

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
NURSING,)
)
Petitioner,)
)
vs.) Case No. 07-1914PL
)
B.J. WALPER PENANSKY, A.R.N.P.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on July 25 and 26, 2007, in Tampa, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Subsection 464.018(1)(j), Florida Statutes (2006),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On March 20, 2007, Petitioner, the Department of Health (Department), filed an Administrative Complaint before the Board of Nursing, alleging that Respondent, B.J. Penansky, A.R.N.P. (advance registered nurse practitioner)(Ms. Penansky), violated Subsection 464.018(1)(j), Florida Statutes, "by being unable to practice nursing with reasonable skill and safety 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." Ms. Penansky requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on May 1, 2007, for assignment of an Administrative Law Judge to conduct the final hearing.

The final hearing was scheduled for hearing on June 28, 2007. On June 20, 2007, Petitioner filed a motion for continuance, which was granted. The final hearing was re-scheduled for July 25 and 26, 2007.

At the final hearing, the Department called the following witnesses: Martha E. Brown, M.D.; Subhakrarao Medidi, M.D.; Yolanda Guzman, R.N.; Carmen Laguerra; George Hammond; and Lynn

Crill. Petitioner's Exhibits 1 through 8 were admitted in evidence. Ms. Penansky testified in her own behalf and called the following witnesses: Raymond Johnson, M.D.; James Nunez; Brantz Roszel; and Susan Bingham, A.R.N.P. Ms. Penansky presented the testimony of Marie Massaro; Nicholas Anthony, Ph.D.; Steven Zweibach, M.D.; and Raymond Johnson, M.D., by deposition. Respondent's Exhibits 1 through 9 and 12 through 21 were admitted in evidence. Respondent's Exhibits 10 and 11 were not admitted in evidence.

Official recognition was taken of Section 20.43 and Subsection 464.018(1)(j), Florida Statutes, and Florida Administrative Code Rule 64B9-8.006.

The three-volume Transcript was filed on August 15, 2007. A corrected portion of the Transcript was filed on August 20, 2007. The parties filed their Proposed Recommended Orders on August 27, 2007. On August 30, 2007, Petitioner filed a Motion to Strike, requesting that a portion of Respondent's Proposed Recommended Order be stricken for exceeding 40 pages. On August 31, 2007, Respondent filed Respondent's Motion to Strike and/or to Authorize Respondent's PRO and Appendix as Filed and/or to Accept Re-formatted Appendix to Respondent's Proposed Recommended Order. The motions were heard by telephonic conference call on September 7, 2007, and an order was entered on September 11, 2007, striking the pages of Respondent's

Proposed Recommended Order, which exceeded 40 pages. The parties' Proposed Recommended Orders have been considered in rendering this Recommended Order.

On September 14, 2007, Respondent filed a Motion for Extension of Time to Allow Transcript of September 7, 2007 Hearing to be Filed and Accepted as Part of the Record. The motion was granted.

FINDINGS OF FACT

1. At all times material to this proceeding, Ms. Penansky has been licensed as an A.R.N.P. in Florida, having been issued license number ARNP1302962 in 1982. From 1993 through August 2006, Ms. Penansky was employed as an A.R.N.P. at the Dover Clinic of Suncoast Community Health Centers, Inc. (Suncoast). She was the primary certified nurse midwife at the facility and saw the obstetric/gynecology patients.

2. During 2004, Carmen Laguerra, who was the office manager at the Dover Clinic, smelled alcohol on Ms. Penansky's breath at work and observed Ms. Penansky's hands trembling. A couple of times, Ms. Laguerra observed that Ms. Penansky was having trouble walking at work and would put her hand on the walls to support herself. Ms. Penansky came to work at times with bruises on her arms and face.

3. In the fall of 2004, the coordinator of medical records at the Dover Clinic asked Ms. Laguerra to observe Ms. Penansky

in the medical records room. Ms. Laguerra observed Ms. Penansky murmuring to herself.

4. Prior to 2004, Ms. Penansky had demonstrated a quiet demeanor. In 2004, Ms. Laguerra observed a change in Ms. Penansky's demeanor. Ms. Penansky became more outspoken and opinionated.

