

Mo. Admin. 05-1367 BN (Mo.Admin.Hrg.Comm.), 2006 WL 2926724

Administrative Hearing Commission

State of **Missouri**

JOSEPH **MOLER**, Petitioner

vs.

STATE **BOARD OF NURSING**, Respondent

05-1367 BN

September 5, 2006

### DECISION

\*1 Joseph **Moler** shall be granted a registered professional **nurse** (“RN”) license without probation.

#### Procedure

On September 9, 2005, **Moler** appealed the decision of the State **Board of Nursing** (“the **Board**”) granting him a probationary RN license. On September 30, 2005, we issued an order denying **Moler's** motion for stay of the terms of probation. Although our file includes a copy of a notice of petition in mandamus and prohibition that **Moler** filed in the Circuit Court of Cole County, we never received a writ of mandamus or prohibition from the court.

On January 20, 2006, we convened a hearing on the complaint. Nicole L. Sublett, with Carson & Coil, P.C., represented **Moler**. Assistant Attorney General Stacy Yeung represented the Board. Assistant Attorney General Jessica J. Hulting filed the Board's written argument. **Moler** filed the last written argument on July 18, 2006.

#### Findings of Fact

1. In 1996, when **Moler** was 18 years old, he drove while intoxicated. On May 21, 1997, in Dallas County, Texas, **Moler** was found guilty of driving while intoxicated (DWI).<sup>1</sup> The court placed **Moler** on unsupervised probation.

2. On June 4, 1998, the Prosecuting Attorney of Sheridan County, Wyoming, filed an information<sup>2</sup> charging that **Moler**:

did unlawfully destroy property by knowingly defacing, injuring or destroying property of another without the owner's consent, to-wit: in that JOSEPH MICHAEL **MOLER** did unlawfully destroy property of Powder River energy Corporation, 1095 Brundage Lane, Sheridan County, Wyoming, the cost of restoring said property being more than \$500.00[.]

On August 24, 1998, **Moler** pled guilty to the crime charged in the information. On September 10, 1998, the court sentenced **Moler** to prison for not less than one year nor more than two years, but suspended the execution of sentence and placed **Moler** on probation for four years. The court ordered:

The Defendant shall not possess or consume alcohol or controlled substances, shall not possess drug paraphernalia, nor will he frequent any place where intoxicants are the chief item of sale, including the bar portion of any restaurant.<sup>3</sup>

The court further ordered that **Moler** submit to random chemical tests to determine whether he consumed or ingested alcohol or controlled substances, that he undergo a substance abuse evaluation within 30 days and complete any counseling requirements, that he attend at least two AA or NA meetings per week with proof of attendance for the first year of probation, and that he pay restitution of \$4,889 to the victims.

3. In January 2000, when he was 21 years old, **Moler** committed another DWI offense in Independence, **Missouri**. At the time, **Moler** was living on his own and working; he had not started college yet. The Independence municipal court imposed unsupervised probation for two years and required **Moler** to complete a SATOP screening program, but he was not required to seek any sort of treatment for alcohol use.

\*2 4. In 2000, **Moler** got married and started college. His wife then became pregnant and had a son. She has stayed home taking care of their son, and **Moler** has provided for the family. While in college, **Moler** also worked full time as a hydrotherapy tech in the burn unit at Kansas University Medical Center. **Moler** started college in an EMT program, but changed his major to **nursing**.

5. At the end of 2000, **Moler** voluntarily put himself in an outpatient alcohol treatment program. **Moler** grew up in a “volatile household,” and felt that there were issues that needed to be resolved in counseling so that he could “move on” with his life. **Moler** completed six months of individual counseling and group counseling on an outpatient basis.

6. **Moler** does not drink alcohol and has been sober since 2000 or 2001.

7. In his last year of school, **Moler** was an intern at Truman Medical Center. He completed his internship in the ER. **Moler** graduated from **nursing** school with a 3.4 GPA. **Moler** has been employed at Truman since December 1, 2004.

8. **Moler** attends work regularly and has no unexcused absences. He has received positive performance evaluations and has never been disciplined, reprimanded or demoted for any work-related issues while employed at Truman.

9. **Moler's** father is in poor health. **Moler** and his family bought a house behind his father, and **Moler** helps care for him.

10. **Moler** understands the wrongfulness of his previous actions and has embraced a new moral code. At the time of the previous offenses, **Moler** was in his teens or barely in his twenties. His moral code no longer includes doing those things or drinking. His life is now focused on his work and his family.

