

15-1014

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOHNATHAN LOWELL MCCLANAHAN, RN,
Petitioner,

v.

Civil Action No. 15-AA-58
Judge Louis H. Bloom

WEST VIRGINIA BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL NURSES,
Respondent.

FINAL ORDER

Pending before the Court is a *Petition for Appeal* filed by the Petitioner, Johnathan Lowell McClanahan, by counsel, Lisa Lilly, on May 4, 2015. The Petitioner appeals a *Final Order* entered by the Respondent, the West Virginia Board of Examiners for Registered Professional Nurses (Board), on March 30, 2015. The *Final Order* adopted the *Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommended Order (Decision)*, which concluded that the Petitioner's use of marijuana rendered him incompetent or unfit to practice as a registered nurse. Upon review of the record and the applicable law, the Court finds and concludes as follows.

FINDINGS OF FACT

1. The Petitioner holds a professional nursing license, numbered 85945 and issued by the Board.
2. In November 2013, the Petitioner was offered a position as a registered nurse at Raleigh General Hospital (RGH), conditioned upon successfully passing a pre-hire drug screen.
3. The Petitioner's drug screen returned positive for marijuana, so RGH terminated his employment and filed a *Complaint* against the Petitioner with the Board on November 26, 2013.

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KAWHA COUNTY CIRCUIT COURT

4. The Board commenced its investigation, and the matter proceeded to a hearing before the hearing examiner, Administrative Law Judge Jack McClung, on October 9, 2014. The following evidence and testimony were adduced at the hearing.

5. Jessica Troche, a phlebotomist at RGH laboratory, collected the subject urine sample from the Petitioner on November 18, 2013.¹ At the hearing, she explained the chain of custody protocol in detail, recounting every step she takes when she administers or oversees a urine sample test and confirming that she followed these steps when she took the Petitioner's sample.²

6. The Petitioner's specimen was collected as a split sample. As such, Ms. Troche transferred the Petitioner's sample into two vials—Sample A and Sample B—and both vials were sealed in the same package to be mailed to the testing laboratory, Aegis Laboratory in Nashville, Tennessee.³

7. On November 18, 2013, as a part of the "Forensic Drug Testing Custody and Control Form," the Petitioner certified, "I provided my specimen to the collector; that I have not adulterated it in any manner; that each specimen bottle/vial used was sealed with a tamper-evident seal in my presence and that the information provided on this form and on the label affixed to each specimen is correct."⁴

8. Aegis Laboratory tested Sample A twice, once in a screening test and again in the confirmation test.⁵ Aegis Laboratory determined that the Petitioner's urine specimen in Sample A tested positive for marijuana.⁶

¹ Ex. 4, Bd. Hr'g, Oct. 9, 2014.

² Troche Test., Bd. Hr'g Tr. 17–29, Oct. 9, 2014.

³ *Id.* at 19, 26–28; Ex. 4, Bd. Hr'g.

⁴ Ex. 4, Bd. Hr'g.

⁵ Aukerman Test., Bd. Hr'g Tr. 47.

⁶ Ex. 2, Bd. Hr'g.

9. When the Petitioner disputed the results based on Sample A, Sample B was sent to be tested at a different federally certified laboratory, Quest Diagnostics laboratory, which reconfirmed a positive result for marijuana.⁷

10. Dr. Douglas Aukerman, a licensed physician and certified medical review officer, appeared as a witness for the Board. He testified that he is the founder and president of Aukmed, Inc., a company that provides medical review services for employer drug programs.⁸ Dr. Aukerman, through his company, Aukmed, has a contract with LifePoint Hospital Systems (LifePoint), the parent company of RGH, to serve as the medical review officer and review and analyze drug screens for all hospitals owned by LifePoint, including RGH.⁹

11. Dr. Aukerman oversaw the testing on Sample A and Sample B and confirmed that a proper chain of custody was utilized.¹⁰

12. Dr. Aukerman testified that a false positive for marijuana in this case was not medically or scientifically possible because: (1) none of the medications Petitioner had taken contained THC; and (2) mass spectrometry testing was performed twice on Sample A and once on Sample B, and each test was independently positive.¹¹

⁷ Aukerman Test., Bd. Hr'g Tr. 47-48; Ex. 3, Bd. Hr'g.

⁸ *Id.* at 34-35.

⁹ *Id.* at 37-38. Dr. Aukerman's resume was admitted as Exhibit 5 at the hearing.

¹⁰ *Id.* at 48.

¹¹ *Id.* at 48-51.

STANDARD OF REVIEW

Under W. Va. Code § 29A-5-4, the Court may affirm the decision of a state agency or remand the case for further proceedings. The Court shall reverse, vacate, or modify the decision of the agency if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.¹²

Regarding reversal of an administrative decision on grounds that the decision is “clearly wrong” or “arbitrary and capricious,” the West Virginia Supreme Court has explained these standards of review “are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.”¹³ “Substantial evidence” is “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.”¹⁴

DISCUSSION

13. The Petitioner raises the following seven assignments of error:

- i. Errors and deficits within the chain of custody for both Aegis and Quest laboratories’ urine drug testing;
- ii. The Petitioner’s scientific evidence was excluded;
- iii. No evidence was produced regarding the criminality of ingesting or smoking and no evidence that the Petitioner’s alleged use was intentional;
- iv. No reasonable basis existed and no law was cited to support the Board’s conclusion that a urine test positive for marijuana use is sufficient to conclude that the Petitioner is “guilty of conduct

¹² W. Va. Code § 29A-5-4.

