STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF NURSING,	)	
Petitioner,	)	
vs.	)	Case No. 99-4871
STEPHEN CAPONEY,	)	
Respondent.	)	

RECOMMENDED ORDER

A formal hearing was held in this case before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings on March 30, 2000, in Orlando, Florida.

APPEARANCES

For Petitioner: Reginald D. Dixon, Esquire
Christopher J. Steinhaus, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: W. Ford Duane, Esquire
Hannah, Estes, & Ingram, P.A.
Post Office Box 4974
Orlando, Florida 32802-4974

STATEMENT OF THE ISSUES

Whether Respondent was guilty of entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of nursing or the ability to practice nursing.

PRELIMINARY STATEMENT

On October 19, 1999, Petitioner filed an Amended Administrative Complaint against Respondent's license to practice nursing. On November 10, 1999, Respondent filed an Election of Rights form disputing material facts asserted in the Amended Administrative Complaint and requesting a formal evidentiary hearing before the Division of Administrative Hearings pursuant to Sections 120.569 and 120.57, Florida Statutes. Following hearings on the motions, Petitioner's Motions to Relinquish Jurisdiction were denied.

At the hearing, the Pre-hearing Stipulation and Amendment thereto were made part of the record and official recognition was given to Section 395.0197(8), Florida Statutes. Petitioner's Motion in Limine was denied. Respondent's Motion to Dismiss on Constitutional grounds was denied for lack of jurisdiction. Petitioner called one witness and offered into evidence one exhibit; the exhibit was admitted. Respondent called two witnesses and offered into evidence 32 exhibits; seven of Respondent's exhibits were admitted in evidence.

The Transcript was filed on April 19, 2000. Each party timely filed proposed recommended orders. Each of the parties' proposals have been given careful consideration in the preparation of this order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of nursing pursuant to law.

2. Petitioner has contracted with Agency for Health Care Administration to provide consumer complaint, investigative, and prosecutorial services required by the Division of Medical Quality Assurance, councils, or boards, as appropriate.

3. Respondent is, and has been at all times material hereto, a licensed registered nurse in the State of Florida, having been issued license number RN3044882.

4. Respondent's last known address is 2216 India Boulevard, Deltona, Florida 32738.

5. In April 1997, Respondent provided nursing care to Patient C.S.

6. In June 1997, Respondent provided nursing care to Patient J.F.

7. Patients C.S. and J.F. both filed complaints with the Orlando Police Department alleging that Respondent had inappropriately touched their breasts.

8. Respondent was charged by Direct Information with Battery and Sexual Battery.

9. On April 13, 1999, Respondent entered a plea of nolo contendere in Ninth Judicial Circuit in and for Orange County, Florida, to one count of Lewd or Lascivious Offense Committed upon an Elderly or Disabled Adult.

10. On April 13, 1999, in the same court, Respondent entered a plea of nolo contendere to one count of Sexual Battery.

11. The court withheld adjudication in the aforementioned cases and placed Respondent on five years' probation. One of the terms of the probation ordered Respondent to have no contact with patients C.S. or J.F. during the probationary period.

12. The crime of Lewd or Lascivious Offense Committed upon an Elderly or Disabled Adult is a crime directly related to the practice or the ability to practice nursing.

13. The crime of Sexual Battery is a crime directly related to the practice or the ability to practice nursing.

14. Respondent has been evaluated by two psychologists. He was evaluated by Dr. Michael Herkov in May 1998, one week after his arrest. Dr. Herkov was selected by the prosecutor. In June 1999, Respondent was evaluated by Dr. Deborah O. Day after entering pleas nolo contendere to the offenses of lewd of lascivious conduct upon an elderly or disabled person and sexual battery. Dr. Day was selected by Respondent's criminal defense attorney.

15. Dr. Herkov's report was not offered in evidence, nor did he testify.

16. Dr. Day performed her evaluation pursuant to a Circuit Court Order, which directed that she address the following issues:

a. Whether the Defendant presents a risk to society (i.e., repeat conduct, etc.).

b. Whether the Defendant suffers from a personality defect, and if so, what?

c. Whether the Defendant has a sexual disorder.

d. If treatment is indicated, then type and length of such treatment, if indicated, shall be a condition of probation. If treatment is indicated, the Defendant shall be allowed to practice nursing, but shall not be allowed to have patient contact while on probation. If treatment is not indicated, then the prohibition against patient contact condition shall be of no force or effect.

17. Dr. Day evaluated Respondent based on information provided to her by Respondent and his criminal defense attorney and conducted a battery of seven psychological tests and conducted clinical interviews of the Respondent.

