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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JOHN RALPH KELLY,

Plaintiff and Appellant,

v.

BOARD OF REGISTERED NURSES,

Defendant and Appellant.

F044238

(Super. Ct. No. 03CECG02456)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jon Nick Kapetan, Judge.

Baker, Manock & Jensen, Donald R. Fischbach, and Matthew E. Farmer for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Alfredo Terrazas, Senior Assistant Attorney General, and Arthur D. Taggart, Deputy Attorney General, for Defendant and Appellant.

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STATEMENT OF THE CASE

On April 30, 1988, the appellant Board of Registered Nurses (Board) of the California Department of Consumer Affairs, issued Registered Nurse License No. 425362 to appellant John Ralph Kelly (Kelly). On February 5, 1990, the Board issued Public Health Nurse Certificate No. 45861 to Kelly.

On February 18, 2000, the Fresno County District Attorney filed information No. 645968-9 in superior court. The information charged appellant with 84 felony counts and two misdemeanor counts of defrauding 47 different insurance companies. On October 13, 2000, Kelly pleaded guilty to a single felony violation of Penal Code sections 487, subdivision (a) and 532, subdivision (a) (count I) with that count amended to include all 47 victims.¹ On December 12, 2000, the superior court sentenced Kelly to two years formal probation, ordered him to report to an adult offender work program, directed him to complete 500 hours of community service, instructed him to pay \$50,000 in restitution, and directed him to obey all laws.

On August 20, 2001, Kelly submitted to the Board an application for a Nurse Practitioner Certificate.

On or about October 7, 2001, Ruth Ann Terry (Terry), M.P.H., R.N., Executive Director of the Board, executed an accusation against Kelly and alleged two causes for

¹ Penal Code section 487, subdivision (a) states in relevant part:

“Grand theft is theft committed in any of the following cases:

“(a) When the money, labor, or real or personal property taken is of a value exceeding four hundred dollars (\$400), except as provided in subdivision (b).”

Penal Code section 532, subdivision (a) states:

“Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, whether real or personal, or who causes or procures others to report falsely of his or her wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained.”

discipline: First Cause for Discipline--conviction of a substantially related offense (Bus. & Prof. Code, §§ 490, 2761, subd. (f); Pen. Code, §§ 487, subd. (a), 532, subd. (a)); and Second Cause for Discipline--unprofessional conduct (Bus. & Prof. Code, § 2761, subd. (a)). Terry prayed for the revocation or suspension of Kelly's registered nurse license and public health nurse certificate and for an order directing Kelly to pay the Board the reasonable costs of the investigation and enforcement of this case.

On August 5, 2002, Terry executed a statement of issues against Kelly. Complainant Terry alleged the Board should deny Kelly's 2001 application for a nurse practitioner certificate on three grounds: First Cause for Denial—a 2000 conviction of grand theft/obtaining money from 47 different insurance companies (Bus. & Prof. Code, § 480, subd. (a)(1); Pen. Code, §§ 487, subd. (a), 532, subd. (a)); Second Cause for Denial—commission of acts constituting grounds for discipline (Bus. & Prof. Code, §§ 480, subd. (a)(3), 490, 2736, 2761, subd. (f)); and Third Cause for Denial—acts involving dishonesty, fraud, and deceit (Bus. & Prof. Code, §§ 480, subd. (a)(2), 2736). Terry prayed that the Board issue a decision denying Kelly's application for a nurse practitioner certificate.

On September 3, 2002, the Board conducted a contested hearing on the statement of issues. At the conclusion of that hearing, the Honorable John D. Wagner, Administrative Law Judge from the Office of Administrative Hearings, took the matter under submission.

On October 2, 2002, Judge Wagner issued a proposed decision, revoked Kelly's registered nurse license and public health certificate, denied Kelly's application for a nurse practitioner certificate, and ordered Kelly to pay \$3,823.25 to the Board.

On December 17, 2002, the Board adopted the proposed decision effective January 16, 2003.

On or about January 15, 2003, Kelly submitted a petition for reconsideration to the Board based on evidence of his rehabilitation. Kelly also submitted a request for stay

pending decision on the petition for reconsideration, additional evidence in support of the petition, and written legal arguments.

On January 16, 2003, the Board issued an order granting a stay of execution until February 5, 2003, for the purpose of considering the request for reconsideration.

On January 17, 2003, the superior court permitted Kelly to withdraw his previous plea of nolo contendere to the underlying criminal charge and enter a new plea of not guilty. The court then dismissed the criminal information against Kelly under the provisions of Penal Code section 1203.4.

On February 4, 2003, the Board issued an order granting reconsideration of its decision and further staying the decision until the rendering of another decision.

On April 22, 2003, the Board issued an order fixing the date for submission of written arguments to a date on or before May 22, 2003.

On May 22, 2003, counsel for the Board submitted written legal argument regarding Kelly's petition for reconsideration.

On June 18, 2003, the Board adopted Judge Wagner's proposed decision of October 2, 2002, as its final decision and stated the decision would become effective on July 18, 2003.

On July 14, 2003, Kelly filed a petition for writ of administrative mandate, request for immediate stay, and supporting points and authorities in the Superior Court of California, County of Fresno. On July 16, 2003, Kelly also filed an ex parte application for immediate stay of enforcement of Board's June 18, 2003 decision.

On July 17, 2003, the superior court denied Kelly's ex parte application for an immediate stay.

On July 31, 2003, the Board filed an answer to Kelly's petition for writ of mandate.

On August 1, 2003, the Board filed a notice of lodging of the administrative record in the superior court.

On the same date, the Board filed written opposition to Kelly's petition for writ of mandate.

On August 13, 2003, Kelly filed a written reply to the Board's opposition papers. On the same date, Kelly filed a replication to the Board's answer to petition for writ of administrative mandate.

On September 8, 2003, the court conducted a contested hearing, heard the arguments of counsel, and granted the petition.

On September 26, 2003, the court filed a written statement of decision.

On the same date, the court filed a judgment reinstating Kelly's license as a registered nurse and certificate as a public health nurse and granting his application for a certificate as a nurse practitioner subject to terms and conditions of probation.

On October 1, 2003, the court signed a peremptory writ of mandate commanding the Board to reinstate Kelly's registered nurse license and public health nurse certificate and to grant his nurse practitioner's certificate subject to probationary terms and conditions.

On October 3, 2003, Kelly's counsel wrote the superior court, indicated that his client had requested attorney fees in the petition for writ, and noted that the judgment was silent on that subject.

On October 8, 2003, the court filed a minute order denying Kelly attorney fees.

On November 3, 2003, the Board filed a timely notice of appeal from the September 26, 2003 judgment and the October 1, 2003 peremptory writ.²

² A judgment in a mandamus proceeding is an appealable order under Code of Civil Procedure section 904.1, subdivision (a)(1). (*U.D. Registry, Inc. v. Municipal Court* (1996) 50 Cal.App.4th 671, 673.)

On November 5, 2003, the Board filed a written return to the peremptory writ of mandate.

On December 5, 2003, Kelly filed a notice of appeal from the September 26, 2003 judgment with respect to the issue of attorney fees.³

On December 8, 2003, Kelly's counsel filed a letter with the trial court requesting clarification as to the period of probation.

On December 12, 2003, the trial court filed a clarification of the judgment indicating the period of probation would be five years commencing on July 18, 2003.

STATEMENT OF FACTS

Facts Underlying Kelly's Criminal Conviction

On April 30, 1988, the Board licensed Kelly as a registered nurse. On February 5, 1990, the Board issued him a public health nurse certificate. For several years after his

³ An appeal, other than in a limited civil case, may be taken from an order made after a judgment made appealable by Code of Civil Procedure section 904.1, subdivision (a)(1). (Code Civ. Proc., § 904.1, subd. (a)(2).) In the instant case, Kelly filed a notice of appeal from the September 26, 2003, judgment and separate statement of decision, but not the October 8, 2003, order denying attorney fees. Notices of appeal will be liberally construed to provide for a hearing on the merits of those issues presented for appellate review. Nevertheless, a statement of decision is not appealable and an attempt to appeal from a trial court's statement of decision is ineffective. (*Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 279, disapproved on another point in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, fn. 11.) The September 26, 2003, judgment makes no mention of attorney fees. An order rendered after judgment is not cross-appealable in connection with an appeal from the judgment. Rather, the postjudgment order must be separately appealed and the appeal time period runs from the notice of entry or entry of the order, not entry of the judgment. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) ¶ 3:175, p. 3-64, citing *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 295.) Here, Kelly filed a timely notice of appeal but did not specify the proper underlying order. We may liberally construe the notice of appeal to protect Kelly's right of appeal since it is reasonably clear what he was trying to appeal from—the denial of attorney fees—and the Board could not possibly have been misled or prejudiced. (*D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361.)

licensure, Kelly worked at Saint Agnes Medical Center in a unit that monitored patients with heart conditions. Kelly later worked at Sierra Community Hospital as a registered nurse and received training in the hospital operating room. While he worked as a preoperative nurse at Sierra, Kelly learned that a registered nurse with a baccalaureate degree could seek certification as a surgical nurse first assistant and then set up a private business. Because Kelly possessed the requisite credentials he applied to the American Academy of Nurse Practitioners for certification.