5. In 2004, Yolanda Guzman, the supervisor of nurses at the Dover Clinic, noticed the smell of alcohol on Ms. Penansky's breath and body while at work. Ms. Guzman also noticed that Ms. Penansky's hands were trembling and that Ms. Penansky's speech was not clear. Ms. Guzman observed bruises on Ms. Penansky's arms and face. Ms. Guzman reported her observations to Ms. Laguerra and to Subhakr Rao Medidi, M.D., who was the associate medical director at the Dover Clinic.

6. Dr. Medidi smelled alcohol on Ms. Penansky's breath one time in 2004. On multiple occasions, he observed Ms. Penansky's hands shaking. After receiving patient complaints, Dr. Medidi confronted Ms. Penansky about the smell of alcohol. Ms. Penansky denied the use of alcohol, claiming that the smell resulted from the use of mouthwash. Dr. Medidi also recalled one time, in particular, when Ms. Penansky came to work with bruises.

7. George Hammond, the chief administrative officer at Suncoast, met with Ms. Penansky to discuss the observations of

employees at the Dover Clinic. Ms. Penansky denied the use of alcohol at work. He directed Ms. Penansky to get a blood-alcohol test. She did as directed, and the result of the test was negative.

8. Mr. Hammond directed Ms. Penansky to contact the Intervention Project for Nurses (IPN), which is the impaired practitioner program for the Board of Nursing. IPN is an independent program that monitors the evaluation, care, and treatment of impaired nurses. IPN oversees random drug screens and provides for the exchange of information between treatment providers, evaluators, and the Department.

9. Ms. Penansky contacted IPN and was referred to Martha E. Brown, M.D., for an evaluation. As part of the evaluation, Ms. Penansky underwent a drug test, which was negative for drugs and alcohol, but was considered dilute. When a drug test is dilute, it usually means that the individual tested consumed a significant amount of fluids prior to the test.

10. Ms. Penansky advised Dr. Brown that she averaged drinking almost every day, but had stopped drinking about ten days prior to the evaluation. As a result of abstinence, Ms. Penansky told Dr. Brown that she felt better and was able to stay up later and get up earlier. Ms. Penansky advised

Dr. Brown that her brother had a problem with alcohol and had not had a drink in 20 years.

11. In a report dated November 8, 2004, Dr. Brown opined that there was suspicion for Ms. Penansky having a substance abuse problem. She recommended that Ms. Penansky enter into an abuse contract with IPN for two years with a one-year review.

12. Ms. Penansky entered into an IPN contract in December 2004. Her participation in the program included random drug screening, joining a support group, attending Alcoholics Anonymous meetings, and being evaluated by her supervisor. During her participation in the program, she was tested for alcohol 17 times, and each time the test was negative. Ms. Penansky completed the program in one year.

13. While Ms. Penansky was participating in the IPN program, employees at Suncoast observed positive changes in her. Ms. Penansky's appearance and mood improved, and the tremors in her hands disappeared.

14. On July 31, 2006, Ms. Penansky was involved in an automobile accident. As a result of the accident, she sustained some bruises to her body, which were visible to employees at the Dover Clinic.

15. In August 2006, while Ms. Penansky was at work, Ms. Guzman again smelled alcohol on Ms. Penansky's breath and noticed Ms. Penansky's hands were shaky, and her speech was not

normal. Ms. Laguerra also smelled alcohol on Ms. Penansky while Ms. Penansky was at work during the same time period. In August 2006, Dr. Medidi noticed that Ms. Penansky's hands were shaking again.

16. Ms. Penansky denies that she had alcohol on her breath at work in either 2004 or 2006. However, both Ms. Guzman and Ms. Laguerra testified credibly that they smelled alcohol on Ms. Penansky's breath and that the smell was different from the smell that would come from the use of mouthwash, which has a medicinal smell. Additionally, Ms. Penansky testified that in 2006 she was not using the mouthwash prior to going to work because she felt that in 2004 her fellow employees had mistaken the smell of the mouthwash for the smell of alcohol. Thus, the smell could not have come from mouthwash in 2006 because Ms. Penansky was not using it.

17. Ms. Penansky commenced a change in her eating habits in which she had lost 50 pounds. In 2006, she was still losing weight, but not at a very rapid pace. At the final hearing, there were some allegations that the odor that Ms. Guzman and Ms. Laguerra smelled was a result of a release of ketones due to Ms. Penansky's diet. However, the smell caused by ketones is a "sweet smell," which is different from the smell of alcohol. Another allegation at the final hearing was that the smell could be a result of Ms. Penansky's periodontal disease, but the smell

that would result from a periodontal disease would be different from the smell of alcohol.

