

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RAM SINGH NEHARA,

Plaintiff and Appellant,

v.

CALIFORNIA BOARD OF REGISTERED
NURSING,

Defendant and Respondent.

F063038

(Super. Ct. No. CV271896)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Linda S. Etienne, Commissioner.

Anderson & Associates, Michael D. Anderson, and John W. Nam for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alfredo Terrazas, Gregory J. Salute and Heather Hua, Deputy Attorneys General, for Defendant and Respondent.

-ooOoo-

Appellant Ram Singh Nehara appeals from the trial court judgment denying him a writ of mandate. He sought a writ of mandate to overturn the administrative decision of the California Board of Registered Nursing (the board) revoking his license as a registered nurse; revocation was based on findings of gross negligence and

unprofessional conduct. We find that substantial evidence supports the trial court's decision, and the penalty imposed was not an abuse of discretion. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, the board issued Nehara a license as a registered nurse (RN). In June 2009, the board filed an accusation against Nehara; as amended, the accusation alleged two causes for discipline: gross negligence and unprofessional conduct. It alleged Nehara was employed as an RN at North Kern State Prison. He worked a shift from 10:00 p.m. to 6:00 a.m., during which he was assigned to provide care to three inmates who were psychiatric patients on suicide watch. His duties included checking on each patient every 30 minutes and documenting those checks in the patient observation records. He was accused of sleeping on duty, not making the required 30-minute checks on his patients, and falsifying the patient observation records to indicate he had made the checks. The accusation sought suspension or revocation of Nehara's nursing license. A hearing on the charges was held on March 22, 23 and 24, 2010. After taking evidence, the administrative law judge (ALJ) issued a proposed decision finding the facts alleged in the accusation to be true and revoking Nehara's nursing license. The board adopted the ALJ's decision on August 4, 2010.

The evidence presented at the administrative hearing was conflicting, but it included the following: On the night of March 18 to 19, 2007, Nehara worked an overtime shift from 10:00 p.m. to 6:00 a.m. He was assigned to the mental health overflow unit to provide nursing services to three suicidal inmates. One was located in the "horseshoe" area in the main medical building. The other two were in the contraband watch area in another building about 100 yards away. It was Nehara's responsibility to check on each patient every 30 minutes and make a notation in the patient observation report of what the patient was doing.

On March 19, 2007, at 5:55 a.m., Sgt. Alfred Castro saw Nehara in an administrative office, asleep in a chair with his feet up. He knocked on the window, then

opened the door. Nehara woke and Castro asked if he was all right. Nehara said “yah,” and stretched and yawned. Nehara then went back to the treatment and triage area. The same day, Castro wrote a memorandum to the associate warden reporting this incident; the memo was forwarded to Michael Cavanaugh, the supervising RN.

On the night of March 18, 2007, Leif Agbayani, a medical technical assistant, was assigned to do one-to-one observation of an inmate on suicide watch. The inmate was in cell 102 in the horseshoe area, across from cell 145, which contained one of Nehara’s assigned patients. Agbayani was required to sit and watch his inmate without taking a break unless he was relieved. He saw Nehara check on the inmate in cell 145 between 10:00 p.m. and midnight, but did not see him there again until 6:00 a.m. Approximately 3:00 a.m., Evelyn Dionisio, RN, asked when Agbayani had last seen Nehara, and he told her not for a few hours. Subsequently, between 6:00 and 6:30 that morning when Dionisio was making her end-of-shift report in the treatment and triage area, Nehara walked in and she overheard another nurse ask Nehara if he had just woken up; Nehara answered “yes.”

On the same night, Alan Tom, a correctional officer, was assigned the suicide watch in the contraband room, where Nehara’s other two inmates were located. The contraband room contained two cells next to each other; the door to the room is kept locked at all times. When the nurses came to check on the inmates, they knocked and Tom opened the door for them. He saw Nehara during the first part of the shift, before 12:00 or 12:30 a.m., and possibly at the end of the shift, but not between.

The patient observation records for each of Nehara’s three patients reflect entries for every half hour from 10:00 p.m. to 6:00 a.m.

Peggy Marquez, RN, testifying as an expert on behalf of the board, opined that Nehara was grossly negligent and substantially departed from the applicable standard of care when he failed to make his 30-minute rounds of his patients. He also displayed unprofessional conduct by accepting an overtime shift when he was too tired to stay

awake. Additionally, he was grossly negligent in falsifying medical records to indicate he had checked on his patients when he had not.

On October 15, 2010, Nehara filed a petition for writ of mandate in the trial court, seeking a writ directing the board to set aside its decision and reinstate his nursing license. The trial court entered judgment denying the petition. Nehara appeals.

