

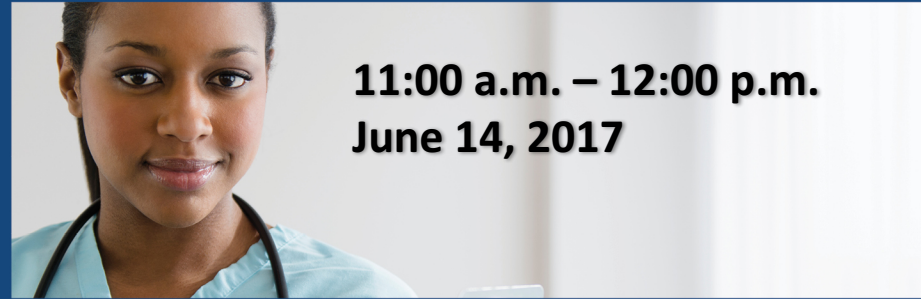


NCSBN

National Council of State Boards of Nursing

Reinstatement Petitions: Relevant Evidence and Burdens

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Introduction – Mark is:

- retired from the Kentucky Office of the Attorney General;
- in private practice (since August 2012), and;
- a long-time presenter in continuing education for over twenty national and state organizations, including FARB and the NCSBN, and private companies.

This continuing education was:

- developed for FARB, of which NCSBN is a member;
- originally presented at the 2017 FARB Forum, San Antonio, and;
- updated for the NCSBN for the DCM Conference.

Objectives – to provide attendees with:

- a focus on reinstatement petitions for a state agency – non-disciplinary versus disciplinary action;
- an analysis of relevant evidence reviewed by a state agency and the burden of proof in a reinstatement proceeding;
- a recommendation on statutes and administrative regulations/rules, or other provisions, regarding reinstatement proceedings, and;

Objectives – to provide attendees with:

- a presentation here that is more relevant to Board staff, Board members, and other (presumably) non-attorneys.

Disclaimer – what this covers, or not:

- does provide a broad overview of reinstatement issues with examples high-lighted from Kentucky law;
- does not cover all nursing laws in the 50 states and jurisdictions, and;
- does educate the person attending to ask the right questions in their own state and profession.

Disclaimer – not the official position of:

This continuing education material is not the official position of:

- the NCSBN;
- any Kentucky state agency, or;
- any sane person.

Disclaimer – so why are we here?

This continuing education material is intended to:

- cover a wide perspective of core issues in state licensure regarding reinstatements;
- generate discussion from your analysis of the issues, and;
- be a productive and worthwhile use of our time.

Introduction – what are we reinstating?

Non-discipline versus disciplinary reinstatement:

- retired or inactive license reinstatement or reactivation applications to a state agency;
- discipline under active, on-going disciplinary terms, and;
- post-discipline after active, disciplinary terms, i.e., reinstatement of a revoked license.

Non-discipline reinstatement of a license:

Non-discipline reinstatement:

- inactive license, retired license – do you have these?
- what are inactive or retired licenses, presumably ones that you cannot use? Why have them?
- what limits are there on holding an inactive or retired license?

Non-discipline reinstatement of a license:

What limits are there on holding a retired or inactive license?

- cannot practice that profession;
- must pay a regular licensure fee (the same or less?), and;
- may have to do things later (and all at once) to reinstate/reactivate a retired/inactive license that would have been done over time as a licensee.

Non-discipline reinstatement of a license:

What advantages are there if you cannot practice?

- do not have to obtain continuing education;
- may pay less than the regular licensure fee;
- can still call yourself a member of that profession thus entitling you to membership in a state association (and association benefits);

Non-discipline reinstatement of a license:

What advantages are there if you cannot practice?

- serves as a placeholder in time thus easier to resume practice, and;
- has advantages for professionals licensed in more than one jurisdiction who may need only hold one active license, but could more easily reactivate their inactive licenses in other jurisdictions on an as-needed basis.

