# STATE OF IOWA BEFORE THE BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS

IN THE MATTER OF: )	CASE NO. NHA 03-005
(KENNETH ERVIN OPP	DIA NO. 03DPHNHA004
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
RESPONDENT )	DECISION AND ORDER

## TO: KENNETH ERVIN OPP

On October 2, 2003, the Board of Examiners for Nursing Home Administrators (Board) filed a Statement of Charges against Kenneth Ervin Opp, (Respondent) alleging that he violated Iowa Code sections 155.18(3), 155.18(5), and 272C.10(3) and 645 Iowa Administrative Code (IAC) 144.1(3), (5), and (7) by being convicted of a felony related to the profession or occupation; by engaging in unethical conduct and practices harmful or detrimental to the public; by knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of nursing home administration; and by willful or repeated violations of any statute or rule pertaining to a nursing home.

A Notice of Hearing was issued, and the hearing was held on July 15, 2004 at 9:00 a.m. at the Lucas State Office Building, Fifth Floor Conference Room, Des Moines, Iowa. The Respondent appeared and was self-represented. The state of Iowa was represented by Rick Autry, Assistant Attorney General.

The following Board members were present for the hearing: Terry R. Cooper, NHA, Chairperson; Margaret Beaty, NHA; Daniel Larmore, NHA; Larry Hertel, RN; Judy Weller, RN; Susan Frey, R.Ph., and Audrae Zoeckler, public member. The hearing was closed to the public, at the Respondent's request, pursuant to Iowa Code section 272C.6(1). The hearing was recorded by a certified court reporter. Margaret LaMarche, Administrative Law Judge from the Iowa Department of Inspections and Appeals, assisted the Board in conducting the hearing, and was instructed to prepare the Board's Findings of Fact, Conclusions of Law, Decision and Order, in conformance with their deliberations.

#### THE RECORD

The record includes the Statement of Charges, Notice of Hearing, the testimony of the witnesses, and the following exhibits:

State Exhibit 1: Handwritten Answer of Respondent

State Exhibit 2: Typed Answer of Respondent

State Exhibit 3: Respondent Letter dated 1/2/03

State Exhibit 4: Trial Information

State Exhibit 5: Certified Copy of Sentencing Order

Respondent Exhibit A: Newspaper articles regarding other

embezzlement cases

Respondent Exhibit B: Certificate of Achievement,

Central Iowa Gambling Treatment

Program, Inc., 6/25/03

Respondent Exhibit C: Letters of Support (5)

Respondent Exhibit D: Order of Reconsideration of

Sentence; Initial Formal Probation

Agreement

## FINDINGS OF FACT

- 1. The Respondent was issued license number 270-01162 to practice as a nursing home administrator in the state of Iowa on November 12, 1981. The Respondent placed his license on inactive status as of January 1, 2004. The Respondent is also a registered nurse in the state of Iowa. (Statement of Charges; State Exhibit 2; Testimony of Respondent)
- 2. The Respondent was employed as the administrator of the Abbey Center, a health care facility located in Des Moines, Iowa, from mid-1999 until his termination on November 5, 2002. The Abbey Center provided nursing level of care. As the administrator, the Respondent was responsible for the day-to-day operation of the facility and for ensuring that the facility was operated in compliance with all applicable state and federal laws and regulations. (Testimony of Respondent; Statement of Charges; State Exhibits 1, 2)
- 3. The Respondent's duties as administrator included serving as a fiduciary for the safekeeping and management of facility accounts and funds, including facility bank accounts, facility lines of credit, facility accounts receivable, and general operating funds intended for facility operation and resident care, treatment and services. (Testimony of Respondent; Statement of Charges; State Exhibits 1, 2)

