

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINELLAS COUNTY SHERIFF'S)
OFFICE,)
)
Petitioner,)
)
vs.) Case No. 07-1124
)
DIANE CROSS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted by Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings (DOAH), on August 16, 2007, in Largo, Florida.

APPEARANCES

For Petitioner: Benjamin R. Welling, Esquire
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101 East Kennedy Boulevard, Suite 900
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For Respondent: Matthew P. Farmer, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent, Diane Cross, violated General Order 3-1.1, Rule 5.4 (Duties and Responsibilities), by obtaining and giving Robaxin, a prescription medication, to David Richardson on July 31, 2006.

Whether Respondent violated General Order 3-1.1, Rule 5.6 (Truthfulness), during the criminal and internal investigation into her conduct on July 31, 2006.

PRELIMINARY STATEMENT

Petitioner, Pinellas County Sheriff's Office (Petitioner or PCSO), employed Respondent as a nurse supervisor at the Pinellas County Jail Complex in Clearwater, Florida. After another nurse supervisor reported that Respondent gave prescription medication to a fellow nurse, without a prescription, in violation of PCSO policies and the law, a PCSO investigation was conducted. Following the investigation, PCSO's Inspections Bureau charged Respondent with violations of General Order 3-1.1, Rule 5.4 (Duties and Responsibilities) and Rule 5.6 (Truthfulness). Based on the seriousness of the violations, Sheriff Coats determined that Respondent's misconduct warranted termination. Respondent denied the allegations and sought an impartial due process hearing. This matter was referred to the DOAH on March 8, 2007, and discovery ensued.

Counsel for both parties entered into a detailed joint pre-hearing stipulation that was submitted at the hearing, in which the parties agree that Respondent's appeal from Petitioner's proposed action hinges entirely on the factual issue of whether Respondent engaged in the misconduct outlined above. More specifically, the parties stipulated that if this tribunal

determines that Respondent did indeed give Robaxin to Richardson on July 31, 2006, this constitutes a violation of Rule 5.4. Furthermore, the parties stipulated that, because Respondent denied that she dispensed Robaxin to Richardson without a prescription in interviews with PCSO's Narcotics Division detectives and Inspections Bureau representative, if this tribunal determines that Respondent obtained and gave Robaxin to Richardson on July 31, 2006, Respondent necessarily was untruthful in interviews with the PCSO's representatives during its investigation into the matter and that this necessarily constitutes a violation of Rule 5.6.

At the hearing, Petitioner called three witnesses, Brammarie Kalicharan, David Richardson, and Mary Caldwell, and offered 13 exhibits, which were received in evidence. The deposition testimony of one witness, Michael Schiavo, was offered in lieu of his live testimony. Respondent offered the testimony of one witness, Rick Brennan, and testified in her own behalf. Respondent offered no additional exhibits.

The Transcript of the hearing was filed on September 4, 2007. The date for filing the parties' proposed findings of fact and conclusions of law was extended at Petitioner's request. Both parties timely filed their proposals on September 28, 2007. Each party's proposal has been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent, a registered nurse, was employed by Petitioner as a nurse supervisor at the Pinellas County Jail Complex in Clearwater, Florida.

2. On the morning of July 31, 2006, Respondent and four other nurse supervisors, David Richardson (Richardson), Bramnarie Kalicharan (Kalicharan), Rick Brennan (Brennan), and Michael Schiavo (Schiavo), were gathered in the nurse supervisor's office.

3. Nurse Supervisor David Richardson was experiencing severe back pain due to an injury, which he sustained the previous day while off-duty.

4. Richardson spoke with Respondent in some detail about his back pain. Respondent asked Richardson what had happened to cause him so much pain, and why he was at work when he was barely able to remain standing.

5. Respondent commented to Richardson a number of times that "he should take something" and asked him if he normally took medication for his back pain. When Richardson responded that he did not normally take medication for this, Respondent asked him why he did not. Respondent continued to urge Richardson to take medication for his back pain, but Richardson continued to insist that he did not need anything.

6. Kalicharan and Brennan made passing comments about Richardson's back pain, noting that Richardson "looked horrible," and was "walking kind of funny." However, it is undisputed that neither asked Richardson about taking medication for his pain, as Respondent did, or questioned Richardson about his back pain for as long as Respondent did.

7. No other nurse supervisor or employee of Petitioner spoke to Richardson about his back pain that morning in the nurse supervisor's office.

8. After speaking with Richardson about his pain and urging him to take medication, Respondent placed a phone call to Mary Caldwell, a licensed practical nurse at the jail complex who was under Respondent's supervision. She told Caldwell to "please bring Robaxin 750 down to the office." Caldwell did not receive any other phone calls that morning requesting her to bring Robaxin or any other medication to the nurse supervisors' office. Nor did any other supervisor make a phone call from the nurse supervisors' office that morning. In fact, no supervisor had ever requested that Caldwell bring medication to the nurse supervisor's office.

