The attached are Primary Source Documents of the Idaho Board of Nursing for:

STEVEN CRUME
N-36792

Idaho Board of Nursing – PO Box 83720 – Boise, Idaho 83720-0061 – (208) 334-3110
August 11, 2008

Steven Crume  
4660 Seymour Drive  
Boise ID  83704

Dear Mr. Crume:

Following your hearing before the Board of Nursing on July 24, 2008, the Board of Nursing members took action to grant the State’s Motion to exclude post-hearing evidence and issued Findings of Fact, Conclusions of Law and a Final Order to revoke your professional nurse license. Enclosed is a copy of the Final Order.

The Order became effective August 8, 2008. Please be advised that you may not apply for reinstatement for a period of two (2) years from the date of this order.

Sincerely,

[Signature]

SANDRA EVANS, MAEd, RN  
Executive Director

SE:1hc  
enclosure

The Mission of the Board of Nursing is to regulate nursing practice and education for the purpose of safeguarding the public health, safety and welfare.
BEFORE THE IDAHO STATE BOARD OF NURSING

In the Matter of the License of: 

STEVEN LYLE CRUME, 
License No. N-26792, 

Respondent. 

) ) ) Case No. BON 06-078 
) ) ) FINAL ORDER 
)

INTRODUCTION

This is a contested case disciplinary proceeding against Respondent Steven L. Crume ("Respondent"), a licensed professional nurse.

On August 6, 2007, the Executive Director of the Idaho Board of Nursing filed a formal Complaint against Respondent with the Board. On October 3, 2007, the Executive Director filed an Amended Complaint. On October 10, 2007, Respondent filed a written Answer to the Amended Complaint and requested an evidentiary hearing.

Pursuant to written notice, on January 8, 2008, an evidentiary hearing was held before Jean Uranga, the Board’s duly appointed hearing officer. After conducting the hearing, on March 13, 2008, the hearing officer entered written Findings of Fact, Conclusions of Law and Recommended Order ("Recommended Order") in this matter. On March 27, 2008, Respondent filed a Petition for Reconsideration of the hearing officer’s Recommended Order. On April 4, 2008, the hearing officer entered a written Order denying the Petition. On April 25, 2008, Respondent filed written exceptions to the hearing officer’s Recommended Order, thereby bringing the matter before the Board for review and resolution.1

1 Board member and Vice-Chairman Randy Hudspeth recused himself and took no part in this proceeding.

FINAL ORDER - 1
Pursuant to written notice, oral argument on Respondent’s exceptions to the hearing officer’s Recommended Order was held before the Board on July 24, 2008. After orally ruling on some preliminary evidentiary matters\(^2\), the Board voted to affirm the hearing officer’s Recommended Order in its entirety. The Board further voted to revoke Respondent’s nursing license. This Final Order serves to memorialize the Board’s decision pursuant to Idaho Code § 67-5246.

**DECISION**

This case essentially turns on the credibility of four (4) witnesses: Respondent and three (3) hospital patients.\(^3\) The focus of Respondent’s argument in his Petition for Reconsideration before the hearing officer and in the “Respondent’s Exceptions to Findings of Fact, Conclusions of Law and Recommended Order” is that the testimony of the patients is untrustworthy and that he is more credible. However, the hearing officer rejected Respondent’s argument and expressly noted in her Findings of Fact why she chose to believe the patients rather than the Respondent. The hearing officer’s findings are well reasoned and supported by substantial, competent evidence. Those findings of sexual impropriety clearly establish violations of Board statutes and rules as set forth in the hearing officer’s Conclusions of Law. Therefore, the Board expressly adopts the hearing officer’s Findings of Fact and Conclusions of Law in their entirety as its own. A true and correct copy of the hearing officer’s Recommended Order is attached hereto as “Exhibit A”, and incorporated herein by reference.

The selection of a disciplinary sanction for the proven violations is entrusted to the sound discretion of the administrative agency. *Knight v. Dep’t of Insurance*, 124

\(^2\) The Board’s ruling on the evidentiary matters is the subject of a separate written order.