18. Neither Ms. Guzman nor Ms. Laguerra had any conflict with Ms. Penansky that would cause them to make false allegations against her. In fact, both Ms. Guzman and Ms. Laguerra were highly complementary of Ms. Penansky's work, aside from the use of alcohol and the hand tremors.

19. The evidence is clear and convincing that in 2004 and in 2006, Ms. Penansky came to work at the Dover Clinic with alcohol on her breath while she was practicing as the primary midwife at the facility.

20. In August 2006, the observations of Ms. Guzman and Ms. Laguerra were made known to the management at Suncoast. Suncoast elected not to require Ms. Penansky to undergo a drug screening to determine whether she had ingested alcohol. On August 3, 2006, Ms. Penansky was terminated from her position with Suncoast for her use of alcohol and directed to contact IPN.

21. After Ms. Penansky was terminated from Suncoast, she went to work for a private physician. Her employment was uneventful, and she continued in his employ until the Department suspended her license by emergency order.

22. Ms. Penansky did not contact IPN, and Suncoast filed a complaint with the Department. An investigation ensued. The Department required Ms. Penansky to be evaluated. In January 2007, Ms. Penansky was again evaluated by Dr. Brown.

23. Ms. Penansky advised Dr. Brown that she had returned to drinking occasionally after she completed her program with IPN, but denied drinking on the job or drinking in large amounts. A drug screen was performed on Ms. Penansky, and the result was negative.

24. Dr. Brown diagnosed Ms. Penansky with alcohol abuse, "rule out alcohol dependency." Credibly, Dr. Brown opined that Ms. Penansky appeared "to be either in denial or minimizing the impact alcohol has had on her life and the problems she has had at work with others smelling alcohol on her breathe [sic] multiple time [sic]." It was Dr. Brown's opinion that in order for Ms. Penansky to be able to practice with reasonable safety and skill that she should minimally complete an intensive outpatient program and have monitoring through IPN.

25. Ms. Penansky was also evaluated by Raymond A. Johnson, M.D., who came to the conclusion that Ms. Penansky did not have an addiction and alcohol problem. He felt that she was safe to practice nursing without treatment or monitoring by IPN. In his report dated January 22, 2007, he stated that Ms. Penansky used mouthwash multiple times a day because of periodontal disease,

and he concluded that the use of the mouthwash was the reason for the smell of alcohol on her breath. His argument loses plausibility based on Ms. Penansky's testimony at final hearing that she was not using the mouthwash in 2006 prior to going to work so that people would not mistake the smell of mouthwash for the smell of alcohol.

26. Dr. Johnson had a psychological evaluation performed on Ms. Penansky by Nicholas Anthony, Ph.D. In his report, Dr. Anthony stated that Ms. Penansky told him that her brother was no longer allowed to use alcohol because he had been diagnosed with diabetes. Based on Ms. Penansky's representations, he concluded that she did not have a family history for addiction.

27. Ms. Penansky's account of her brother's abstinence differed when she related her family history to Dr. Brown. She did not tell Dr. Brown that her brother had stopped drinking because he was a diabetic. At the final hearing, she did not mention that her brother refrained from drinking because of diabetes. At the final hearing, Ms. Penansky testified:

Well, what he [her brother] told me, in fact, what he told the whole family was, at one point he said he just felt like he was drinking too much and decided to stop. That was it. He never said anything about being an alcoholic. He never said he was diagnosed by a physician. He made a personal choice.

28. Dr. Anthony tested Ms. Penansky using the Minnesota Multiphasic Personality Inventory-II (MMPI), The Rorschach, and the Million Clinical Multiaxial Inventory-III (MCMI). The Rorschach, otherwise known as the "ink blot" test, is not commonly used in the field of addiction psychiatry to look at substance abuse diagnoses.

29. In the field of psychiatry, alcohol abuse and alcohol dependency are considered Axis I, or primary, diagnoses. The MMPI and the MCMI are more accurate and effective in diagnosing other Axis I disorders such as psychosis than in diagnosing substance abuse or dependency. This is due to the fact that individuals with substance abuse or dependency problems often attempt to present themselves in the best possible light when answering the test questions. The test results themselves for these individuals are often invalid because the test either misses the substance abuse or dependency diagnosis or identifies the individual's denial or minimization tendencies.

