IN THE MATTER OF	*	**BEFORE THE**
YVETTE D. PHILLIPS, LGSW	*	**MARYLAND STATE**
Respondent	*	**BOARD OF**
	*	**SOCIAL WORK EXAMINERS**
LICENSE NUMBER 19758	*	**Case No.: 2015-2101**
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RESPONDENT'S MOTION TO VACATE THE MARYLAND STATE BOARD OF SOCIAL WORK EXAMINERS' FINAL DECISION AND ORDER, AND FOR NEW HEARING

Petitioner, Yvette Phillips ("Petitioner"), through counsel, hereby files Respondent's Motion to Vacate the Maryland State Board of Social Work Examiners' Final Decision and Order, and for New Hearing.

The Petitioner seeks to vacate the Maryland State Board of Social Work Examiners' (the "Board") Final Decision and Order dated August 15, 2018, and to obtain a new evidentiary hearing, and as grounds, states as follows:

FACTS

1. On July 13, 2018, the Board conducted an evidentiary hearing on various charges issued against the Respondent under the Maryland Social Workers Act (Md. Code, Health Occupations Art. §§ 19-101 *et seq.* See Ex. 1, p. 3.

2. The Board conducted the evidentiary hearing in the Respondent's absence. Id.

3. The Board allegedly "provided notice to the Respondent by certified mail and regular mail of the charges," but each of the Board's notices were "returned to the Board stamped 'Return to Sender.'" Id.

4. The Board allegedly made six attempts between March 13, 2018, and March 18, 2018, to serve notice of the charges and evidentiary hearing on the Respondent by certified and regular mail. See Ex. 1, p. 3.

5. The Board also indicated that on or about September 27, 2016, it issued an investigative subpoena to the Respondent by certified and regular mail. Id., p. 7.

6. The investigative subpoena, sent to the Respondent by both certified and regular mail, was returned to the Board unclaimed. Id.

7. The investigative subpoena is not alleged by the Board to have contained notice of the charges against the Respondent, or notice of the evidentiary hearing. Id.

8. During all times relevant, the Respondent maintained her current mailing address on file with the Board. See Ex. 2, Affidavit of Yvette Phillips.

9. Although the Respondent maintained her current mailing address on file with the Board, she did not receive notice of the charges, or notice of the evidentiary hearing. Id.

10. The post offices at which the Respondent maintained post office boxes from 2016 through 2018 would frequently place her mail into post office boxes belonging to other persons, and place other persons' mail into her post office box. Id.

11. The Respondent was informed by management at those post offices that some post office workers would place her mail into post office boxes belonging to other persons, and would also return her mail to the sender without ever placing it into her post office box. Id.

12. The Respondent did not receive various items of mail due to the post offices placing her mail into post office boxes belonging to other persons, and due to her mail being returned to the sender without ever having been placed into her post office box. Id.

13. The Respondent notified the Board by letter dated November 7, 2016, that her address had changed from P.O. Box 4460, Capitol Heights, Maryland 20791, to 43 Randolph Road, Box 124, Silver Spring, Maryland 20904. See Ex. 2; see also Ex. 3, Change of Address Letter from Yvette Phillips to the Maryland State Board of Social Work Examiners.

14. At all times relevant, the Respondent maintained her current phone number on file with the Board. See Ex. 2.

15. According to the Board, the Respondent called the Board on or about September 27, 2016, in response to the investigative subpoena. Id.

16. During all times relevant, the Respondent only used her personal cell phone to make and receive telephone calls, and she never called the Board in response to any subpoena, or further any other purpose. See Ex. 2.

17. The Respondent's personal cell phone records from September 27, 2016, contain no indication that the Respondent called the Board that day. See Ex. 4, Cell Phone Records of Yvette Phillips.

18. The Board never called the Respondent by telephone to notify her of the charges, or of the evidentiary hearing. See Exs. 1 and 2.

19. The Board never sent a text message to the Respondent's phone to notify her of the charges or evidentiary hearing. See Exs. 1 and 2.

