STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF NURSING, Petitioner, vs. ANNIE SCOTTO DOWNS, Respondent.	)	Case No. 00-3646PL

RECOMMENDED ORDER

On November 15, 2000, a formal administrative hearing in this case was held by videoconference in Tampa and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Elizabeth A. Hathaway, Esquire
Reginald D. Dixon, Esquire
Agency for Health Care Administration
General Counsel's Office
2727 Mahan Drive, Building 3
Tallahassee, Florida 32308

For Respondent: Annie Scotto Downs, pro se
8708 52nd Street, North
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STATEMENT OF THE ISSUE

The issue in the case is whether the allegations of the Administrative Complaint filed by the Petitioner are correct and, if so, what penalty should be imposed against the Respondent.

PRELIMINARY STATEMENT

By Administrative Complaint dated May 18, 2000, the Department of Health (Petitioner) alleged that Annie Scotto Downs (Respondent) violated Section 464.018(1)(h), Florida Statutes, and Rule 64B9-8.005(18), Florida Administrative Code, by testing positive for a controlled substance without a prescription or a legitimate medical reason for use of the substance. The Respondent requested a formal hearing. The Petitioner forwarded the request for hearing to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

During the hearing, the Petitioner presented the testimony of five witnesses and had Exhibits numbered 2-7 admitted into evidence. Petitioner's Exhibit number 2 consisted of the Respondent's responses to the Petitioner's Request for Admissions and was admitted after the Respondent's response to Petitioner's request number 11 was struck. The Respondent testified on her own behalf and had one composite exhibit admitted into evidence. A Transcript of the hearing was filed on November 27, 2000. The Petitioner filed a Proposed Recommended Order. The Respondent filed a letter that has been treated as a Proposed Recommended Order.

FINDINGS OF FACT

1. Since July 1993, and at all times material to this case, the Respondent has been licensed as a registered nurse holding Florida license number RN-2711762.

2. On April 27, 1999, the Respondent was employed as a nurse by "Qwest, Inc."

3. On April 27, 1999, the Respondent submitted to an employer-ordered drug screening at her workplace.

4. The drug screen was conducted by use of a urine sample collected by Kenneth Stanley. Mr. Stanley owns and operates a business that specializes in collection of urine samples for purposes of drug screens.

5. Mr. Stanley utilized the sample collection guidelines adopted by the "Florida Drug Free Workplace" program and the Florida Department of Transportation.

6. Upon arriving at "Qwest, Inc." Mr. Stanley secured the rest room where the urine samples would be taken by placing blue dye in the toilet water and covering the faucet with a surgical glove secured with tape. Apparently, the purpose of the process is to prohibit the contamination of a urine sample by dilution.

7. Mr. Stanley set up a table in the area outside the rest room to permit the processing of the samples and the completion of paperwork.

8. Mr. Stanley called the Respondent into the area and verified her identification. He began to complete paperwork identifying the Respondent.

9. Mr. Stanley removed a plastic cup from a sealed package that was opened for use in obtaining the sample from her. He provided the cup to her and asked her to enter the rest room,

fill the cup to the proper level, set the cup on the sink counter, and then exit the rest room without washing her hands or flushing the toilet.

10. Mr. Stanley retrieved the cup immediately after the Respondent notified him that she had completed the process and brought it back to his table. He placed the sample into a sealed tube and completed the paperwork identifying the sample as having been provided by the Respondent.

11. The protocol utilized by Mr. Stanley requires the sample-provider to remain in the room until all paperwork is completed and the sample is properly sealed and packaged for shipment.

12. The Respondent asserts that she left the room after providing the sample to Mr. Stanley and that Mr. Stanley failed to maintain appropriate security for her sample, permitting it to be contaminated by another employee.

13. The evidence establishes that the Respondent remained in the area and was in the presence of the sample at all times during the collection, sealing and identification process. The Respondent was present when her sample was identified, processed, and packaged for shipment.

14. There is no credible evidence that another employee of "Qwest, Inc." contaminated the Respondent's urine sample or that Mr. Stanley failed to maintain the proper identification of the

Respondent's sample from the point of collection through the point of shipment.

15. Mr. Stanley shipped the Respondent's sealed urine sample to Clinical Reference Laboratory (CRL) in Lenexa, Kansas.

16. The sealed sample was received and processed by CRL, which similarly receives and processes approximately one million samples annually for purposes of drug screen testing.