Non-discipline reinstatement of a license:

How do you reinstate such a license? This should:

- be a ministerial act, that is, a “cookbook” style step found in administrative regulation or rule that specifies exactly what has to be done;
- be a check-off list created based on the requirements in the law, which board staff may carry out that does not require professional expertise and judgment.

Non-discipline reinstatement of a license:

How do you reinstate such a license? This should:

- require a written application for reinstatement in an approved form document available to the public and recognized by law with an administrative regulation or rule, and;
- include all the same questions on a regular initial application or regular renewal form (see FARB model application/renewal documents).

Non-discipline reinstatement of a license:

How do you reinstate such a license? This requires:

- one to apply within a period of time since last fully licensed;
- the Board to act in a discretionary matter if there is any substantive question on the reinstatement application -- the sufficiency of required continuing education or the existence of a criminal conviction;

Non-discipline reinstatement of a license:

How do you reinstate such a license? This requires:

- after a period of time holding an inactive or retired license, one must “start over” or do something else, and;
- reinstatement in these contexts not to be pejorative actions.

Non-discipline reinstatement of a license:

Examples in the law? Note:

- what is that period of time measured from? From last holding a license? Or from last engaging in the active practice of that profession with a license?
- further note: What is “active practice?”

Non-discipline reinstatement of a license:

Examples in the law?

- many examples by administrative regulation or rule;
- each board should have an administrative regulation for:
 - licensure renewal;
 - late renewal and grace period (if any);
 - reinstatement within “X” time, and;
 - reinstatement after more than “X” time.

Non-discipline reinstatement of a license:

Examples in the law?

- a license may lapse or expire for the simple failure to renew it;
- lapsing or expiring are terms under law to reflect the change in that legal status, and;
- non-pejorative actions and terms.

Non-discipline reinstatement of a license:

Examples in the law?

- in Kentucky, state statute holds a license not renewed simply “lapses” but may be “reinstated” upon appropriate application. Kentucky Revised Statute 314.071(2);
- the same administrative regulation applies to the process to reinstate a lapsed license or a retired license. 201 Kentucky Administrative Regulation 20:225 § 1.

Disciplinary reinstatement of a license:

Disciplinary reinstatement – these apply to:

- terms and conditions of a Settlement Agreement or Consent Decree, an administrative document taking disciplinary action and may contain automatic or discretionary reinstatement terms (see FARB model settlement agreement documents), and;
- automatic versus discretionary terms.

Disciplinary reinstatement of a license:

Disciplinary reinstatement – automatic versus discretionary terms: advantages and disadvantages of each?

- automatic terms allow self-implementing reinstatement based on express terms and conditions;
- discretionary terms allow open-ended time to comply – may provide too much discretion and may unreasonably delay reinstatement;

Disciplinary reinstatement of a license:

Disciplinary reinstatement – pejorative actions:

- disciplinary reinstatements should be automatic to implement the terms and conditions of a disciplinary action, and;
- may not require specific forms such as non-disciplinary reinstatements, but does call for precise adherence to the terms and conditions of each individual disciplinary action.

Relevant evidence and burdens:

- all reinstatements should include all statutory and administrative requirements of the law as evidence to comply;
- the burden to prove reinstatement is on the applicant, the licensee, or former licensee seeking reinstatement, and;
- a denied reinstatement should trigger a due process right of the denied applicant to request an administrative hearing.

Relevant evidence and burdens:

- what about a due process right of the denied applicant to request an administrative hearing?
- practice tip: the agency may issue a preliminary denial stating grounds why the reinstatement is denied, then offer an administrative hearing by written request, and;
- burden of proof is embodied in a state administrative procedures act.

Relevant evidence and burdens:

An example - KRS 13B.090(7):

- “In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. . . . The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the hearing officer.”

Relevant evidence and burdens:

Check your governing statutes about revoked licenses:

- what does revoke mean? Should your statute say “permanent revocation?”
- does a right to seek reinstatement apply by statute? and;
- if so, such statutes typically govern the period of time and the standard of reinstatement.