¹³ Syl. pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

¹⁴ *Id.* at syl. pt. 4.

derogatory to the morals or standing of the profession of registered nursing;”

- v. No reasonable basis existed and no law was cited to support the Board’s conclusion that a urine test positive for marijuana use is sufficient to conclude that the Petitioner is “unfit or incompetent to practice registered professional nursing by reason of habits or other causes;”
- vi. The Board failed to meet its burden of proof, so the Board’s decision to suspend the Petitioner’s license is beyond the Board’s statutory authority; clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and/or arbitrary and capricious;
- vii. The Petitioner’s attorney provided ineffective assistance of counsel.

14. Under W. Va. Code § 30-7-11,

The board shall have the power to deny, revoke or suspend any license to practice registered professional nursing issued or applied for in accordance with the provisions of this article, or to otherwise discipline a licensee or applicant upon proof that he or she Is unfit or incompetent by reason of negligence, habits or other causes; or . . . Is guilty of conduct derogatory to the morals or standing of the profession of registered nursing. . . .

Chain of Custody

15. The Petitioner contends that because Ms. Troche did not explain how the specimen cup was stored, handled, cleaned, and sterilized prior to it being given to the Petitioner, the “chain of custody” of the sample was not proven and, therefore, the Board did not prove by a preponderance of the evidence that the Petitioner used marijuana. The Petitioner further alleges that the Board did not meet its burden because the Board did not produce Aegis or Quest Diagnostics representatives to verify that proper chain of custody protocols were followed.

16. Under West Virginia law, a decision on chain of custody will not be disturbed on appeal absent an abuse of discretion.¹⁵ Further, “[t]he mere possibility or speculation that evidence

¹⁵ See *Stewart v. W. Va. Bd. of Examiners for Registered Prof'l Nurses*, 197 W. Va. 386, 389, 475 S.E.2d 478, 481 (1996).

could have been tampered with does not constitute sufficient grounds for exclusion.”¹⁶ Albeit in the context of criminal trials, the West Virginia Supreme Court has stated:

To allow introduction of physical evidence into a criminal trial, it is not necessary that every moment from the time evidence comes into the possession of a law enforcement agency until it is introduced at trial be accounted for by every person who could conceivably come in contact with the evidence during that period, nor is it necessary that every possibility of tampering be eliminated; it is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.¹⁷

17. The Petitioner neither cites to law nor anything in the record to support his assertions that the evidence was somehow tainted. The Petitioner does not point to any evidence that suggests the samples were tampered with. The Petitioner’s allegations rest solely on speculation.

18. The evidence adduced at the hearing supports the Board’s finding that proper chain of custody protocols were utilized. Ms. Troche testified in detail as to the chain of custody, explaining the chain of custody protocol she followed. She testified that the specimen cup is sealed inside the drug test kit until it’s opened in front of the Petitioner: “this is actually opened up in front of the donor as well so they know that it’s a new container. I actually make them watch me open this seal, too, so they know it’s not something that’s been tampered with. This is the urine sample that they initially take into the bathroom with them.”¹⁸ Further, the Petitioner verified upon signing the “Forensic Drug Testing Custody and Control Form” that the specimen was unadulterated. Dr. Aukerman testified affirmatively that proper chain of custody procedure was utilized.

19. Accordingly, the Court is of the opinion that the Board did not abuse its discretion in finding that the proper chain of custody protocol was followed.

¹⁶ *State v. Davis*, 164 W. Va. 783, 789, 266 S.E.2d 909, 913 (1980).

¹⁷ *Id.* 786–787, 911–912.

¹⁸ Troche Test., Bd. Hr’g Tr. 23–24.

Excluded Scientific Evidence

20. The Petitioner contends the Board improperly excluded the Petitioner's scientific evidence and improperly denied the Petitioner's request to personally qualify as an expert in relation to chain of custody or in relation to interpretation of laboratory studies.

21. Upon review of the record, at the hearing before the Board, the Petitioner did not attempt to have himself qualified as an expert and did not present any scientific evidence much less have any scientific evidence excluded. Further, neither the *Petition* nor the *Memorandum of Law* identifies what scientific evidence was excluded. Accordingly, the Court finds this assignment of error meritless.

22. In the Petitioner's *Reply Brief*, the Petitioner raises for the first time the issue of newly discovered evidence. The Petitioner contends that Binicki Shrewsbury, MS, LSW, LPC, AADC of FMRS Health Systems, Inc. evaluated the Petitioner for psychological addiction and found there was not enough information to find that the Petitioner needs substance abuse treatment. The Petitioner contends that the Board did not disclose this information to the Petitioner's prior counsel.