DISCUSSION

I. Standard of Review

When an administrative agency decision is challenged by a petition for a writ of administrative mandamus, one of two standards of review is used in the trial court. (*Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359, 366.) If the administrative decision substantially affects a fundamental vested right, the trial court must exercise the independent judgment test. (*Id.* at p. 367.) All other decisions are subjected to substantial evidence review. (*Ibid.*)

The suspension or revocation of an existing license has been held to affect a vested right. (*Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 915.) Nehara's petition for a writ of mandate challenged the board's revocation of his nursing license. Accordingly, the trial court was required to use its independent judgment in reviewing the board's decision. In so doing, it was required to inquire whether the findings of the administrative agency were supported by the weight of the evidence. (*Lozano v. Unemployment Ins. Appeals Bd.* (1982) 130 Cal.App.3d 749, 754.)

“On appeal, however, “the question is not whether the administrative determination was supported by the weight of the evidence, but whether, ... there is substantial evidence in support of the *trial court's findings.*” [Citations.]’ [Citation.]” (*Aantex Pest Control Co. v. Structural Pest Control Bd.* (1980) 108 Cal.App.3d 696, 701.) “The judgment will be upheld if there is any substantial evidence in support of each of the trial court's essential findings; all contrary evidence will be disregarded on appeal [citation].’ [Citations.]” (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 388, fn. 9.) Nehara fails to distinguish the standard

applicable in review by the trial court from the standard applicable in review by this court. We reject his argument that we may review the administrative decision de novo. We review the trial court's decision to determine whether it is supported by substantial evidence.

II. Admissibility of Patient Records

Nehara contends the nursing records, including the patient observation records, of the three patients he was caring for on March 18 to 19, 2007, were improperly admitted in evidence in the administrative proceeding. He asserts (1) they were confidential records that could not be disclosed without the patients' consent and (2) they were required to be produced by the custodian of records with an affidavit attesting to their authenticity. They were admitted over his objections on the grounds of hearsay and lack of foundation. We find no error.

Evidentiary rulings are reviewed for abuse of discretion. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639.) The trial court correctly found that Nehara did not raise an objection based on the confidentiality of patient records at the administrative hearing. Accordingly, that objection was forfeited. (See *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Additionally, Nehara contends the board's subpoena failed to comply with the procedural requirements of Code of Civil Procedure section 1985.3, which apply when the records of a consumer are sought. He has not, however, pointed us to anything in the record that demonstrates the patient records were not produced pursuant to a properly served subpoena that complied with the statute. It is the appellant's burden to present an adequate record to establish any claimed error, and to provide specific references to the evidence in the record demonstrating the error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.)

Nehara contends a foundation for admission of the patient records was not laid because they were not accompanied by the affidavit provided for in Evidence Code section 1561 and there was no witness testimony providing that information. Evidence

Code section 1561 provides that business records produced in response to a subpoena duces tecum “shall be accompanied by the affidavit of the custodian or other qualified witness” containing specified information, including a statement that the affiant is the custodian of records or other qualified witness and has authority to certify them, the copy is a true copy of the records described in the subpoena, and the records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event. (Evid. Code, § 1561, subd. (a).) The affidavit may be used to lay the foundation for the records in lieu of witness testimony. (Evid. Code, § 1562.) Nehara asserts there was no affidavit or testimony; although the board’s attorney attempted to lay a testimonial foundation for the patient records through her own statements, Cavanaugh, the purported custodian of records, was silent.

A disciplinary hearing before the board “need not be conducted according to technical rules relating to evidence and witnesses Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.” (Gov. Code, § 11513, subd. (c); see Bus. & Prof. Code, § 2750.) Cavanaugh testified he was a supervising RN employed by the North Kern State Prison. In his job, he wrote policies and procedures and made sure they were carried out. He explained the protocol for nurses documenting patients’ conditions and their own observations. He identified the records of the patients Nehara was caring for on the night of March 18, 2007, as records of the prison. Nehara testified that Cavanaugh was director of nursing, and the supervisor of his supervisor. Nehara stated he made certain entries in the patient records identified by Cavanaugh, and placed his initials on them. When he did so, he was following the normal protocol of the prison. The testimony demonstrated the documents were prison records on which Nehara had routinely recorded his observations, in conformity with prison protocol. Consequently, although Cavanaugh did not expressly state that he was qualified to testify to the making of the records, there

was sufficient testimony about the records to establish they were “the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” (Gov. Code, § 11513, subd. (c).) Admitting the patient records was not an abuse of the trial court’s discretion.