18. Dr. Day's testified, in answer to the issues framed in the Circuit Court Order are, as follows:

a. Respondent has above average intelligence, and had a successful career in nursing prior to the allegations against him. Further, he was unemployed when she saw him, and presented as a well defended individual. He wasn't forthcoming on all points, but became more conversational in the interviews. Dr. Day attributed this suspicion to anger over the process and his lack of trust. The psychological testing revealed a lack of any psychopathology or major mental illness.

b. Respondent has no diagnosable disorder.

c. There was no diagnosable sexual disorder, and he was functioning in the expected range regarding sexuality. Dr. Day recommended short term supportive psychotherapy to deal with Respondent's anger, suspiciousness and

> lack of trust, but made it clear that was unrelated to any sexual disorder which she did not find to be present.
> d. The evaluation did not suggest the existence of any high risk sexual behavior disorders or personality defect.
> e. Finally, there appears to be no reason that Respondent can not practice in his area of specialty.

19. Dr. Day concluded that there was no "need for treatment related to any high-risk sexual behavior, disorder or personality defect" and there did not appear to be any "reasons that he cannot practice in his area of specialty." The conclusions of Dr. Day are credible.

20. Dr. Day's methodology in performing the evaluation of Respondent satisfactorily met the recognized criteria for evaluations in the field of professional sexual misconduct as it relates to the ability to practice nursing.

21. Linda L. Smith was recognized as an expert in the area of professional sexual misconduct as it pertains to nursing. After reviewing the evaluations conducted by Dr. Day and Dr. Herkov and the collateral investigative materials, including the various witness statements and medical records, she opined that Respondent "is not currently safe to practice nursing."

22. Ms. Smith was offered to disagree with the methodology employed by Dr. Day, but not her opinions. In her opinion a proper evaluation requires an evaluator to pour through all of the underlying evidence, depositions, medical records, and everything of a similar nature. She also opined that it is

equally important for an evaluator to know if the nurse did not do something he or she was accused of doing.

23. Ms. Smith agreed there was clear evidence that Respondent didn't do some of the things he was accused of doing.

24. Ms. Smith's opinion is substantially predicated upon Dr. Herkov's evaluation, which was not offered into evidence by Petitioner and is hearsay, and which was essentially predicated upon allegations of wrongdoing in Florida and New York prior to any evidentiary predicate. Further, Ms. Smith acknowledged that at the time of Dr. Herkov's evaluation, the evidence resulting in the dismissal of the New York case was not in existence.

25. As part of his mitigation, Respondent explained his reasons for entering pleas of nolo contendere while specifically denying his guilt on the record. Respondent reiterated that he is not guilty, but the gravity of the consequences of an adverse jury verdict was so severe, he opted for certainty by entering pleas of convenience.

26. Part of Respondent's reasons for his pleas of convenience was predicated upon a charge in New York for conduct that did not occur, but was dismissed before his plea of convenience.

27. As a result of the allegations against him, Respondent was held out to public ridicule in the newspaper and on television.

28. Respondent has not worked as a nurse since he voluntarily agreed to refrain from practice, and has effectively been rendered unemployable due to having to register as a sex offender even though he was not adjudicated guilty of a crime, nor was there any finding of guilt.

CONCLUSIONS OF LAW

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

30. Petitioner is the state agency charged with regulating the practice of nursing pursuant to Section 20.43, Chapters 455, and 464, Florida Statutes.

31. Disciplinary license proceedings are penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973). Petitioner must prove the material allegations in the Amended Administrative Complaint by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne, Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

32. Petitioner has proved by clear and convincing evidence that on April 13, 1999, Respondent enter a plea of nolo contendere to one count of Lewd or Lascivious Offense Committed upon an Elderly or Disabled Adult, and to one count of Sexual Battery.

33. Petitioner has proved by clear and convincing evidence that the crimes of Lewd or Lascivious Offense Committed upon an Elderly or Disabled Adult and Sexual Battery are crimes directly related to the practice or the ability to practice nursing.

34. Petitioner has proved by clear and convincing evidence that Respondent has violated Section 464.018(1)(c), Florida Statutes (1997).

35. Section 464.018(1)(c), Florida Statutes, provides that the Board of Nursing may discipline a licensee for being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of nursing or the ability to practice nursing.

36. Rule 64B9-8.006(3), Florida Administrative Code, provides a penalty range for violations of Section 464.018(1)(c), Florida Statutes, of:

> [f]rom fine of $500, referral to IPN, two years' suspension and probation for the duration of court ordered probation to revocation and $1000 fine.

37. Rule 64B9-8.006(4), Florida Administrative Code, provides that the Board of Nursing may deviate from the disciplinary guidelines set forth in Rule 64B9-8.005(3), Florida Administrative Code, upon a showing of aggravating or mitigating circumstances, by clear and convincing evidence.