23. The Court finds Ms. Binicki's conclusions irrelevant to the issues presented here. The issues presented on appeal are: (1) whether the Board proved by a preponderance of the evidence that the Petitioner used an illicit drug and (2) whether use of an illicit drug is "derogatory to the morals" of the nursing profession or whether use of an illicit drug renders the Petitioner "unfit" to be a nurse. Assuming Ms. Shrewsbury's report is entitled to weight and consideration, her conclusion regarding substance abuse treatment does not relate to whether the Petitioner's positive drug tests provide ample ground for the Board to conclude, pursuant to the West Virginia Code and the West Virginia Code of State Rules, either that such conduct is "derogatory

to the morals” of the profession or that such conduct renders the Petitioner “unfit” to be a nurse. These standards do not require a finding that a nurse needs substance abuse treatment. The Court finds this assignment of error to be meritless.

Grounds for Discipline & Burden of Proof

24. The Petitioner contends that the Board did not provide evidence that a positive drug test equates to “conduct derogatory to the morals or standing of the profession of registered nursing” as prohibited by W. Va. Code § 30-7-11(f) or means he is “unfit or incompetent by reason of negligence, habits or other causes” as prohibited by W. Va. Code § 30-7-11(c). The Petitioner thus contends that the Board did not meet its burden to prove that using marijuana is grounds for discipline. As such, the Petitioner asserts the Board *Decision* is arbitrary and capricious, beyond the Board’s authority, clearly wrong in view of the reliable, probative, and substantial evidence on the whole record.

25. Under W. Va. Code § 30-7-11(f), the Board has authority to suspend a license if a licensee is “guilty of conduct derogatory to the morals or standing of the profession of registered nursing.” W. Va. Code St. R. § 19-3-14 defines “conduct derogatory to the morals or standing of the profession of registered nursing” as taking “any prescription drug in any way not in accordance with a legal, valid prescription or [using] any illicit drug.”

26. The Board concluded, in pertinent part:

In a pre-hire drug screen, Respondent McClanahan tested positive for Marijuana. The medical review officer and expert witness, Dr. Aukerman, testified that a false positive was medical and scientifically impossible. Respondent McClanahan’s positive drug screen was independently confirmed by three (3) mass spectrometry tests, and the record reflects that none of the medications McClanahan reported to have been taking contained THC. Respondent McClanahan did not offer expert testimony or any evidence to rebut either the positive test results or Dr. Aukerman’s testimony, and it is therefore concluded that said

results be accepted as valid for the purposes of this proceeding. . . . It is further concluded that such unlawful use of Marijuana also renders McClanahan guilty of conduct derogatory to the morals or standing of the profession of registered nursing, in violation of W. Va. Code § 30-7-11(f).¹⁹

27. Under West Virginia law, preponderance of the evidence is defined as evidence which is of greater weight or more convincing than the evidence offered in opposition to it—that is, evidence which as a whole shows the fact sought to be proved is more probable than not.

28. The Court is of the opinion that the Board proved by a preponderance of the evidence that the Petitioner tested positive for marijuana, which is grounds for discipline. First, after testing the Petitioner’s urine Sample A twice, Aegis Laboratory determined that the Petitioner’s urine tested positive for marijuana. Second, Quest Diagnostics laboratory confirmed that the Petitioner’s urine Sample B also tested positive for marijuana. Third, Dr. Aukerman, who reviewed the lab results, confirmed that the Petitioner’s positive test for marijuana was accurate because (1) none of the Petitioner’s medications contained THC and (2) each test was independently positive.

29. The Board proved by a preponderance of the evidence that the Petitioner used an illicit drug, which, by statutory definition, is “derogatory to the morals or standing of the profession of registered nursing.” Thus, the Petitioner’s assignment of error fails. Because being “guilty of conduct derogatory to the morals or standing of the profession of registered nursing” is a sufficient ground to suspend a license, the Court finds it unnecessary to address the Petitioner’s argument invoking the “unfit or incompetent by reason of negligence, habits or other causes” standard found in W. Va. Code § 30-7-11(c).

Ineffective Assistance of Counsel

30. The Petitioner contends his “constitutional right of due process was violated” because his attorney, Sarah Smith, failed to adequately protect his interests thus providing him “ineffective

¹⁹ Hearing Examiner’s Findings of Fact, Conclusions of Law, and Recommended Order at 7–8.

assistance of counsel.”²⁰ Specifically, the Petitioner contends that Ms. Smith failed to: prepare pre-hearing motions, retain expert witnesses, call fact witnesses, and prepare exhibits. The Petitioner does not specify which motions or exhibits should have been prepared or what evidence any expert or fact witnesses could have provided.

31. The Constitution of West Virginia mandates that a defendant in a criminal proceeding receive competent and effective assistance of counsel.²¹ West Virginia does not provide the same guarantee for a respondent in an administrative proceeding. Rather, a party may assert a legal malpractice claim for damages, which the Petitioner has not done here. Accordingly, the Court finds this ground to be meritless.

Conclusion

32. The Court finds that the proper chain of custody was followed. The Court finds the Petitioner’s claims regarding exclusion of scientific evidence and ineffective assistance of counsel to be meritless. The Court finds that the Board proved by a preponderance of the evidence that the Petitioner used marijuana. The Court finds that the Board properly suspended the Petitioner’s license upon properly finding that the Petitioner is guilty of conduct derogatory to the morals or standing of the profession of registered nursing. Thus, the Court finds and concludes that the Board did not err in its *Decision*. The Court finds and concludes that the Board’s *Decision* is supported by a rational basis and substantial evidence.