III. Sufficiency of the Evidence

Nehara contends the evidence was insufficient to support various findings made by the trial court.

“An appellate court “must *presume* that the record contains evidence to support every finding of fact” [Citations.] It is the appellant’s burden, not the court’s, to identify and establish deficiencies in the evidence. [Citation.] This burden is a ‘daunting’ one. [Citation.] ‘A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient*. [Citation.]’ [Citation.]” (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.)

Nehara attempts to show the insufficiency of the evidence by introducing new evidence that contradicts the evidence presented at the administrative hearing and in the trial court, by challenging the credibility of the witnesses, and by stressing the evidence favorable to him. The trial court independently reviewed the evidence and found that the weight of the evidence supported the administrative decision. Substantial evidence in the record supports that conclusion.

A. Overtime shift

Nehara argues the evidence did not support the finding he was working an overtime shift on the night in issue. He bases his argument on his own testimony that the 10:00 p.m. to 6:00 a.m. shift was his regular shift. He fails to mention that Cavanaugh testified Nehara was working an overtime shift. Even if the finding were unsupported, it would not change the outcome because Nehara has not demonstrated that finding is prejudicial. Regardless whether he was working overtime or not, there was substantial evidence supporting the findings that Nehara was seen asleep during his shift, that he failed to check on his patients every half hour as he was required to do, and that he

nonetheless completed the patient observation records so they reflected that Nehara made all of the required checks on his patients.

B. Reliance on new evidence

Nehara contends the finding that Castro saw him sleeping at 5:55 a.m. was not supported by the evidence. He argues Castro did not sign in to work and begin his shift until five minutes after this occurred, at 6:00. He concedes that the evidence he relies on for this argument—a sign-in sheet and a time sheet—was not presented at the administrative hearing. The trial court sustained the board’s objection and excluded this new evidence when Nehara sought to have it admitted. Nehara presents no argument with supporting legal authority and reference to the record showing that the trial court’s decision to exclude the evidence was an abuse of its discretion. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [when an appellant asserts a point but fails to support it with reasoned argument and citations to authority, it will be treated as waived].) Consequently, he has not demonstrated any error in the exclusion of the evidence, and he may not rely on evidence that was not before the trial court to establish error in the judgment.¹

C. Credibility of witnesses

Nehara contends both the board and the trial court made incorrect determinations concerning the credibility of the witnesses against him. Citing *Guymon v. Board of Accountancy* (1976) 55 Cal.App.3d 1010, 1016, he asserts this court may make its own determination of credibility and should find the testimony of Castro, Tom, and Agbayani lacking in credibility. In *Guymon*, the court concluded that when the trial court reviews an administrative decision using the independent judgment standard, it “has the power and responsibility to weigh the evidence at the administrative hearing and to make its own determination of the credibility of witnesses.” (*Ibid.*) This rule applies because

¹To the extent Nehara has attempted to request judicial notice in this court of records that were not presented or were excluded in the trial court, he has not complied with the requirements of California Rules of Court, rule 8.809. Accordingly, we deny any such request.

under current practice the administrative hearing is conducted by an administrative law judge, but the decision is made by the agency; thus, the administrative decision maker does not view the witnesses and “[t]he advantage of view of the warm witnesses over examination of the cold record” is lost. (*Id.* at p. 1015.) The agency has no more exposure to the witnesses than the trial court. (*Ibid.*)

The standard of review in the appellate court after a trial court judgment in a mandamus proceeding is different, however.

“In a case wherein the trial court is authorized to conduct a limited trial de novo ... the province of the appellate court is analogous to that assumed by it in an ordinary civil appeal: only errors of law are subject to its cognizance, and a factual finding can be overturned only if the evidence received by the trial court, including the record of the administrative proceeding, is insufficient as a matter of law to sustain the finding.” (*Merrill v. Department of Motor Vehicles, supra*, 71 Cal.2d at p. 915.)

Fact finding and the credibility determinations that underlie it are the province of the trial court. In conducting a substantial evidence review, we ““have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.”” [Citations.]” (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) We review to determine whether substantial evidence supports the trial court’s decision. Consequently, we must accept the factual determinations made by the trial court, so long as they are supported by evidence that is “of ponderable legal significance” and “reasonable in nature, credible, and of solid value.” (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644.)

There was conflicting evidence regarding the credibility of each challenged witness. Nehara contends Castro was biased against him because a few months before March 18, 2007, Nehara had filed a formal complaint against Castro after Nehara was assaulted by an inmate allegedly due to a lapse in security for which Castro was responsible. Castro, however, testified he was unaware of Nehara’s complaint and he only learned of the assault on Nehara a week or so before the administrative hearing.