11. **Moler** filed an application to sit for the RN licensure examination. On August 8, 2005, the Board issued an order granting a probated license if **Moler** successfully passed the licensure examination. **Moler** passed the examination.

12. The conditions of probation imposed by the Board include a chemical dependency evaluation. **Moler** has already submitted to such an evaluation, and the evaluator recommended no further treatment for **Moler**. The Board's conditions of probation also require that **Moler** submit to random drug and alcohol tests, the frequency of which would be in the Board's discretion, at **Moler's** expense.

13. **Moler** has complied with the Board's probationary chemical screening requirements during the pendency of this appeal, and the tests have shown no presence of alcohol or controlled substances in his system.

## Conclusions of Law

### I. Motion in Limine

On the day of the hearing, **Moler** filed a motion in limine to exclude closed records from evidence. At the hearing, **Moler** objected to Exhibit C, which is the court records from the 2000 DWI. Section 610.105, RSMo Supp. 2005,<sup>4</sup> provides:

If the person arrested is charged but the case is subsequently nolle prossed, dismissed, or the accused is found not guilty or imposition of sentence is suspended in the court in which the action is prosecuted, official records pertaining to the case shall thereafter be closed records when such case is finally terminated except as provided in section 610.120 and except that the court's judgment or order or the final action taken by the prosecutor in such matters may be accessed. If the accused is found not guilty due to mental disease or defect pursuant to section 552.030, RSMo, official records pertaining to the case shall thereafter be closed records upon such findings, except that the disposition may be accessed only by law enforcement agencies, child-care agencies, facilities as defined in section 198.006, RSMo, and in-home services provider agencies as defined in section 660.250, RSMo, in the manner established by section 610.120.

\*3 The exhibit shows that the court suspended the imposition of sentence and that probation was completed. Therefore, we agree that this record is closed under the statute, and we do not receive Exhibit C into evidence. However, **Moler** admitted during his hearing testimony that he "received a DUI in 2000" (Tr. at 25), and nothing precludes such testimony.

At the hearing, the Board requested leave to amend its answer to reflect the date of the guilty plea to the DWI as March 20, 2001, rather than 2002. **Moler** argues that he did not have sufficient notice of the Board's basis for probation. The Board's answer states the case number and court in which it alleged that **Moler** pled guilty to DWI. A mistake in the year does not amount to inadequate notice.<sup>5</sup> We grant leave to amend the answer, but Exhibit C is not admitted into evidence. Without Exhibit C, it is unclear whether **Moler** pled guilty to the DWI in 2000 or whether the court found him guilty. We infer that he either pled guilty or was found guilty, as **Moler** admitted that he "received a DUI" and was placed on probation for the offense.

## II. Statutory Basis for Probation

Section 620.149 provides:

1. Whenever a board within the division of professional registration . . . may refuse to issue a license for reasons which also serve as a basis for filing a complaint with the administrative hearing commission seeking disciplinary action against a holder of a license, the board, as an alternative to refusing to issue a license, may, at its discretion, issue to an applicant a license subject to probation.
2. The board shall notify the applicant in writing of the terms of the probation imposed, the basis therefor, and the date such action shall become effective. . . . If the board issues a probated license, the applicant may file, within thirty days of the date of delivery or mailing by certified mail of written notice of the probation, a written complaint with the administrative hearing commission seeking review of the board's determination. Such complaint shall set forth that the applicant or licensee is qualified for nonprobated licensure pursuant to the laws and administrative regulations relating to his or her profession. . . . Hearings shall be held pursuant to chapter 621, RSMo. The burden shall be on the board to demonstrate the existence of the basis for imposing probation on the licensee. . . .

The discretion whether to issue a probated license is now ours.<sup>6</sup> Because **Moler** filed the complaint, the reasons for probation appear in the Board's answer.<sup>7</sup>

Section 335.066.2(2) allows discipline when a licensee:

has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution pursuant to the laws of any state . . . for any offense reasonably related to the qualifications,

functions or duties of [an RN], for any offense an essential element of which is fraud, dishonesty or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed[.]

\*4 Under § 620.149.1, this is also a discretionary basis for issuing a probated license.

