

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
BOARD OF NURSING, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-1458PL  
 )  
PEARLA M. MIXON, C.N.A., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held before Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings, in the above-styled case on June 26, 2003, by video teleconference with sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: Kim M. Kluck, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

For Respondent: No appearance.

STATEMENT OF THE ISSUES

Whether Respondent violated Sections 456.072(1)(k) and 464.204(1)(b), Florida Statutes (2001), and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On August 1, 2002, the Department of Health, Board of Nursing, Petitioner, filed an Administrative Complaint against Pearla M. Mixon, Respondent, alleging a violation of Sections 456.072(1)(k) and 464.204(1)(b), Florida Statutes (2001), by intentionally violating the statutory and legal obligation of certified nursing assistants to not physically abuse or hit a patient.

Respondent filed a request for formal hearing which disputed the allegations of the Administrative Complaint. On April 23, 2003, the case was forwarded to the Division of Administrative Hearings, and Administrative Law Judge Susan B. Kirkland was assigned this case by Initial Order, and this matter was set for hearing. Petitioner filed its Pre-hearing Statement on June 5, 2003.

At the hearing, Daniel M. Kilbride, Administrative Law Judge, presided as the trier of fact. Petitioner's Exhibit 1 (Respondent's verification of certification as a certified nursing assistant from the Department of Health) was received in evidence. Agnes Kelly, registered nurse, testified on behalf of Petitioner. The record remained open in order to take the testimony of Sheleta Cunningham-Talley, certified nursing assistant, by deposition. The deposition of the witness was taken on July 3, 2003, and filed on July 7, 2003.

The parties were given ten days from the date of the filing of the official transcript in which to file proposed recommended orders. The Transcript was filed on July 9, 2003.

Petitioner filed its Proposed Recommended Order on July 11, 2003. Respondent has not filed her proposals as of the date of this Recommended Order.

#### FINDINGS OF FACT

1. Effective July 1, 1997, Petitioner is the state agency charged with regulating the responsibility for regulation and discipline of the nursing practice within the State of Florida.

2. Respondent is a certified nursing assistant (CNA) holding Florida nursing certificate number CX 0993266675590.

3. In December 2001, Respondent was employed as a CNA at Beverly Health Care, now known as Seacrest Health Care of Largo.

4. Patient F.K. was a dementia patient in her advanced years and was not coherent or responsive. She was a total care patient, which required staff to perform all activities of daily living for her, such as mouth care, showers, feeding, dressing, bathing, and getting her into and out of bed. Patient F.K. did not speak, but did have a tendency to hum loudly and continuously.

5. On December 20, 2001, Respondent was in Patient F.K.'s room following Patient F.K.'s return from lunch. Respondent called another CNA, Sheleta Cunningham-Talley, into Patient

F.K.'s room, and Respondent engaged her in conversation. At that time, Patient F.K. was humming, as she often did. Respondent said to Talley, "watch how I shut this bitch up" and then proceeded to strike Patient F.K. on the face and throat. Patient F.K.'s face and neck turned red, and she became visibly upset after being struck.

6. Beverly Health Care has a policy that residents have a right not to be physically abused. CNAs are under a legal or statutory duty not to hit or abuse patients. Striking a patient in the face and throat is a violation of that duty to not physically abuse a patient.

7. Agnes Kelly is a registered nurse who was employed at Beverly Health Care during Respondent's employment there. Kelly has practiced as a registered nurse since 1994. She was a weekend supervisor at Beverly Health Care and supervised approximately 25 nursing employees which included a number of CNAs. Kelly has supervised nursing staff and CNAs for approximately nine years, and, as such, is familiar with the duties and responsibilities of CNAs. It is her opinion that Respondent violated her duty not to physically abuse a patient.

8. Based on the foregoing, the evidence is clear and convincing that Respondent violated Sections 456.072(1)(k) and 464.204(1)(b), Florida Statutes (2001), by intentionally

violating the statutory and legal obligation of CNAs to not physically abuse or hit a patient.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Sections 120.569, 120.57(1), 120.60, and Chapters 456 and 464, Florida Statutes (2001).

10. Pursuant to Section 464.204(1), Florida Statutes (2001), Petitioner is empowered to revoke, suspend, or otherwise discipline the license of a CNA for violation of Section 456.072(1)(k), Florida Statutes (2001), for failure to perform any statutory or legal obligation placed upon Respondent.

11. Revocation of license proceedings are penal in nature, State ex rel Vining v. Florida Real Estate Commission, 281 So. 2d 487 (Fla. 1973), and must be construed strictly in favor of the one against whom the penalty would be imposed. Munch v. Department of Professional Regulation, Division of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992); Fleischman v. Department of Professional Regulation, 441 So. 2d 1121 (Fla. 3d DCA 1983). The standard of proof required in this matter is that relevant and material findings of fact must be supported by clear and convincing evidence of record. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). Petitioner has the burden of proving by clear and convincing

evidence each of the allegations in the Administrative Complaint. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

12. Subsection 456.072(1), Florida Statutes (2001), as it pertains to the alleged facts in this matter reads, in pertinent part:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

\* \* \*

(k) Failing to perform any statutory or legal obligation placed upon a licensee.

13. Relative to the above statutory prohibitions, Petitioner's disciplinary guidelines are set forth in Section 464.204(2), Florida Statutes (2001). This statute provides that Respondent's license may be penalized as follows:

(2) When the board finds any person guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:

(a) Denial, suspension or revocation of certification.

(b) Imposition of an administrative fine not to exceed \$150 for each count or separate offense;

(c) Imposition of probation or restriction of certification, . . . .

14. In order to find that a nurse has violated this statute, an intentional act must be proven before a violation

can be found. Munch v. Department of Professional Regulation, Division of Real Estate, supra.

15. The evidence establishes by clear and convincing evidence that Respondent intentionally struck a patient, without justification or cause, amounting to physical abuse. This is a violation of a statutory and legal duty.

16. An aggravating factor to be considered is that Patient F.K. was completely dependent on those around her for her basic care and needs. She was defenseless against Respondent's unprovoked attack. Respondent chose not to attend the hearing or deposition and offered no evidence in contravention or in mitigation of her actions.

#### RECOMMENDATION

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

RECOMMENDED that Petitioner issue a final order finding Respondent guilty of violating Sections 456.072(1)(k) and 464.204(1)(b), Florida Statutes (2001), and revoking Respondent's certification and requiring Respondent to pay the costs of investigation and prosecution of this matter.

DONE AND ENTERED this 22nd day of July, 2003, in  
Tallahassee, Leon County, Florida.



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DANIEL M. KILBRIDE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of July, 2003.

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.