- 4. The Respondent was also responsible for ensuring that the residents were maintained at their highest practicable level and that the facility was managed so as to achieve maximum efficiencies and outcomes with the funds and resources entrusted to him by the facility owner. (Testimony of Respondent; Statement of Charges; State Exhibits 1, 2)
- 5. In 2001 and 2002 and while employed as a nursing home administrator for the Abbey Center, the Respondent repeatedly misappropriated and embezzled funds owned by the facility and converted the funds to his own use. The Respondent also submitted numerous false claims for rent reimbursement. (Testimony of Respondent; Statement of Charges; State Exhibits 1, 2)
- 6. The Respondent maintains that his embezzlement was the result of his gambling addiction and admits that he has had a problem with compulsive behavior in the past. The Respondent was successfully treated for an alcohol addiction in January 1994 but later became cross-addicted to gambling. The Respondent entered gambling treatment on November 9, 2002 and completed this treatment program on June 25, 2003. (Testimony of Respondent; Respondent Exhibits B, C)
- On May 19, 2003, the Respondent pled quilty to 3 felony counts of First Degree Theft, 2 felony counts of First Degree Fraudulent Practice, and 3 felony counts of Income Tax Evasion. On July 15, 2003, he was sentenced to a period not to exceed 10 years on each count of First Degree Theft, 10 years on each count of First Degree Fraudulent Practice, and 5 years on each count of Income Tax Evasion. The sentences on the First Degree Theft and First Degree Fraudulent Practices were to consecutively, for a total not to exceed 50 years. sentences on the Income Tax Evasion run concurrently with the other sentences. The Respondent's plea agreement included a provision that he would be entitled to reconsideration of the sentence within one year of the sentencing date. The Respondent was committed to the Iowa Department of Corrections and was incarcerated at Oakdale. The Respondent was unable participate in gambling treatment during his incarceration because none is available at the prison.

The Respondent was also fined \$1,000 on each count of Theft First and Fraudulent Practice First, and \$750 on each count of Income Tax Evasion. He was ordered to pay restitution to the state of Iowa in the amount of \$70,519 for taxes, penalties and

interest and \$204,440.07 for fraudulent rent reimbursement claims. It was noted in the sentencing order that the amounts of restitution to the Respondent's former employer were disputed and would be the subject of a supplemental order. The former employer estimated his losses at \$400,000 plus legal and accounting fees, while the Respondent only admitted that the amount exceeded \$100,000. (Testimony of Respondent; State Exhibits 1, 2, 4, 5)

- 8. On July 7, 2004, the Respondent appeared in Polk County District Court for sentence reconsideration. The court suspended the Respondent's sentence and placed him on probation for a period of five (5) years, with no early discharge. The Respondent was also ordered to make restitution as outlined in the original sentencing order and to appear for a restitution hearing on August 24, 2004. The Respondent's probation is subject to numerous conditions, including but not limited to participation in gambling treatment and 500 hours of community service. The Respondent has attended meetings of Gamblers Anonymous (GA) since his release from prison. (Testimony of Respondent; Respondent Exhibit D)
- 9. The Respondent's former employer maintains that the Respondent converted \$400,000 to his own use. The Respondent denies that the amount was \$400,000 but concedes that he converted \$203,000. The Respondent maintains that he has paid back \$140,000 of the converted funds. The amount of restitution to the former employer will be determined at the hearing scheduled for August 24, 2004. (Testimony of Respondent; State Exhibits 1, 2)
- 10. The Respondent had worked as a nursing home administrator for approximately 26 years prior to his termination at Abbey Center. He has worked at 38 nursing home facilities since 1981. He presented testimony and letters of support from former coworkers and employees who state that he is a talented administrator, who was particularly skilled in managing budgets and improving facilities with operational problems.

Sheri Wimber had worked for the Respondent at a previous nursing care facility, and he recruited her to be the new Director of Nursing at the Abbey Center in August 1999. She remained at the Abbey Center until January 15, 2003. Ms. Wimber knew about the Respondent's past problems with alcoholism and noted that he exhibited compulsive behaviors at work, such as working long hours and not taking any days off. However, she never suspected that he was embezzling funds from the facility. In her opinion,

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the residents did not suffer as a result of the Respondent's actions. All of their needs were met and the residents were happy while the Respondent was the administrator at the facility. After the Respondent left the facility, things were different and the residents' needs were no longer being met by the new administrator. (Testimony of Respondent; Sheri Wimber; Respondent Exhibit C)

#### CONCLUSIONS OF LAW

Iowa Code section 155.18 provides, in relevant part:

## 155.18 Revocation or suspension.

A license to practice as a nursing home administrator may be revoked or suspended when the licensee is guilty of any of the following acts or omissions:

. .

3. Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of the licensee's profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.

. .

5. Conviction of a felony related to the profession or occupation of the licensee. A copy of the record of conviction or plea of guilty shall be conclusive evidence.

Accord, Iowa Code section 272C.10.

The Board's rules have been updated and renumbered since the Statement of Charges was issued. At the time of the Statement of Charges, 645 IAC 144.1 provided, in relevant part:

645-144.1(155,272C) Grounds for discipline. The board may impose any of the disciplinary sanctions provided in rule 645-13.1(272C) when the board determines that the licensee is guilty of any of the following acts or offenses:

• . .

