

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
 vs.) Case No. 02-2297PL
)
 LINDA KOPPELMAN,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Vero Beach, Florida, on September 18, 2002.

APPEARANCES

For Petitioner: Amy M. Pietrodangelo
Assistant General Counsel
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Suzanne H. Suarez
Suzanne Hope Suarez, P.A.
The Legal Building
447 3rd Avenue North, Suite 404
St. Petersburg, Florida 33701-3255

STATEMENT OF THE ISSUES

The issues are whether Respondent obtained Oxycontin by using a forged prescription, in violation of Section 464.018(1)(h), Florida Statutes, and Rule 64B9-8.005, Florida

Administrative Code, which prohibit unprofessional conduct, and in violation of Section 464.018(1)(i), Florida Statutes, which prohibit the unauthorized possession, sale, or distribution of controlled substances; and whether Respondent's use of Oxycontin affects her ability to practice nursing with reasonable skill and safety, in violation of Section 464.018(1)(j), Florida Statutes, which prohibits the inability to practice nursing with reasonable skill and safety by reason of illness or use of alcohol, drugs, narcotics, or chemicals or as a result of any mental or physical condition. If so, an additional issue is what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated April 1, 2002, Petitioner alleged that, on October 5, 2001, Respondent dropped off a forged prescription at Walgreens for fifty 20-mg. Oxycontin tablets for patient O. C. The Administrative Complaint alleges that Dr. Stuart Byer, of the Indian River Cancer Center, apparently signed the prescription, but in fact had not done so. The Administrative Complaint alleges that two days later Respondent picked up the prescription. The Administrative Complaint alleges that Respondent's use of Oxycontin affects her ability to practice nursing with reasonable skill and safety. Based on these allegations, the Administrative Complaint alleges that Respondent has violated the provisions set forth above.

Respondent timely requested a formal hearing.

At the hearing, Petitioner called eight witnesses and offered into evidence 17 exhibits: Petitioner Exhibits 1-17. Respondent called six witnesses and offered into evidence six exhibits: Respondent Exhibits 1-2 and 4-7. All exhibits were admitted except Petitioner Exhibit 13 and Respondent Exhibit 4, which were proffered. Petitioner's objections to Respondent Exhibit 4 are sustained.

The court reporter filed the transcript on October 22, 2002. The parties filed their proposed recommended orders on November 25, 2002.

FINDINGS OF FACT

1. Respondent is a licensed registered nurse, holding license number RN 521142. She has been so licensed for 31 years. Respondent's long career in nursing has featured dedication, hard work, commitment, and competence. The record does not reveal any past discipline.

2. For most of Respondent's professional career, starting in 1971, she has worked at Indian River Memorial Hospital in Vero Beach. Respondent has worked in various capacities at the hospital, including the emergency room and operating room. Respondent later helped develop a neurological unit at the hospital. Starting in 1980, she worked for a couple of years at Vero Orthopedics. Since 1997, Respondent has worked on a

contract basis at the Indian River Memorial Hospital, although her present physical infirmities, partly described below, prevent her from working at present.

3. In May 2000, Respondent injured her back while moving a heavy patient in the hospital. A couple of months later, Respondent underwent a laminectomy to relieve the pain from two herniated disks. Six weeks after the surgery, Respondent reinjured her back and had to undergo additional surgery. Six weeks after the second surgery, Respondent, who was not doing well, left her job at the orthopedic clinic and took a less strenuous job. One month after doing so, Respondent was still experiencing pain when she got into and out of cars.

4. In June 2001, Respondent underwent a third operation, in which the surgeon fused two injured vertebrae. The surgery obtained access to the vertebrae by a posterior incision running from the breast to the pubis. The surgery also required a hip bone graft, thus necessitating an incision to the hip. The recovery from this excruciatingly painful surgery was difficult, and Respondent has not yet returned to work, although she is nearing the point at which she can perform some nursing-related work, such as teaching. At present, she still has difficulty walking or standing.

5. When discharging Respondent from the hospital in late June 2001, Dr. Gomez prescribed her Oxycontin for pain.

Dr. Gomez was covering for Respondent's neurosurgeon, Dr. Magana. Later, Dr. Cunningham, a pain management specialist and Respondent's family physician, resumed the care of Respondent. Dr. Cunningham continues to monitor Respondent and treat her pain.