30. The Adult Clinical Interpretive Report for Ms. Penansky's MMPI test states:

[Ms. Penansky] approached the test items in a somewhat defensive manner. Her overcautious approach to the items suggests that she is concerned with making a good impression and is reluctant to disclose much about her personal adjustment. Interpretations of the clinical and content scale profiles should allow for her possible minimization of problems.

31. The Adult Clinical Interpretive Report for Ms. Penansky's MCMI test states:

Unless this patient is a well-functioning adult who is facing minor life stressors, her responses suggest an effort to present a socially acceptable appearance or a resistance to admitting personal shortcomings. Inclined to view psychological problems as a sign of emotional or moral weakness, the patient may protectively deny any unseemly traits or symptoms. This probably reflects either a broad-based concern about being appraised unfavorably by others or an active suspicion of the arcane motives of psychological inquiry. Her MCMI-II scores have been adjusted to compensate for her defensiveness, but the overall profile may remain partially distorted. An interpretation based on standard interpretive procedures is likely to be reasonably valid but may fail to represent certain features of either the patient's disorders or her character.

The BR scores reported for this individual have been modified to account for the defensiveness suggested by the prominence of Personality Patterns Scale 7 (Compulsive).

32. Dr. Anthony interpreted the results of Ms. Penansky's test scores as being negative for a diagnosis of alcohol abuse or dependency. Dr. Johnson relied on Dr. Anthony's interpretation of test results in forming his opinion that Ms. Penansky was negative for a diagnosis of alcohol abuse or dependency.

33. Dr. Brown reviewed the Adult Clinical Interpretive Reports of the MMPI and the MCMI performed on Ms. Penansky by

Dr. Anthony and opined that the tests are bordering on invalid and that, given Ms. Penansky's defensiveness on the test in answering questions, she would not use the test results as a total basis for concluding that Ms. Penansky did not have a problem with alcohol.

34. Given Dr. Johnson's reliance on the use of mouthwash as the explanation for the smell on alcohol on Ms. Penansky's breath, the lack of credibility in Ms. Penansky's account of her family history, and the defensive answers given by Ms. Penansky on her psychological testing, Dr. Johnson's opinion concerning Ms. Penansky's alcohol abuse lacks credibility.

35. Current and former employees of Suncoast highly regarded Ms. Penansky's work. Her evaluations were very good. She worked very hard, and the quality of her work was excellent. However, alcohol abuse can affect a nurse's judgment and ability to practice with reasonable skill and safety. Alcohol may slow concentration and thinking and thereby cause a nurse to miss a diagnosis or symptom while treating a patient. Alcohol abuse may cause tremors, such as those experienced by Ms. Penansky. Although Ms. Penansky's alcohol abuse may not have resulted in patient harm, it does not mean that it will not result in harm in the future. It is not necessary to wait for a patient to be harmed to determine whether a nurse can practice with reasonable skill and safety by reason of use of alcohol.

CONCLUSIONS OF LAW

36. 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. (2007).

37. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). What constitutes clear and convincing evidence was described by the court in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1989) as follows:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

38. The Department alleges that Ms. Penansky violated Subsection 464.018(1)(j), Florida Statutes, which provides that the following act constitutes grounds for disciplinary action: "[b]eing 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.”

39. The Department has established by clear and convincing evidence that Ms. Penansky has violated Subsection 464.018(1)(j), Florida Statutes. She is unable to practice nursing with reasonable skill and safety to patients by reason of use of alcohol. The evidence established that Ms. Penansky had alcohol on her breath while on duty in 2004 and 2006. She experienced tremors in her hands, and her speech was unclear.

40. Florida Administrative Code Rule 64B9-8.006(3)(r) provides that the penalty for a first offense of being unable to practice nursing with reasonable skill and safety to patients by reason of use of alcohol ranges from a \$250 fine, IPN evaluation, and probation to a \$500 fine, IPN evaluation, and suspension to be followed by a term of probation or revocation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that B.J. Penansky, A.R.N.P., violated Subsection 464.018(1)(j), Florida Statutes; imposing an administrative fine of \$250; requiring her to undergo an IPN evaluation; suspending her license until such time as she undergoes an IPN evaluation; requiring compliance with all IPN recommendations, if any; and

placing her on probation for three years with direct supervision.

DONE AND ENTERED this 25th day of September, 2007, in Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 25th day of September, 2007.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2006 version.

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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.