²⁰ Pet’r’s Br. 5, 13.

²¹ W. Va. Const. art. 3, § 14.

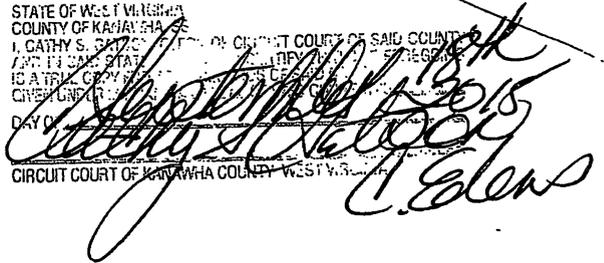
DECISION

Accordingly, the Court does **AFFIRM** the Board *Decision* entered on March 30, 2015. There being nothing further, the Court does **ORDER** that this matter be **DISMISSED** and **STRICKEN** from the docket of the Court. The Clerk is **DIRECTED** to send a certified copy to the parties and counsel of record.

ENTERED this 17 day of September 2015.



Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA
I, GATHY S. BRYCE, CLERK OF SAID COURT, DO HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE ORIGINAL AS FILED UNDER NO. _____ ON _____ DAY OF _____, 2015.
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA


9/18/15
Certified copies sent to:
____ course of record
____ parties
____ other
By: G. Foster
____ certified/1st class mail
____ fax
____ hand delivery
____ interdepartmental
____ other (describe how furnished)

Deputy Circuit Clerk

**BEFORE THE WEST VIRGINIA BOARD OF
EXAMINERS FOR REGISTERED PROFESSIONAL NURSES**

**WEST VIRGINIA BOARD OF
EXAMINERS FOR REGISTERED
PROFESSIONAL NURSES,**

Petitioner,

v.

License No. 85945

JOHNATHAN MCCLANAHAN,

Respondent.

**HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER**

This matter came on for evidentiary hearing on the 9th day of October, 2014, before the undersigned Hearing Examiner Jack C. McClung pursuant to a Complaint And Notice Of Hearing issued by Petitioner West Virginia Board of Examiners for Registered Professional Nurses against Respondent Johnathan McClanahan. The initial Complaint And Notice Of Hearing in this matter was issued on June 30, 2014, and set the hearing for August 7, 2014. That hearing was continued and the hearing subsequently conducted on October 9, 2014.

Petitioner West Virginia Board of Examiners for Registered Professional Nurses (hereinafter "Board") appeared by its counsel, Greg S. Foster, Assistant Attorney General. Respondent Johnathan McClanahan (hereinafter "Respondent" or "McClanahan") appeared in person and by his counsel, Sarah Smith.

All witnesses were sworn, documents (Exhibits 1 - 5) were received into evidence, the hearing was recorded electronically, and a transcript prepared and distributed to the parties.

After a review of the record and exhibits admitted into evidence at the hearing of this matter,

after assessing the credibility of all testimony of witnesses of record and weighing the evidence in consideration of the findings as to credibility, and after consideration of the proposed findings of fact and conclusions of law as were filed by the parties, the undersigned hearing examiner makes the following findings of fact, conclusions of law, and proposed order.

To the extent that these findings and conclusions are inconsistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are rejected by the hearing examiner. Conversely, to the extent that these findings and conclusions are generally consistent with any proposed findings of fact and conclusions of law submitted by the parties, the same are accepted and adopted. To the extent that the testimony of any witness is not in accordance with these Findings and Conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed or submitted by a party but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

CREDIBILITY OF WITNESSES, TESTIMONY, AND EXHIBITS

The hearing examiner was and is satisfied that all records and documents entered as exhibits are complete, authentic and valid, and that they were entered with the proper evidentiary foundations.

The hearing examiner was and is satisfied that the witnesses brought on by the Board were credible and truthful except as noted below. Neither the demeanor of the witnesses nor the substance of any testimony suggested any inconsistency, conflict, or ulterior motive except as noted below.

FINDINGS OF FACT

1. The Board is a statutorily created regulatory body whose mission is to protect the public through the regulation of the practice of registered nursing. W. Va. Code § 30-7-1 *et seq.*
2. Respondent McClanahan is a licensee of the Board, holding professional nursing license number 85945 as issued by the Board.