#### A. DWI

**Moler** admitted that he committed the offense of DWI in Texas in 1996 and in **Missouri** in 2000. We infer that he either pled guilty to or was found guilty of DWI. The record does not show the statutes or ordinances that he violated. In **Missouri**, violation of a municipal ordinance is a civil matter, not a criminal prosecution.<sup>8</sup> Even if **Moler** was found guilty or pled guilty to DWI in a criminal prosecution pursuant to the laws of any state, this Commission has previously concluded that DWI is not reasonably related to the qualifications, functions, or duties of the **nursing** profession.<sup>9</sup>

Moral turpitude is:

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything “done contrary to justice, honesty, modesty, and good morals.”<sup>10</sup>

This Commission has also previously concluded that DWI is not a crime involving moral turpitude, and the weight of authority from other jurisdictions recognizes that it is not.<sup>11</sup> We find no basis for subjecting **Moler's** license to probation on the basis of DWI.<sup>12</sup>

#### B. Property Destruction

Wyoming Statute § 6-3-201 provides:

(a) A person is guilty of property destruction and defacement if he knowingly defaces, injures or destroys property of another without the owner's consent.

**Moler's** counsel attempts to minimize his conduct by asserting that the crime involved an auto accident. There is absolutely no evidence of that in the record in this case.

The qualifications of an RN include good moral character.<sup>13</sup> Good moral character is honesty, fairness, and respect for the law and the rights of others.<sup>14</sup> The crime of property destruction shows a lack of fairness or respect for the law and the rights of others. The crime of property destruction is reasonably related to moral character.

The crime of property destruction is also contrary to justice, honesty and good morals, and is thus a crime of moral turpitude.<sup>15</sup> Therefore, we have a basis for granting a license to **Moler** subject to probation.

#### III. Exercise of Discretion

The Board has established a discretionary basis to issue **Moler** a probated license because he previously committed the crime of property destruction. Bad conduct and a guilty plea cannot preclude an applicant from demonstrating that he has rehabilitated himself.<sup>16</sup> Therefore, we may consider the nature and seriousness of the original conduct that gave rise to the charge and plea;

the nature of the crime pleaded to and its relationship to the profession for which certification is sought; the date of the conduct and plea; the conduct of the applicant since then and since any release from imprisonment or probation; the applicant's reputation in the community; and any other evidence relating to the extent to which the applicant has repented and been rehabilitated.<sup>17</sup> In order to demonstrate rehabilitation after committing a crime, license applicants must show that they understand the wrongfulness of their actions and have embraced a new moral code.<sup>18</sup>

\*5 The incident of property destruction was eight years ago, when **Moler** was very young, and is not directly related to the **nursing** profession. **Moler** was required to make restitution and completed probation for the offense. The fact that **Moler** violated the terms of that probation by drinking alcohol and having another DWI causes some concern. However, since that time, **Moler** completed an intensive treatment program, has stopped drinking, and has had no further offenses. **Moler** has also married, fathered a son, and provides for his family. In addition, **Moler** has bought a house behind his ailing father and moved there to help care for him. We have found as a fact that **Moler** understands the wrongfulness of his previous actions and has embraced a new moral code that does not include doing such things. **Moler** has established that he is rehabilitated and is unlikely to have recurrences of his past behavior.

The primary purpose of professional licensing is to protect the public.<sup>19</sup> “[T]he license granted places the seal of the state's approval upon the licen[see.]”<sup>20</sup> **Moler** has already complied with one condition of probation by having a chemical dependency evaluation, and the evaluator found no need for further treatment. The conditions of probation that the Board has imposed include chemical testing that **Moler** has to pay for whenever the Board, in its discretion, requests it. **Moler** has abstained from alcohol since 2000 or 2001. He has been employed in a **nursing** capacity since his graduation in 2004 and has had positive performance evaluations. We recognize that we denied a stay of the probationary terms during the pendency of the appeal, based on the allegations in the Board's answer. **Moler** complied with the chemical screening requirements and has been free of drugs and alcohol. Now that we have heard the evidence, we are convinced that **Moler** is rehabilitated and has changed his life. We see no public protection purpose that would be served by granting **Moler** a probated license and requiring him to continue to comply with requirements such as chemical screening.