38. Petitioner submitted no evidence of aggravating circumstances, beyond the facts proven in this case.

39. The following facts in mitigation were established by Respondent:

a. Respondent's pleas of nolo contendere were pleas of convenience wherein Respondent specifically denied his guilt, and continues to maintain that he did not inappropriately touch J.F. or C.S.

b. Respondent testified in mitigation that the consequences of the charges and his pleas were:
1. Being held out to public ridicule in the media.
2. Not being able to practice nursing since December 1997.
3. Having to register as a sex offender while never having been convicted or found guilty of anything; and
4. Being rendered virtually unemployable.

c. Respondent was evaluated by Dr. Deborah D. Day pursuant to a Circuit Court Order, in June of 1999.

d. Dr. Day's opinions in answer to the issues framed in the Circuit Court Order as that the evaluation did not suggest the existence of any high risk sexual behavior disorders or personality defect, and finally, there appears to be no reason that Respondent can not practice in his area of specialty.

e. The opinions of Dr. Day are credible.

f. Petitioner's rebuttal expert witness, Linda L. Smith, was offered to disagree with the methodology employed by Dr. Day, but not her opinions. In Ms. Smith's opinion, one of the critical concerns in evaluating a nurse whose fitness is drawn into question by virtue of an allegation of wrongdoing or improper conduct, is whether or not the underlying conduct occurred. Of equal importance to Ms. Smith is for an evaluator to know if the nurse did not do something they were accused of doing.

g. There is no clear and convincing record evidence that Respondent committed the underlying acts.

h. Ms. Smith agreed that there was clear evidence that Respondent didn't do some of the things he was accused of doing, and agreed that a good example was the Sandra Davis sexual battery case, which was voluntarily dismissed before Respondent's pleas.

i. Ms. Smith also acknowledged that at the time of Dr. Herkov's evaluation, the evidence resulting in the Dismissal of the New York case was not in existence.

j. Ms. Smith's opinion that Respondent is not currently safe to practice nursing, is substantially predicated upon Dr. Herkov's evaluation, which was not offered into evidence by Petitioner, and which was essentially predicated upon allegations of wrongdoing in Florida and New York prior to any evidentiary predicate. Consequently, the complaint of Ms. Smith regarding Dr. Day's methodology appears to be equally applicable to Dr. Herkov, because his evaluation did not consider all of the information in both cases, not did he concern himself with whether or not the alleged conduct occurred. Therefore, Petitioner has not provided clear and convincing evidence that Respondent is not currently safe to practice nursing, Ms. Smith's opinion notwithstanding.

k. Respondent entered his nolo contendere pleas of convenience and opted for certainty because he had lost confidence in the system after being charged with crimes he did not commit.

RECOMMENDATION

Based on the foregoing facts and conclusions of law, it is

RECOMMENDED that a Final Order be entered by the Board of Nursing finding Respondent guilty of violating Section

464.018(1)(c), Florida Statutes, and imposing the following discipline on Respondent's license:

a. Respondent's license to practice nursing in the State of Florida, be suspended for two years, nunc pro tunc October 19, 1999, followed by probation for the duration of the court ordered probation.

b. Prior to returning to the practice of nursing, Respondent shall pay a fine in the amount of $500.00 to the Board of Nursing.

c. Prior to returning to the practice of nursing, Respondent shall complete 24 hours of nursing continuing education in the area of sexual misconduct or nursing boundaries. These hours shall be in addition to those required for renewal of Respondent's nursing license.

d. Prior to returning to the practice of nursing, Respondent shall, pursuant to Rule 64B9-8.011(2)(c) submit an evaluation by a psychiatrist or psychologist approved by the Intervention Project of Nurses (IPN) which attests to the nurse's present ability to engage in safe practice, or conditions under which safe practice can be attained. If the evaluation indicates that the Respondent is able to practice nursing with reasonable skill and safety to patients and in accordance with the laws of Florida, the suspension shall be lifted and the Respondent shall be allowed to practice nursing under the monitoring and supervision of I.P.N.

DONE AND ENTERED this 22nd day of June, 2000, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2000.

COPIES FURNISHED:

Reginald D. Dixon, Esquire
Christopher J. Steinhaus, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

W. Ford Duane, Esquire
Hannah, Estes & Ingram, P.A.
Post Office Box 4974
Orlando, Florida 32802-4974

Ruth Stiehl, Executive Director
Board of Nursing
Department of Health
4080 Woodcock Drive, Suite 202
Jacksonville, Florida 32207

Angela T. Hall, Agency Clerk
Department of Health
4052 Bald Cypress Way
Bin A02
Tallahassee, Florida 32399-1703

William W. Large, General Counsel
Department of Health
4052 Bald Cypress Way
Bin A02
Tallahassee, Florida 32399-1703

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.