\(^3\) A fourth patient (A.G.) testified against Respondent but the hearing officer concluded that there was insufficient evidence to substantiate those allegations. The Board concurs with that assessment.
Idaho 645 (1993); Pence v. Idaho State Horse Racing Comm'n., 109 Idaho 112 (1985). Utilizing that discretion, the Board concludes that revocation of Respondent's nursing license is a reasonable sanction. Respondent violated his nursing duties and the privacy of three (3) vulnerable hospital patients entrusted to his care. Respondent committed acts of a sexual nature on each of these victims for no legitimate medical purpose. This conduct cannot be tolerated and calls for severe punishment. Having carefully considered its options and alternative, less onerous sanctions, the Board concludes that revocation is warranted and the most appropriate sanction in this instance. This conclusion is consistent with sanctions imposed in prior disciplinary actions involving sexual misconduct.

ORDER

1. The Board hereby adopts in full as its own the Findings of Fact and Conclusions of Law contained in the hearing officer's Recommended Order, dated March 13, 2008. See Exhibit A attached hereto;
2. License No. N-26792, issued to Respondent Steven Crume, is revoked;
3. Pursuant to IDAPA 23.01.01.061.04.f., Respondent may not apply for reinstatement of his license until two (2) years from the date of this Order;
4. In the event Respondent should apply in the future for a nursing license and be approved, the issuance of any license shall be conditioned upon:
   a. The Respondent paying all investigative and prosecution costs and attorney fees incurred by the Board in connection with the instant proceeding;
   b. The Respondent demonstrating to the satisfaction of the Board that he is no longer a danger to patients and is fit to practice nursing;

FINAL ORDER - 3
c. The Respondent agreeing to all conditions, terms and restrictions the Board deems reasonable and necessary to place on Respondent's licensure; and
d. The Respondent complying with all other requirements for licensure imposed by Board statutes and rules.

IT IS ORDERED

DATED this __ day of August 2008

IDAHO STATE BOARD OF NURSING

[Signature]

SUSAN ODOM, PhD, RN
Chairman

NOTICE OF APPEAL RIGHTS

This is a Final Order of the Board. Any party may file a motion for reconsideration of this Final Order within fourteen (14) days of the service date of this Order. The Board will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Idaho Code § 67-5246(4).

Pursuant to Idaho Code § 54-1413 and Board of Nursing Rule IDAPA 23.01.01.165, you may petition for reconsideration of this Final Order of the Board upon the following grounds:

1. Newly discovered or newly available evidence relevant to the issues;
2. Error in the proceeding or Board decision that would be grounds for reversal or judicial review of the order;

FINAL ORDER - 4
3. Need for further consideration of the issues and the evidence in the public interest; or

4. A showing that issues not considered ought to be examined in order to properly dispose of the matter.

Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this Final Order may appeal this Final Order to district court by filing a petition in the district court of the county in which:

i. A hearing was held,

ii. The final agency action was taken,

iii. The party seeking review of the order resides, or

iv. The real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days (a) of the service date of this Final Order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of August 2008, I caused to be served a true and correct copy of the foregoing FINAL ORDER addressed as follows:

Karl Klein  
Deputy Attorney General  
Office of the Attorney General  
PO Box 83720  
Boise, Idaho 83720-0010

J.D. Merris  
MERRIS NAUGLE & HERNDON, PLLC  
913 West River Street, Suite 420  
Boise, ID 83702

Roger L. Gabel, DAG  
Contracts & Administrative Law Division  
Office of the Attorney General  
954 W. Jefferson St., 2nd Floor  
P.O. Box 83720  
Boise, ID 83720-0010

U.S. Mail, postage prepaid  
Certified U.S. Mail, return receipt  
Hand Delivery  
Overnight Mail  
Facsimile:__________________  
Statehouse Mail

X U.S. Mail, postage prepaid  
Certified U.S. Mail, return receipt  
Hand Delivery  
Overnight Mail  
Facsimile:__________________  
Statehouse Mail

X U.S. Mail, postage prepaid  
Certified U.S. Mail, return receipt  
Hand Delivery  
Overnight Mail  
Facsimile:__________________  
Statehouse Mail

Linda Coley  
Management Assistant  
Board of Nursing
BEFORE THE IDAHO STATE BOARD OF NURSING

In the Matter of the License of:

STEVEN LYLE CRUME,
License No. N-26792,
Respondent.

Case No. BON 06-078
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED ORDER

This matter came on for hearing on January 9, 2008. The Idaho State Board of Nursing was represented by Karl Klein, Deputy Attorney General. Respondent appeared in person and by and through his attorney of record, J.D. Marris. Both parties submitted evidence.

Following the close of the hearing, the parties agreed on a briefing schedule. The final post hearing brief was received February 12, 2008.

