

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
NURSING,)
)
Petitioner,)
)
vs.) Case No. 08-2106PL
)
JEAN CASSEL, R.N.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on July 9, 2008, in Clearwater, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Megan M. Blacho, Esquire
William Miller, Esquire
Department of Health
4052 Bald Cypress Way, Bin No. C-65
Tallahassee, Florida 32399

For Respondent: Louis Kwall, Esquire
Kwall, Showers, Coleman
& Barack, P.A.
133 North Fort Harrison Avenue
Clearwater, Florida 33755

STATEMENT OF THE ISSUES

The issues in the case are whether Respondent violated Subsections 456.072(1)(q) and 456.072(1)(gg), Florida Statutes (2005),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On March 21, 2008, the Department of Health (Department) filed a two-count Amended Administrative Complaint before the Board of Nursing (Board) against Respondent, Jean Cassel, R.N. (Ms. Cassel), alleging that she violated Subsections 456.072(1)(q) and 456.072(1)(gg), Florida Statutes. Ms. Cassel requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings for assignment to an Administrative Law Judge to conduct the final hearing.

On July 7, 2008, the Department filed Petitioner's Request for Official Recognition. The request was granted at the final hearing, where official recognition was taken of Subsections 456.001(4), 456.072(1)(q), 456.072(1)(y), 456.072(1)(gg), and Section 456.076, Florida Statutes; Florida Administrative Code Rule 64B4-8.006, effective from February 22, 2004, until August 2, 2005; and Florida Administrative Code Rule 64B4-8.006, effective August 3, 2005, until July 4, 2006.

The parties filed a Joint Prehearing Stipulation in which they stipulated to certain facts contained in Section E of the Joint Prehearing Stipulation. To the extent relevant, those

stipulated facts have been incorporated in this Recommended Order.

At the final hearing, Ms. Cassel filed Respondent's Motion to Dismiss Second Amended Administrative Complaint for Failure to Comply with Florida Bar Rules of Civil Procedure and Failure to Obtain the Court's Permission to Amend. Argument was heard on the motion, and the motion was denied at the final hearing.

At the final hearing, the Department called Ms. Cassel, Jean D'Aprix, and Lorraine Busch as its witnesses. Petitioner's Exhibits 1 through 7 and 9 were admitted in evidence. At the final hearing, Ms. Cassel testified in her own behalf, and Respondent's Exhibits 1, 2, 3, 5 through 10, 12, and 13 were admitted in evidence.

The one-volume Transcript was filed on July 28, 2008. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. The parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Board is the state agency charged with regulating the practice of nursing pursuant to Section 20.43 and Chapters 456 and 464, Florida Statutes.

2. Ms. Cassel is and has been at all times material to this case a licensed registered nurse in the State of Florida, having been issued license number RN 9177327.

3. The Intervention Project for Nurses (I.P.N.) is part of the impaired practitioner programs established pursuant to Subsection 456.072(1), Florida Statutes. The mission of I.P.N. is to ensure public health and safety by providing an avenue for swift intervention and close monitoring of nurses whose practice may be impaired due to the use, misuse, or abuse of alcohol or drugs, or a mental and/or physical condition. Any nurse, including employers who are nurses, are required to report any nurse who is in violation of the Nurse Practices Act. Nurses may be referred to I.P.N. instead of being reported to the Board if the violation is associated with impairment due to drugs, alcohol, psychiatric or physical problems. Nurses who are referred to I.P.N. must voluntarily request admission to I.P.N.

4. In 2005, Ms. Cassel was hospitalized after attempting suicide by ingesting alcohol and Amitriptyline. Amitriptyline is an anti-depressant, which Ms. Cassel received after completing an online application listing her symptoms. Ms. Cassel was employed as a registered nurse with the Visiting Nurses Association at the time of her attempted suicide.

5. Following her attempted suicide, Ms. Cassel asked an employee at her work place about a referral program, and Ms. Cassel was given the telephone number of I.P.N.