6. On direct examination, Respondent testified that she has not taken Oxycontin since December 2001. (However, on August 9, 2002, Respondent told her certified addictions professional that she had not taken any Oxycontin since March 2001.) Respondent testified that, after Oxycontin, she took no pain medication besides nonsteroidal anti-inflammatory medications and steroids.

7. However, on cross-examination, Respondent admitted that she takes Methadose as needed, pursuant to a prescription from Dr. Cunningham. Respondent testified that he switched her from Oxycontin in July 2002. Respondent filled the Methadose prescription at a different drug store than the one that she has used for her other prescriptions.

8. On October 5, 2001, Respondent presented a forged prescription to a different drug store than the one she has used for her other prescriptions. The prescription was for fifty 20-mg. Oxycontin tablets, which Respondent picked up two days later. Respondent fraudulently obtained the Oxycontin for her own use.

9. Oxycontin is an analgesic opioid and a schedule II controlled substance. It is highly addictive and presently among the most commonly abused controlled substances. Oxycontin can produce a feeling of short-lived euphoria, as well as impaired cognitive functioning and impaired judgment.

10. Methadose, a form of methadone, is a synthetic analgesic. It is also used in the detoxification process undergone by heroin addicts.

11. Petitioner has proved by clear and convincing evidence that Respondent engaged in unprofessional conduct in her acquisition of the Oxycontin by using a forged prescription and that Respondent unlawfully possessed a controlled substance.

12. Petitioner has not proved by clear and convincing evidence that Respondent's use of Oxycontin affects her ability to practice nursing with reasonable skill and safety. First, Petitioner did not prove by clear and convincing evidence that Respondent still uses Oxycontin. It appears likely that she may have substituted Methadose for Oxycontin to manage her pain. It is unclear from the present record whether Respondent's use of Methadose is also to assist her in overcoming an addiction to Oxycontin. But even if Petitioner had pleaded Methadose rather than Oxycontin, the record does not reveal the extent to which Respondent presently uses Methadose.

13. For the reasons stated in the preceding paragraph, the relevance of the Methadose is not to prove the third count of the Administrative Complaint, but to underscore the risk that Respondent may pose if she practices nursing at present. Respondent was not candid at the hearing. She was not candid about the October 2001 incident. She was not candid about the recent use of Methadose and was evasive about the drug's properties.

14. The two-hour evaluation that Respondent underwent by a certified addictions professional was cursory and curiously deferential to Respondent. This remarkable evaluation is entitled to absolutely no weight whatsoever. The opinion of the certified addictions professional that Respondent does not suffer from a drug abuse or dependency may or may not be true, but, if true, the result is a chance occurrence, rather than a professional conclusion following the comprehensive collection of relevant, reliable data and the careful, informed analysis of such data.

15. The safeguards provided by the pretrial intervention program, into which Respondent entered after her arrest for the fraudulent acquisition of the Oxycontin, are inadequate. The random drug tests always occur on Tuesdays, just not every Tuesday. The assurances that ensue from Respondent's apparent compliance with the conditions of her probation, which include

negative urinalyses, are meaningful, but not sufficiently rigorous to provide the necessary protection to a nurse's patients.

16. On December 26, 2001, Petitioner entered an emergency suspension order in this case. The record amply demonstrates that Respondent will suffer considerable financial distress if denied the opportunity to practice her profession. However, Respondent's lack of candor precludes a detailed analysis of the safeguards in her current monitoring program and a detailed prescription of what, if any, additional safeguards would be required to permit any discipline short of a suspension. In its proposed recommended order, Petitioner seeks a suspension until lifted pursuant to, and subject to the conditions set by, an evaluation coordinated by the Intervention Project for Nurses (IPN); treatment as recommended by the IPN; probation for three years if no treatment is recommended by the IPN; an administrative fine of \$750; a reprimand; and the assessment of costs of the investigation and prosecution.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

18. Section 464.018(1)(h), (i), and (j) provides:

The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(h) Unprofessional conduct, as defined by board rule.

(i) Engaging or attempting to engage in the possession, sale, or distribution of controlled substances as set forth in chapter 893, for any other than legitimate purposes authorized by this part.

