

**BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

**IN THE MATTER OF THE LICENSE OF
TANIELA FAKALOLO KIVALU
TO PRACTICE AS A
LICENSED PRACTICAL NURSE
IN THE STATE OF UTAH**

**NOTICE OF ENTRY OF DEFAULT
FINDINGS OF FACT
CONCLUSIONS OF LAW
AND RECOMMENDED ORDER
CASE No. DOPL 2010-348**

BY THE ADMINISTRATIVE LAW JUDGE:

This adjudicative proceeding was initiated pursuant to the issuance of an October 18, 2010 notice of agency action. The notice recites Respondent was required to file a response within thirty (30) days of the mailing date of the notice.

The October 18, 2010 notice was sent to Respondent's address of _____, Orem, Utah 84097 by both certified and first class mail. Respondent filed an October 27, 2010 Response, which was received by the Division on November 1, 2010. The Division filed a November 2, 2010 request for a prehearing teleconference.

The Court conducted the initial prehearing teleconference in this proceeding during November 2010. The Court scheduled the Division to disclose to Respondent the relevant and nonprivileged contents of its investigative file by December 9, 2010. The Court also scheduled the Division's disclosure of its witness and exhibit list by the same date. The Court next scheduled the hearing before the Board of Nursing to

commence at 9:00 a.m. on April 14, 2011. Finally, the next prehearing teleconference was to be conducted at 9:00 a.m. on December 16, 2010.

The Court attempted to directly contact Respondent on that date. However, the Court was unable to do so. The Court left a message for Respondent to contact the Court by telephone. However, Respondent did not return the call. L. Mitchell Jones, counsel for the Division, contacted the Court by telephone on December 20, 2010. Upon his inquiry, the Court confirmed the Board hearing was set for April 14, 2011. Moreover, the Court scheduled the next prehearing teleconference to be conducted with the Division and Respondent during the last week of January 2011.

Respondent sent a January 6, 2011 letter to the Office of the Utah Attorney General. The letter recites Respondent was scheduled for a January 11, 2011 surgery on his right knee. Respondent then sent a January 13, 2011 letter to the Office of the Attorney General. Mr. Jones provided a copy of both letters to the Court. The January 13, 2011 letter recites Respondent and his family would be in Tonga from January 16, 2011 through January 29, 2011 for a funeral.

The letter also recites Respondent should then be available, but that his knee surgery has been rescheduled for February 1, 2011. The January 13, 2011 letter further states Respondent expects to be hospitalized for five (5) days, which would be followed by thirty (30) days in a nursing home to convalesce from his surgery. Respondent's January 13, 2011 letter finally recites that he would then participate in about three (3)

months of rehabilitation to allow him to walk and he should then be able to proceed with this case.

The Court conducted a January 24, 2011 teleconference with the parties. Respondent directly requested a continuance of the April 14, 2011 hearing. The Division opposed that request and the Court denied Respondent's request for a continuance as being premature. Specifically, the Court concluded any latter request for a continuance could be addressed based on developing circumstances in the interim.

The Court next conducted a March 1, 2011 prehearing teleconference with the parties. Respondent stated he was scheduled to see a doctor on March 2, 2011 to possibly schedule eye surgery. Respondent also stated he is to begin physical therapy twice a day, commencing March 3, 2011.

The Court conducted the next prehearing teleconference with the parties on March 8, 2011. Respondent requested that he be allowed to participate in the April 14, 2011 hearing by telephone due to his physical condition and inability to travel from Orem, Utah to Salt Lake City, Utah. The Division had no objection to that request.

Department of Commerce Administrative Procedure Act Rules expressly allow telephonic testimony by witnesses under certain circumstances in formal adjudicative proceedings. However, those Rules are silent whether a party may participate in a hearing by telephone.

The Court concluded a proper basis exists in this case to allow Respondent's participation in the hearing by telephone, as based on the parties' consent to that procedure and the lack of any apparent prejudice to either party were that procedure allowed in this case. The Court thus granted Respondent's request.

