

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD)	
OF NURSING,)	
)	
Petitioner,)	
)	Case No. 02-1645PL
vs.)	
)	
MARIE DARIUS, C.N.A.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 15, 2002, in the Dade County Courthouse, 73 West Flagler Street, Miami, Florida, before Florence Snyder Rivas, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:	Amy M. Pietrodangelo, Esquire
	Department of Health
	Bureau of Health Care Practitioner
	Regulation - Legal
	4052 Bald Cypress Way, Bin C-65
	Tallahassee, Florida 32399-3265
 For Respondent:	 Ron Cordon, Esquire
	335 Northwest 54th Street
	Miami, Florida 33127

STATEMENT OF THE ISSUE

The issue is whether the Respondent committed the acts alleged in the Administrative Complaint dated June 11, 2002, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner filed an Administrative Complaint against the Respondent's certificate to practice as a certified nursing assistant (CNA), alleging that the Respondent engaged in sexual misconduct, specifically that Respondent inappropriately touched patient Mary Teel (Teel) while washing her. Petitioner further alleged that Respondent exercised influence on a patient for purpose of financial gain in that she took \$50 from Teel's purse.

Respondent disputed the factual allegations of the complaint and timely requested a formal hearing.

At the hearing, Petitioner called four witnesses and offered eleven exhibits into evidence; nine of the exhibits were admitted. Respondent testified on her own behalf and offered one exhibit into evidence.

All statutory references are to Florida Statutes (2000) unless otherwise noted.

The transcript was filed on August 30, 2002. Petitioner timely filed a Proposed Recommended Order, which has been

carefully considered. Respondent waived her right to make a post hearing submission.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of nursing pursuant to Chapters 20, 456 and 464, Florida Statutes.

2. Respondent is a certified nursing assistant. At the time of the events giving rise to this case, she was employed by Hallandale Rehabilitation Center located in Hallandale, Florida.

3. Respondent has no prior disciplinary history, and was considered by her employer to be a good worker.

4. Teel, the alleged victim of the serious offenses charged, was a resident of Hallandale Rehabilitation Center. At all times relevant to this matter, Teel was ninety years old and in need of 24-hour supervision, including assistance with all activities of daily living.

5. On September 24, 2001, the Hallandale Rehabilitation Center Administrator, Carol McGovern (McGovern), received a call from Teel's daughter, Lorraine Perez (Perez). Perez told McGovern that Teel had complained that "the nurse who gives [Teel] morning care touches her in the wrong way and also talks lewd to her." In addition, Perez reported to McGovern

that "during the night [the same individual] steals her money."

6. The Hallandale Police Department was notified. Department records indicate that the police investigator who responded was told by McGovern that Teel had reported that \$15 had been stolen from the dresser in her room, and further, that several people had access to the room. The record is silent as to whether any criminal prosecution was initiated.

7. At all times relevant to this case, a number of caregivers are assigned to supervise and assist Teel and other patients. The staffing as to each patient may vary from day to day. No security was in place to control access to patient rooms. Once a staff member or visitor is inside the Hallandale Rehabilitation Center building, he or she is free to come into contact with any patient.

8. In addition to the police investigation, various Hallandale Rehabilitation Center staffers interviewed Teel and other patients in an attempt to establish the identity of the CNA Teel was accusing of theft and improper conduct. Teel told at least one person that the person she was accusing was named "Marie." There was no evidence concerning how CNAs are assigned, nor any testimony regarding how personal care was delivered to Teel, and by whom, on a day-to-day basis. There is no evidence to establish whether it is even possible to

determine who is working any given shift, let alone who was working on September 24. There was no testimony regarding whether CNAs are required to document whether and when personal care services are provided.

9. A preponderance of evidence did establish that baths are generally given by the day shift, and a less formal clean-up is provided prior to bedtime.

10. Perez' report to McGovern suggested that a day shift worker had committed the more serious offense of sexual misconduct, and initially suspicion fell upon a day shift worker named Marie Duvenger (Duvenger).

11. Teel was shown Duvenger's picture ID and absolved her of any wrongdoing.

12. As the investigation went forward, all CNAs were interviewed and several expressed concerns that various of their colleagues would leave their floors for reasons not related to their job duties.

13. After Duvenger was eliminated as a suspect, Respondent, the only other worker named Marie, became the focus of the investigation.

14. At various times, people involved in the investigation, including Teel, referred to the alleged wrongdoer as Mary. There is no evidence establishing whether anyone named Mary worked at the Hallandale Rehabilitation

Center, and if so, whether any efforts were made to determine whether such person(s) might have been involved in the incidents alleged by Teel.