In 1992, the Academy granted Kelly certification as a surgical first assistant and family nurse practitioner. He went into business for himself but could not practice as a nurse practitioner until first certified by the Board. Kelly initially limited his surgical assistant work to nights and weekends. As his caseload expanded, he made the transition from operating room nurse to fulltime surgical assistant. For a time, Kelly used billing companies to submit his claims for reimbursement to insurance companies. He subsequently submitted claims directly to the insurance companies.

Kelly billed for this surgical assistant work using the code, “80-Modifier.” That code allowed Kelly to receive payment as an assisting surgeon and each payment represented 20 percent of the surgeon’s fee. Kelly initially received the full 20 percent and, for a period of time, earned a satisfactory level of reimbursement from the insurance companies. After about two years, some insurers began denying his claims for surgical assistant work. According to Kelly, the companies reviewed their policies and concluded they were not required to pay a registered nurse at a surgical assistant’s rate.

On occasion, insurers involved with worker’s compensation claims would notify Kelly and request that he bill with an “83-Modifier” code rather than the “80-Modifier” code. Such notices provided that Kelly would receive 10 percent of the surgeon’s fee. Kelly believed his income would decline dramatically if he switched from the “80” code to the “83” code. As a result, he decided to alter the claims forms to confuse processors into thinking he was a physician instead of a nurse. Kelly listed his credential as

“FACRN” rather than as “RNFAC” in order to resemble a physician’s credential. Kelly also submitted operative reports listing the surgical assistant as “MD.”

Kelly acknowledged aggressive billing techniques but said he employed them to circumvent unreasonable denials of reimbursement from insurance companies. Kelly continued to use the “80 Modifier” to obtain a higher rate of compensation. He also believed he should not be paid less than a physician’s assistant, who typically received 15 percent of a surgeon’s fee, or a general practitioner physician, who typically received 20 percent of a surgeon’s fee. Kelly was also irritated that claims examiners questioned his degree, training, and qualifications when evaluating his claims for work as a surgical assistant. Kelly stopped submitting false claims when law enforcement investigators entered his home and confiscated his business records.

On February 18, 2000, the Fresno County District Attorney filed information No. 645968-9 in superior court. The information charged appellant with 84 felony counts and two misdemeanor counts of defrauding 47 different insurance companies. On October 13, 2000, Kelly pleaded guilty to a single felony count a violation of Penal Code sections 487, subdivision (a) and 532, subdivision (a), which count had been amended to include all 47 victims. On December 12, 2000, the superior court sentenced Kelly to two years formal probation, ordered him to report to an adult offender work program, directed him to complete 500 hours of community service, instructed him to pay \$50,000 in restitution, and directed him to obey all laws. At the time of the administrative hearing, Kelly had two months of formal probation remaining.

Facts Elicited at the Administrative Hearing

Thomas Granata, Ph.D., a clinical psychologist, testified he has a master’s degree in child development from California State University, Fresno and a Ph.D. in clinical psychology from the University of Nevada. Dr. Granata said he saw Kelly on two occasions, took a variety of histories, and administered the Minnesota Multiphasic Personality Inventory (MMPI) and the Personality Assessment Inventory.

Dr. Granata reviewed the results of the MMPI and said Kelly chronically tends to blame others for his problems. According to Granata, this behavior pattern is a way of coping with anxiety because Kelly can avoid responsibility by blaming others. Granata also characterized this conduct as “a pattern of behavior.” Granata also said that Kelly was remorseful and regretful, openly admitted he was responsible for the billing fraud, and did not blame anyone else.

Danilo Manimtim, M.D., an orthopedic surgeon, testified he has practiced medicine in Fresno County since 1981. Dr. Manimtim said he has known Kelly since the latter was working as a nurse at Sierra Hospital in the 1980’s. Manimtim used Kelly as a surgical assistant on 50 to 100 occasions and characterized his competence and skills as “excellent.” Dr. Manimtim could not remember whether Kelly had expressed remorse for his billing practices. Manimtim also did not know the number of felony charges against Kelly, that Kelly was on criminal probation, or how long Kelly had engaged in criminal misconduct.

John Thomas Bonner, M.D., a neurological surgeon, testified he has practiced medicine in the state of California for 30 years. Dr. Bonner considered Kelly one of the best assistants he had in his medical career. Bonner testified a nurse must have high competency standards and possess equally high ethical and moral standards. Bonner said Kelly did not discuss the criminal charges with him in any detail.

William J. Vlymen, M.D. testified he has been a radiologist at the Veteran’s Administration Medical Center for 20 years and has a personal and professional relationship with Kelly. Dr. Vlymen said Kelly has a reputation for being extremely detail-oriented, good at what he does, and thoroughly professional in every respect. Vlymen further testified that nurses should have high moral and ethical standards and would expect someone working with him to have such qualifications.

The Decision of the Administrative Law Judge as Adopted by the Board

On October 2, 2002, Administrative Law Judge Wagner issued a proposed decision on the Board's accusation against Kelly. On December 17, 2002, the Board adopted the proposed decision as its decision in the matter, effective January 16, 2003. On June 18, 2003, the Board issued a decision after reconsideration and again adopted Wagner's proposed decision as its final decision in the matter, effective July 18, 2003.

The decision stated in relevant part:

“FACTUAL FINDINGS [¶] ... [¶]

“4. On October 13, 2000, in the Fresno County Superior Court, respondent was convicted, on his plea of nolo contendere, of violating Section 487(a)/532(a) [Grand Theft/Obtaining money under false pretenses] of the Penal Code. This crime was a felony. It is substantially related to the qualifications, functions or duties of a Registered Nurse or a Nurse Practitioner. It involved dishonesty, fraud or deceit with the intent to substantially benefit respondent and substantially injure another. It constitutes unprofessional conduct.

“As a result of this conviction, respondent received a suspended imposition of judgment and was placed on two years formal probation. The terms of respondent's probation included community service, a work program, and restitution in the amount of \$50,000. Respondent has completed these terms and his probation is scheduled to end in December 2002.

“5. The facts and circumstances surrounding this conviction are that on and between July 30, 1993, and July 1998, respondent unlawfully, knowingly, designedly, and fraudulently obtained possession of approximately \$50,000 from 47 different insurance companies. After assisting various doctors with surgical procedures, respondent submitted health insurance claim forms and billings to insurance companies with fraudulent written material representations to obtain compensation to which he was not entitled.

[¶]...[¶]

“6. Respondent has begun to rehabilitate himself. Respondent has completed 500 hours of community service. He has completed his restitution. A psychological evaluation indicates that respondent has a tendency to blame others (e.g., insurance companies) and to be argumentative. However, respondent doesn't deny that what he did was wrong. He accepts his responsibility and is remorseful.

“A great deal of testimony and other evidence was received during the hearing that demonstrated respondent unquestionably has the capacity to practice safe nursing. Several doctors testified that respondent is very competent.

“Although respondent has begun his rehabilitation, he is not rehabilitated. Not enough time has elapsed for his rehabilitation. He is still on criminal probation. The crime he was convicted of is directly related to the professional practice of a Registered Nurse. It involved dishonesty and a form of theft. The public was harmed. The crime was serious, both in its nature and its extent. [¶]...[¶]

“CONCLUSIONS OF LAW

“1. Cause for discipline of respondent’s Registered Nurse License and Public Health Nurse Certificate was established pursuant to Sections 490 and 2761(f) [Conviction of a Felony] of the Business and Professions Code by reason of Finding 4.

“2. Said cause was established for violation of Section 2761(a) [Unprofessional Conduct] of said code by reason of Finding 4.

“3. Cause for denial of respondent’s application for a Nurse Practitioner Certificate was established as follows:

“a. Pursuant to Sections 2736 and 480(a)(1) [Conviction] of the Business and Professions Code, by reason of Finding 4.

“b. Pursuant to Sections 2736(a)(3) and 480(a)(3) [Act if done by Licentiate would be grounds for discipline] of said code, by reason of Finding 4.

“c. Pursuant to Sections 2736(a)(3) and 480(a)(2) [Act involving dishonesty, fraud or deceit] of said code, by reason of Finding 4.

“4. In view of the seriousness of respondent’s conviction and its direct relationship to the ethical and professional practice of registered nursing, and the fact that respondent is not yet rehabilitated (regardless of his established competency), his Registered Nurse License and Public Health Nurse Certificate should be revoked at this time. Respondent’s application for a Nurse Practitioner Certificate should be denied. [¶]...[¶]

“ORDER

“WHEREFORE, the following order is hereby made:

“1. Registered Nurse License No. 425362 issued to John Ralph Kelly is REVOKED.