The Court conducted the next prehearing teleconference with the parties on March 22, 2011. That teleconference was prompted when Respondent contacted the Court by telephone on that date. Respondent informed the Court and Mr. Jones that he was in Tonga for a job interview. Respondent stated he believed he would be chosen for that job and, if so, he would reside in Tonga for two (2) years.

Mr. Jones obtained Respondent's address in Tonga and he mailed the Division's exhibits to Respondent on March 23, 2011. Mr. Jones had also obtained an electronic mail address for Respondent in Tonga. Mr. Jones thus sent an April 11, 2011 e-mail to Respondent, requesting him to contact the Court to identify how he would participate in the April 14, 2011 hearing, scheduled to commence at 10:00 a.m. on that date.

The Court sent an April 12, 2011 e-mail message to Respondent. The Court thus informed Respondent that, if he called the telephone number provided by Mr. Jones in his April 12, 2011 e-mail message to participate in the upcoming hearing, a charge of 62 cents per minute would apply to that international call. The Court thus informed Respondent that the anticipated three (3) hour hearing would cost \$111.00 and he would bear the total cost of his participation by telephone.

However, the Court also informed Respondent that his audio access to the hearing could be available through an internet connection with the installation of a software program if Respondent would have a computer available to him for the hearing. The Court requested Respondent to contact either Mr. Jones or the Court by the late afternoon of April 13, 2011 if Respondent wanted to use that less expensive option. Respondent did not contact either Mr. Jones or the Court in that regard.

Mr. Jones sent another e-mail message to Respondent at 8:47 a.m. on April 14, 2011. Mr. Jones thus reiterated Respondent was to call the telephone number previously provided to participate in the 10:00 a.m. hearing on that date. Mr. Jones further informed Respondent that, if a prior hearing to be conducted commencing 9:00 a.m. on that date was not completed by 10:00 a.m., Respondent should call at 15 minute intervals to confirm when the hearing involving his license could begin.

Mr. Jones contacted Respondent by telephone at 10:00 a.m. on April 14, 2011. He told Respondent that the prior hearing was still in session, Respondent should wait by the phone and Mr. Jones would call him again to inform Respondent when he should place the call for his hearing. Respondent agreed to that process.

Mr. Jones then contacted Respondent by telephone at 10:20 a.m. Mr. Jones informed Respondent that the prior hearing was still in session and it would require additional time to conclude that matter. Respondent agreed to wait by the telephone. Mr. Jones next contacted Respondent by telephone at 10:40 a.m. He repeated the same

information which he had previously provided. Respondent stated he would wait for Mr. Jones to call again.

The prior hearing concluded at approximately 11:35 a.m. Mr. Jones placed six (6) telephone calls to Respondent, commencing 11:50 a.m., but he could not directly contact Respondent. The telephone rang six (6) times on each call and every call was transferred to a voice message system. However, that mail box was full and Mr. Jones was unable to leave a message for Respondent.

Ten (10) Nursing Board members were present for the hearing, as were five (5) Division witnesses. Also present was the Division Director, Mr. Jones, the Court and the court reporter. Given the circumstances, the Court concluded a final attempt to contact Respondent should be made before any further proceedings were conducted.

Accordingly, the Court requested Mr. Jones to attempt one more contact with Respondent. Mr. Jones then placed six (6) more telephone calls to Respondent, commencing 12:15 p.m. Mr. Jones was again not able to directly contact Respondent and Mr. Jones again encountered the above described process.

The Division then requested the entry of Respondent's default. Mr. Jones initially made a proffer as to the above-stated matters. The Board and the Division Director were present during that proffer. However, since Respondent could not be contacted when the hearing in this case could be commenced, the Court excused both the Board and Mark B. Steinagel, Director of the Division..