15. The staff Care Plan Coordinator Sharon Brown (Brown) reviewed the nursing schedules in an effort to identify a suspect. Even though Brown was available to testify and did testify at the hearing, she failed to offer any meaningful testimony upon which an identification could be based. Brown testified in a conclusory fashion that Teel "picked [Marie] out." There was no contemporaneous documentation of this identification.

16. Teel testified by deposition. She is sincere in her belief that she was touched inappropriately. She also believes that money was taken from her, although she did not use the \$50 figure in her testimony. Neither does her testimony confirm Petitioner's allegation that the theft and the abuse occurred on the same date.

17. Petitioner asserts that Teel is "alert, coherent, oriented and knowledgeable. She does not suffer from any cognitive deficiencies. She is aware of time and what is going on around her."

18. A different picture emerges when viewing her videotaped deposition. It is apparent to the viewer that Teel's faculties in general and her memory in particular are

not sufficiently sound that a person of ordinary prudence would rely upon her memory, standing alone, to establish that events did or did not occur. In other words, Petitioner has failed to provide clear and convincing evidence that the offenses charged were committed by anyone.

19. For example, with regard to the theft charge, Respondent is alleged to have taken \$50 from Teel's purse. In reference to the alleged theft, Teel was asked:

"Was there money in [your purse] before?"

Teel replied: "I had \$20, and I saw \$4. But let's just say it was \$2. I asked her how many one's [sic] there were, but let's say \$3; \$22"

Petitioner's counsel asked, "So you think it was about \$22?"

Teel replied, "It might have been three, but I don't want to tell a lie."

20. The foregoing exchange completely undermines the notion that Teel is capable of providing clear and convincing evidence.

21. The Administrative Complaint suffers from a more technical flaw with respect to the theft charge. Respondent is charged with having exercised influence on Teel for the purpose of financial gain. Yet, there was no testimony that anyone exercised any influence on Teel. Rather, the crime charged, if it occurred, was garden variety stealing.

22. At other points in the deposition, Petitioner's counsel attempted to ask questions concerning the alleged sexual assault. Often, Teel's responses related instead to the alleged theft. On cross-examination Teel stated that she does not know the names of everyone who assists her. She volunteered, ". . . I have a poor memory of things, but I know if they're nice. I know they're nice. All the other nurses are nice but that one."

23. Asked how she knew the name of the person who touched her, Teel stated, "Well, she told me" as she gestured in the direction of Petitioner's attorney. On redirect the attorney attempted to clarify this testimony and the following exchange took place.

"Okay. Now, you also said that I told you her name, right? Did I tell you her name or did I just correct the name that you said?

Well, I had a name, but you said it, corrected it."

24. Teel's deposition concludes with the following exchange:

Teel: Are you going to meet me at 9 o'clock?

Petitioner's Counsel: Am I going to meet you at 9 o'clock? Why would I meet you at 9 o'clock?"

Teel: Well the nurse said you're going to meet me at 9 o'clock, no?

Petitioner's Counsel: No.

25. It goes without saying that it is illegal and despicable to harm a frail elderly person by bathing him or her except in accordance with appropriate protocols for personal care, and to steal from a person entrusted to one's professional care. Such conduct, if proven, warrants harsh punishment.

26. Unfortunately, the complaint made on Teel's behalf by her daughter did not receive the thorough investigation the allegations warranted. The community of staff and residents at Hallandale Rehabilitation Center are left to wonder if Teel was abused, and if so, by whom.

27. On the evidence presented, there is no basis to impose discipline against Respondent. One would have to know a great deal more about what was going on in and around Mary Teel's room on September 24, 2001, than was presented, in order to conclude that the offenses charged were in fact committed, and were committed by Respondent.

CONCLUSIONS OF LAW

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

29. In this case, Petitioner must prove the material allegations by clear and convincing evidence. Ferris v.

Turlington, 510 So. 2d 292 (Fla. 1987); Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

30. Petitioner has failed to prove by clear and convincing evidence that on or about September 24, 2001, the Respondent inappropriately touched Teel while washing her, and subsequently stole money from Teel.

RECOMMENDATION

Based on the foregoing, it is RECOMMENDED that the Board of Nursing enter a final order of dismissal.

DONE AND ENTERED this 14th day of October, 2002, in Tallahassee, Leon County, Florida.

FLORENCE SNYDER RIVAS
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 14th day of October, 2002.

COPIES FURNISHED:

Amy M. Pietrodangelo, Esquire
Department of Health
Bureau of Health Care Practitioner
Regulation - Legal
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Ron Cordon, Esquire
335 Northwest 54th Street
Miami, Florida 33127

Dan Coble, R.N., Ph.D., CNAAC, B.C.
Executive Director
Board of Nursing
Department of Health
4052 Bald Cypress Way, Bin C02
Tallahassee, Florida 32399-3252

R. S. Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

William W. Large, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

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.