Before the
Administrative Hearing Commission
State of Missouri

CHRISTINE REICH-GAGE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 15-0009 BN
	)	
MISSOURI STATE BOARD OF NURSING,	)	
	)	
Respondent.	)	

DECISION

Christina Reich-Gage has filed two complaints appealing the decision by the Missouri State Board of Nursing ("the Board") to grant her a probated license. We dismissed the first complaint on May 14, 2014. We now grant the Board's motion to dismiss Reich-Gage's second complaint.

Findings of Fact

1. On August 19, 2013, the Board of Nursing issued an order regarding issuance of a probated license ("the probation order") to Christina Reich-Gage.[1] The probation order granted her the right to sit for the licensed practical nurse (LPN) examination, the NCLEX. It also granted her an LPN license subject to probation following successful passage of the NCLEX. The order stated that it would go into effect when Reich-Gage passed the NCLEX, and placed

[1] At the time, Christina Reich.

her LPN license on probation for a period of five years from the effective date of the probation order.

2. On September 17, 2013, Reich-Gage filed a complaint appealing the probation order. Specifically, Reich-Gage asked that the probationary period ordered by the Board be shortened. We opened Case No. 13-1649 BN (also, "the first case") and set the case for hearing. The Board filed an answer on October 3, 2013.

3. On March 13, 2014, Reich-Gage filed a motion to continue the hearing, in which she represented that the parties were discussing settlement. We cancelled the hearing and ordered Reich-Gage to file a status report no later than May 12, 2014.

4. Reich-Gage did not timely file a status report. On May 14, 2014, we dismissed the first case as a sanction for her failure to comply with our order.

5. On June 3, 2014, Reich-Gage filed a request to reopen her case. She stated that she was not aware that her status reports needed to be filed in writing. On June 4, 2014, we denied her motion.

6. Reich-Gage did not appeal the dismissal of her case.

7. On October 23, 2014, the Board sent Reich-Gage a letter informing her that she had passed the NCLEX examination. It enclosed a copy of the probation order, which had not changed, and informed her that its effective date was October 23, 2014.

8. On November 21, 2014, Reich-Gage filed a letter addressed to this Commission asking for a re-evaluation of her probationary period. Because Case No. 13-1649 BN had been closed for six months, we filed the letter in that case file as miscellaneous correspondence and took no further action on it. We did not open a new case.

9. On January 5, 2015, Reich-Gage called our office to inquire about the status of her case. She stated she had filed a complaint on November 21, 2014. When told we had no record

of such a complaint having been filed, she fax-filed a copy of the correspondence she had previously filed. We opened a new case, No. 15-0009 BN (also, "the second case").

10. Reich-Gage's complaints in the first and second cases are substantially the same, although she includes more detail about her situation in the second complaint. In both, she asks that this Commission re-evaluate and shorten the probationary period ordered by the Board.

11. We sent our notice of complaint/notice of hearing in Case No. 15-0009 BN to the parties on January 12, 2015. On January 14, 2015, the Board filed a motion to dismiss Reich-Gage's complaint as untimely.

12. On February 2, 2015, Reich-Gage responded to the Board's motion to dismiss by stating that she did appeal the Board's probation order within the thirty-day time limit. We investigated the records of our fax machine and discovered that Reich-Gage had filed her correspondence on the evening of November 21, 2014. Thus, we considered that it was a complaint that was timely filed on November 22, 2014. On February 11, 2014, we denied the Board's motion to dismiss.

13. On February 26, 2015, the Board filed a "Motion to Reconsider Motion for Involuntary Dismissal on Alternative Grounds."

14. In the motion to reconsider, the Board, for the first time, references Case No. 13-1649 BN. It recites the history of that case and argues that the order dismissing Reich-Gage's complaint and the order denying her motion for reconsideration are final orders that disposed of her case and that we have no jurisdiction to take any further action respecting the Board's decision to issue her a probated license.

15. We notified Reich-Gage that she could respond to the Board's motion to reconsider by March 13, 2015, but she filed no response.

Conclusions of Law

We have jurisdiction to hear complaints filed by persons who have been issued a probated license. Section 324.038.2.[2] Our authority to hear Reich-Gage's case in its current posture is less clear.

The history of this case, as set forth above, is confusing. When Reich-Gage filed her correspondence on November 22, 2014, this Commission took notice of her complaint in Case No. 13-1649 BN. We filed her correspondence in that case file but took no further action because the case had been closed for over six months at that time. Our jurisdiction or authority to act in a case lapses when the time to appeal our decision has expired. *See Woodman v. Director of Revenue,* 8 S.W.3d 154, 157 (Mo. App. W.D. 1999).

But when Reich-Gage inquired about the status of her complaint in January of this year, we apparently did not review the file in Case No. 13-1469 BN. Instead, we opened a new case. And when the Board filed its initial motion to dismiss in Case No. 15-0009 BN, it likewise did not refer to Case No. 13-1469 BN or the existence of a previous complaint filed by Reich-Gage. Thus, our previous order denying the Board's motion to dismiss did not take that history into account.

There are multiple reasons for the confusion that has arisen in this case, including the inattention of the Board and this Commission. But the wording of § 324.038.2 has also played a role. The statute appears to set forth two opportunities for a person in Reich-Gage's position to appeal the Board's decision to issue her a probated license. The first opportunity arises when the Board initially notifies the prospective licensee of its decision to issue the probated license:

> The board shall notify the applicant in writing of the terms of the probation imposed, the basis therefor, and the date such action **shall become effective.** The notice shall also advise the applicant of the right to a hearing before the administrative hearing

[2] Statutory citations are to the RSMo Supp. 2013 unless otherwise indicated.