“2. Public Health Certificate No. 45861 issued to John Ralph Kelly is REVOKED.

“3. The application of John Ralph Kelly for a Nurse Practitioner Certificate is DENIED.”

The Statement of Decision

On September 26, 2003, the Honorable Jon N. Kapetan, judge of the superior court, filed a statement of decision providing in relevant part:

“Petitioner, John Ralph Kelly, filed a Petition for Writ of Mandate seeking to compel the State of California, Board Of Registered Nursing to return his registered nurse license and public health certificate and grant his application for a nurse practitioner’s certificate. The petition was filed on July 14, 2003, and argued on September 8, 2003.

“The question presented in this case is whether or not respondent properly revoked petitioner’s registered nurse license and public health certificate and further denied petitioner’s application for a nurse practitioner’s certificate. The court finds that respondent [Board] failed to act properly in that: (1) petitioner’s criminal conviction is not substantially related to the qualifications, functions, or duties of a nurse; and (2) respondent failed to consider new and additional evidence submitted with petition for reconsideration. Consequently, Petitioner’s Writ of Mandate should be and hereby is granted. [¶]...[¶]

“Here, the ALJ found that the felony convictions were substantially related to petitioner’s qualifications, functions or duties as a registered nurse, or a nurse practitioner because it involved dishonesty, fraud, or deceit, with the intent to substantially benefit petitioner and to substantially Injure another. (Factual finding #4.)

“Petitioner was convicted for violating Penal Code §487(a) [grand theft], and Penal Code §532(a) [fraudulently obtaining money, property or labor]. It would appear that these convictions would, by their very nature, Involve theft, dishonesty, fraud, or deceit.

“Although the ALJ’s decision that the conviction involved dishonesty and theft appears to have been correct, the ALJ did not complete the analysis for substantial relationship. He must have also determined if, to a

substantial degree, the conviction evidenced the present or potential unfitness of petitioner to practice nursing in a manner consistent with the public health, safety, or welfare. (Cal. Code Regs. Tit. 16, § 1444.) In fact, it appears there is no evidence in the record to show any present or potential unfitness of petitioner to practice nursing in a manner inconsistent with the public health, safety, or welfare, other than the fact of conviction.

“To the contrary, the ALJ himself explicitly found that petitioner [‘]unquestionably has the capacity to practice safe nursing.’ (Proposed decision, factual finding #6.) It is not enough that the ALJ [f]ound the conviction stemmed from theft or dishonesty; he must have also found it to have evidenced, to a substantial degree the present or potential unfitness of petitioner to practice as a registered nurse in a manner consistent with the public health, safety, or welfare. (Cal. Code Regs. Tit.16, §1444.)

“In fact, there is uncontroverted evidence [i]n the record that there was no expectation that petitioner’s criminal behavior would occur again. (Letter from senior deputy district attorney, Burton Francis, exhibit ‘J.’) [¶]...[¶]

“[H]ere, even under the more generous substantial evidence test applicable to denial of applications for a license, there was no evidence that petitioner’s earlier conviction had any rational or substantial relationship to the criminal conviction. As already discussed, the only evidence on this topic showed that petitioner’s the [*sic*] criminal behavior would not occur again.

“The decision is not supported by substantial evidence in light of the whole record...”

The Judgment

On the same date (September 26, 2003), the court filed a formal judgment granting Kelly’s petition for a peremptory writ of mandate to compel reinstatement of his registered nurse license and public health nurse certificate, and the grant of a nurse practitioner’s certificate with probation under the following terms and conditions:

“(1) OBEY ALL LAWS – Respondent [Kelly] shall obey all federal, state and local laws. A full and detailed account of any and all violations of law shall be reported by the respondent to the Board in writing within seventy-two (72) hours of occurrence. To permit monitoring of compliance with this condition, respondent shall submit completed fingerprint forms and fingerprint fees within 45 days of the effective date of the decision, unless previously submitted as part of the licensure application process.

“(2) COMPLY WITH THE BOARD’S PROBATION PROGRAM – Respondent shall fully comply with the conditions of the Probation Program established by the Board and cooperate with representatives of the Board in its monitoring and investigation of the respondent’s compliance with the Board’s Probation Program. Respondent shall inform the Board in writing within no more than 15 days of any address change and shall at all times maintain an active, current license status with the Board, including during any period of suspension. [¶] Upon successful completion of probation, respondent’s license shall be fully restored.

“(3) REPORT IN PERSON – Respondent, during the period of probation, shall appear in person at interviews/meetings as directed by the Board or its designated representatives.

“(4) RESIDENCY, PRACTICE, OR LICENSURE OUTSIDE OF STATE – Periods of residency of practice as registered nurse outside of California shall not apply toward a reduction of this probation time period. Respondent’s probation is tolled, if and when he ... resides outside of California. The respondent must provide written notice to the Board within 15 days of any change of residency or practice outside the state, and within 30 days prior to re-establishing residency or returning to practice in this state.

“Respondent shall provide a list of all states and territories where he ... has ever been licensed as a registered nurse, vocational nurse, or practical nurse. Respondent shall further provide information regarding the status of each license and any changes in such license status during the term of probation. Respondent shall inform the Board if he/she applies for or obtains a new nursing license during the term of probation.

“(5) SUBMIT WRITTEN REPORTS – Respondent, during the period of probation, shall submit or cause to be submitted such written reports/declarations and verification of actions under penalty of perjury, as required by the Board. These reports/declarations shall contain statements relative to respondent’s compliance with all the conditions of the Board’s Probation Program. Respondent shall immediately execute all release of information forms as may be required by the Board or its representatives. [¶] Respondent shall provide a copy of this decision to the nursing regulatory agency in every state and territory in which he or she has a registered nurse license.

“(6) FUNCTION AS A REGISTERED NURSE – Respondent, during the period of probation, shall engage in the practice of registered nursing in California for a minimum of 24 hours per week for 6 consecutive months or

as determined by the Board. For purposes of compliance with [this] section, ‘engage in the practice of registered nursing’ may include, when approved by the Board, volunteer work as a registered nurse, or work in any non-direct patient care position that requires licensure as a registered nurse.

“The Board may require that advanced practice nurses engage in advanced practice nursing for a minimum of 24 hours per week for 6 consecutive, months or as determined by the Board.

“If respondent has not complied with this condition during the probationary term, and the respondent has presented sufficient documentation of his ... good faith efforts to comply with this condition, and if no other conditions have been violated, the Board, in its discretion, may grant an extension of the respondent’s probation period up to one year without further hearing in order to comply with this condition. During the one-year extension, all original conditions of probation shall apply.

“(7) EMPLOYMENT APPROVAL AND REPORTING REQUIREMENTS – Respondent shall obtain prior approval from the Board before commencing or continuing any employment, paid or voluntary, as a registered nurse. Respondent shall cause to be submitted to the Board all performance evaluations and other employment related reports as a registered nurse upon request of the Board.

“Respondent shall provide a copy of this decision to his or her employer and immediate supervisors prior to commencement of any nursing or other health care related employment.

“In addition to the above, respondent shall notify the Board in writing within seventy-two (72) hours after he ... obtains any nursing or other health care related employment. Respondent shall notify the Board in writing within seventy-two (72) hours after he or she is terminated or separated, regardless of cause, from any nursing, or other health care related employment with a full explanation of the circumstances surrounding the termination or separation.

“(8) SUPERVISION – Respondent shall obtain prior approval from the Board regarding respondent’s level of supervision and/or collaboration before commencing or continuing any employment as a registered nurse, or education and training that includes patient care.

“Respondent shall practice only under the direct supervision of a registered nurse in good standing (no current discipline) with the Board of Registered

Nursing, unless alternative methods of supervision and/or collaboration (e.g., with an advanced practice nurse or physician) are approved. [¶] Respondent's level of supervision and/ or collaboration may include, but is not limited to the following:

“(a) Maximum – The individual providing supervision and/or collaboration is present in the patient care area or in any other work setting at all times.

“(b) Moderate – The individual providing supervision and/or collaboration is in the patient care unit or in any other work setting at least half the hours respondent works.

“(c) Minimum – The individual providing supervision and/or collaboration has person-to-person communication with respondent at least twice during each shift worked.

“(d) Home Health Care – If respondent is approved to work in the home health care setting, the individual providing supervision and/or collaboration shall have person-to-person communication with respondent as required by the Board each work day. Respondent shall maintain telephone or other telecommunication contact with the individual providing supervision and/or collaboration as required by the Board during each workday. The individual providing supervision and/or collaboration shall conduct, as required by the Board, periodic, on-site visits to patients' homes visited by the respondent with or without respondent present.

“(9) EMPLOYMENT LIMITATIONS – Respondent shall not work for a nurse's registry, in any private duty position as a registered nurse, a temporary nurse placement agency, a traveling nurse, or for an in-house nursing pool.