FINDINGS OF FACT


2. During 2005 and 2006, Respondent was employed by St. Ai's
Regional Medical Center. He had been employed at St. Al’s for fourteen years.

3. On November 15, 2006, the Board of Nursing received a report from St. Al’s indicating Respondent’s employment had been terminated based upon allegations of improper sexual contact by Respondent with patients. The Board of Nursing assigned an investigator, Chanel Johnson, who conducted an investigation for the Idaho State Board of Nursing. Following completion of the investigation, the Board of Nursing initiated formal disciplinary proceedings against Respondent.

4. Patient S.S. had back surgery performed at St. Al’s on or around June 29, 2005. During the night after the surgery and after her husband had gone home, Patient S.S. became upset and panicky. Respondent entered her room and was trying to comfort her. Respondent pulled a pill out of his pocket and he told her to take it, which she did. Respondent started massaging Patient S.S. neck and shoulders and then started massaging her breasts under her gown. Patient S.S. pulled a pillow up over her chest in an effort to stop Respondent and Respondent pushed it down again. This happened a couple of times. She finally told him to stop. Respondent asked Patient S.S. if he could massage her legs and she said “no.” Patient S.S. stated Respondent touched the tops of her breasts, but not her nipples. She reported the incident to St Al’s administration on June 30, 2005, shortly after it occurred. Respondent admitted giving back rubs to Patient S.S.
5. With respect to Patient S.S.; Respondent admitted that he treated Patient S.S. in his capacity as charge nurse when the other assigned nurse went to lunch. He admitted giving a pill and acknowledged he had not charted what type of medication he provided. He further admitted massaging her shoulders, neck and temple and admitted that she asked him to stop; which he did. Respondent denied ever touching her breasts. The Hearing Officer finds that Patient S.S.'s description of the incident with Respondent inappropriately massaging her breasts is more credible than Respondent's denial.

6. The hospital investigated the complaint, but since there had been no other complaints, it was the patient's word against Respondent's and no further action was taken.

7. Patient C.W. was admitted to St. Al's for an abscess in her brain which required surgery on or around August 28, 2005. During her hospital stay on August 30, 2005, Patient C.W. awoke to find Respondent fondling her nipples. She asked him to stop and he stated: "Am I pissing you off?" Respondent stopped when another nurse came into the room. Respondent was cupping both of Patient C.W. breasts with his hands. She felt Respondent would not have stopped if another nurse had not walked into the room. Patient C.W. reported the incident on August 31, 2005, shortly after it occurred and filed a police report.

8. Respondent initially denied he had touched the patient's nipples and then later admitted he had touched her nipples, but was
performing a "nipple twisting" technique to arouse the patient. Respondent's explanation lacks credibility, particularly since "nipple twisting" is an outdated and unsupported nursing intervention.

9. Following this incident, Respondent was relieved of his charge nurse duties and required to comply with various terms and conditions by St. Al's.

10. Patient E.S. had spinal fusion surgery at St. Al's on or around October 30, 2006. She had a drain in her back so she could not lie on her back. During the night shift on October 31, 2006, Respondent entered her room and she felt him run his fingernail from her ankle to her vagina and Respondent said: "Does this feel good?" She started crying and Respondent then left the room.

11. Patient E.S. adamantly denied that the Jackson Pratt drain line and her catheter became entangled in any way.

12. Respondent admitted he gave the patient massages on her thighs and accidentally brushed his hand against her pubic hair where the catheter line and Jackson Pratt drain lines became tangled. Respondent's explanation lacks credibility for the reason it was an inappropriate nursing intervention to provide leg rubs to a post surgical patient due the risk of deep vein thrombosis. In addition, it is unlikely the drain from the patient's back was long enough to become tangled in the catheter. Patient E.S. reported the incident on November 2, 2006 shortly after it occurred.
13. Following this incident, St. Al's terminated Respondent's employment.

14. Patient A.G. was seen at the St. Al's Emergency Center on July 30, 2006 for a TIA. She was admitted to floor five and Respondent was the assigned night nurse. Respondent gave her two large pills for her complaint of headache. During the night, she was sleeping soundly and awoke to find Respondent sitting on her bed and holding her left hand. The curtain was pulled around her bed. Patient A.G. testified she was very frightened by Respondent's unexplained presence in her room with the curtain drawn. She did not report the incident until she was later completing a patient satisfaction form.