Nehara contends Agbayani was not credible because he was dozing off during the shift and because Cavanaugh, rather than Agbayani, wrote Agbayani's memo stating that Nehara failed to check on his patient between midnight and 6:00 in the morning. Agbayani testified to his recollection of events on the night of March 18, 2007. The only evidence that Agbayani was dozing off was Nehara's testimony to that effect, which the trial court viewed as self-serving; it also noted there was no corroborating report by Nehara of Agbayani sleeping on the job. There was also evidence that Nehara did not mention Agbayani dozing off in his statements to investigators. As to Agbayani's written statement, Agbayani testified he prepared the document at Cavanaugh's request; Cavanaugh helped him with the sentence structure, but did not change the information about the events that took place. There was no evidence that Cavanaugh wrote the statement for Agbayani.

Nehara asserts Tom's testimony was not credible because Tom could not recall that night when asked about it 11 days later, and Tom was biased against Nehara, who testified unfavorably to Tom's wife in her sexual harassment grievance proceeding. Tom testified that when Cavanaugh asked him 11 days later for a written statement, he was caught off guard and his mind went blank. He did his best, however, to remember how many times Nehara came in. He testified he saw Nehara two to three times on the night in issue; he did not see him more than 15 times. When the investigator asked him about his written statement, Tom said he was not sure of the third time he saw Nehara. He added the statement on the first page of exhibit 16, that he was not clear if Nehara entered at 4:45 a.m. as he had said in his initial written statement. Nehara's contention that Tom's testimony was contradicted by his log book entries is without merit; the log book was not offered in evidence at the administrative hearing, and it was excluded by the trial court.

Tom testified he had nothing against Nehara, and was grateful to him in a way. He stated Nehara was the only one who stepped forward to testify for his wife when she had a harassment grievance. Tom was not present at that hearing, but his wife told him

about it. Nehara testified his testimony in Tom's wife's case was unfavorable to her and caused her to lose her case. Nehara also asserts a tape recording of that proceeding and the transcript of the recording show Tom's bias. Those items were not submitted in the administrative hearing and were excluded by the trial court.

Although there was conflicting evidence regarding the credibility of each of these witnesses, there was nothing inherently incredible about their testimony; it was not unreliable as a matter of law. The determination of credibility was for the trial court to make. There was sufficient evidence to support the trial court's conclusion that the witnesses were credible.

D. Conclusion

"[A] factual finding can be overturned only if the evidence received by the trial court, including the record of the administrative proceeding, is insufficient as a matter of law to sustain the finding." (*Merrill v. Department of Motor Vehicles, supra*, 71 Cal.2d at p. 915.) Nehara has not demonstrated that the evidence supporting any of the trial court's material factual findings was insufficient as a matter of law.

IV. Penalty

"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. [Citations.] 'Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed.' [Citations.] This rule is based on the rationale that 'the courts should pay great deference to the expertise of the administrative agency in determining the appropriate penalty to be imposed.' [Citation.]" (*Hughes v. Board of Architectural Examiners* (1998) 68 Cal.App.4th 685, 692.)

Nehara argues the board abused its discretion in imposing its penalty because the evidence does not support the charges. Further, the board based its penalty on two charges: failing to provide the required nursing care to his patients and falsely documenting that he performed the required care; if the evidence supports only one of the charges, he argues, there is doubt that the board would have imposed the same penalty.

We have already addressed and rejected Nehara’s argument that the evidence was insufficient. Both charges were adequately supported.

Nehara also contends the board abused its discretion because the penalty was excessive. “‘One of the tests suggested for determining whether the administrative body acted within the area of its discretion is whether reasonable minds may differ as to the propriety of the penalty imposed. The fact that reasonable minds may differ will fortify the conclusion that there was no abuse of discretion.’ [Citation.]” (*Hughes v. Board of Architectural Examiners, supra*, 68 Cal.App.4th at p. 692.) Nehara was responsible for checking three suicidal patients every 30 minutes to ensure that they did not harm themselves. He failed to make those checks for several hours. In his absence, any one of them could have displayed warning signs which, if ignored, could have resulted in the patient injuring or killing himself. The board viewed Nehara’s failure to make the required patient visits and the falsification of the nursing records to reflect that he had made them as “an extreme departure from the standard of care,” which constituted unprofessional conduct and gross negligence. Reasonable minds may differ as to the propriety of the license revocation, and we find no abuse of discretion in the board’s choice of penalty.

DISPOSITION

The judgment is affirmed. The board is entitled to its costs on appeal.

PEÑA, J.

WE CONCUR:

WISEMAN, Acting P.J.

POOCHIGIAN, J.