

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HUBERT HERRING,)
)
 Petitioner,)
)
 vs.) Case No. 07-5095
)
 BOARD OF NURSING,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On March 4, 2008, a hearing was held by means of videoconferencing in Tallahassee and Jacksonville, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Borden Hallows, Esquire
4613 Highway 17 South
Orange Park, Florida 32003

For Respondent: Lee Ann Gustafson, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to reinstatement of his license as a registered nurse in the State of Florida.

PRELIMINARY STATEMENT

On December 27, 2006, the Florida Board of Nursing issued an Order on Petition for Reinstatement denying Petitioner's request that his nursing license be reinstated. Petitioner requested a hearing pursuant to Section 120.57(1), Florida Statutes, and on November 6, 2007, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge. The case was originally assigned to Judge Don W. Davis who noticed it for hearing February 5, 2008. Petitioner requested a continuance, which was granted, and the case was re-noticed for hearing March 4, 2008.

On February 28, 2008, the case was re-noticed to be conducted as a video teleconference hearing on the same date, i.e., March 4, 2008, and the case was subsequently transferred to the undersigned. Because the parties were in different locations and no pre-hearing order had been entered, there had been no exchange of exhibits. At hearing, the parties were ordered to late-file any exhibits by March 11, 2008, and to note any objection to the admissibility of those exhibits in the proposed recommended orders. Petitioner testified on his own behalf and presented the testimony of Karen Clark. The deposition of Bernard Clark, M.D., was submitted and is admitted into evidence as Petitioner's Exhibit 1. The Board of Nursing presented no witnesses. Respondent's Exhibits numbered 1 through 3 were admitted into evidence.

The transcript was filed March 24, 2008, and by post-hearing Order the parties were given until April 3, 2008, to file proposed recommended orders. The responses to any objections to the admissibility of objections were required to be filed April 10, 2008. Both Proposed Recommended Orders were timely filed and have been carefully considered in preparing this Recommended Order. Although the Board of Nursing objected to the admissibility of Dr. Bernard's deposition, no response to this objection was filed.

FINDINGS OF FACT

1. Petitioner is a nurse licensed by the Florida Board of Nursing, having nursing license number RN 2651872.

2. On June 3, 1998, an Administrative Complaint was filed against Petitioner in Case No. 1998-00739, asserting that Petitioner engaged in unprofessional conduct in violation of Section 464.018(1)(8), Florida Statutes. The parties entered into a Settlement Agreement and on March 3, 2000, a Final Order was filed by the Board of Nursing approving the Settlement Agreement and imposing one year of probation.

3. Pursuant to an Order to Show Cause, Petitioner appeared before the Board of Nursing in August 2000. By Order filed September 25, 2000, the Board of Nursing extended Petitioner's probation for six months and required him to obtain an evaluation coordinated by the Intervention Project for Nurses (IPN) within six months.

4. On approximately March 29, 2002, an Administrative Complaint was filed against Petitioner in Case No. 2001-12091, alleging that Petitioner had engaged in unprofessional conduct in violation of Section 464.018(1)(h), Florida Statutes, and violated the terms of the Final Order in Case No. 1998-00739, in violation of Section 456.072(1)(q), Florida Statutes.

5. On October 28, 2003, the Board of Nursing entered a Final Order with respect to Case No. 2001-12091. The Final Order reprimanded Petitioner; suspended Petitioner's license for a period of three years; required him to undergo an evaluation coordinated by PRN; and imposed a \$1,000.00 administrative fine. Specifically, the Final Order provided:

1. The license of Hubert H. Herring is hereby reprimanded.

2. The licensee, Hubert H. Herring, is suspended for three (3) years and thereafter until she/he personally appears before the Board and can demonstrate the present ability to engage in the safe practice of nursing. That demonstration shall include at least an in-depth psychological evaluation coordinated through the Intervention Project for Nurses, with an MMPI or other appropriate testing from a psychiatrist, psychologist, or other licensed mental health counselor experienced in the treatment of addiction. The licensee shall supply a copy of this Order to the evaluator. The evaluation must contain evidence that the evaluator knows of the reason for referral. The evaluator must specifically advise this Board that the licensee is presently able to engage in the safe practice of nursing or recommend the conditions under which safe practice could be attained. The licensee must also submit prior to appearance before the Board a reentry plan, proof of continued treatment

and counseling if recommended in the psychological evaluation, and demonstration of two years of documented continuous drug free/alcohol free living. The Board reserves the right to impose reasonable conditions of reinstatement at the time the licensee appears before the Board to demonstrate her/his present ability to engage in the safe practice of nursing.

6. Petitioner appealed the Final Order and on January 28, 2005, the First District Court of Appeal affirmed the Final Order in Case No. 1D03-5084. The mandate of the district court issued February 15, 2005. See Herring v. Department of Health, 891 So. 2d 1167 (Fla. 1st DCA 2005).

7. No stay of the penalty was sought during the pendency of the appeal. On November 18, 2004, the Department of Health filed an Administrative Complaint against Petitioner in Case No. 2004-01520, alleging a violation of the Final Order in Case No. 2001-12901. On or about June 29, 2005, the Board of Nursing filed a Final Order in Case No. 2004-01520, revoking Petitioner's license. Petitioner appealed this Final Order.

8. The Department of Health requested the First District Court of Appeal to relinquish jurisdiction to the Board of Nursing because the penalty of revocation was outside the Board's disciplinary guidelines. The Court granted the Motion to Relinquish Jurisdiction and on January 10, 2006, the Board vacated the Final Order revoking Petitioner's license. On that same day, the Board issued a new Final Order in Case No. 2004-01520, that reprimanded Petitioner's license; fined him \$250 and

imposed investigative costs of \$1,592.21; and suspended Petitioner's license until he made payment of the fine and costs of the most recent Final Order and "demonstrates compliance with each and every term of the Final Order in Case No. 2001-12091 filed on October 28, 2003."