15. All four women patients testified that they were scared and upset by Respondent's conduct. During their testimony, the testifying patients were still visibly upset when they described what had happened.

16. Respondent testified that he had not engaged in improper sexual contact or conduct; however, the Hearing Officer finds the testimony of the four patients more credible.

CONCLUSIONS OF LAW

17. The Board of Nursing offered the testimony of Amy Crume, Respondent's niece, who testified that Respondent sexually abused her as a child when she lived in Respondent's home in 1991 when she was eleven years old. Testimony of a police officer who investigated Amy's allegations and various exhibits were also offered.
The Hearing Officer allowed the testimony to be presented, but reserved ruling on admissibility of the evidence to allow the parties to submit briefing. Both parties provided the Hearing Officer with a couple of cases to review.

18. It is undisputed that the Rules of Evidence do not apply to administrative proceedings; however, the Hearing Officer may exclude evidence that is irrelevant. Idaho Code §67-5251. Consequently, a review of cases relating to relevant evidence is instructive. In the case of *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (S.Ct. 1992), the Supreme Court noted that, as a general rule, Idaho Rules of Evidence 404 precludes admission of prior bad acts or wrongs unless relevant to prove such things as identity, motive, intent, preparation, plan, etc. The Supreme Court referred to *State v. Moore*, 120 Idaho 743, 819 P.2d 1142 (1991) and ruled that corroborative evidence in sex crime cases involving youthful victims is at times necessary to establish the credibility of a young child. In order to admit such evidence, the Supreme Court went on to explain that challenges to credibility are particularly significant when witnesses are minors.

19. Similarly, in the very recent case of *State v. Field*, 07.16 ISCR 669 (S.Ct. 2007), the Supreme Court reversed a decision which had allowed evidence of prior bad acts. The Supreme Court again reiterated the Idaho Rule of Evidence which provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person to show he committed the crime for which
he is on trial. Limited exceptions apply and the trier of fact must determine whether the evidence is relevant and material and whether the probative value outweighs the danger of unfair prejudice. The Supreme Court noted they had affirmed the use of bad acts evidence in sexual misconduct cases where there were charges of sexual abuse and the conduct was either similar to or involved victims of similar ages to those abused. In the Field case, the Supreme Court overruled the admission of other bad acts testimony because of the age difference of the victims.

20. Based upon the foregoing, the Hearing Officer concludes the testimony of Amy Crume and the police officer who investigated the allegations are not admissible because of its remoteness in time to the incidents occurring at St. Al's and the conduct in Ms. Crume's case did not directly involve patients or occur in a health care setting.

21. In addition, the victims are not minors and there was sufficient corroborative evidence from the other patients to address any possible credibility issues.

22. With respect to Patient A.G., the Hearing Officer concludes the evidence is insufficient to establish that Respondent engaged in improper sexual contact with Patient A.G. With respect to the remaining three patients, the evidence establishes a pattern by Respondent of engaging in improper sexual contact with Patients S.S., E.S. and C.W.
23. Sexual contact with patients by health care providers is now a crime. Idaho Code §18-919.

24. Respondent’s conduct as described above is grounds for discipline under the laws and rules governing Idaho nursing practice, including:

a. Idaho Code §54-1413(1)(g) and Board Rule 100.08 (a nurse shall not violate the Board’s laws, rules or standards of conduct and practice);

b. Idaho Code §54-1413(1)(h) and Board Rule 100.09 (a nurse shall not engage in conduct of a character likely to deceive, defraud or endanger patients or the public);

c. Board Rule 101.04.d (a nurse must safeguard his patient from incompetent practice, verbal or physical abuse, or illegal practice of any person);

d. Board Rule 101.04.g (a nurse shall respect the patient’s privacy);

e. Board Rule 101.05.b (a nurse shall respect the patient’s human dignity);

f. Board Rule 101.05.c (a nurse shall be responsible and accountable for his nursing judgments, actions and competence); and

g. Board Rule 101.05.h (a nurse shall not abuse the patient’s trust, shall respect the dignity of the profession and maintain appropriate professional boundaries with respect to patients, shall not engage in threatening or abusive behavior towards patients, must be aware of the potential imbalance of power
in professional relationships with patients, and must ensure that all aspects of the nurse/patient relationship focus exclusive upon the needs of the patient).

25. Pursuant to Idaho Code §54-1413(1), the Board of Nursing has authority to impose disciplinary sanctions against Respondent for his violations of the Nursing Practice Act.