144.1(3) Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of nursing home administration or engaging in unethical conductor practice harmful or detrimental to the public. Proof of actual injury need not be established.

• • •

144.1(5) Conviction of a felony that is substantially related to the qualifications, functions or duties of a nursing home administrator in a manner consistent with the public health, safety and welfare, in the courts of this state or any other state, territory, country or of the United States. As used in this paragraph, "conviction of a felony" shall include a conviction of an offense which if committed in this state would be deemed a felony under either state or federal law, without regard to its designation elsewhere. A copy of the record of conviction or plea of guilty shall be conclusive as evidence.

• • •

144.1(7) Willful or repeated violations of any statute, rule or regulation pertaining to a nursing home.

The preponderance of the evidence established that the Respondent violated Iowa Code sections 155.18(3), 272C.10(3) and 645 IAC 144.1(3) and (7) by knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of nursing home administration and by engaging in unethical conduct. As the administrator of the Abbey Center, the Respondent had a fiduciary duty to properly manage and handle all facility funds for the benefit of the facility and the residents. By repeatedly using deceitful practices to convert facility funds to his own use, the Respondent has violated the cited Iowa Code sections and the administrative rules.

The preponderance of the evidence established that the Respondent has been convicted of eight (8) felonies that are substantially related to his qualifications, functions and duties as a nursing home administrator and which are evidence of his unfitness to perform as a nursing home administrator, consistent with the public health, safety, and welfare. The Respondent has violated Iowa Code section 155.18(5) and 645 IAC 144.1(5) and (7).

## SANCTION

The Board is permitted to consider a number of different factors when it determines the appropriate sanction for particular violations. 645 IAC 13.2, 144.4. Several factors are relevant to the Board's decision in this case: the relative serious nature of the violations as they relate to assuring the citizens of this state a high standard of professional care; the facts of

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the particular violations; whether remedial action has been taken, and such other factors as may reflect upon the competency, ethical standards, and professional conduct of the licensee.

The Respondent admits the violations but asserts that they were caused by his gambling addiction. The Respondent asserts that his illegal actions did not cause harm to any resident and asks the Board to consider his long successful career in nursing home administration. Finally, the Respondent cites to other cases of embezzlement and argues that he has already been disproportionately punished for his actions by the criminal justice system. (Respondent Exhibit A)

The Board does not accept the Respondent's assertion that residents were not harmed by his actions. Even if the Respondent managed to meet the residents' needs while he remained employed at the facility, the illegal diversion of substantial funds from a nursing facility will inevitably compromise the facility's ability to provide necessary services and supplies to its residents and result in harm to residents.

It is clear that the Respondent engaged in planned, systematic, and deceptive practices over a period of years to divert facility funds to his own use and to make numerous fraudulent rent reimbursement claims. These are extremely betrayals of the Respondent's professional and obligations as an administrator and as a fiduciary. While the Respondent has been given significant criminal penalties as a result of his actions, the Board's primary responsibility is the protection of the public and the integrity of the nursing home administrator profession. The Respondent should permitted to apply for reinstatement as a nursing home administrator before he has successfully completed his five year criminal probation. The egregious and repeated nature of the Respondent's ethical violations raises serious doubt whether he can ever be trusted to return to the practice as a nursing home administrator.

## DECISION AND ORDER

IT IS THEREFORE ORDERED that the license to practice as a nursing home administrator in the state of Iowa issued to Kenneth Ervin Opp, license no. 270-01162 is hereby REVOKED, effective on the date of service of this order.

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IT IS FURTHER ORDERED that the Respondent may not apply for reinstatement of his license for a minimum period of five (5) years from the effective date of the revocation. In any proceeding for reinstatement, the burden will be on the Respondent to establish that the reason for the revocation no longer exists, and that it is in the public interest for his license to be reinstated. Given the egregious violations that led to the revocation of his license, the Board believes that this will be an extremely difficult burden for the Respondent to carry.

IT IS FURTHER ORDERED, pursuant to Iowa Code section 272C.6, that the Respondent shall pay \$75.00 hearing fee, within thirty (30) days of receipt of this decision. The cost of a transcript will be charged to the party requesting it. 645 IAC 11.23.

This Findings of Fact, Conclusions of Law, Decision and Order is approved by the board on October 21, 2004.

Judicial review of the Board's action may be sought in accordance with the terms of the Iowa Administrative Procedure Act. 645 IAC 11.29.