3. In November 2013 McClanahan was offered a position as a registered nurse at Raleigh General Hospital, conditioned upon successfully passing a pre-hire drug screen. Hearing Transcript ("Tr.") at 11-12.
4. McClanahan submitted to a urine drug screen on November 18, 2013. Tr. at 20-29; Board Exhibit No. 4.
5. Jessica Troche, a phlebotomist at Raleigh General Hospital's laboratory, collected the urine sample from Mr. McClanahan. *Id.*
6. The record reflects that Ms. Troche utilized proper chain of custody protocol as to the said sample. Tr. at 16-29; Board Exhibit No. 4.
7. In accordance with such protocol, McClanahan's specimen was collected as a split sample. Specifically, when McClanahan returned the specimen to Jessica Troche, she transferred the sample into two vials, and both vials were sealed in the same package to be mailed to the testing laboratory. Tr. at 19; Board Exhibit No. 4.
8. McClanahan's urine specimen was packaged and mailed to Aegis Laboratory in Nashville, Tennessee, for analysis. Tr. at 26-28.
9. McClanahan certified that the urine specimen collected from him at the Raleigh General Hospital laboratory was not adulterated in any manner. *See* Board Exhibit 4.
10. Upon testing and analysis of the urine specimen, Aegis Laboratory determined that McClanahan's urine specimen tested positive for Marijuana. *See* Board Exhibit No. 2.
11. Dr. Douglas Aukerman, a licensed physician and certified medical review officer, appeared as a witness for the Board. He testified that he is the founder and president of AukMed, Incorporated ("AukMed"), a company that provides medical review services for employer drug programs. Tr. at

34-35.

12. Dr. Aukerman was qualified as an expert witness at the hearing. Tr. at 37.

13. Dr. Aukerman, through his company, AukMed, has a contract with LifePoint Hospital Systems ("LifePoint"), the parent company of Raleigh General Hospital, to serve as the medical review officer and review and analyze drug screens for all hospitals owned by LifePoint, including Raleigh General Hospital. Tr. at 37-38.

14. A certified medical review officer is a licensed physician who is responsible for receiving and processing the results of a drug screen test from a testing laboratory, and making a final determination as to the reasons, if any, for any drug screen tests that reflect a positive result. Tr. at 36-37.

15. Dr. Aukerman received the laboratory report of Mr. McClanahan's drug screen from Aegis Laboratory. Tr. at 38-39; Board Exhibit No. 2.

16. As Mr. McClanahan's specimen was a split sample, the Aegis Laboratory drug screen shown in Board Exhibit No. 2 contained the results of the first vial, identified as the A Bottle ("Sample A."). Tr. at 41-42.

17. In his testimony, Dr. Aukerman confirmed that McClanahan's drug screen for the Sample A bottle tested positive for Marijuana. Tr. at 39-40.

18. Dr. Aukerman testified that the testing of the Sample A bottle is a two-step process. The first test is a screening test, specifically identified as an immunoassay screening test. The immunoassay screening test is a general test to determine if the specimen contains a presence of a class of metabolite that does not identify as a specific drug. If the immunoassay screening test is positive, the specimen undergoes a second and more precise test for confirmation. In the confirmation test, the specimen is tested under a mass spectrometry test to determine the specific compound structure

graph of what substance is present. The mass spectrometry test precisely identifies the substance and the qualitative amount of the substance present in the specimen. Tr. at 41-44.

19. Dr. Aukerman confirmed that proper chain of custody was utilized in the course of the said testing. Tr. at 48.

20. The record reflects that McClanahan's positive drug screen for Marijuana shown in Board Exhibit No. 2 is the results of the mass spectrometry test performed on the Sample A bottle. Tr. at 44.

21. Because Marijuana is an illicit substance, Dr. Aukerman forwarded the drug screen of the Sample A bottle directly to Raleigh General Hospital, in accordance with protocol. Tr. at 39-41.

22. The second vial containing Mr. McClanahan's split sample urine specimen, identified as the B Bottle ("Sample B"), remained sealed in the freezer at Aegis Laboratory. In accordance with protocol, the Sample A bottle is always tested first. In the event the donor feels the results of the Sample A test are incorrect, the donor may request that Sample B be tested. Tr. at 41-45.

23. Mr. McClanahan disputed the results of the Sample A drug screen, and requested that Sample B be tested.

24. In accordance with protocol, the Sample B bottle was sent to a different federally certified laboratory for testing. Tr. at 44-46.

25. The record reflects that the Sample B bottle underwent a mass spectrometry exam at Quest Diagnostics laboratory.

26. The Sample B bottle also tested positive for Marijuana, which was confirmed by Dr. Aukerman in his testimony. Board Exhibit No. 3; Tr. at 46-47.

27. Additionally, for quality control purposes, anytime a drug screen is challenged, Aegis Laboratory retests the Sample A bottle. As such, McClanahan's Sample A bottle was tested a second

time by Aegis Laboratory with a mass spectrometry test, which reconfirmed a positive result for Marijuana. Tr. at 47-48.

28. There were therefore three separate and independent mass spectrometry tests of the two McClanahan samples, all of which confirmed a positive screen for Marijuana from Mr. McClanahan's urine specimen.

29. Respondent McClanahan testified in this matter and denied that he smoked Marijuana. He stated that the positive drug screen results could have been false positives caused by other medications he was taking at the time. Respondent testified that at the time of the subject pre-hire drug screen he had been taking several prescribed and over-the-counter medications, and that he had provided a list of those medications to the Board. Tr. at 64-67.

30. Dr. Aukerman testified that a false positive for Marijuana in this case was not medically or scientifically possible because, first, none of the medications McClanahan was taking contained THC and, second, that mass spectrometry testing was performed twice on Sample A and once on Sample B and every test was independently positive. See testimony of Dr. Aukerman, Tr. at 48-51.