RECOMMENDED ORDER

The Hearing Officer recommends that the Board of Nursing consider such sanctions as it deems appropriate.

DATED this 13 day of March, 2008.

[Signature]
JEAN R. URANZA
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13 day of March, 2008, I served true and correct copies of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER by depositing copies thereof in the United States mail, postage prepaid, in envelopes addressed to:

Karl Klein  
Deputy Attorney General  
Office of the Attorney General  
P.O. Box 83720  
Boise, Idaho 83720-0010

J.D. Merris  
Merris Naugle & Herndon, PLLC  
Attorneys at Law  
913 West River Street, Suite 420  
Boise, Idaho 83702

[Signature]  
JEAN R. URANZA

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER - 9
INTRODUCTION

This is a contested case disciplinary proceeding against Respondent Steven L. Crume ("Respondent"), a licensed professional nurse.

Following a January 8, 2008 evidentiary hearing, on March 13, 2008, the Board's duly appointed hearing officer entered written Findings of Fact, Conclusions of Law and Recommended Order ("Recommended Order"). On April 4, 2008, the hearing officer entered a written Order denying a Petition for Reconsideration filed by Respondent. On April 25, 2008, Respondent filed written exceptions to the hearing officer's Recommended Order, thereby bringing the matter before the Board for review and resolution.¹

On April 30, 2008, Respondent filed an "Affidavit of Counsel" which is an affidavit of his attorney, J.D. Merris ("First Merris Affidavit"). Attached to this affidavit is a copy of what purports to be a report and test results of a polygraph examination administered to Respondent on April 28, 2008. The affidavit indicates that it is being offered in support of Respondent's exception to the hearing officer's Recommended Order; however, it does not explain the relevance of the report, why it is being submitted to the Board or why it is admissible. No motion or supporting briefing was filed by Respondent

¹ Board member and Vice-Chairman Randy Hudspeth recused himself and took no part in this proceeding.
expressly requesting the Board to supplement the contested case evidentiary record to include the affidavit and attached report.

On or about May 16, 2008, the Board’s Executive Director, through her legal counsel, Deputy Attorney General Karl Klein, filed a document captioned “State’s (1) Response to Exceptions and (2) Objection and Motion to Strike Post-Hearing Evidence” (“Motion to Strike”). The Motion to Strike requests that the Board “strike any and all post-hearing evidence Respondent has submitted in support of his exceptions, including the April 30, 2008, Affidavit of Counsel with its attached polygraph report.”

On or about June 23, 2008, Respondent filed another “Affidavit of Counsel” which is a second affidavit of his attorney, J.D. Merris (“Second Merris Affidavit”). Attached to this second affidavit is a copy of what purports to be a Judgment of Conviction entered May 9, 2008, against E.S., a patient who testified against Respondent at the January 8, 2008 evidentiary hearing. The Second Merris Affidavit, like the First Merris Affidavit, indicates that it is being offered in support of Respondent’s exceptions to the hearing officer’s Recommended Order; however, it also does not explain the relevance of the Judgment, why it is being submitted to the Board or why it is admissible. Once again, no motion or supporting briefing was filed by Respondent expressly requesting the Board to supplement the contested case evidentiary record to include the affidavit and attached Judgment.

The issue regarding the two Merris Affidavits is whether they are properly before the Board for consideration as evidence in this proceeding. Stated alternatively, should the Board grant the State’s Motion to Strike this evidence? At the July 24, 2008 hearing, the Board voted to grant the Motion. This Order memorializes the Board’s decision.
DISCUSSION AND ANALYSIS

A. No Explanation Given for Failure to Introduce Polygraph at Evidentiary Hearing

The two Merris Affidavits and their attached documents were not introduced at the January 8, 2008 evidentiary hearing or otherwise considered by the hearing officer. Obviously, the May 9, 2008, Judgment of Conviction attached to the Second Merris Affidavit could not be presented to the hearing officer because it had not been entered as of the date of the evidentiary hearing. However, no explanation has been given as to why Respondent waited until April 28, 2008 to take a polygraph examination. If Respondent or his attorney deemed such a test important and relevant to the case, the test could have been administered long before and presented to the hearing officer for a ruling on its admissibility at the evidentiary hearing. After all, the original Complaint was filed in this matter on August 6, 2007, thereby giving Respondent many months of notice as to the issues and patients involved in the charges and alerting Respondent and his counsel as to the need to marshal evidence in his defense. Despite this fact, Respondent delayed taking the test until well after the evidentiary hearing and only after the hearing officer had entered her Findings of Fact, Conclusions of Law and Recommended Order.