20. At all times relevant, the Respondent maintained her current email address on file with the Board. See Ex. 2.

21. The Board never emailed the Respondent notice of the charges or evidentiary hearing. See Exs. 1 and 2.

22. The Board did not personally serve the Respondent with notice of the charges or evidentiary hearing. See Exs. 1 and 2.

23. On August 15, 2018, the Board issued a Final Decision and Order revoking the Respondent's license to practice as a licensed graduate (master) social worker in the State of Maryland. See Ex. 1, pp. 9-10.

ARGUMENT

24. The Board must vacate its Final Decision and Order and grant the Respondent a new evidentiary hearing because it failed to provide the Respondent with legally sufficient notice of the charges and evidentiary hearing.

25. Md. Code, Health Occ. § 19-312(b) required the Board to "give [the Respondent] notice and hold the hearing in accordance with the Administrative Procedure Act" (the "APA") (Md. Code, State Gov't Art. § 10-201 *et seq.*). The APA required the Board to give the Respondent "reasonable notice of the agency's action," as well as "reasonable written notice of the hearing." Md. Code, State Gov't Art. §§ 10-207(a) and 10-208(a). Prior to ordering the revocation of the Respondent's license, the Board was required to give the Respondent "an opportunity for a hearing before the Board." Md. Code, Health Occ. § 19-312(a).

26. The statutory notice and hearing requirements imposed on the Board by the Health Occupations and State Government Articles of the Maryland Code comport with the procedural and substantive due process rights afforded the Respondent under the Fifth and Fourteenth Amendments to the U.S. Constitution (no person shall be "deprived of life, liberty, or property, without due process of law"). Likewise, they ensure compliance with the rights afforded to the Respondent under the Maryland Declaration of Rights, Article XXI (no person shall be "deprived of his life, liberty, or property, but by the judgment of his peers, or by the law

of the land"). They further protect the Respondent's common law and statutory rights to fundamental fairness.

27. In this case, the Board's Final Decision and Order must be reversed because the Board failed to provide the Respondent with legally sufficient notice of the charges and evidentiary hearing.

28. The Supreme Court has established that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (citations omitted). To satisfy constitutional requirements, "'[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it[,]' and '[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . , or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.'" Id. at 315 (internal citations omitted).

29. In Jones v. Flowers, the Supreme Court considered "whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed." 547 U.S. 220, 227, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006). In that case, the state mailed a letter notifying the petitioner of his tax delinquency and his right to redeem his property within two years via certified mail to petitioner's last known address, but the letter was returned, marked as "unclaimed." Id. at 223–24. Two years later, the state published a notice of

public sale in the newspaper, and, upon receiving an offer, mailed a notice of tax sale, again via certified mail, to petitioner at the same address. This letter was also returned as "unclaimed." Jones, 547 U.S. at 224. Notice via first-class mail was not sent. Id. After the property was purchased, the petitioner's daughter, who had received an unlawful detainer notice while residing at the address, finally notified petitioner of the sale, and the petitioner filed a lawsuit challenging, on due process grounds, the state's failure to provide sufficient notice. Id.

30. The Supreme Court concluded that "the State should have taken additional reasonable steps to notify [the petitioner], if practicable to do so" upon receiving the returned form indicating that the petitioner had not received the notice. Id. at 234. In the Court's view, "[a]lthough the State may have made a reasonable calculation of how to reach [the petitioner], it had good reason to suspect when the notice was returned that [the petitioner] was 'no better off than if the notice had never been sent.'" Id. at 230 (quoting Malone v. Robinson, 614 A.2d 33, 37 (D.C.App.1992)). "Deciding to take no further action is not what someone 'desirous of actually informing' [the petitioner] would do; such a person would take further reasonable steps if any were available." Id.

31. The Supreme Court concluded that there were several reasonable options for the state to have taken. To address the possibility that the petitioner still resided at the address but was not at home at the time the certified mail was delivered, the State could have mailed a notice to the petitioner via first-class mail. Id. at 234. The Court observed that "the use of certified mail might make actual notice less likely in some cases-the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time." Id. at 235. Moreover, "[f]ollowing up with regular mail might also increase the chances of actual notice to [the petitioner] if—as it turned out—he had moved"

because "[e]ven occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and leave it for the postman to retrieve, or notify [the petitioner] directly." Jones, 547 U.S. at 235. To address the possibility that the petitioner had moved, the Court opined that the state could have posted a notice on the front door or addressed the undeliverable mail to the "occupant." Id. The Court determined that "[i]t suffices for present purposes that we are confident that additional reasonable steps were available for [the state] to employ before taking [the petitioner's] property." Id. at 238.