31. Respondent did not offer any expert testimony or evidence to dispute the testimony of Dr. Aukerman that a false positive for Marijuana was not possible under the circumstances.

32. Although it is found that Respondent presented a plausible denial of Marijuana use, his failure to rebut or discredit the positive test results of record and Dr. Aukerman's testimony as to the impossibility of false positives causes the said positive test results to be accepted as correct as to this matter. Given the acceptance of those positive results, the only conclusion that can be reasonably drawn from the evidence presented in this matter to be that Respondent McClanahan tested positive for Marijuana because Respondent had used Marijuana prior to submitting to the pre-hire drug screen at Raleigh General Hospital.

CONCLUSIONS OF LAW

1. The Board is a state entity created by West Virginia Code § 30-7-1, *et seq.*, and is empowered to regulate the conduct of professional registered nurses in the State of West Virginia.
2. Mr. McClanahan was subject to the authority of the Board upon issuance of his registered professional nursing license by the Board.
3. In disciplinary matters, the Board bears the burden of proof.
4. Pursuant to W. Va. Code § 30-7-11(c), "[t]he board shall have the power to deny, revoke or suspend any license to practice registered professional nursing issued or applied for in accordance with the provisions of this article, or to otherwise discipline a licensee or applicant upon proof that he or she...[i]s unfit or incompetent by reason of negligence, habits or other causes.
5. Pursuant to W. Va. Code § 30-7-11(f), "[t]he board shall have the power to deny, revoke or suspend any license to practice registered professional nursing issued or applied for in accordance with the provisions of this article, or to otherwise discipline a licensee or applicant upon proof that he or she... [i]s guilty of conduct derogatory to the morals or standing of the profession of registered nursing."
6. In a pre-hire drug screen, Respondent McClanahan tested positive for Marijuana. The medical review officer and expert witness, Dr. Aukerman, testified that a false positive was medically and scientifically impossible. Respondent McClanahan's positive drug screen was independently confirmed by three (3) mass spectrometry tests, and the record reflects that none of the medications McClanahan reported to have been taking contained THC. Respondent McClanahan did not offer expert testimony or any evidence to rebut either the positive test results or Dr. Aukerman's testimony, and it is therefore concluded that the said results be accepted as valid for the purposes of this proceeding
7. The evidence and testimony presented by the Board therefore establishes, by a preponderance of the evidence, that Mr. McClanahan tested positive for Marijuana because he used Marijuana prior to his pre-hire drug screen at Raleigh General Hospital.

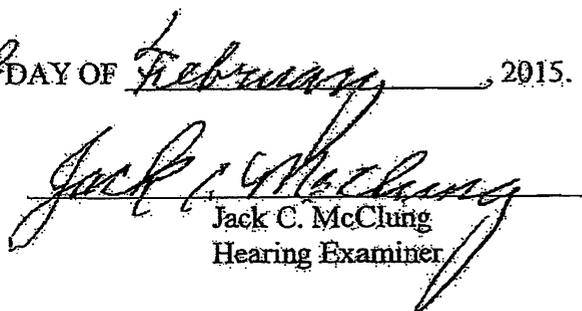
8. Based on the record of this matter, it is therefore concluded that Respondent McClanahan unlawfully used Marijuana and that such use of an illegal substance renders McClanahan unfit or incompetent to practice registered professional nursing by reason of habits or other causes, in violation of W. Va. Code § 30-7-11(c). It is further concluded that such unlawful use of Marijuana also renders McClanahan guilty of conduct derogatory to the morals or standing of the professional of registered nursing, in violation of W. Va. Code § 30-7-11(f).

9. The Board has therefore met its burden of proof in this matter, by a preponderance of the evidence, as to the allegations stated in the June 30, 2014, Complaint And Notice Of Hearing and therefore may, pursuant to law, discipline the license of Mr. McClanahan accordingly.

RECOMMENDED ORDER

It is therefore recommended as to the June 30, 2014, Complaint And Notice Of Hearing that the allegations stated in the said Complaint as to Respondent Johnathan McClanahan be SUSTAINED, that any objections or defenses thereto by Respondent be DENIED, and that the Board act under authorization of law to discipline the license of Respondent Johnathan McClanahan accordingly.

RECOMMENDED THIS 24th DAY OF February, 2015.


Jack C. McClung
Hearing Examiner

**BEFORE THE WEST VIRGINIA BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL NURSES**

**IN THE MATTER OF JOHNATHAN LOWELL MCCLANAHAN
LICENSE NO. 85945**

FINAL ORDER

On March 25, 2015, the State of West Virginia Board of Examiners for Registered Professional Nurses (hereinafter Board) reviewed the Findings of Fact, Conclusions of Law and Recommendations submitted in the above-styled matter by Hearing Examiner, Jack McClung. After consideration of the aforementioned Findings of Fact, Conclusions of Law and Recommendations, and after a thorough review of the record, the Board does hereby, adopt as its FINAL ORDER the findings of fact and conclusions of law as set forth by the Hearing Examiner. The Board has further reviewed the Recommendation of the hearing examiner, and adopts such Recommendation as its Final Order. The ORDER was signed into effect March 30, 2015.