Utah Code Ann. §63G-4-209(1)(b) provides an order of default may enter if a party to a formal adjudicative proceeding “fails to attend or participate in a properly scheduled hearing after receiving proper notice”. Given Respondent's failure to have been available when the April 14, 2011 hearing could commence on that date, the Division requested the Court to enter Respondent's default.

The Division directly notified Respondent on three (3) occasions during the morning of April 14, 2011 as to the delay of the hearing in this proceeding. The extent of that delay was both unexpected and unfortunate. Nevertheless, the Division diligently informed Respondent as to the ongoing status of the earlier hearing.

Moreover, Respondent had agreed to wait until the prior hearing had concluded. Respondent also agreed he would then be available to participate in the hearing in this case involving his license. Given the foregoing, the Court readily concluded a proper basis exists to enter Respondent's default. The Court thus entered Respondent's default.

After the entry of a default order, §63G-4-209(4)(a) provides the presiding officer shall conduct further proceedings as necessary to complete the adjudicative proceeding without the participation of the party in default. §63G-4-209(4)(a) also provides a determination shall be made of all issues in the adjudicative proceeding, including those affecting the defaulting party. Consistent with those statutory provisions, the Division then made a proffer of evidence in support of

the matters set forth in the October 18, 2010 Verified Petition.

FINDINGS OF FACT

Based on the proffer made by the Division, the Court adopts the allegations set forth in Paragraphs 3 through 14 of the October 18, 2010 Verified Petition as its Findings of Fact. The Court also adopts Paragraphs 15 through 37 of the Verified Petition as its Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

The Court finds and concludes Respondent has engaged in unlawful and unprofessional conduct violative of §58-1-501(1)(e). Respondent also engaged in unprofessional conduct violative of §58-1-501(2)(a) and (h).

Specifically, Respondent applied for the renewal of his license on March 23, 2010. However, he failed to disclose that he had been charged on August 11, 2009 with Fraudulently Obtaining Unemployment Compensation, a second degree felony, in Fourth Judicial District Court proceedings. Respondent was found guilty of that charge after a two day jury trial on April 7-8, 2010.

Respondent was thus convicted of an offense which involves moral turpitude. Moreover, Respondent was convicted of a crime which is reasonably related to his ability to safely practice as a nurse. Respondent also engaged in unprofessional conduct when he practiced as a nurse after acquiring his license in a false, misleading, deceptive or fraudulent manner.

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Thus, the Court readily finds and concludes a proper factual and legal basis exists to enter disciplinary action on Respondent's license. Given the entry of Respondent's default, the Court also concludes his response should be stricken. Absent any matters offered in defense or mitigation, the Court thus concludes the following action is warranted:

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED Respondent's license to practice as a licensed practical nurse in this state shall be revoked, effective the date this Recommended Order may be adopted.

I hereby certify the foregoing **NOTICE OF ENTRY OF DEFAULT, FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER** were submitted to Mark B. Steinagel, Director of the Division of Occupational and Professional Licensing, on the 2nd day of May 2011 for his review and action.



J. Steven Eklund
Administrative Law Judge
Department of Commerce

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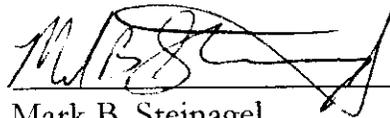
DEFAULT ORDER
CASE NO: DOPL-2010-348

BY THE DIVISION:

The attached Notice of Entry of Default, Findings of Fact, Conclusions of Law and Recommended Order is hereby adopted by the Director of the Division of Occupational and Professional Licensing of the State of Utah. Respondent's license to practice as a licensed practical nurse is thus revoked, effective the date of this Order.

IT IS FURTHER ORDERED that the revoked license, both wall and wallet sizes, as well as any embossed certificate, be surrendered to the Division of Occupational and Professional Licensing.

Dated this 4 day of May 2011.



Mark B. Steinagel
Director
Division of Occupational and
Professional Licensing