“Respondent shall not work for a licensed home health agency as a visiting nurse unless the registered nursing supervision and other protections for home visits have been approved by the Board. Respondent shall not work in any other registered nursing occupation where home visits are required.

“Respondent shall not work in any health care setting as a supervisor of registered nurses. The Board may additionally restrict respondent from supervising licensed vocational nurses and/or unlicensed assertive personnel on a case-by-case basis.

“Respondent shall not work as a faculty member in an approved school of nursing or as an instructor in a Board approved continuing education program.

“Respondent shall work on a regularly assigned, identified and predetermined worksite(s) and shall not work in a float capacity.

“If the respondent is working or intends to work in excess of 40 hours per week, the Board may request documentation to determine whether there should be restrictions on the hours of work.

“(10) COST RECOVERY – Respondent shall pay to the Board costs associated with its investigation and enforcement pursuant to Business and Professions Code section 125.3 in the amount \$3,823.25. Respondent shall be permitted to pay these costs in a payment plan approved by the Board, with payments to be completed no later than three months prior to the end of the probation term.

“If respondent has not complied with this condition during the probationary term, and respondent has presented sufficient documentation of his or her good faith efforts to comply with this condition, and if no other conditions have been violated, the Board, in its discretion, may grant an extension of the respondent’s probation period up to one year without further hearing in order to comply with this condition. During the one-year extension, all original conditions of probation will apply.

“(11) VIOLATION OF PROBATION – If a respondent violates the conditions of his ... probation, the Board after giving the respondent notice and an opportunity to be heard, may set aside the stay order and impose the stayed discipline (revocation/suspension) of the respondent’s license.

“If during the period of probation, an accusation or petition to revoke probation has been filed against respondent’s license or the Attorney General’s Office has been requested to prepare an accusation or petition to revoke probation against the respondent’s license, the probationary period shall automatically be extended and shall not expire until the accusation or petition has been acted upon by the Board.

“(12) LICENSE SURRENDER – During respondent’s term of probation, if he or she ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the conditions of probation, respondent may surrender his or her license to the Board. The Board reserves the right to evaluate respondent’s request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances, without further hearing. Upon formal acceptance of the tendered license and wall certificate, respondent will no longer be subject to the conditions of probation.

“Surrender of respondent’s license shall be considered a disciplinary action and shall become a part of respondent’s license history with the Board. A registered nurse whose license has been surrendered may petition the Board for reinstatement no sooner than the following minimum periods from the effective date of the disciplinary decision:

“(1) Two years for reinstatement of a license that was surrendered for any reason [other] than a mental or physical illness; or

“(2) One year for a license surrendered for a mental or physical illness.”

DISCUSSION

I.

CALIFORNIA CODE OF REGULATIONS, TITLE 16, SECTION 1444

The Board contends the trial court misconstrued California Code of Regulations, title 16, section 1444 and erroneously concluded Kelly’s conviction for grand theft by fraud was not substantially related to the qualifications, functions, or duties of a registered nurse.

The Nursing Practice Act (the Act) (Bus. & Prof. Code, § 2700 et seq.) is the chapter on the practice of nursing within the Business and Professions Code. (Bus. & Prof. Code, § 2700.) The California Department of Consumer Affairs includes a nine-member Board of Registered Nursing. (Bus. & Prof. Code, § 2701.) No state agency other than the Board may define or interpret the practice of nursing for those licensed under the Act or develop standardized procedures or protocols pursuant to the Act, unless so authorized by the Act or specifically required under state or federal statute. (Bus. & Prof. Code, § 2725, subd. (e).) Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific, or otherwise carryout the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to effectuate its purpose. (Gov. Code, § 11342.2; *Helene Curtis, Inc. v. Assessment Appeals Bd.* (1999) 76 Cal.App.4th 124, 129.)

Every certificate holder or licensee may be disciplined or denied a certificate or license as provided in the Act. (Bus. & Prof. Code, §§ 2700, 2761.) The Board of

Registered Nurses may take disciplinary action against a certified or licensed nurse or deny his or her application for a certificate or license for conviction of a felony or of any offense substantially related to the qualifications, functions, and duties of a registered nurse, in which event the record of the conviction shall be conclusive evidence thereof. (Bus. & Prof. Code, § 2761, subd. (f).)

California Code of Regulations, title 16, section 1444 states in relevant part:

“A conviction or act shall be considered to be substantially related to the qualifications, functions or duties of a registered nurse if to a substantial degree it evidences the present or potential unfitness of a registered nurse to practice in a manner consistent with the public health, safety, or welfare. Such convictions or acts shall include but not be limited to the following: [¶]...[¶] (c) Theft, dishonesty, fraud, or deceit....”

California Code of Regulations, title 16, section 1444.5 states:

“In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.), the Board shall consider the disciplinary guidelines entitled ‘Recommended Guidelines for Disciplinary Orders and Conditions of Probation’ (10/02) which are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the board in its sole discretion determines that the facts of the particular case warrant such a deviation -- for example: the presence of mitigating factors; the age of the case; evidentiary problems.”

The Board’s “Recommended Guidelines for Disciplinary Orders and Conditions of Probation” state that the recommended discipline for conviction of a felony or any offense substantially related to the qualifications, functions, and duties of a registered nurse is “Revocation.” The Board’s “Policy Statement on Denial of Licensure” provides in relevant part:

“The law provides for denial of licensure for crimes or acts which are substantially related to nursing qualifications, functions, or duties. A crime or act meets this criterion if, to a substantial degree, it evidences present or potential unfitness to perform nursing functions in a manner consistent with the public health, safety, or welfare (California Code of Regulations, Section 1444).

“The Board may deny licensure on the basis of:

- “• Conviction of crime substantially related to the practice of nursing. [¶]...[¶]

“**Convictions**

“The Board considers most convictions involving sex crimes, drug crimes, and crimes of violence to be substantially related to nursing practice. Board regulations list examples of such crimes or acts to include, but not be limited to: [¶]...[¶]

- “• Violation of Nursing Practice Act. [¶]...[¶]

“**Rehabilitation**

“If the Board determines that an act or crime is substantially related to the practice of nursing, then it is the responsibility of the applicant to present sufficient evidence of rehabilitation. When considering denial of license, the Board takes into account the following criteria to evaluate the rehabilitation of the applicant. (California Code of Regulations, Section 1445).

- “1. Nature and severity of the acts or crimes.
- “2. Additional subsequent acts.
- “3. Recency of acts or crimes.
- “4. Compliance with terms of parole, probation, restitution, or other sanctions.
- “5. Evidence of rehabilitation submitted by applicant.

“The Board has developed [a] list of suggested evidence of rehabilitation for applicants whose licensure is in question.”

An applicant for licensure as a registered nurse must comply with various statutory qualifications and must “[n]ot be subject to denial of licensure under [Business and Professions Code] Section 480.” (Bus. & Prof. Code, § 2736, subd. (a)(3).) Generally speaking, a regulatory board may deny a license regulated by the Business and Professions Code on the grounds that the applicant has been (1) convicted of a crime; (2) done any act involving dishonesty, fraud, or deceit with the intent to substantially benefit

himself or another, or substantially injure another; or (3) done any act which if done by a licentiate of the business or profession at question, would be grounds for suspension or revocation of license. (Bus. & Prof. Code, § 480, subd. (a).)

Business and Professions Code section 475 states in relevant part:

“(a) Notwithstanding any other provisions of this code, the provisions of this division [commencing with section 475] shall govern the denial of licenses on the grounds of: [¶]...[¶]

“(2) Conviction of a crime.

“(3) Commission of any act involving dishonesty, fraud or deceit with the intent to ... substantially injure another.

“(4) Commission of any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.”

The Administrative Law Judge stated in his proposed decision dated October 2, 2002:

“3. On August 20, 2001, respondent [Kelly] submitted an application for a Nurse Practitioner Certificate to the Board. The application is pending.

“4. On October 13, 2000, in the Fresno County Superior Court, respondent was convicted, on his plea of nolo contendere, of violating Section 487(a)/532(a) [Grand Theft/Obtaining money under false pretenses] of the Penal Code. This crime was a felony. It is substantially related to the qualifications, functions or duties of a Registered Nurse or a Nurse Practitioner. It involved dishonesty, fraud or deceit with the intent to substantially benefit respondent and substantially injure another. It constitutes unprofessional conduct. [¶]...[¶]

“6. Respondent has begun to rehabilitate himself. Respondent has completed 500 hours of community service. He has completed his restitution. A psychological evaluation indicates that respondent has a tendency to blame others (e.g., insurance companies) and to be argumentative. However, respondent doesn’t deny that what he did was wrong. He accepts his responsibility and is remorseful.

“A great deal of testimony and other evidence was received during the hearing that demonstrated respondent unquestionably has the capacity to

practice safe nursing. Several doctors testified that respondent is very competent.