There is no showing or explanation why the polygraph evidence could not have been gathered earlier and presented to the hearing officer. There are legitimate reasons to insist that all evidence be introduced at the evidentiary hearing before the initial trier-of-fact (the hearing officer). Failure to do so largely defeats much of the reason for having hearing officers: to use their expertise as trained legal professionals in ruling on evidence and conducting the proceedings, as well as freeing-up the Board's
time. It is only in a rare and exceptional case, something seemingly lacking here, that the Board should exercise its discretion to admit evidence (or otherwise permit augmentation of the record) at this late stage of the proceedings.

B. **Respondent Failed to Comply with Procedural Requirements**

Contrary to standard procedural practice in contested cases, Respondent did not file a motion asking permission to submit the additional information (i.e., the two affidavits and attached material). Motions are expressly provided for in the Idaho Rules of Administrative Procedure of the Attorney General ("IRAP"). Those rules are applicable to Board of Nursing disciplinary cases. IDAPA 23.01.01.004. Motions should state the facts upon which they are based, refer to the appropriate provision of statute, rule, or other law that supports the motion, and state the specific relief requested. IDAPA 04.11.01.260(2). Since no motion was filed contemporaneous with either the First Merris Affidavit or the Second Merris Affidavit, these filings are not in compliance with this procedural rule.

The proper procedure would have been to file an appropriate motion under the above-referenced rule requesting the Board to either: (1) allow the record to be supplemented to include the affidavits for the Board's direct review or (2) remand the case to the hearing officer to consider the affidavits and determine whether they are admissible and, if so, whether they cause the hearing officer to change her Findings of Fact and Conclusions of Law.

While the IRAP provides for much more relaxed and flexible proceedings than those applicable to court actions, the rules still mandate some degree of structure and uniformity so that a "level playing field" is established. Requiring the parties to present
issues (such as evidentiary rulings) by motion fosters those purposes. Permitting a party to simply file additional evidence with the agency after hearing, as occurred here, without an accompanying motion explaining the reasons and grounds for the filing thwarts those purposes.

C. The Polygraph Test Usurps the Authority of the Trier of Fact

The State points out in its briefing that the Idaho Supreme Court has ruled that polygraph test results are not currently admissible in court proceedings. While the Court relied partially on the fact that such testing has not been shown to be sufficiently reliable, the ruling focused on the fact that admitting such test results has the effect of usurping the authority of the jury. State v. Perry, 139 Idaho 520, 525 (2003). The jury is charged with determining credibility of witnesses and being the ultimate fact-finder. Permitting polygraph test results may have the effect of hindering, rather than assisting, in that process.

However, the Perry Court left open the possibility that polygraph test results may be admissible in other proceedings and forums:

In ruling that polygraph evidence is inadmissible to vouch for the credibility of a witness at trial, this Court notes that polygraph evidence may be admissible in instances where the parties stipulate to the admission of the evidence,...and in other informal hearings where the rules of evidence do not apply, ... at the discretion of the trial court or presiding official. This opinion does not touch on the efficacy of the polygraph tests in other contexts or uses, except as to jury and court trials conducted in this State.

State v. Perry, 139 Idaho at 526.

This current disciplinary proceeding by the Board of Nursing is governed by the Idaho Administrative Procedure Act ("APA"). Idaho Code § 54-1413(3)(a). The Idaho Rules of Evidence do not apply to contested case proceedings under the APA.
Therefore, the Supreme Court’s decision in *Perry v. State* does not definitively preclude the admission of the affidavits at issue in this contested case. Rather, the question is whether such test results are admissible under the APA.

The APA standard for admissibility is:

The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. Idaho Code § 67-5251(1) (emphasis added).

Applying this standard, while polygraph test results are generally inadmissible in court proceedings, law enforcement officers, potential employers, and others do rely upon them in conducting their affairs. Therefore, an argument could be made to admit such results in this case. Whether or not the Board allows this evidence, particularly in this post-hearing posture of the case, is a discretionary matter. See generally, *Stolle v. Bennett*, 144 Idaho 44, 48 (2007)(No abuse of discretion in Industrial Commission’s denial of motion to reopen record after hearing, where party had not complied with a procedural requirement).