32. In the Respondent's case, the Board failed to utilize several additional, practicable, and reasonable steps that would have notified her of the charges and evidentiary hearing. The fact that all of the Board's notices mailed to the Respondent's current address on file with the Board—notices sent by both certified and regular mail—were returned to the Board marked "Return to Sender," put the Board on notice that its attempts to notify the Respondent by mail had failed, and that the Respondent did not have actual or constructive notice of the charges or evidentiary hearing.

33. Despite knowing that the Respondent did not receive notice by mail, the Board made no further attempts to notify her of the charges or evidentiary hearing. The Board did not attempt to notify her by telephone, text message, or personal service. Those alternative methods of serving notice were practicable and reasonable in light of the circumstances, and they would have notified the Respondent of the charges and evidentiary hearing. The Board's failure to take these additional, practicable, and reasonable steps indicates that it was not desirous of actually providing the Respondent with notice.

34. Maryland case law also requires that the Board's Final Decision and Order be reversed. In Griffin v. Bierman, 403 Md. 186, 941 A.2d 475 (2008), the Court of Appeals determined whether to apply the principle set forth in Jones. In that case, Griffin defaulted on home finance loans. Id. at 191. The substitute trustees under the deed of trust for the property docketed a foreclosure action and sent notice to Griffin via certified mail and first-class mail. Id. at 192. The letter sent by certified mail was returned as "unclaimed," and the letter sent by first-class mail was not returned. Id. at 193. When it came time to foreclose upon the property, the trustees mailed, again, first-class and certified mail of the time, date, and location of the foreclosure sale, as well as a letter addressed to the "occupant" of the residence via first-class and certified mail. Id. at 193–94. The certified letter addressed to the occupant was returned as "unclaimed," but none of the first-class mailings were returned to the trustees. Id. at 194. When Griffin learned of the foreclosure sale, she filed exceptions on the ground that the sale violated her due process rights due to lack of sufficient notice, but the sale was ratified. Id.

35. The Court of Appeals concluded that the notice provided to Griffin, conducted pursuant the statutory foreclosure scheme, provided sufficient notice and was not unconstitutional. Id. at 200. The Court concluded that the trustees did not have "certain knowledge" that Griffin did not receive the notices sent via both certified and first-class mail. Id. The Court explained that it was logical that a recipient of the notice sent via first-class, which indicated that an identical notice was also sent via certified mail, would not make the effort to go to the post office and sign for a duplicate letter. Id. Therefore, the Court concluded that the trustees in that case provided Griffin with due process by complying with Maryland's foreclosure notice requirements and also satisfied several of the alternative steps identified by the Supreme Court in Jones. Id.; see also Snider Int'l Corp. v. Town of Forest Heights, 739 F.3d

140, 147 (4th Cir.) (rejecting a motorist's claim that notice of speeding infraction sent via first-class mail alone was insufficient to provide due process where there was no indication that the delivery was not successful, i.e., the envelopes being returned as undeliverable), cert. denied, 134 S.Ct. 2667, 189 L.Ed.2d 210 (2014). Of key importance is the Court's reasoning that when "first-class mail is undeliverable, it is returned to the sender[;] [t]he sender knows that notice was not received." Griffin, 403 Md. at 206 n. 14.

36. In contrast to Griffin, the Board in this case had "certain knowledge" that the Respondent was never put on notice of the charges and evidentiary hearing because all of the Board's notices, including those sent by both certified and regular mail, were returned to the Board marked "Return to Sender." Not even the first-class mailings were received or claimed by the Respondent.

37. The return of all mailed notices to the Board made it evident that this was not an instance in which the Respondent did not make an effort to go to the post office to sign for a duplicate letter that had already been delivered by regular mail. The return of all mailed notices clearly indicated that none of them had been delivered to, or were reviewed by, the Respondent, and that she had no actual or constructive notice regarding the charges or evidentiary hearing.