#### IV. Redaction

**Moler** requests that we order the Board to issue a redaction of its previously published statements regarding allegations against **Moler**, including reports to the National Practitioner Data bank and reports in the Board's regular licensure newsletter. Although we would strongly encourage the Board to notify the National Practitioner Data bank that **Moler** has been issued a license without probation and to report in its newsletter that **Moler** has prevailed in his appeal and has been granted a license without probation, we have no authority to superintend the Board's procedures.<sup>21</sup> We may only make findings of fact and conclusions of law in the case before us.<sup>22</sup>

#### V. Constitutional Issues

**Moler's** reply to the Board's answer asserts that § 620.149 and the provisions of Chapter 335, RSMo, violate his right to due process and equal protection. This Commission does not have the authority to declare a statute unconstitutional,<sup>23</sup> and **Moler** has prevailed on the merits.

#### VI. Attorney Fees and Costs

\*6 **Moler** requests an award of attorney fees and costs herein. This request is premature. Section 536.087.

#### **Summary**

**Moler** shall be granted an RN license without probation.

SO ORDERED on September 5, 2006.

JOHN J. KOPP  
Commissioner

Footnotes

- 1 The computerized court records contain very little discernable information. (Ex. A.) The records show a “verdict date” of May 21, 1997. From this we infer that **Moler** was found guilty. The form includes no blank indicating a plea of guilty. **Moler** does not dispute that he committed the crime.
- 2 Ex. B.
- 3 Ex. B.
- 4 Statutory references are to the 2000 Revised Statutes of **Missouri**, unless otherwise noted.
- 5 See *Duncan v. Missouri Bd. for Arch'ts, Prof' Eng'rs & Land Surv'rs*, 744 S.W.2d 524, 539 (Mo. App., E.D. 1988).
- 6 *State Bd. of Regis'n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App., K.C.D. 1974).
- 7 *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App., E.D. 1984).
- 8 *City of Cape Girardeau v. Jones*, 725 S.W.2d 904, 906 (Mo. App., E.D. 1987).
- 9 *State Bd. of Nursing v. Fitchpatrick*, No. 04-0898 BN (Mo. Admin. Hearing Comm'n, March 1, 2005). The Board does not claim that an essential element of DWI is fraud, dishonesty or an act of violence.
- 10 *In re Frick*, 694 S.W.2d 473, 479 (Mo. banc 1985) (quoting *In re Wallace*, 19 S.W.2d 625 (Mo. banc 1929)).
- 11 *Fitchpatrick*. **Moler** cites the Court of Appeals' decision in *KV Pharmaceutical Co. v. Missouri State Bd. of Pharmacy*, 2000 WL 248075 (Mo. App., W.D. 2000), which reversed the circuit court's judgment affirming our decision and the Board of Pharmacy's imposition of probation. However, that decision is unreported because the case was transferred to the Supreme Court of **Missouri**, which affirmed our decision and the Board of Pharmacy's imposition of probation. *KV Pharmaceutical Co. v. Missouri Bd. of Pharmacy*, 43 S.W.3d 306 (Mo. banc 2001).
- 12 **Moler** argues that there was no proof that he pled guilty to or was found guilty of the 2000 DWI. **Moler** admitted that he had the DWI, and we infer that he either pled guilty or was found guilty. However, because we conclude that it is not a crime of moral turpitude or reasonably related to the qualifications, functions, or duties of the profession, this is inconsequential.
- 13 Section 335.046.1.
- 14 *State ex rel. McAvoy v. Louisiana Bd. of Med. Examiners*, 115 So.2d 833, 839 n.2 (La. 1959), and *Florida Bd. of Bar Examiners Re: G. W. L.*, 364 So.2d 454, 458 (Fla. 1978).
- 15 Although we could conclude that violence is an essential element of property destruction, the Board does not allege that fraud, dishonesty, or an act of violence is an essential element of the crime.
- 16 *State Bd. of Regis'n for the Healing Arts v. DeVore*, 517 S.W.2d 480, 484 (Mo. App., K.C.D. 1974).
- 17 *DeVore*, 517 S.W.2d at 484.
- 18 *Francois v. State Bd. of Regis'n for the Healing Arts*, 880 S.W.2d 601, 603 (Mo. App., E.D. 1994).
- 19 *Lane v. State Comm. of Psychologists*, 954 S.W.2d 23, 25 (Mo. App., E.D. 1997).
- 20 *State ex rel. Lentine v. State Bd. of Health*, 65 S.W.2d 943, 950 (Mo. 1933).
- 21 *Missouri Health Facilities Review Committee v. Administrative Hearing Comm'n*, 700 S.W.2d 445, 450 (Mo. banc 1985).
- 22 Section 621.120.
- 23 *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982).

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