Record of this ORDER will be placed into the file of Johnathan Lowell McClanahan and shall be kept by the State of West Virginia Board of Examiners for Registered Professional Nurses. It shall be a matter of public record, and as such shall be available to any person who should inquire as to the status of the license of Johnathan Lowell McClanahan.

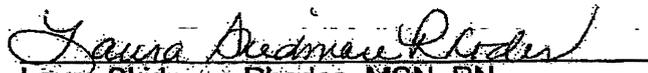
It is therefore, ADJUDGED, ORDERED and DECREED that the Hearing Examiner's findings of fact, conclusions of law, the recommendation and the document entitled "Final Order Addition", be attached hereto as this Board's Final Order stated below.

By this Final Order, a copy of which shall be sent by certified mail to the parties and counsel, if applicable, and by first class mail to the Secretary of State, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

**WEST VIRGINIA BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL NURSES**

Entered for and at the direction of the State of West Virginia Board of Examiners for Registered Professional Nurses this 30th day of March, 2015, in Charleston, Kanawha County, West Virginia.


Laura Skidmore Rhodes, MSN, RN
Executive Director

**THE WEST VIRGINIA STATE BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL NURSES**

**IN THE MATTER OF JOHNATHAN LOWELL MCCLANAHAN
FINAL ORDER ADDITION**

On the basis of the foregoing, the Board hereby suspends license number 85945, issued to McClanahan for a period of one (1) year, with such suspension hereby stayed and contingent upon McClanahan complying with the terms set forth below, license number 85945 is placed on PROBATION for a period of two (2) years of employment as a registered professional nurse. The computation of such period is to begin on the date on which notice is received in the office of the Board that McClanahan is employed as a registered professional nurse and shall run only during such time that he is employed as a registered professional nurse on at least a permanent part-time basis (forty hours every two weeks) or full time basis in the State of West Virginia. The Board also ORDERS McClanahan to pay a fine and administrative cost of two thousand dollars (\$2000.00).

Violation of any of the following terms shall constitute grounds for denial of the leave granted to McClanahan to petition for reinstatement. To receive and maintain a probationary license, regardless of employment status, McClanahan shall meet the following conditions:

1. McClanahan shall not work at a Nursing Registry, Temporary Nursing Agency, Home Health Care Agency, Private Duty Nurse or an Extended Care Facility.
2. McClanahan shall not work in an autonomous or supervisory nursing position. He shall work only under the direct supervision of a registered professional nurse in a structured setting throughout the term of his probation. Such supervising registered professional nurse must, at the time of said supervision, hold an active, unencumbered West Virginia license until evaluation is completed and a determination regarding any requirements.
3. McClanahan shall inform the Board in writing within ten (10) days of the date he assumes the practice of registered professional nursing, or any employment in the health care field, in the State of West Virginia and shall include the name, address, and telephone number of his employer. He shall provide in writing the name of his immediate registered professional nurse supervisor. He shall inform the Board of any interruption in nursing practice or change in employment within ten (10) days of such interruption or change.
4. McClanahan shall immediately inform his nursing employer, and prospective nursing employer, and the director of any nursing education program in which he enrolls or teaches, that the Board has placed his license on probation, and shall provide a complete copy of this agreement to his employer(s). The Board may provide his employer(s) with a copy of this agreement and may communicate with his employer(s).
5. McClanahan shall, within ten (10) days of employment or continuation of practice, cause his employer or immediate registered professional nurse supervisor to notify the Board, in writing, of the employer's or supervisor's receipt of a copy of this agreement. McClanahan shall further cause his employer or supervisor to submit monthly reports to the Board describing his job

performance, attendance, attitude, and other work behaviors during the first year of probation and if his progress is satisfactory to the Board, quarterly thereafter.

6. McClanahan shall submit documentation of fifteen (15) contact hours of continuing education in addictions and in ethics year during the time his license is on probation in addition to those required by law.
7. McClanahan shall report in person for an appointment with the Board staff upon request.
8. McClanahan shall submit to unannounced, witnessed drug-screening tests. Said tests shall be on demand and to the specifications of the Board and at McClanahan's expense. **McClanahan shall call the Board's drug screening company DAILY between the hours of 5:00 a.m. through 2:30 p.m. to see if he is selected to test. Receipt of a positive drug screen and/or not calling the drug screening program daily within the specified time frame is deemed to be a violation of this Consent Agreement, and shall result in immediate suspension of McClanahan's license.** Eating products containing poppy seeds will not constitute as an accepted reason for having a positive screen for opioids. McClanahan shall not consume tonic water, quinine water, hemp tea or other products containing substances that trigger a positive drug screen.
9. McClanahan shall abstain from the use of alcohol and limit his use of drugs to those prescribed for a legitimate purpose by a physician, dentist or nurse practitioner duly licensed in the State of West Virginia. He shall provide a copy of this Order to any prescribing physician, dentist, nurse practitioner or any other health care provider having legal authority to prescribe. He shall cause the prescribing health care provider to notify the Board in writing of any medications/drugs prescribed and the condition for which said drug(s) has been prescribed. McClanahan agrees that, if he accepts a prescription for a narcotic or psychotropic drug, the Board may impose additional terms.
10. McClanahan shall coordinate any health care services he requires with one physician or registered nurse practitioner, who shall be informed of any services or prescriptions sought or obtained by any physician, dentist, nurse practitioner or other health care provider. McClanahan shall provide the individual, who serves as his point of contact for health care needs, with a copy of this Order.
11. McClanahan shall execute a release to permit the Board to obtain medical or other health care records, which may be requested at any time while his license is on Probation, regarding his physical or mental health and any treatment rendered.
12. McClanahan shall annually submit to the Board a written personal statement. The statement shall be due at the end of the year and in each subsequent year during the month in which this Order is accepted by the Board.
13. McClanahan shall submit to an evaluation by a Psychiatrist certified in addictions and/or Certified Addictions Counselor (CAC) within thirty (30) days of this Order. McClanahan shall comply with the recommendations. If it is determined that McClanahan meets the requirements of West Virginia Restore (the Board's recovery and monitoring program), he shall enter into an agreement with West Virginia Restore and shall comply with the terms of the agreement.