Relevant evidence and burdens:

An example – KRS 319.082(4):

- “Three (3) years from the date of a revocation, any person whose license has been revoked may petition the board for reinstatement. The board shall investigate his or her petition and may reinstate his or her license upon finding that the former licensee has complied with the provisions of this chapter and administrative regulations promulgated by the board and is again able to engage in the practice of psychology with reasonable skill, competency, and safety to the public.”

Relevant evidence and burdens:

Enact your evidentiary standards and burden of proof into law:
“the three Rs” of remorse, restitution, rehabilitation.

An example: Kentucky Supreme Court Rule 2.300(7):

- “A petitioner for reinstatement will be held to a substantially more rigorous standard than a first time applicant for an initial admission to the Bar. The prior determination that he/she engaged in professional misconduct continues to be evidence against him or her and the proof presented must be sufficient to overcome that prior adverse judgment.”

Relevant evidence and burdens:

Among the considerations to be weighed are:

- “the nature of the misconduct for which the applicant was suspended or disbarred;
- the applicant’s conception of the serious nature of his or her act;
- the applicant’s sense of wrongdoing;
- the applicant’s previous and subsequent conduct and attitude toward the courts and the practice, including the element of time elapsed since disbarment;
- the applicant’s candor in dealing with the Character and Fitness Committee, and;
- the relevant knowledge of witnesses called by the applicant.”

Relevant evidence and burdens:

Enact your evidentiary standards and burden of proof into law:

- administrative regulation or rule, or by state statute;
- in the absence of regulation, rule, or statute, put them in a Settlement Agreement or Consent Decree when you have one;

An example: Kentucky Supreme Court Rule 3.330:

- “In reinstatement hearings the burden shall rest upon the Applicant, and he/she must demonstrate by clear and convincing evidence his/her suitability for reinstatement.”

Relevant evidence and burdens:

- “in reinstatement cases the applicant has the burden of proving by clear and convincing evidence that he/she possesses the requisite character, fitness and moral qualification for re-admission to the practice of law. (SCR 3.330) Issues that will be considered include, but are not limited to, the following:
 - (a) Whether the applicant has presented clear and convincing evidence that he/she has complied with every term of the order of suspension or disbarment;
 - (b) Whether the applicant has presented clear and convincing evidence that his/her conduct while under suspension shows that he/she is worthy of the trust and confidence of the public;”

Relevant evidence and burdens:

- (c) Whether the applicant has presented clear and convincing evidence that he/she possesses sufficient professional capabilities to serve the public as a lawyer;
- (d) Whether the applicant has presented clear and convincing evidence that he/she presently exhibits good moral character, and;
- (e) Whether the applicant has presented clear and convincing evidence that he/she appreciates the wrongfulness of his/her prior misconduct, that he/she has manifest contrition for his/her prior professional misconduct, and has rehabilitated himself/herself from past derelictions.”

Check applicable case law:

What does revoke mean? For how long? What happens next?

- *Shamaeizadeh v. Kentucky Board of Medical Licensure*, 2006 Ky. App. Unpub. LEXIS 1229, Court of Appeals of Kentucky, No. 2004-CA-001768-MR, rendered January 27, 2006;
- discretionary review denied by the Supreme Court of Kentucky, and opinion of the Court of Appeals ordered not to be published. *Kentucky Board of Medical Licensure v. Shamaeizadeh*, 2006 Ky. LEXIS 244 (September 13, 2006)

Check applicable case law:

Application for reinstatement by a revoked physician;

- questions to ask:
 - non-disciplinary or disciplinary reinstatement?
 - who had the burden of proof?
 - what standard of evidence?
 - what weight was given to a Board final order?

Check applicable case law:

- conclusion: The Court of Appeals reversed and remanded a case to the lower court directing that court to conduct a judicial review of the Board's denial of the physician's reinstatement petition.
- facts: Physician was revoked March 7, 2000 – upheld by the lower court (circuit court) on judicial appeal, and upheld again by the Court of Appeals. Physician reapplied in October 2003 under statute allowing a petition two years after revocation.