9. Minutes after receiving this phone call, Caldwell took a card of Robaxin out of her "med card" and took it to the nurse supervisors' office, as she had been instructed to do. Once she arrived at the nurse supervisors' office, Caldwell handed the

entire card of Robaxin to Respondent. Once Respondent received the card of Robaxin from Caldwell, she gave it to Richardson. Richardson pushed the pills of Robaxin out of the card and put them in his pocket.

10. The testimony of each corroborating witness about these facts is essentially consistent.

11. It is undisputed that Robaxin is not stored in the nurse supervisors' office.

12. It is undisputed by Respondent, and as a matter of law, that Respondent did not have authority to dispense prescription medication to someone without a prescription from a medical doctor.

13. Richardson did not have a prescription for Robaxin on July 31, 2006. Nor did Respondent perform a medical history of Richardson before giving him Robaxin.

14. None of the nurse supervisors in the office immediately reported this incident. However, Schiavo eventually reported the incident to Director of Nursing Sylvia Watkins approximately two months later, while discussing with Watkins an informal complaint that Respondent and Brennan had lodged against him. Watkins then reported the incident to her superior, Health Program Administrator Vicki Scotti.

15. Once Scotti was informed of this incident, PCSO began an investigation into the matter.

16. The first stage of the investigation involved PCSO's Narcotics Division, which conducted a criminal investigation into the matter, during which Respondent denied that she gave Robaxin to Richardson at any time.

17. On January 5, 2007, following the conclusion of the criminal investigation, PCSO informed Respondent that a formal complaint of misconduct had been filed against her and that she was the subject of an internal Inspections Bureau Investigation (Case No. AI-06-082). PCSO also informed Respondent in this memorandum that she was charged with violations of General Order 3-1.1, Rule 5.4 (Duties and Responsibilities) and Rule 5.6 (Truthfulness), noting:

You knowingly provided an agency member with prescription medication which you are unauthorized to prescribe. Furthermore, when questioned by PCSO Detectives, you were untruthful in your recollection of the incident in question.

18. Brennan, Kalicharan, Richardson, Schiavo and Caldwell were also subjects of the same investigation due to their involvement in the events of July 31, 2006.

19. As the parties have stipulated, Respondent continued to deny in the interview before PCSO's Inspections Bureau, as she had done in the course of the criminal investigation, that she had given Robaxin to Richardson on the morning of July 31, 2006.

20. On February 15, 2007, PCSO convened an Administrative Review Board (ARB) in order to review the materials gathered by the Inspection Bureau and make a recommendation on the level of discipline, if any, that Respondent and the other individuals involved should receive.

21. The ARB members reviewed the Inspections Bureau file and sworn statements of the individuals involved, and also had an opportunity to question each witness about his or her statement. After deliberating as a group, the ARB recommended that the charges against Respondent of violating Rule 5.4 and 5.6 should be sustained.

22. All of the supervisors who witnessed or participated in the events of July 31, 2006, received some level of discipline as a result of the investigation. Schiavo, Kalicharan, and Brennan received one-day suspensions for failing to report Respondent's misconduct, in violation of General Order 3-1.2 Rule 4.1 (Reporting Violation of Laws, Ordinances, Rules or Orders). Richardson, who admitted receiving Robaxin, received a five-day suspension and was demoted from his position of nurse supervisor for violation of Rule 5.4. Mary Caldwell was exonerated.

23. On February 16, 2007, Sheriff Jim Coats (Coats) informed Respondent by memorandum that the ARB had determined that she violated Rules 5.4 and 5.6. Coats also informed

Respondent that the recommended discipline based on the point values associated with two level five violations ranged from seven days to termination.

24. On this same day, Coats informed Respondent via a separate memorandum that he had thoroughly reviewed her case and determined that termination was the proper level of discipline. Coats also notified Respondent of her right to appeal the decision.

25. Respondent formally appealed her termination on February 21, 2007.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2007), and the Pinellas County Sheriff's Civil Service Act.

27. The Civil Service Act of the Pinellas County Sheriff's Office was established pursuant to Chapter 89-404, Laws of Florida (1989), as amended by Chapter 90-395, Laws of Florida (1990).

28. Chapter 89-404, Section 2, Laws of Florida, gives authority to PCSO to adopt rules necessary to administer the Civil Service Act. PCSO has adopted General Order 3-1, which

contains standards of conduct to which all employees of PCSO must adhere.

29. General Order 3-1.1 sets forth the relevant standards of conduct in the present matter. Rule 5.4 of this Order provides:

Duties and Responsibilities--The primary responsibility of all Sheriff's Office personnel is to be aware of their assigned duties and responsibilities. All personnel are always subject to duty and are responsible for taking prompt and effective action within the scope of their duties and abilities whenever required.

30. Rule 5.6 of the same Order provides:

Truthfulness--Members are required to be truthful at all times when acting in an official capacity, whether under oath or not, such as when offering testimony in legal proceedings and administrative investigations. This includes a prohibition against deliberate or intentional omissions or misrepresentation of material fact.