38. Despite knowing that the Respondent did not have notice of the charges or evidentiary hearing, the Board failed to attempt any other means to provide notice, such as a telephone call, text message, or personal service.

39. Finally, in Maryland State Board of Nursing v. Sesay, 224 Md.App. 432, 121 A.3d 140 (2015), the Court of Special Appeals considered whether a licensee was afforded legally sufficient notice when a board's notice sent via certified and regular mail had been returned unclaimed. Sesay, a registered nurse, received notice of the charges issued against her.

Sesay, 224 Md.App. at 453. Thereafter, she moved to a new address, but failed to comply with a statute requiring her to notify the board of her change of address. Id. The board mailed notice of the evidentiary hearing via both certified and regular mail to her (old) address on file, but both were returned unclaimed. Id. Sesay's own failure to comply with the statute requiring her to notify the board of her change of address was the reason why she never received the mailed notices regarding the evidentiary hearing. Id.

40. The Court of Special Appeals held that, because the board mailed notice of the evidentiary hearing to the address it had on file, Sesay had constructive knowledge of the notice pursuant to Md. Code, State Gov't § 10-209(c). The court's reasoning was based on the fact that Sesay failed to comply with her statutory duty to notify the board of her change of address. Sesay, 224 Md.App. at 453. Of significance is the Court's notation that its holding would have been different had the first-class mail notices been returned undelivered, or the certified mail had been returned as something more revealing than "unclaimed[.]"

41. Unlike Sesay, the Respondent in this case always maintained her current address on file with the Board. She also notified the Board of her change of address by means of a letter delivered to the Board on or about November 2016. Furthermore, the Respondent in this case never received notice of the initial charges filed against her.

42. The Respondent, therefore, had neither constructive nor actual notice of the charges or evidentiary hearing. Despite knowing that all mailings had not effected notice, the Board failed to take any additional, practicable, and reasonable steps to provide such notice.

43. In conclusion, the Board in this case failed to provide the Respondent with legally sufficient notice of the charges and evidentiary hearing. It, therefore, violated her substantive and procedural due process rights afforded to her under the Fifth and Fourteenth Amendments to

the U.S. Constitution, and under the Maryland Declaration of Rights, Article XXI. The Board also violated the Respondent's common law and statutory rights to fundamental fairness.

44. For the foregoing reasons, the Board must vacate its Final Decision and Order, and grant the Respondent a new hearing ("Upon a showing that the person neither knew nor had reasonable opportunity to know of the fact of service, a person served by regular mail under subsection (a) of this section shall be granted a hearing.") Md. Code, State Gov't Art. § 10-209(b).

CONCLUSION

WHEREFORE, the Respondent, Yvette Phillips, hereby requests that the Maryland State Board of Social Work Examiners vacate its Final Decision and Order for the reasons stated above; grant her a new evidentiary hearing on the charges; and grant her any and all further relief that the Board may deem necessary or just.

Respectfully submitted,

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TABLE OF POINTS AND AUTHORITIES

1. Griffin v. Bierman, 403 Md. 186, 941 A.2d 475 (2008);
2. Jones v. Flowers, 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006);
3. Malone v. Robinson, 614 A.2d 33 (D.C.App.1992);
4. Md. Code, Health Occ. Art. § 19-312(b);
5. Md. Code, State Gov't Art. § 10-201 et seq.;
6. Md. Code, State Gov't Art. §§ 10-207(a) and 10-208(a);
7. Md. Code, Health Occ. Art. § 19-312(a);
8. Md. Code, State Gov't Art. § 10-209(c);
9. Md. Code, State Gov't Art. § 10-209(b);
10. Md. Declaration of Rights, Article XXI;
11. Md. State Bd. of Nursing v. Sesay, 224 Md.App. 432, 121 A.3d 140 (2015);
12. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950);
13. Snider Int'l Corp. v. Town of Forest Heights, 739 F.3d 140 (4th Cir.);
14. U.S. Constitution, amend. V; and
15. U.S. Constitution, amend. XIV