

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
 vs.) Case No. 05-3235PL
)
 ROSE GAUBERT, C.N.A.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On October 19, 2005, an administrative hearing in this case was held in Ft. Myers, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kurt L. Barch, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Rose Gaubert, pro se
1613 Maple Drive
Fort Myers, Florida 33907

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated March 16, 2005, the Department of Health (Petitioner) alleged that Rose Gaubert, C.N.A. (Respondent), violated certain Florida Statutes related to the provision of nursing services. The Respondent disputed the allegations and requested a formal administrative hearing. The Petitioner forwarded the matter to the Division of Administrative Hearings, which scheduled the hearing to commence on October 19, 2005.

At the hearing, the Petitioner presented the testimony of five witnesses and had Exhibits numbered 1 and 2 admitted into evidence. The Respondent testified on her own behalf. The hearing Transcript was filed on November 15, 2005. The Petitioner filed a Proposed Recommended Order that has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was a certified nursing assistant (C.N.A.), holding Florida certificate number CX 0501XXXX17400.

2. At all times material to this case, the Respondent was employed as a C.N.A. at the Rehabilitation and Health Care Center, 2629 Del Prado Boulevard, Cape Coral, Florida.

3. One of the residents at the facility where the Respondent was employed was H.L., a 67-year-old female described

as frail and in poor health, suffering from dementia, vascular insufficiency, and cardiac problems.

4. On October 24, 2004, the Respondent was assigned to provide care to H.L. On that day, other employees heard yelling coming from H.L.'s room and entered her room, whereupon the Respondent was observed yelling at H.L with the Respondent's hands on H.L.'s shoulders and legs, forcefully pushing H.L. onto a bed.

5. Linda Roan, a registered nurse, testified at the hearing as an expert in nursing care of elderly patients. Nurse Roan opined that the treatment provided by the Respondent to H.L. on October 24, 2004, failed to meet minimal standards of acceptable and prevailing nursing practice. Nurse Roan's testimony is accepted.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2004).

7. The Petitioner is the state agency charged with the regulation of C.N.A.s in the State of Florida. See Ch. 464, Fla. Stat. (2004).

8. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Department of

Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is that which is credible, precise, explicit, and lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). In this case, the burden has been met.

9. The Administrative Complaint charges that the Respondent has violated Subsection 464.204(1)(b), Florida Statutes (2004), by violating Subsection 464.018(1)(n), Florida Statutes.

10. Subsection 464.018(1)(n), Florida Statutes (2004), provides that failure to meet minimal standards of acceptable and prevailing nursing practice constitutes grounds for disciplinary action.

11. Subsection 464.204(1)(b), Florida Statutes (2004), provides in relevant part as follows:

(1) The following acts constitute grounds for which the board may impose disciplinary sanctions as specified in subsection (2):

* * *

(b) Intentionally violating any provision of this chapter, chapter 456, or the rules adopted by the board.

(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, including conditions such as corrective actions as retraining or compliance with an approved treatment program for impaired practitioners.

12. As set forth herein, the evidence establishes that the Respondent is guilty of one count of failure to meet minimal standards of acceptable and prevailing nursing practice.

13. In its Proposed Recommended Order, the Petitioner asserts that the applicable disciplinary guidelines are set forth at Florida Administrative Code Rule 64B9-8.006 which are applicable to the practice of nursing, and provide that an administrative fine of between \$250 to \$500 is the appropriate penalty in this case. The Petitioner's suggested penalty exceeds that authorized by Subsection 464.204(1)(b), Florida Statutes (2004).

14. Florida Administrative Code Rule 64B9-15.009 sets forth disciplinary guidelines specifically related to C.N.A.s which are to be utilized in determining the appropriate penalty

to be assessed in this case; however, none of the guidelines reference the statutory violations alleged in the Administrative Complaint. The following penalty is based upon the language set forth at Subsection 464.204(1)(b), Florida Statutes (2004).

RECOMMENDATION

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

RECOMMENDED that the Department of Health enter a final order finding that Rose Gaubert, C.N.A., is guilty of one count of failure to meet minimal standards of acceptable and prevailing nursing practice, and imposing a fine of \$50, a probationary period of one year, and such additional training as the Department of Health deems appropriate.

DONE AND ENTERED this 14th day of December, 2005, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

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 14th day of December, 2005.

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.