*, p. 1207.) We agree with the court's reasoning and reject Duck's equal protection argument.

4. *The discipline imposed by the board does not reflect an abuse of discretion.*

The disciplinary decision adopted by the board provides, "Pursuant to the board's disciplinary guidelines [citation], [Duck] will be placed on probation for three years." The guidelines list various "standard" terms of probation, and also several optional probation conditions, which the guidelines state are "usually required (in addition to the standard conditions 1-13) if the offense involves alcohol/drug abuse." The board imposed most of the standard conditions but because Duck had "no prior history of discipline, alcohol abuse, or impaired functioning as a nurse" the board declined to impose any of the optional conditions, which include participation in a treatment program, therapy, and submission to tests. The trial court found that Duck failed to establish that the board's discipline order was an abuse of discretion. The court explained, "The board applied a minimum three-year term of probation with certain conditions within its guidelines, and

explained the reasons for doing so, including rejecting certain conditions sought . . . in this case.”

On appeal, Duck argues that because he has no prior history of discipline or alcohol abuse and because his offense had no direct impact on his patients, “there is no justification for the board’s order prohibiting [him] from teaching nursing, supervising registered nurses, working in patient’s homes or floating among hospital units.” Probation subject to conditions is within the range of disciplinary actions recommended in the guidelines. As the board notes, “the recommended discipline for violation of section 2762(b), is either outright revocation or, in the case of a ‘first time offense with documented evidence of an on-going rehabilitation program,’ the guidelines recommend ‘minimum’ conditions of probation 1-19 [which include both the standard and optional probation conditions]. For violation of section 2762(c), the guidelines likewise recommend, at a minimum, probation conditions 1-19 in the case of a ‘first time offense with documented evidence of an on-going rehabilitation,’ and where the misconduct did not occur ‘on the job.’ ” The conditions challenged by Duck are only the standard probation conditions, which the guidelines explain “provide for consumer protection and establish a mechanism to monitor the rehabilitation progress of a probationer.” The more onerous and invasive optional conditions were not imposed. Contrary to Duck’s argument, the challenged conditions are reasonably designed to serve the identified purposes of probation. Although these conditions may appear harsh under the circumstances of this case, Duck has not established that the board abused its discretion or acted in the arbitrary, capricious or patently abusive manner required to disturb an agency’s disciplinary decision.

Disposition

The judgment is affirmed.

Pollak, Acting P.J.

We concur:

Siggins, J.

Jenkins, J.