“Although respondent has begun his rehabilitation, he is not rehabilitated. Not enough time has elapsed for his rehabilitation. He is still on criminal probation. The crime he was convicted of is directly related to the professional practice of a Registered Nurse. It involved dishonesty and a form of theft. The public was harmed. The crime was serious, both in its nature and its extent. [¶]...[¶]

“1. Cause for discipline of respondent’s Registered Nurse License and Public Health Nurse Certificate was established pursuant to Sections 490 and 2761(f) [Conviction of a Felony] of the Business and Professions Code by reason of Finding 4.

“2. Said cause was established for violation of Section 2761(a) [Unprofessional Conduct] of said code by reason of Finding 4.

“3. Cause for denial of respondent’s application for a Nurse Practitioner Certificate was established as follows:

“a. Pursuant to Sections 2736 and 480(a)(1) [Conviction] of the Business and Professions Code, by reason of Finding 4.

“b. Pursuant to Sections 2736(a)(3) and 480(a)(3) [Act if done by Licentiate would be grounds for discipline] of said code, by reason of Finding 4.

“c. Pursuant to Sections 2736(a)(3) and 480(a)(2) [Act involving dishonesty, fraud or deceit] of said code, by reason of Finding 4.

“4. In view of the seriousness of respondent’s conviction and its direct relationship to the ethical and professional practice of registered nursing, and the fact that respondent is not yet rehabilitated (regardless of his established competency), his Registered Nurse License and Public Health Nurse Certificate should be revoked at this time. Respondent’s application for a Nurse Practitioner Certificate should be denied.”

The Board adopted the foregoing decision as its decision effective January 16, 2003.

In a petition for reconsideration dated January 15, 2003, Kelly urged the Board to apply the regulatory standards for rehabilitation (Cal. Code Regs., tit. 16, § 1445) and grant reconsideration based on the expungement of his conviction, the fact that

considerable time had elapsed since the commission of the underlying criminal acts, the fact he had received extensive additional education, and the fact he demonstrated the capacity to practice safe nursing. On February 4, 2003, the Board issued an order granting reconsideration and stayed its previous decision until the rendering of another decision. The Board issued a decision after reconsideration effective July 18, 2003 that stated in relevant part: “The Board of Registered Nursing hereby adopts the ... Proposed Decision of the Administrative Law Judge dated October 2, 2002 as its final Decision in this matter.”

On July 14, 2003, Kelly filed a verified petition for writ of administrative mandate in Fresno County Superior Court and requested an immediate stay. The court heard the arguments of counsel on September 8, 2003, and issued a statement of decision on September 26, 2003, that provided in relevant part:

“Here, the ALJ found that the felony convictions were substantially related to petitioner’s qualifications, functions or duties as a registered nurse, or a nurse practitioner because it involved dishonesty, fraud, or deceit, with the intent to substantially benefit petitioner and to substantially Injure another. (Factual finding #4.)

“Petitioner was convicted for violating Penal Code §487(a) [grand theft], and Penal Code §532(a) [fraudulently obtaining money, property or labor]. It would appear that these convictions would, by their very nature, Involve theft, dishonesty, fraud, or deceit.

“Although the ALJ’s decision that the conviction involved dishonesty and theft appears to have been correct, the ALJ did not complete the analysis for substantial relationship. He must have also determined if, to a substantial degree, the conviction evidenced the present or potential unfitness of petitioner to practice nursing in a manner consistent with the public health, safety, or welfare. (Cal. Code Regs. Tit. 16, § 1444.) In fact, it appears there is no evidence in the record to show any present or potential unfitness of petitioner to practice nursing in a manner inconsistent with the public health, safety, or welfare, other than the fact of conviction.

“To the contrary, the ALJ himself explicitly found that petitioner [‘]unquestionably has the capacity to practice safe nursing.’ (Proposed

decision, factual finding #6.) It is not enough that the ALJ [f]ound the conviction stemmed from theft or dishonesty; he must have also found it to have evidenced, to a substantial degree the present or potential unfitness of petitioner to practice as a registered nurse in a manner consistent with the public health, safety, or welfare. (Cal. Code Regs. Tit. 16, § 1444.)

“In fact, there is uncontroverted evidence In the record that there was no expectation that petitioner’s criminal behavior would occur again. (Letter from senior deputy district attorney, Burton Francis, exhibit ‘J.’) [¶]...[¶]

“... What is required is competent evidence that the present qualifications of the licentiate is in some way ‘rationally and substantially related to, effected [sic] by the earlier offense.’ (*Pieri v. Fox* (1979) 96 Cal.App.3d 802, 807.)

“Again, here, even under the more generous substantial evidence test applicable to denial of applications for a license, there was no evidence that petitioner’s earlier conviction had any rational or substantial relationship to the criminal conviction. ... [T]he only evidence on this topic showed that [Kelly’s] criminal behavior would not occur again.

“The decision is not supported by substantial evidence in light of the whole record....”

Kelly’s conviction may properly form the basis of discipline and a denial of licensure if the conviction is substantially related to the qualifications, functions, and duties of a registered nurse. Whether such a relationship exists is a question of law for the independent determination of the appellate court. (*Krain v. Medical Board* (1999) 71 Cal.App.4th 1416, 1424; *Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, 598.) The parties rely on seemingly contradictory precedents, neither of which has been reversed, for their respective positions. The Board cites *Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461 (*Windham*), a case considering whether a physician’s conviction for federal income tax evasion was substantially related to the qualifications, functions, or duties of a physician. In finding such a substantial relationship, Division Five of the Court of Appeal, Second Appellate District, stated:

“[W]e find it difficult to compartmentalize dishonesty in such a way that a person who is willing to cheat his government out of \$65,000 in taxes may

yet be considered honest in his dealings with his patients. In this connection, however, we should point out that today's doctor deals financially with the government—state, local and federal—in many ways that have nothing to do with his own personal tax obligation. We also point out that respondent's chosen specialty—forensic medicine—demands a high degree of honesty in reporting concerning examinations and in testifying, if called upon to do so.

“Quite apart from these contacts with various governmental agencies, most practicing physicians deal with various private insurance carriers on a basis which demands utmost honesty in reporting. Above all, however, there is the relation between doctor and patient. It is unnecessary to describe the extent to which that particular relationship is based on utmost trust and confidence in the doctor's honesty and integrity....” (*Windham, supra*, 104 Cal.App.3d at p. 470.)

Kelly, in turn, relies upon *Pieri v. Fox* (1979) 96 Cal.App.3d 802 (*Pieri*), in which the Department of Real Estate denied a writ petitioner's application for a real estate broker's license because he had made a false written statement to obtain unemployment benefits four years earlier. Division One of the Court of Appeal, Fourth Appellate District, held there was no evidence of a substantial relationship between the applicant's present qualifications and his earlier offense:

“Before Pieri's application for real estate broker's license could be denied, substantial evidence must be produced to support a finding that the crime he committed came within its ambit; to wit, the crime must have been *substantially related to his qualifications* for a real estate broker's license. Here the evidence before the law judge, without question, showed the commission of a 1974 crime involving a false statement made to procure unemployment benefits—this was a crime involving moral turpitude. [Citations.] The record, however, before the law judge contains no evidence whatsoever to warrant the further finding required by section 480, subdivision (a)(3) that this single isolated act in 1974 ‘substantially related’ in some rational respect to his 1978 application for a broker's license. The evidence before the law judge was without contradiction that since 1975 when Pieri was granted a California real estate salesman's license, he had performed his duties in all respects satisfactorily.... [¶]...[¶]

“We conclude that the prohibition against denial of a real estate license enacted in 1974 in Business and Professions Code section 480, subdivision (a)(3), adds an additional factual requirement that must be supported by

substantial evidence. It is in addition to the requirement authorizing a denial of a license found in Business and Professions Code section 10177, subdivision (b). Proof of commission of a crime involving moral turpitude is not enough: competent evidence must show that the present qualifications of Pieri for a broker's license is in some fashion rationally and substantially related to, affect by the earlier offense. Absence of such evidence here requires reversal." (*Pieri, supra*, 96 Cal.App.3d at pp. 806-807.)

The right of an individual to engage in any of the common occupations of life is among the several fundamental liberties protected by the due process and equal protection clauses of the Fourteenth Amendment. Therefore, a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice that profession. When an individual obtains the license required to engage in a particular profession or vocation, he or she has a fundamental vested right to continue in that activity. A licensee, having obtained such a fundamental vested right, is entitled to certain procedural protections greater than those accorded an applicant. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 788-789 (*Hughes*).

When a petition is brought for restoration of a license, the trial court must apply its independent judgment to review the facts underlying the administrative decision. After a trial court's exercise of its independent judgment in review of the facts, an appellate court is limited to determining whether the trial court's findings (not those of the administrative agency) are supported by substantial evidence. (*Vaill v. Edmonds* (1991) 4 Cal.App.4th 247, 258.) Nonetheless, the appellate court may independently exercise its ability to decide issues of law. (*Marek v. Board of Podiatric Medicine* (1993) 16 Cal.App.4th 1089, 1095-1096.) Applying the substantial evidence rule, we resolve conflicts in the evidence in favor of the trial court's findings and we accept the inferences of the trial court where alternative inferences are reasonably possible. (*Clare v. State Bd. of Accountancy* (1992) 10 Cal.App.4th 294, 300.)