17. In performing urinalysis drug screen tests, CRL initially performs a preliminary test called an "enzyme immunoassay" on a portion of the sample.

18. If the results of the preliminary test indicate the presence of a substance, CRL tests a second portion of the sample using a gas chromatography mass spectrometer to confirm the results of the first test and to quantify the specific amount of drug present in the urine sample.

19. The enzyme immunoassay performed on the Respondent's urine sample indicated the presence of marijuana metabolites.

20. Marijuana metabolites are a chemical substance contained in the Cannabis plant.

21. Cannabis is a controlled substance pursuant to Chapter 893, Florida Statutes.

22. The gas chromatography mass spectrometer test performed on the Respondent's urine sample confirmed the presence of marijuana metabolites and indicated the specific amount of drug

present in the urine sample as 28 nanograms of marijuana metabolites per milliliter of urine.

23. Based on the results of the testing at CRL, the evidence establishes that the Respondent's urine sample taken on April 27, 1999 tested positive for marijuana.

24. There is no evidence that the Respondent had a prescription or a valid medical reason for using marijuana.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Section 120.57(1), Florida Statutes.

26. The Department of Health is responsible for licensure and regulation of registered nurses in Florida. Chapters 456 and 464, Florida Statutes.

27. The Petitioner has the burden of proving by clear and convincing evidence the allegations against the Respondent. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

28. Section 464.018, Florida Statutes, sets forth standards for disciplinary actions that can be taken by the Department of Health, and provides in relevant part as follows:

> 464.018 Disciplinary actions.--
>
> (1) The following acts shall be grounds for disciplinary action set forth in this section:
>
> (h) Unprofessional conduct, which shall include, but not be limited to, any departure from, or the failure to conform to, the

> minimal standards of acceptable and prevailing nursing practice, in which case actual injury need not be established.

29. Rule 64B9-8.005(18), Florida Administrative Code, provides that "unprofessional conduct" includes "[t]esting positive for any drugs under Chapter 893 on any drug screen when the nurse does not have a prescription and legitimate medical reason for using such drug."

30. The evidence establishes that the Respondent's urine sample collected on April 27, 1999, reflected the presence of marijuana metabolites.

31. There is no evidence that the Respondent had a prescription for, or any valid medical use for, marijuana or any derivative thereof.

32. Rule 64B9-8.006(3)(i), Florida Administrative Code, sets forth the following guideline for imposition of discipline in this case: "Fine from $250 - $1000 plus reprimand, to suspension, probation with conditions and fine."

33. Rule 64B9-8.006(4)(a), Florida Administrative Code, provides that the "Board shall be entitled to deviate from the foregoing guidelines upon a showing of aggravating or mitigating circumstances by clear and convincing evidence. . . ." The rule further provides that "[i]f a formal hearing is held, any aggravating or mitigating factors must be submitted to the hearing officer at formal hearing."

34. Rule 64B9-8.006(4)(b), Florida Administrative Code, provides as follows:

> Circumstances which may be considered for purposes of mitigation or aggravation of penalty shall include, but are not limited to, the following:
> 1. The severity of the offense.
> 2. The danger to the public.
> 3. The number of repetitions of offenses.
> 4. Previous disciplinary action against the licensee in this or any other jurisdiction.
> 5. The length of time the licensee has practiced.
> 6. The actual damage, physical or otherwise, caused by the violation.
> 7. The deterrent effect of the penalty imposed.
> 8. Any efforts at rehabilitation.
> 9. Attempts by the licensee to correct or stop violations, or refusal by the licensee to correct or stop violations.
> 10. Cost of treatment.
> 11. Financial hardship.
> 12. Cost of disciplinary proceedings.

35. There is no evidence that the Respondent has had any previous disciplinary action taken against her during her six-year licensure. There is no evidence that the Respondent presents any danger to the public. There have been no attempts at rehabilitation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Petitioner enter a Final Order reprimanding the Respondent, imposing a fine of $250 and requiring the completion of an appropriate continuing education course related to substance abuse in health professions. The continuing

education course shall be in addition to those continuing education requirements otherwise required for licensure.

Further, the Final Order should further require that the Respondent participate in an evaluation by the Intervention Project for Nurses (IPN) within 60 days of the issuance of the Final Order, and comply with the treatment recommendations, if any, made by the IPN, or suffer suspension of licensure until compliance with this requirement is established.

DONE AND ENTERED this 29th day of December, 2000, in Tallahassee, Leon County, Florida.

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of December, 2000.

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.