14. Contingent upon the recommendations in the evaluation by the Psychiatrist and or CAC, McClanahan shall participate in a structured aftercare program. The treating Psychiatrist and or CAC shall make a monthly report to the Board about his progress and his compliance with the aftercare program.
15. Contingent upon the recommendations in the evaluation by the Psychiatrist and/or CAC, McClanahan shall participate in 12-Step meetings. Written evidence of participation in meetings shall be submitted to the Board on or before the fifth day of each month.

Violation of Terms:

16. Any deviation from these requirements without prior written consent of the Board shall constitute a violation of this Order, and result in immediate suspension of McClanahan's probationary license.
17. The Board shall immediately notify McClanahan via certified mail of the specific nature of the charges, and the suspension of his license.
 - a. McClanahan may request reinstatement of his probationary license through renewal of this agreement, or execution of a new agreement, which may contain different or additional terms. The Board is not bound to comply with this request.
 - b. If the Board does not accept a renewed or new agreement, McClanahan shall be notified in writing. McClanahan may request a hearing to seek reinstatement of his probationary license. If McClanahan requests a hearing following suspension for violation of this agreement and does not prevail, the cost incurred in holding such hearing shall be borne by McClanahan. If McClanahan prevails, the cost of such hearing shall be borne by the Board. Cost shall refer only to the expense of employing a court reporter and hearing examiner for the purpose of the hearing, and shall not include any legal or other fees incurred by the Board or McClanahan in bringing the matter to hearing.
 - c. The Board may schedule a hearing on its own initiative for the purpose of allowing the Board opportunity for considering further suspension or revocation of McClanahan's license. Said hearing shall be scheduled in accordance with the provisions of West Virginia Code §30-1-8 and §30-1-7 *et. seq.* The Board shall bear the cost if it should seek a hearing following suspension of McClanahan's probationary license for violation of this agreement. Cost shall refer only to the expense of employing a court reporter and hearing examiner for the purpose of the hearing, and shall not include any legal or other fees incurred by McClanahan in bringing the matter to hearing.

Petition for Reinstatement:

18. Following the two (2) year probationary period, or conclusion of McClanahan's agreement with WV Restore (if applicable), McClanahan may petition to appear before the Board and submit satisfactory evidence that he is presently able to safely engage in the practice of registered professional nursing. Evidence in support of this request shall include:

- a. A letter from WV Restore indicating McClanahan has successfully completed his agreement (if applicable);
- b. Letter from McClanahan's employer, if employed;
- c. Letter from McClanahan outlining his future plans; and
- d. Payment of all fines and administrative costs.

However, the terms of this Order shall remain in effect and subject to yearly review and appropriate revision by the Board until such time as McClanahan's license is fully reinstated by the Board.

This FINAL ORDER ADDITION is considered part of McClanahan's FINAL ORDER and will be filed as such.

**THE WEST VIRGINIA STATE BOARD OF EXAMINERS
FOR REGISTERED PROFESSIONAL NURSES**

**IN THE MATTER OF JOHNATHAN LOWELL MCCLANAHAN
FINAL ORDER ADDITION**

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3. McClanahan shall inform the Board in writing within ten (10) days of the date he assumes the practice of registered professional nursing, or any employment in the health care field, in the State of West Virginia and shall include the name, address, and telephone number of his employer. He shall provide in writing the name of his immediate registered professional nurse supervisor. He shall inform the Board of any interruption in nursing practice or change in employment within ten (10) days of such interruption or change.
4. McClanahan shall immediately inform his nursing employer, and prospective nursing employer, and the director of any nursing education program in which he enrolls or teaches, that the Board has placed his license on probation, and shall provide a complete copy of this agreement to his employer(s). The Board may provide his employer(s) with a copy of this agreement and may communicate with his employer(s).
5. McClanahan shall, within ten (10) days of employment or continuation of practice, cause his employer or immediate registered professional nurse supervisor to notify the Board, in writing, of the employer's or supervisor's receipt of a copy of this agreement. McClanahan shall further cause his employer or supervisor to submit monthly reports to the Board describing his job

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