As to the legal issue in the instant case, the Board submits the ultimate question of whether a conviction or act is substantially related to a profession is a question of law for the independent determination of the appellate court. (*Krain v. Medical Board, supra*, 71 Cal.App.4th at p. 1424; *Gromis v. Medical Board, supra*, 8 Cal.App.4th at p. 598.) Cases such as *Windham* and *Hughes* clearly stand for the proposition that intentional dishonesty is a valid basis for a finding of unfitness to hold various professional licenses. In the instant case, however, we must consider the impact of California Code of Regulations, title 16, section 1444, which recognizes a substantial relationship between a conviction/act and the qualifications/functions/duties of a registered nurse “if to a substantial degree it evidences the present or potential unfitness of a registered nurse to practice in a manner consistent with the public health, safety, or welfare.” Administrative Law Judge Wagner expressly found that Kelly “unquestionably has the capacity to practice safe nursing” and the Board adopted that factual finding when it adopted Judge Wagner’s proposed decision as its own.

On appeal, the Board argues that Kelly’s conviction of grand theft by fraud was sufficient evidence, standing alone, of present unfitness to practice. The rules of construction that apply to statutes also apply to rules and regulations of administrative bodies. (*Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292.) Statutes must be given a fair and reasonable interpretation with due regard to the language used and the purpose to be accomplished. (*Cedars of Lebanon Hosp. v. County of L.A.* (1950) 35 Cal.2d 729, 734-735.) Words of a statute must be given such interpretation as will promote rather than defeat the general purpose and policy of the law. (*City of L.A. v. Pac. Tel. & Tel. Co.* (1958) 164 Cal.App.2d 253, 256.) The Board contends here that a conviction involving conduct listed in California Code of Regulations, title 16, section 1444, subdivisions (a) through (d), by itself, demonstrates present or potential unfitness to practice as a registered nurse. The Board’s interpretation of the regulation is questionable at best. Had the Legislature or the regulatory authority intended such a

bright line standard, it would have simply forbade state licensure to nurses with theft-related convictions.⁴ Moreover, such an approach would have rendered the statutory and regulatory provisions on rehabilitation of an applicant a virtual nullity. (Bus. & Prof. Code, § 482; Cal. Code Regs, tit.16, § 1445.) Under general rules of statutory interpretation, an interpretation which has the effect of making statutory language null and void is to be avoided. (*Kane v. Superior Court* (1995) 37 Cal.App.4th 1577, 1587.)

In our view, the listing of various categories of convictions or acts in California Code of Regulations, title 16, section 1444 is illustrative rather than a definitive roster of behaviors absolutely precluding licensure or certification as a nursing professional. Under these unique circumstances, we cannot now say Kelly's prior criminal conviction evidences, to a substantial degree, his present or potential unfitness to practice as a registered nurse in a manner consistent with the public health, safety, or welfare. This is particularly true in light of his payment of restitution, completion of court-ordered community service, and the superior court's expungement of his conviction.

As to the factual issues in the instant case, the trial court found uncontroverted evidence there was no expectation that Kelly's criminal behavior would occur again. Deputy District Attorney Burton J. Francis of the Workers' Compensation Fraud Unit prosecuted Kelly on the criminal charges. Francis issued a letter stating: "... Mr. Kelly has fully cooperated with our investigation and prosecution. He [Kelly] has completed

⁴ Under the doctrine of *ejusdem generis*, when general words follow the enumeration of particular things in a statute, the general words will be construed as applicable only to things of the same general nature as those enumerated. The rationale for the doctrine is that if the Legislature had intended the general words to be unrestricted, it would not have named the particular things or classes of things, which in that event would have become mere surplusage. (*Nakamura v. Superior Court* (2000) 83 Cal.App.4th 825, 834.) The doctrine applies whether specific words follow general words in a statute or whether general words follow specific words. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 141.)

restitution, expressed genuine remorse for his actions, and we have no reason, at this point in time, to expect a recurrence of his criminal behavior.” Past isolated acts unrelated to a licensee’s profession cannot alone be the basis for discipline against a professional. However, past misconduct relating to one’s profession can give rise to adverse inferences which would provide evidence of present unfitness. (*Dresser v. Board of Medical Quality Assurance* (1982) 130 Cal.App.3d 506, 512-514.) Thus, the Board submits that Kelly’s conviction of grand theft by fraud was substantially related to his qualifications, functions or duties as a registered nurse and the trial court erred by finding otherwise.

As noted above, we resolve conflicts in the evidence in favor of the trial court’s findings and we accept the inferences of the trial court where alternative inferences are reasonably possible. (*Clare v. State Bd. of Accountancy, supra*, 10 Cal.App.4th at p. 300.) Deputy District Attorney Francis’s letter, combined with documentary evidence of the expungement of Kelly’s criminal conviction, gave the trial court a reasonable basis for concluding that Kelly’s conviction was not substantially related to his present qualifications, functions, or duties of a registered nurse within the meaning of California Code of Regulations, title 16, section 1444 and relevant statutes.

II.

EVIDENCE SUBMITTED WITH PETITION FOR RECONSIDERATION

The Board contends the trial court erroneously concluded that the Board did not consider evidence submitted with Kelly’s petition for reconsideration.

The administrative law judge issued a proposed decision on October 2, 2002, and the Board adopted it as its decision effective January 16, 2003. On January 15, 2003, Kelly filed a petition for reconsideration with exhibits along with a request for stay pending decision on a petition for reconsideration. On January 17, 2003, Kelly submitted additional evidence in support of the petition for reconsideration. This additional

evidence included a January 17, 2003, formal order of the superior court expunging his criminal conviction.

On February 4, 2003, the Board issued a stay, agreed to reconsider its decision, and agreed to accept written argument from the parties upon preparation of the hearing transcript. On or about May 22, 2003, Kelly's counsel prepared and submitted written argument on reconsideration. On or about the same date, the Board's counsel prepared and submitted legal argument on reconsideration. On June 18, 2003, the Board issued a decision after reconsideration effective July 18, 2003. The decision adopted the administrative law judge's original proposed decision and stated in relevant part:

“Having reviewed the record and petition for reconsideration, the complainant's opposition to respondent's motion for reconsideration, and further argument by respondent, the Board of Registered Nursing ... makes and enters its Decision After Reconsideration”

In its statement of decision filed September 26, 2003, the trial court stated in part:

“...The court finds that respondent [Board] ... failed to consider new and additional evidence submitted with petition for reconsideration.”

At the time Kelly filed the petition for reconsideration Government Code section 11521 stated:

“(a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

“(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.”

The Board contends on appeal:

“... The exhibits attached to the petition for reconsideration included the hearing transcript, letter of support from the district attorney, order from the criminal court granting respondent relief under Penal Code section 1203.4, and other documents attesting to respondent’s educational and professional achievements. Not only were the exhibits physically attached to the petition, they were cited throughout respondent’s [Kelly’s] written argument, and integrated in the argument as support for his legal positions. Moreover, in his own written argument, respondent states ‘... in [t]he petition for reconsideration [Respondent] presented some new documents *that were accepted by [Appellant] ... and have thus become part of the record on reconsideration.*’ The record simply does not support the court’s ruling that respondent’s evidence on reconsideration was not considered, and the judgment of the trial court should be reversed.”

Evidence Code section 664 states:

“It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.”

The effect of the rebuttable presumption created by Evidence Code section 664 is merely to impose upon the party against who it operates the burden of proof as to the nonexistence of the presumed fact. (*California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 505.) The presumption of section 664 is misplaced in a case where the record affirmatively shows the agency failed to satisfy every requirement of its regulatory program. (*La Costa Beach Homeowners’ Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 820.) Expressed another way, in the absence of evidence to the contrary, it is presumed that official duty has been properly

performed. (*Roelfsema v. Department of Motor Vehicles* (1995) 41 Cal.App.4th 871, 879.)

In the instant case, Kelly has not cited and we have been unable to find any portion of the record affirmatively showing the Board failed to satisfy the adjudicatory requirements of the regulatory process. Although the Board may have misapplied the new evidence upon Kelly's petition for reconsideration, we cannot agree with the trial court's finding that the Board "failed to consider new and additional evidence submitted with petition for reconsideration." On this record, the trial court erred by failing to presume that official duty had been regularly performed in conjunction with the evidence on reconsideration. Code of Civil Procedure section 632 requires the court upon request, to issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial. Failure to determine a material issue in a statement of decision can, in some circumstances, be reversible error if there is evidence that would support a finding in the opposing party's favor. (*Triple A Management Co. v. Frisone* (1999) 69 Cal.App.4th 520, 536.) However, reversal on this ground is not required here as the trial court independently and separately determined that Kelly's conviction was not substantially related to his qualifications, functions or duties as a registered nurse and substantial evidence supports that determination.