The reliability of polygraph testing is still open to substantial question. This is compounded in the present case where the Board’s enforcement attorney has not been given an opportunity to challenge the tester’s credentials and training, the method of administering the test, and other relevant factors. These are normally things done at the evidentiary hearing before the hearing officer. Admitting the test results by the simple expedient of attaching them to the First Merris Affidavit effectively denies the State a meaningful ability to contest the reliability of the testing procedure.
Furthermore, allowing the test results may cause the Board to place too much weight on this one piece of evidence, and not enough on the other relevant evidence. There is a danger the Board might attribute an undeserved aura of authoritativeness to the polygraph results. The hearing officer judged the credibility of the witnesses and documentary evidence introduced at the hearing. The evidence the hearing officer permitted into the record was subject to cross-examination and possible objection by the other side. This process helps to ensure that weaknesses are exposed and appropriate weight assigned to the evidence. In essence, this process ensures some degree of reliability of the admitted evidence. No such process is available as to the polygraph results.

Finally, the main reason the Idaho Supreme Court excluded polygraph test results in trial courts is applicable here. To allow the polygraph expert to give his interpretation of whether a person is telling the truth is an unwarranted invasion of the province of the jury (here, the hearing officer and Board) and does not assist the trier of fact in making credibility determinations.

D. The Judgment of Conviction Attached to the Second Merris Affidavit is Irrelevant

Mr. Merris’ June 23, 2008 affidavit was filed after the parties had concluded their briefing to the Board from the review of the hearing officer’s Recommended Order. The affidavit simply states that attached thereto is a felony Judgment of Conviction entered against patient E.S., a witness in this matter. As discussed above, no motion or briefing was filed in support of the affidavit, leaving the Board to guess at its relevance and why it is being filed.
Speculating, this affidavit was likely submitted to attack the credibility of patient E.S. Under Rule 609 of the Idaho Rules of Evidence, prior felony convictions can be used to impeach a witness’ testimony but only if the court determines that the conviction is relevant to the credibility of the witness and the probative value of the evidence outweighs the prejudice to the party introducing the witness. If the Idaho Rules of Evidence applied to this case, the Judgment of Conviction would not be admissible because, at the time E.S. testified at the January 8, 2008 evidentiary hearing, the May 9, 2008 Judgment had not been entered. Therefore, it was not a prior felony conviction for impeachment purposes. While the formal rules of evidence are not applicable to disciplinary proceedings under the APA, no argument has been presented by Respondent or his attorney why the same result should not be obtained in this contested case.

Furthermore, there has been absolutely no showing of how the Judgment of Conviction is relevant to the case. The conviction was for possession of a controlled substance on April 2, 2005. Respondent’s argument is that E.S. should not be believed because she was under the influence of drugs during her hospital stay on October 31, 2006. See, “Respondent’s Exceptions to Findings of Fact, Conclusions of Law and Recommended Order,” p. 2. There is a disconnect between the two events. One is left to hypothesize how the criminal behavior a year and one-half before the hospital stay bears on the credibility of the witness’ testimony at the January 8, 2008 evidentiary hearing.
CONCLUSION

For the foregoing reasons, the Board believes that the two affidavits are inadmissible. Furthermore, the Board declines to remand the issue to the hearing officer for consideration. The Board therefore grants the State's Motion to exclude post-hearing evidence, to include the First Merris Affidavit and the Second Merris Affidavit.

IT IS ORDERED

DATED this 8th day of August 2008

IDAHO STATE BOARD OF NURSING

SUSAN ODOM, PhD, RN
Chairman
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of August 2008, I caused to be served a true and correct copy of the foregoing ORDER GRANTING MOTION TO STRIKE addressed as follows:

Karl Klein  
Deputy Attorney General  
Office of the Attorney General  
PO Box 83720  
Boise, Idaho 83720-0010

U.S. Mail, postage prepaid  
Certified U.S. Mail, return receipt  
Hand Delivery  
Overnight Mail  
Facsimile:

X Statehouse Mail

J.D. Merris  
MERRIS NAUGLE & HERNDON, PLLC  
913 West River Street, Suite 420  
Boise, ID 83702

U.S. Mail, postage prepaid  
Certified U.S. Mail, return receipt  
Hand Delivery  
Overnight Mail  
Facsimile:

X Statehouse Mail

Roger L. Gabel, DAG  
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