

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
BOARD OF NURSING, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 99-2165  
 )  
GARY MATTHEW DAVIS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, Donald R. Alexander, on September 24, 1999, in Fernandina Beach, Florida.

APPEARANCES

For Petitioner: Howard M. Bernstein, Esquire  
Agency for Health Care Administration  
Post Office Box 14229  
Tallahassee, Florida 32317-4229

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue is whether Respondent's license as a practical nurse should be disciplined for the reasons given in the Administrative Complaint filed on October 26, 1998.

PRELIMINARY STATEMENT

This matter began on October 26, 1998, when Petitioner, Department of Health, Board of Nursing, filed an Administrative

Complaint against Respondent, Gary Matthew Davis, a licensed practical nurse, alleging that Respondent pled no contest to a charge of possession of marijuana, a misdemeanor, in October 1997 and January 1998, and that these pleas constituted a violation of Sections 464.108(1)(c) and (i), Florida Statutes (1997).

Respondent denied the allegation and requested a formal hearing to contest the preliminary action. The matter was referred by Petitioner to the Division of Administrative Hearings on May 11, 1999, with a request that an Administrative Law Judge be assigned to conduct a formal hearing.

By Notice of Hearing dated June 3, 1999, a final hearing was scheduled on September 17, 1999, in Fernandina Beach, Florida. Because of adverse weather conditions caused by Hurricane Floyd, the matter was continued to September 24, 1999, at the same location. On September 14, 1999, the case was transferred from Administrative Law Judge E. J. Davis to the undersigned.

At the final hearing, Petitioner presented the testimony of Mellisa Kurz, a registered nurse and former director of nursing services at Maxim Home Healthcare Services, where Respondent was once employed. Also, it offered Petitioner's Exhibits 1-3. All exhibits were received in evidence. Respondent did not appear at the final hearing.

The Transcript of the hearing was filed on October 4, 1999. Proposed findings of fact and conclusions of law were due by October 14, 1999. None, however, have been filed.

## FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In this disciplinary action, Petitioner, Department of Health, Board of Nursing (Board), seeks to impose penal sanctions on the license of Respondent, Gary Matthew Davis, a licensed practical nurse, on the ground that he twice entered a plea of no contest to a crime related to the practice or the ability to practice nursing. In his Election of Rights Form filed with the Board, Respondent disputed various allegations in the complaint and requested a formal hearing.

2. Respondent is subject to the regulatory jurisdiction of the Board, having been issued license no. 1265761 by endorsement on March 12, 1997. As of June 1999, the license was active.

3. Petitioner's Composite Exhibit 3 establishes that on October 9, 1997, Respondent was arrested in Duval County, Florida, for purchasing marijuana from an undercover sheriff's officer, a felony. On December 8, 1997, the charge was reduced to possession of less than 20 grams of marijuana, a misdemeanor. Although the Administrative Complaint alleges that on the same date Respondent entered a plea of no contest to the misdemeanor charge, perhaps through inadvertence, the records offered into evidence do not substantiate this charge.

4. Petitioner's Composite Exhibit 2 establishes that on October 24, 1997, Respondent was again arrested for possession of

marijuana and carrying a concealed weapon in his automobile. On January 22, 1998, Respondent entered a plea of no contest to one count of possession of less than 20 grams of marijuana, a misdemeanor. The firearms charge was dropped. He was adjudicated guilty and sentenced to serve 2 days in jail and pay court costs. He also forfeited the concealed weapon.

5. Despite the lack of expert testimony on this issue, it is fair to infer that the use of a drug such as marijuana could impair the ability of a nurse to practice his profession, and thus the crime to which Respondent pled guilty related to his ability to safely practice nursing.

6. A representative of Respondent's former employer, Melissa Kurz (Kurz), gave lay testimony at hearing and established that Respondent was working as a licensed practical nurse at Maxim Home Healthcare Services in the fall of 1997. His sole responsibility was giving flu shots to patients. After Respondent's arrest, he was dismissed from employment and referred to a substance abuse program by his employer. However, Respondent refused to enter the program. Given his refusal to participate in that program, and the fact that Respondent was in possession of a controlled substance, Kurz expressed concern about Respondent's ability to continue practicing as a nurse at her facility.

7. In terms of mitigation, there is no evidence that Respondent has ever been disciplined by the Board on any prior

occasion. There is also no evidence that his use of drugs caused harm to any patient.

8. As aggravating circumstances, the evidence shows that while Respondent was convicted of possession of a controlled substance on only one occasion, he was arrested for the same offense twice within a one-month period. Also, Respondent failed to make any effort to rehabilitate himself by refusing to attend substance abuse classes, as directed by his employer. Finally, Respondent had been licensed as a professional for less than one year when these events occurred.

#### CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

10. As the party seeking to impose penal sanctions on Respondent's professional license, Petitioner bears the burden of proving the allegations in the charging document by clear and convincing evidence. See, e.g., Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

11. The Administrative Complaint alleges that Respondent "is subject to discipline pursuant to [S]ection 464.108(1)(c), [Florida Statutes (1997)], by being found guilty, or entering a plea of nolo contendere to, regardless of adjudication, of a crime related to the practice or the ability to practice nursing." The complaint goes on to allege that Respondent may

also be disciplined pursuant to Section 464.108(1)(i), Florida Statutes [1997], by "engaging, or attempting to engage in the possession of controlled substances under [C]hapter 893, Florida Statutes, for other than legitimate purposes." These sections have been subsequently renumbered as Sections 464.018(1)(c) and (i), Florida Statutes (1999).

12. By clear and convincing evidence, Petitioner has established that on January 22, 1998, Respondent pled guilty to a crime related to the practice or the ability to practice nursing, as proscribed by Section 464.108(1)(c), Florida Statutes (1997). Therefore, as to that particular allegation, the charge in Count I has been sustained. There is no proof, however, that he pled guilty to a similar crime on October 24, 1997.

13. By clear and convincing evidence, Petitioner has also established that Respondent engaged in the possession of a controlled substance as defined by Chapter 893, Florida Statutes, for other than a legitimate purpose, as alleged in Count II of the complaint. Therefore, a violation of Section 464.108(1)(i), Florida Statutes (1997), has been shown.

14. Rule 64B9-8.006, Florida Administrative Code, sets forth the disciplinary guidelines and range of penalties for statutory violations. Among other things, where a misdemeanor violation related to the practice of nursing has been established, paragraph (3)(f) of the rule calls for a penalty ranging "from [a] fine of \$250 and reprimand to referral to IPN

or \$1000 fine [and] one year suspension and two years' probation with conditions." For a violation of Section 464.108(1)(i), Florida Statutes, paragraph (3)(j) of the rule calls for a penalty ranging "from \$250 - \$1000 fine and probation with conditions or IPN participation to five year suspension followed by probation with conditions."

15. Given the mitigating and aggravating circumstances noted in paragraphs 7 and 8, a suspension of Respondent's license for one year is appropriate, to be followed by a period of probation (and conditions) to be determined by the Board.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board of Nursing enter a final order finding that Respondent violated Sections 464.108(1)(c) and (i), Florida Statutes (1997), on one occasion, and that his license should be suspended for one year, to be followed by a period of probation (and conditions) to be determined by the Board. The remaining charge should be dismissed.

DONE AND ENTERED this 19th day of October, 1999, in  
Tallahassee, Leon County, Florida.

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DONALD R. ALEXANDER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of October, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.