III.

JURISDICTION TO FORMULATE AND IMPOSE DISCIPLINARY ORDER

The Board contends the trial court lacked jurisdictional authority to supplant the Board's order with its own order and abused its discretion by doing so.

Code of Civil Procedure section 1094.5, subdivision (f) states:

"The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order

respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.”

Business and Professions Code section 2759 states:

“The board shall discipline the holder of any license, whose default has been entered or who has been heard by the board and found guilty, by any of the following methods:

“(a) Suspending judgment.

“(b) Placing him upon probation.

“(c) Suspending his right to practice nursing for a period not exceeding one year.

“(d) Revoking his license.

“(e) Taking such other action in relation to disciplining him as the board in its discretion may deem proper.”

Business and Professions Code section 2760 states:

“If the holder of a license is suspended, he or she shall not be entitled to practice nursing during the term of suspension.

“Upon the expiration of the term of suspension, he or she shall be reinstated by the board and shall be entitled to resume his or her practice of nursing unless it is established to the satisfaction of the board that he or she has practiced nursing in this state during the term of suspension. In this event, the board shall revoke his or her license.”

Business and Professions Code section 2760.1 states in relevant part:

“(a) A registered nurse whose license has been revoked, or suspended or who has been placed on probation may petition the board for reinstatement or modification of penalty, including reduction or termination of probation, after a period not less than the following minimum periods has elapsed from the effective date of the decision ordering that disciplinary action, or if the order of the board or any portion of it is stayed by the board itself or by the superior court, from the date the disciplinary action is actually implemented in its entirety:

“(1) Except as otherwise provided in this section, at least three years for reinstatement of a license that was revoked, except that the board may, in

its sole discretion, specify in its order a lesser period of time provided that the period shall be not less than one year.

“(2) At least two years for early termination of a probation period of three years or more.

“(3) At least one year for modification of a condition, or reinstatement of a license revoked for mental or physical illness, or termination of probation of less than three years.

“(b) The board shall give notice to the Attorney General of the filing of the petition. The petitioner and the Attorney General shall be given timely notice by letter of the time and place of the hearing on the petition, and an opportunity to present both oral and documentary evidence and argument to the board. The petitioner shall at all times have the burden of proof to establish by clear and convincing evidence that he or she is entitled to the relief sought in the petition.

“(c) The hearing may be continued from time to time as the board deems appropriate.

“(d) The board itself shall hear the petition and the administrative law judge shall prepare a written decision setting forth the reasons supporting the decision.

“(e) The board may grant or deny the petition, or may impose any terms and conditions that it reasonably deems appropriate as a condition of reinstatement or reduction of penalty. [¶]...[¶]

“(g) No petition shall be considered while the petitioner is under sentence for any criminal offense, including any period during which the petitioner is on court-imposed probation or parole”

At the September 8, 2003, hearing on petition for reconsideration in the instant case, the following exchange occurred:

“THE COURT: [¶]...[¶] My problem is that it appears the administrative law judge failed ... to take into account any of the evidence that subsequently happened. The expungement. The ... reimbursement. The letters from the district attorney’s office, etcetera, etcetera.

MR. RODRIGUEZ [deputy attorney general]: I can’t respond to that specifically, your honor, because ... I was just brought in at the last minute to make this appearance.

“THE COURT: Okay. Let me ask you a question.

“MR. RODRIGUEZ: Yes?

“THE COURT: What I want to do is grant the writ with ... the suggestion by ... [Kelly’s] Counsel ... that ... a period of probation be placed upon the granting of the writ. Does that make sense?

“MR. RODRIGUEZ: Yes, it does, your honor.

“THE COURT: Do you understand what I’m saying?

“MR. RODRIGUEZ: I understand, your honor.

“THE COURT: That’s what I want to do at this point. So, I’m prepared to rule, but I think what I want to do is put that in writing. Okay, so that would give me two weeks to do that. That’s what I intend on doing.

“MR. RODRIGUEZ: That’s acceptable, your honor.

“THE COURT: Is [*sic*] grant the writ with a period of probation. Now, let me have some guides from you guys. What’s the normal period of probation in these matters?

“MR. RODRIGUEZ: Your honor, I don’t deal with nursing board cases. I deal with medical cases. I’m not even in the same section. ... My sense is that probation is normally anywhere from three to five years.

“THE COURT: My guess is he was placed on five years probation on the criminal charges to pay off the fine or the restitution. Therefore, what I intend on doing is placing him on five years probation.

“MR. FARMER [Kelly’s counsel]: That is fine, your honor. [¶] ... [¶]

“THE COURT: I’m going to make it simple. I’m not going to be in the business to baby-sit or to craft these. What I will do is just say that he comply with any and all terms of the Board of Nursing and whatever ... and also obey all laws.

“MR. RODRIGUEZ: Your honor, if I may?

“THE COURT: Yes, sir.

“MR. RODRIGUEZ: It’s my experience, not just with these cases but with medical board as well. They have standardized conditions of probation that

are set forth for the administrative law judges to review in structuring their decisions. I think they may be helpful in helping you, as well, your honor.

“THE COURT: Where can I get those?”

“MR. RODRIGUEZ: I will ask the board to provide us with a copy, and I will submit them within the time frame. If I can have a couple of days to do that.

“THE COURT: That would ... be fine. If you can get it to me by the end of the week, and then I will try to be within my time frame to issue the ruling.

“MR. RODRIGUEZ: You can review them and see how they apply.

“THE COURT: Okay, sir.

“MR. FARMER: Thank you, your honor.”

On September 26, 2003, the trial court filed a judgment commanding the Board to reinstate Kelly’s registered nurse license and public health nurse certificate and to grant Kelly’s application for a nurse practitioner’s certificate with probation on specified terms and conditions. These terms and conditions (as fully set forth *ante*) included: (1) Kelly’s obedience to all laws; (2) Kelly’s compliance with the Board’s probation program; (3) that Kelly report in person at interviews/meetings as directed by the Board; (4) that periods of residency, practice, or licensure outside of California would not apply toward a reduction of the probation period; (5) that Kelly submit verified written reports as required by the Board; (6) that Kelly function as a registered nurse in California for a minimum of 24 hours per week for six consecutive months or as determined by the Board; (7) that Kelly obtain prior approval from the Board before commencing or continuing any employment; (8) that Kelly obtain prior approval from the Board regarding his level of supervision and/or collaboration before commencing or continuing any employment as a registered nurse or education/training that includes patient care; (9) that Kelly be subject to certain employment limitations, such as not working for a nurse’s registry, a licensed home health agency, or in any health care setting as a supervisor of

registered nurses; (10) that Kelly pay the Board those costs associated with its investigation and enforcement; (11) that upon a probation violation the Board could set aside the stay order and impose the stayed discipline (revocation/suspension) of Kelly's license after giving notice and opportunity to be heard; and (12) that Kelly could surrender his license to the Board during the term of his probation. In a clarification of judgment filed December 12, 2003, the court stated its intention was "that the period of probation be five (5) years commencing on July 18, 2003."

On appeal, the Board contends it acted reasonably and within its discretion in revoking Kelly's license and certificate and in denying his nurse practitioner certification. The Board also contends the trial court exceeded its authority by substituting its judgment for that of the administrative agency by creating its own disciplinary order and imposing it on appellant. In response, Kelly argues the Board, by its counsel Rodriguez, acquiesced to the trial court's selection of discipline and thereby waived the right to challenge those actions as being in excess of the court's jurisdiction. Kelly further contends the trial court did not exceed its jurisdiction because the court directed that he be placed upon probation upon terms and conditions selected by the Board.

The propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency. The decision of the agency may not be disturbed unless there has been a manifest abuse of discretion. In reviewing the penalty imposed by an administrative body that is duly constituted to announce and enforce such penalties, neither the trial court nor an appellate court is free to substitute its own discretion as to the matter. Nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh. Such interference will only be sanctioned when there is an arbitrary, capricious, or patently abusive exercise of discretion. These principles apply whether the statewide administrative tribunal is one that is constitutionally authorized to

exercise judicial functions or one that is not so empowered. (*Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* (1987) 188 Cal.App.3d 872, 884-885.)

Again, Kelly contends the Board's counsel waived the application of Code of Civil Procedure section 1094.5, subdivision (f) by failing to object at the September 8, 2003, hearing on petition for rehearing. Generally speaking, the failure to raise an issue in the trial court in a writ proceeding waives the issue on appeal. However, the doctrine of waiver does not apply if the issue is one of public interest or the due administration of justice, and involves a pure question of law on undisputed facts. (*Fox v. State Personnel Bd.* (1996) 49 Cal.App.4th 1034, 1039.) California has a strong public policy of regulating professions so as to exclude from practice those individuals who, by their wrongful conduct, have demonstrated their unfitness to practice within this state. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 793.)