Check applicable case law:

KRS 311.607 allowed for a reinstatement petition:

- “A licensee who has had his license revoked may, after two (2) years from the effective date of the revocation order, petition the board for a license to again practice in the Commonwealth of Kentucky; [Note: the statute has exceptions and qualifications.]
- No new license shall be issued to such former licensee unless the applicant satisfies the board that he is presently of good moral character and qualified both physically and mentally to resume the practice of medicine without undue risk or danger to his patients or the public.”

Check applicable case law:

On December 3, 2003, the Board issued a final order denying the reinstatement under “good moral character and qualified both physically and mentally” ordering:

- “Furthermore, having considered all available information, particularly the licensee’s disciplinary history before this Board and the bases for those disciplinary orders, [the Board] orders that it will not consider another petition for reinstatement filed by the licensee prior to its November 2013 meeting, a period of ten (10) years.”
- judicial review was denied by the lower court – reversed by the Court of Appeals.

Check applicable case law:

Rationale:

- “The legislature has created a procedure for reinstatement of a medical license; it is a proceeding separate and distinct from the disciplinary action that preceded the revocation of the license. The order adjudicating the application for reinstatement concludes that process and constitutes a final order. If a physician is aggrieved by the final order, that order becomes subject to judicial review.
- [T]he non-ministerial orders of an administrative agency are inherently reviewable for abuse or arbitrariness regardless of whether there is a statutory procedure established for that purpose.”



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Check applicable case law:

- answers and comments:
 - non-disciplinary or disciplinary reinstatement?
 - who had the burden of proof?
 - what standard of evidence?
 - what weight was given to the lower court's conclusion agreeing with the Board that there was no right to judicial review?

Check applicable case law:

In re the reinstatement of Drain, 2016 OK 68, 376 P.3d 208, Oklahoma Supreme Court (2016) (see FARB Top Regulatory Cases):

- application for reinstatement by a formerly licensed attorney;
- questions to ask:
 - non-disciplinary or disciplinary reinstatement?
 - who had the burden of proof?
 - what standard of evidence?
 - what weight was given to a recommendation to reinstate?

Check applicable case law:

- conclusion: The Supreme Court of Oklahoma determined an attorney seeking reinstatement of his law license did not demonstrate the required competency to grant his petition.
- facts: Drain had resigned from the practice of law 10 years earlier with no disciplinary proceedings pending, but an administrative suspension had been issued for failing to pay \$100 in CLE late fees prior to his resignation.

Check applicable case law:

- more facts: Drain had worked thereafter as a paralegal and as an instructor of paralegal courses. Drain filed for reinstatement - the Professional Responsibility Tribunal recommended reinstatement and determined:
 - Drain had complied with all procedural rules, established he had not engaged in unlicensed practice, and had demonstrated competence.

Check applicable case law:

- rationale: The Oklahoma Supreme Court overruled the recommendation finding there was no evidence Drain completed the mandatory CLE in the 10 years since his resignation and teaching paralegal courses to non-attorneys did not rise to the level and competency expected of attorneys;
- based on Drain's extended absence from the profession, he must retake the state bar examination as the only recourse for reinstatement.

Check applicable case law:

- answers and comments:
 - non-disciplinary or disciplinary reinstatement?
 - who had the burden of proof?
 - what standard of evidence?
 - what weight was given to a recommendation to reinstate?
- *de novo* review – court here looks at the facts and law without giving weight to any recommendation (no deference), and;
- passing the examination again seems always a path to reinstatement.

Check applicable case law:

- could Drain pass the state bar examination again? Perhaps!
- was Drain successful in avoiding that requirement simply by being reinstated? No!
- what may we ultimately conclude?!?!?

Conclusion:

We have covered:

- identifying reinstatement petitions for review, non-disciplinary action versus disciplinary action;
- analyzing relevant evidence reviewed by a state agency and the burden of proof in a reinstatement proceeding, and;

Conclusion:

We have covered:

- recommending statutes and administrative regulations/rules, or other provisions, regarding reinstatement proceedings.

Questions?



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