(j) Being unable to practice nursing with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, or chemicals or any other type of material or as a result of any mental or physical condition. In enforcing this paragraph, the department shall have, upon a finding of the secretary or the secretary's designee that probable cause exists to believe that the licensee is unable to practice nursing because of the reasons stated in this paragraph, the authority to issue an order to compel a licensee to submit to a mental or physical examination by physicians designated by the department. If the licensee refuses to comply with such order, the department's order directing such examination may be enforced by filing a petition for enforcement in the circuit court where the licensee resides or does business. The licensee against whom the petition is filed shall not be named or identified by initials in any public court records or documents, and the proceedings shall be closed to the public. The department shall be entitled to the summary procedure provided in s. 51.011. A nurse affected by the provisions of this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that she or he can resume the competent practice of nursing with reasonable skill and safety to patients.

19. Although Rule 64B9-8.005(1), which defines unprofessional conduct, does not mention explicitly the act of which Respondent is guilty in forging a prescription (as distinguished from Rule 64B9-8.005(2)(a) and (c), which mentions falsifying patient records and misappropriating drugs as examples of failing to meet the minimum standards of nursing practice), this rule is only illustrative. Obviously, forging a prescription to obtain Oxycontin for one's unauthorized use is unprofessional conduct for a nurse.

20. Section 893.03(2) provides:

A substance in Schedule II has a high potential for abuse and has a currently accepted but severely restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependence.

Section 893.03(2)(a)1 lists Oxycontin as a schedule II controlled substance.

21. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

22. Rule 64B9-8.006(3)(p) provides that the penalty for a first-offense violation of Section 464.018(1)(h), in which no injury is demonstrated, is a citation.

23. Rule 64B9-8.006(3)(q) provides that the penalty guidelines for a first-offense violation of Section 464.018(1)(i) range from a \$250 fine, IPN evaluation, and probation to a \$500 fine and suspension followed by probation. Rule 64B9-8.006(3)(r) provides the same penalty guidelines for a first-offense violation of Section 464.018(1)(j).

24. Section 456.072(4) provides:

In addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, pursuant to this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is no board, shall assess costs related to the investigation and prosecution of the case. In any case where the board or the department imposes a fine or assessment and the fine or assessment is not paid within a reasonable time, such reasonable time to be prescribed in the rules of the board, or the department when there is no board, or in the order assessing such fines or costs, the department or the Department of Legal Affairs may contract for the collection of, or bring a civil action to recover, the fine or assessment.

25. Petitioner has proved a violation of Section 464.018(1)(h) or (i), but not Section 464.018(1)(j). Because the relevant facts are the same for either violation, Petitioner may impose discipline only for one violation, not for two violations. Although Respondent's act in fraudulently obtaining the Oxycontin prescription constitutes unprofessional conduct,

this act is better described as the unauthorized possession of a controlled substance, so Section 464.018(1)(i) should provide the basis for discipline.

26. Despite Respondent's long, successful career in nursing, the lack of injury to the public, and the financial burden of a suspension, a suspension is necessary in this case so that Petitioner can obtain an adequate evaluation of Respondent's current status and safety to practice. Thus, the appropriate penalty is a suspension until lifted pursuant to, and subject to the conditions set by, an evaluation coordinated by the IPN; treatment as recommended by the IPN; probation for three years if no treatment is recommended by the IPN; an administrative fine of \$250; and the assessment of costs of the investigation and prosecution. The Administrative Law Judge shall retain jurisdiction to assess the costs of the investigation and prosecution upon remand, if the parties are unable to stipulate to these costs within a reasonable time.

RECOMMENDATION

It is

RECOMMENDED that the Board of Nursing enter a final order finding Respondent guilty of violating Section 464.018(1)(i), Florida Statutes, and imposing a penalty of a \$250 administrative fine, a suspension until lifted pursuant to, and subject to the conditions set by, an evaluation coordinated by

the IPN; treatment as recommended by the Intervention Project for Nurses; probation for three years if no treatment is recommended by the Intervention Project for Nurses; and the assessment of costs of the investigation and prosecution, upon remand, if necessary.

DONE AND ENTERED this 20th day of December, 2002, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
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 20th day of December, 2002.

COPIES FURNISHED:

Dan Coble, RN PhD CNAAC, BC
Executive Director
Board of Nursing
Department of Health
4052 Bald Cypress Way, Bin C02
Tallahassee, Florida 32399-3252

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

Amy M. Pietrodangelo
Assistant General Counsel
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Suzanne H. Suarez
Suzanne Hope Suarez, P.A.
The Legal Building
447 3rd Avenue North, Suite 404
St. Petersburg, Florida 33701-3255

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 must be filed with the agency that will issue the final order in this case.