> commission, if the applicant files a complaint with the administrative hearing commission within thirty days of the date of delivery or mailing by certified mail of written notice of the probation.

(Emphasis added). The second opportunity arises after the Board actually issues the probated license:

> If the board issues a probated license, the applicant may file, within thirty days of the date of delivery or mailing by certified mail of written notice of the probation, a written complaint with the administrative hearing commission seeking review of the board's determination**.**

The Board generally takes the position that its decision to issue a probated license is ripe for appeal only after it has issued the license, but we have denied previous motions to dismiss that asserted this position. *See Ferguson v. State Board of Nursing,* No. 11-0683 BN (May 17, 2011); *Griffin v. State Board of Nursing,* No. 10-2144 BN (June 2, 2011); *Brown v. State Board of Nursing,* No. 13-0182 BN (March 11, 2013).[3] Nonetheless, this case illustrates the perils of our interpretation that § 324.038.2 allows two separate opportunities to appeal a licensing agency's decision to issue a probated license. That interpretation may need to be revisited in the future.

Even if we assume that interpretation is correct, the apparent existence of two separate opportunities to appeal the decision to issue a probated license does not mean that a person may appeal the same agency decision twice. The Board argues that Reich-Gage may not pursue a second appeal because the final order in Case No. 13-1469 precludes her seeking review of the Board's probation order on the basis of *res judicata,* and because allowing her case to proceed would create the "whack-a-mole" situation we rejected in *St. Louis Metropolitan Towing v. Director of Revenue,* No. 13-1026 RL (July 29, 2013), *aff'd,* 450 S.W.3d 303, 305 (Mo. App. W.D. 2014).

[3] We note that the Board did not file such a motion in Case No. 13-1649 BN.

The principles of *res judicata* apply to agency adjudications. *Cedar Hill Manor, L.L.C. v. Department of Social Services,* 145 S.W.3d 447, 454 (Mo. App. W.D. 2004). For *res judicata* to adhere, four identities must occur: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made. *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 500 (Mo. banc 1991), cited in *Briscoe v. Walsh*, 445 S.W.3d 660, 664 (Mo.App. E.D. 2014). This case shares all of those identities with Case No. 13-1649 BN.

But the application of *res judicata* also requires a final judgment on the merits. *State ex rel: Pryor v. Nelson,* 450 S.W.3d 811, 815 (Mo. App. W.D. 2014). A "judgment on the merits is one rendered after argument and investigation and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or technical point, or by default, and without trial." *St. Louis University v. Hesselberg Drug Co.,* 35 S.W.3d 451, 455 (Mo. App. E.D. 2000) (citations omitted), quoted in *Johnson v. Missouri Dept. of Health and Senior Services,* 174 S.W.3d 568, 585 -586 (Mo.App. W.D., 2005). Our decision in Case No. 13-1649 BN was final, but it was not on the merits.

That does not mean Reich-Gage is entitled to appeal the same order twice. Another principle of law, the one actually relied on by the court of appeals in *Metropolitan Towing,* prevents her from doing so. In that case, Metropolitan Towing ("Metro Towing"), a partnership, applied for a license as a salvage automobile dealer. On February 4, 2013, the Director of Revenue sent Metro Towing a notice of refusal to issue a license. The notice informed Metro Towing that it could appeal the Director's decision within thirty days after the decision was mailed.

Metro Towing did not appeal the decision, but it resubmitted substantially the same application on June 10, 2013. On June 11, 2013, the Director returned the June application to Metro Towing, stating it had already denied the application on February 4, 2013.

Metro Towing appealed the Director's refusal to consider its application to this Commission. We dismissed the appeal, finding that the Director's June 11 letter returning the application was not a final decision of the Director from which Metro Towing could appeal. Metro Towing then appealed our decision to dismiss its case. The Court upheld that decision, stating:

> Metro Towing presented no new information in the June 10 Application for the Director's consideration . . . Metro Towing had an adequate remedy to challenge the Director's denial of its application for a salvage dealer license, but it let the time for seeking that remedy expire. It cannot revive its action by filing a second substantially identical application. Metro Towing's failure to appeal the February 4 Decision to the AHC rendered the Director's decision regarding denial of Metro Towing's salvage dealer license application **final and not susceptible to collateral attack.**

450 S.W.3d at 307 (emphasis added, internal citations omitted).

"A collateral attack is an attempt to impeach a judgment in a proceeding not instituted for the express purpose of annulling the judgment." *Vilsick v. Fibreboard Corp.,* 861 S.W.2d 659, 662 (Mo. App. E.D. 1993), quoted in *Wright v. Bartimus Frickleton Robertson & Gorny PC,* 364 S.W.3d 558, 564 -565 (Mo. App. W.D. 2011). " 'Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified ... the attack is a 'collateral attack.' " *Flanary v. Rowlett,* 612 S.W.2d 47, 49 (Mo. App. W.D. 1981).

Based on these authorities, we believe Reich-Gage's second complaint is an impermissible collateral attack on the Board's decision to issue her a probated license, which became final when we dismissed her case on May 14, 2014, and she failed to appeal that dismissal. She may not, at this point, revive that complaint by refiling it, despite the wording of

§ 324.038.2. To allow her to do so would give her "two bites at the apple." Even if § 324.038 provides two opportunities to appeal, it does not provide the opportunity to file two separate but substantially identical appeals of the same agency decision. Accordingly, we cannot consider Reich-Gage's second complaint.

Summary

We grant the Board's motion to dismiss.

SO ORDERED on March 26, 2015.

\s\ Karen A. Winn
KAREN A. WINN
Commissioner