In our view, attorney Rodriguez's comments at the September 8, 2003, hearing did not waive the Board's right to insist on compliance with the requirements of Code of Civil Procedure section 1094.5, subdivision (f). However, it nevertheless appears that as the parties discussed on September 8, the conditions of probation used by the court (as fully set forth *ante*) are or are patterned on standardized conditions of probation used by the Board and as suggested and supplied by counsel for the Board, Mr. Rodriguez.

On the instant record, the trial court could properly direct issuance of a peremptory writ of mandate commanding the Board to reinstate Kelly's registered nurse license and public health nurse certificate, as the Board had previously examined his substantive qualifications for those credentials. (Bus. & Prof. Code, §§ 2725-2742, 2816-2820.) However, Kelly's application for a nurse practitioner certificate raises a concern because "[c]ourts are relatively ill-equipped to determine whether an individual would be qualified ... to practice a particular profession or trade." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 146.) The record on appeal contains Kelly's application packet for the nurse practitioner certification. However, the judicial branch of government is not equipped to

determine Kelly's qualifications for this credential. Moreover, from this record, we cannot determine whether the Board ever went beyond Kelly's criminal record and examined the submitted information and credentials for a substantive determination of Kelly's qualifications for use of the title "nurse practitioner." (Bus. & Prof. Code, §§ 2834-2837.) The judgment shall not limit or control in any way the discretion legally vested in the Board. (Code Civ. Proc., § 1094.5, subd. (f).)

Therefore, the judgment will be affirmed as to Kelly's registered nurse license and public health nurse certificate. As to the nurse practitioner application, the judgment will be reversed, and that matter remanded, to the trial court with directions to enter judgment commanding the Board to set aside its order and to reconsider Kelly's nurse practitioner application in light of this court's opinion.

IV.

FAILURE TO AWARD REASONABLE LITIGATION EXPENSES

Kelly contends:

"Mr. Kelly sought reasonable litigation expenses in the amount of \$7,500.00 pursuant to either Code of Civil Procedure section 1028.5 or Government Code section 800. While both statutes allow for a maximum reimbursement of \$7,500.00, Mr. Kelly recognizes he is not entitled to recover, simultaneously, under both statutes.... [¶]...[¶]

"... [B]oth the record and the trial court's findings lead to the conclusion that the Board arbitrarily and summarily adopted the Proposed Decision that was not based upon all evidence within the record and the Board ignored the fact it had no evidence whatsoever that Mr. Kelly had an alleged present disposition to commit criminal transgressions consistent with his prior criminal conduct. The Board action against Mr. Kelly therefore was taken based upon mere speculation considering the only evidence on the issue presented at the administrative hearing was to the contrary (i.e., no expectation that Mr. Kelly will commit such acts again in the future). The trial court thus had only one conclusion it could reach based upon its own findings and the record: award Mr. Kelly his reasonable litigation expenses due to the arbitrary and capricious conduct of the Board. As such, Mr. Kelly submits the trial court erred in not awarding him

reasonable litigation expenses, including attorneys' fees, in the amount of \$7,500.00.”

Government Code section 800 states in relevant part:

“In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law, except actions resulting from actions of the State Board of Control, where it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, computed at one hundred dollars (\$100) per hour, but not to exceed seven thousand five hundred dollars (\$7,500), where he or she is personally obligated to pay the fees, from the public entity, in addition to any other relief granted or other costs awarded.

“This section is ancillary only, and shall not be construed to create a new cause of action.

“Refusal by a public entity or officer thereof to admit liability pursuant to a contract of insurance shall not be considered arbitrary or capricious action or conduct within the meaning of this section.”

Code of Civil Procedure section 1028.5, the Carpenter-Katz Small Business Equal Access to Justice Act of 1981, states in relevant part:

“(a) In any civil action between a ... licensee and a state regulatory agency, involving the regulatory functions of a state agency as applied to ... a licensee, if the ... licensee prevails, and if the court determines that the action of the agency was undertaken without substantial justification, the ... licensee may, in the discretion of the court, be awarded reasonable litigation expenses in addition to other costs.

“(b) ‘Reasonable litigation expenses’ means any expenses not in excess of seven thousand five hundred dollars (\$7,500) which the judge finds were reasonably incurred in opposing the agency action, including court costs, expenses incurred in administrative proceedings, attorney's fees, witness fees of all necessary witnesses, and such other expenses as were reasonably incurred. [¶] ... [¶]

“(d) ‘Licensee’ means any person licensed by a state agency who does not qualify as a small business, but whose annual gross receipts from the use of such license do not exceed one million dollars (\$1,000,000).

“(e) A ... licensee shall be deemed to prevail in any action in which there is no adjudication, stipulation, or acceptance of liability on the part of the ... licensee. [¶] ... [¶]

“(g) Section 800 of the Government Code shall not apply to actions which are subject to the provisions of this section.”

Assuming arguendo Government Code section 800 has some application here, that code section pertains only where it is shown the finding or other determination of the administrative proceeding “was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity.” An arbitrary act is one done without any apparent reason therefore. (*Verdugo Hills Hospital, Inc. v. Department of Health* (1979) 88 Cal.App.3d 957, 964.) The phrase “arbitrary or capricious” encompasses conduct not supported by a fair or substantial reason, stubborn insistence on following an unauthorized course of action, and a bad faith legal dispute. Attorney fees will not be awarded simply because the agency’s action was erroneous or even clearly erroneous. (*Gilliland v. Medical Board* (2001) 89 Cal.App.4th 208, 220-221.) The decision under section 800 is essentially one of fact within the sound discretion of the trial court. (*Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 88.) Nevertheless, an award of attorney fees under section 800 is mandatory where the complaining party has made the requisite showing. (*Plumbing etc. Employers Council v. Quillin* (1976) 64 Cal.App.3d 215, 224-225.)

With respect to Code of Civil Procedure section 1028.5, neither Kelly nor this court has been able to find any case law defining the statutory term “substantial justification.” Kelly maintains “it appears ... to require a showing similar in kind [to that of] Government Code section 800, i.e., arbitrary and capricious conduct on the part of the agency.”

An applicant for licensure as a registered nurse must meet certain statutory qualifications. Such an applicant must not be subject to denial of licensure under Business and Professions Code section 480. (Bus. & Prof. Code, § 2736, subd. (a)(3).)

Business and Professions Code section 480 states in relevant part:

“(a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:

“(1) Been convicted of a crime....

“(2) Done any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another; or

“(3) Done any act which if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

“The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made.”

Business and Professions Code section 2761 states in relevant part:

“The board may ... deny an application for a certificate or license for any of the following: [¶]...[¶] (f) Conviction of a felony or of any offense substantially related to the qualifications, functions, and duties of a registered nurse, in which event the record of the conviction shall be conclusive evidence thereof.”

Business and Professions Code section 481 states:

“Each board under the provisions of this code shall develop criteria to aid it, when considering the denial, suspension or revocation of a license, to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates.”

California Code of Regulations, title 16, section 1444 states in relevant part:

“A conviction or act shall be considered to be substantially related to the qualifications, functions or duties of a registered nurse if to a substantial degree it evidences the present or potential unfitness of a registered nurse to practice in a manner consistent with the public health, safety, or welfare. Such convictions or acts shall include but not be limited to the following: [¶] ... [¶] (c) Theft, dishonesty, fraud, or deceit.”

In the instant case, Business and Professions Code sections 480 and 481 along with California Code of Regulations, title 16, section 1444, provided the administrative

law judge and the Board with articulable statutory and regulatory bases for denying Kelly's application for a nurse practitioner certificate and revoking his existing credentials. The Board's reasonable reliance on the foregoing code provisions, as well as those embodied in the Nursing Practice Act, simply cannot be equated with "conduct not supported by a fair or substantial reason [citation], stubborn insistence on following an unauthorized course of action [citation], and a bad faith legal dispute [citation]."

(Gilliland v. Medical Board, supra, 89 Cal.App.4th at p. 220.)

The trial court did not abuse its discretion by denying Kelly's request for reasonable litigation expenses under Code of Civil Procedure section 1028.5 and Government Code section 800.

DISPOSTION

The judgment as to the registered nurse license and public health nurse certificate reinstatement and the denial of Kelly's request for reasonable litigation expenses under Code of Civil Procedure section 1028.5 and Government Code section 800, is affirmed. The judgment in so far as it orders the Board to grant Kelly's application for a nurse practitioner's certificate, is reversed, and as to such order, the matter is remanded to the trial court with directions to enter judgment commanding the Board to set aside its order and reconsider the application in light of this court's opinion.

The parties shall bear their own costs on appeal.

HARRIS, Acting P.J.

WE CONCUR:

WISEMAN, J.

GOMES, J.