31. Unless otherwise provided by statute, the burden of proof is on the party asserting the affirmative of an issue in an administrative proceeding. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). As such, Petitioner has the burden to establish the allegations against Respondent by a preponderance of the evidence. Dalem v. Department of Corrections, 720 So. 2d 575, 576 (Fla. 4th DCA 1998).

32. Based on the combined testimony of Richardson, Caldwell, Schiavo, and Kalicharan, Petitioner has proven, by a preponderance of the evidence, that Respondent requested Robaxin from Caldwell on the morning of July 31, 2006, which Caldwell delivered to her, and Respondent gave it to Richardson after receiving it.

33. Respondent's denials relating to calling Caldwell and about giving Robaxin to Richardson are not credible in light of the testimony from these witnesses about the events of July 31, 2006. Respondent failed to produce any witness to rebut the combined testimony of Kalicharan, Caldwell, Richardson, and Schiavo.

34. Notably, Richardson himself, on penalty of suspension and demotion, admitted that he received Robaxin on July 31, 2006, delivered by Caldwell. Significantly, Respondent (who was handed the Robaxin by Caldwell) denied the entire event and failed to offer any alternative explanation as to how Richardson obtained Robaxin on July 31, 2006, when it was undisputed that Robaxin was not stored in the nurse supervisors' office.

35. Respondent testified about Schiavo's alleged retaliatory motives in reporting the incident to Watkins and allegedly being dishonest about what happened on July 31, 2006. However, even if Schiavo and Respondent had a somewhat strained relationship, nothing negates nor calls into question the

veracity of Caldwell's testimony that Respondent called her and asked her to bring Robaxin to the nurse supervisors' office. In fact, Caldwell went so far as to testify that Respondent had been her favorite supervisor. Nor does Respondent's aspersions toward Schiavo negate Kalicharan's testimony (which is consistent with Caldwell's and Schiavo's) that Respondent requested Robaxin from Caldwell, was handed Robaxin by Caldwell, and then gave it to Richardson. Indeed, because Caldwell has no reason to fabricate a story, having been neither accused of nor disciplined for her conduct that day, her testimony is the most credible. It simply makes no sense that Caldwell would fabricate that Respondent was involved. To the contrary, Caldwell's testimony that she particularly remembers the request by Respondent because it was so unusual is clearly the more credible and compelling. Respondent offers no reason for the disparity in her testimony.

36. Furthermore, Respondent's attempts to undercut Schiavo's testimony because of minor differences in testimony from the other witnesses are not persuasive. While Schiavo was the only witness that testified about certain details before Respondent's call to Caldwell, the issue at hand is whether Respondent physically gave Robaxin to Richardson. This pre-call testimony, even if disputed, does nothing to undercut the

observations and testimony of the other witnesses about the stipulated issue.

37. It is not surprising that four witnesses do not have identical recall of the events of July 31, 2006. However, nothing in Schiavo's testimony is inconsistent with the testimony of the other witnesses that collectively demonstrate that Respondent requested Robaxin from Caldwell and then gave it to Richardson. Indeed, it is undisputed that Richardson received Robaxin from one of those nurses in that room that morning. No testimony from any witness supports any other person placing the order or giving of the Robaxin but Respondent. Even Respondent does not identify anyone else as the person placing order and giving the Robaxin -- only that "it was not me."

38. Richardson's testimony (on penalty of suspension and demotion) about receiving Robaxin, though lacking in detail, due to the fact that he was focused on his back pain rather than his surroundings, undercuts Respondent's denial of the entire event and is consistent with the testimony of Kalicharan, Schiavo, and Caldwell. Similarly, Brennan's testimony that he has no recollection of the events of that morning fails to support Respondent.

39. In summary, Respondent has failed to provide any evidence or testimony, other than her own, to bolster her argument or to discredit the testimony of the other witnesses.

40. Because the parties have narrowed the issue for consideration to the factual question of whether Respondent provided Robaxin to Richardson on July 31, 2006, and stipulated that such action constitutes a violation of Respondent's duties and responsibilities under Rule 5.4, and because it is found that she engaged in the conduct of which she is accused, Respondent violated this rule.

41. Furthermore, the parties have stipulated that at all stages of the investigation into her actions Respondent denied providing Robaxin to Richardson.

42. The parties have further stipulated that, if this tribunal finds that Respondent provided Robaxin to Richardson, Respondent was necessarily untruthful in the course of PCSO's investigation and that such untruthfulness constitutes a violation of Rule 5.6.

43. As such, because Petitioner satisfied its burden of proving that Respondent provided Robaxin to Richardson, and because there is no dispute as to Respondent's denials about engaging in this behavior, Petitioner has also satisfied its burden of demonstrating that Respondent was less than truthful in the course of PCSO's investigation in violation of Rule 5.6.

44. In view of the seriousness of the violations, progressive discipline is not warranted, and termination is the appropriate penalty.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding Respondent guilty of the alleged violations and terminating her employment.

DONE AND ENTERED this 24th day of October, 2007, in Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
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Filed with the Clerk of the
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this 24th day of October, 2007.

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.