9. On February 20, 2006, the First District Court of Appeal dismissed the appeal as moot in light of the vacation of the Final Order being appealed.

10. Petitioner has not been authorized to practice nursing in the State of Florida since October 28, 2003, some four and a half years ago. No evidence was presented at hearing to show whether Petitioner has attended continuing education courses during this time or taken any steps to keep his nursing skills and knowledge up to date.

11. Petitioner submitted the deposition of Dr. Bernard, a physician with whom he worked prior to the suspension of his license. He also presented the testimony of Karen Clark, the staffing coordinator at Tandem Rehabilitation Center. Ms. Clark served in that capacity from December 2002 through August 2004, and knew Mr. Herring during her employment there. According to her testimony, Mr. Herring was a nursing supervisor and was still employed at Tandem when she left in August 2004. She considered him a good, "team player" employee.^{1/} No testimony was presented, however, regarding his current ability to practice with reasonable skill and safety.

12. Mr. Herring petitioned the Board for reinstatement of his license. His re-entry plan "is simple, to go back to work and provide for my family." He submitted information showing he had paid his fines, renewed his license, and sought evaluation from IPN providers. He stated, however, that he could not and would not be involved with IPN, both because of cost and what he considered to be "extreme prejudice" to him.

13. Two evaluations from IPN providers were presented to the Board of Nursing. The first, prepared by Dr. Selah of the Center for Medicine and Psychiatry, Inc., indicates that in Dr. Selah's view, Petitioner was not safe to practice nursing with reasonable skill and safety. The second, prepared by Dr. Judy Rivenbark, stated that Petitioner would be safe to practice nursing only if he obtained therapy, entered into and complied with an IPN contract and demonstrated that he was current and up to date on his nursing skills. Although considered by the Board of Nursing, no testimony was presented at hearing from either professional.

14. The Board considered his request and on December 27, 2006, entered an Order on Petition for Reinstatement denying his request.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this

action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

16. Petitioner is seeking reinstatement of licensure. He therefore bears the burden of proof to demonstrate, much like an applicant for licensure, that he has met the requirements for reinstatement. Espinoza v. Department of Business and Professional Regulation, 739 So. 2d 1250 (Fla. 3d DCA 1999); Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Florida Department of Transportation v. J.W.C. Co., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981).

17. Section 464.018(3), Florida Statutes, provides that the board shall not reinstate the license of a nurse "until such time as it is satisfied that such person has complied with all of the terms and conditions set forth in the final order and that such person is capable of safely engaging in the practice of nursing."

18. The Board has adopted a rule with respect to the reinstatement of suspended and revoked licenses. Florida Administrative Code Rule 64B9-8.011 provides in pertinent part:

(1) When the Board has suspended the license of a nurse . . . the licensee, by petition, shall demonstrate to the Board, after expiration of the time period, compliance with all terms and conditions of the final order and must demonstrate the present ability to engage in the safe practice of nursing to obtain reinstatement. . . .

(2) In order to demonstrate the present ability to engage in the safe practice of nursing, the nurse must submit evidence which may include:

(a) Completion of continuing education courses approved by the Board, particularly if the disciplinary action resulted from unsafe practice or the nurse has been out of practice for a number of years.

(b) Participation in nursing programs, including refresher courses, clinical skills courses, and any Board approved nursing education programs leading to licensure in this state, particularly if the nurse has been out of practice for a number of years.

(c) Submission of evaluations of mental or physical examinations by appropriate professionals which attest to the nurse's present ability to engage in safe practice or conditions under which safe practice can be attained.

(d) Completion of treatment within a program designed to alleviate alcohol or other chemical dependencies, including necessary aftercare measures or a plan for continuation of such treatment as appropriate. Current sobriety must be demonstrated.

* * *

(5) If the Board reinstates the license of the petitioner, it may order reasonable conditions of probation or participation in the Intervention Project for Nurses (IPN), particularly when the nurse has been out of practice for a number of years, when practice problems led to the disciplinary action, or when mental, physical, or substance abuse problems led to the disciplinary action.

19. Petitioner attempted to use this proceeding as a means to dispute and criticize the Board's actions in taking discipline against him. However, the propriety of the Board's prior final

orders is not an issue in this proceeding. The Final Order suspending his license was affirmed by the District Court of Appeal, and will not be revisited here. All that is relevant regarding these prior final orders is whether Petitioner has demonstrated compliance with the terms contained therein and has demonstrated that he is presently able to practice with reasonable skill and safety.

20. Petitioner failed to make such a demonstration. His "re-entry plan" is no plan at all. It makes no provision for updating his training and no showing that he currently possesses the skills necessary for practice. He did not submit an evaluation indicating that he was safe to practice because the one evaluator willing to indicate he could practice made that statement conditioned upon Petitioner's compliance with certain requirements, including refresher courses and continued therapy, along with an IPN contract. Petitioner refuses to comply with the conditions recommended by the evaluator, and presented no alternative to IPN involvement. Under these circumstances, Petitioner has failed to demonstrate a basis for reinstatement of his nursing license.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered denying Petitioner's request for reinstatement of his nursing license.

DONE AND ENTERED this 22nd day of April, 2008, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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 April, 2008.

ENDNOTE

1/ If Petitioner was still working as a nursing supervisor in August 2004, it appears that he would have been practicing nursing while his license was suspended. This issue is not directly before me, but does support the ultimate conclusion that Petitioner was not complying in any fashion with the Final Order suspending his license.

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.