6. In April 2005, Ms. Cassel contacted I.P.N. to see if I.P.N. had a referral program for depression.

7. When Ms. Cassel initially contacted I.P.N., she was advised by I.P.N. staff that Cherry Pfau from the Visiting Nurses Association had contacted I.P.N. about Ms. Cassel's attempted suicide.

8. After her initial contact with I.P.N., but prior to entering into a contract with I.P.N., Ms. Cassel received an evaluation by an I.P.N. approved evaluator. She was diagnosed with alcohol abuse versus alcohol dependency and major depressive disorder, recurrent, moderate to severe. Prior to entering into the contract, Ms. Cassel began and entered into an intensive outpatient treatment program, which she successfully completed on September 25, 2005.

9. On or about August 2005, Ms. Cassel entered into a five-year I.P.N. advocacy contract with monitoring from August 2005 through August 2010.² Ms. Cassel was provided a Participant Manual as part of the contract. Ms. Cassel read the Participant Manual.

10. The Participant Manual provides:

USE OF MOOD-ALTERING CHEMICALS

1. IPN participants in abstinence contracts are expected to remain free of all mood-altering, controlled, or addictive substances (including alcohol), over-the-counter drugs and prescriptive drugs.
2. IPN does not determine if you can take a mood-altering and/or over-the-counter medication. This is a decision you and your prescribing professional (who is aware of your IPN participation) must make. IPN encourages you and your prescribing professional to explore non-mood-altering alternative methods of pain control to minimize risk to your recovery.
3. If there is a medical need for the use of any mood-altering chemical, you are required to inform your IPN Case Manager as soon as possible, either when prescribed or the next business day. You must submit a fully completed Medication Report form to IPN. If IPN does not receive a completed Medication Report, your use of a prescribed medication may be considered a chemical relapse.
4. In the event a random drug screen is positive and you have not informed IPN of your medication use as required, your use of the medication may be managed as a relapse.
5. You are to refrain from providing patient care when using any prescribed mood-altering medication until authorized to return to practice by IPN. A negative urine drug screen may be required prior to return to patient care.
6. Medically necessary, frequent or extended use of any mood-altering medications will require that an IPN-approved addictionist be involved in your case to monitor your medication management. A performance assessment and/or neuropsychological testing to determine your practice ability may be required.

11. The contract required Ms. Cassel to participate in random drug testing. Testing positive on a random drug test is deemed to be a relapse. The Participant Manual provides:

When relapse has occurred, the IPN participant and employer will be informed that the nurse or CNA must refrain from work until an IPN-facilitated evaluation is completed. . . . Nurses or CNA's who refuse to comply with reevaluation or treatment recommendations will be dismissed from IPN and reported to [Department of Health, Florida Board of Nursing].

12. Ms. Cassel submitted to a random drug screen which returned positive for ethanol in November 2005 while under an abstinence contract with I.P.N. Ms. Cassel attributes the positive test result to her having taken NyQuil for the flu. She did not advise I.P.N. as required by the contract that she had taken the medication, and the use of the NyQuil was managed as a relapse.

13. Ms. Cassel received a telephone call from Lorraine Busch, a case manager with I.P.N., advising Ms. Cassel that she had tested positive for alcohol and that she would need to be reevaluated. Ms. Cassel became angry and asked, "You mean I can't have a glass of wine with dinner?" Ms. Busch reminded Ms. Cassel that she was in an abstinence contract. Ms. Cassel did not tell Ms. Busch that she had taken NyQuil. Ms. Cassel also told Ms. Busch that she was on her way to a job orientation and that she was not going to participate in the I.P.N. any

longer because she did not think that the program was geared for persons suffering from depression. Ms. Cassel was upset, essentially told the I.P.N. case manager that I.P.N. could take the program and "put it where the sun doesn't shine," and hung up on her.

14. Ms. Cassel received a letter from I.P.N. dated November 8, 2005, informing her that, following her positive urine drug screen for alcohol, she was required to refrain from the nursing practice and was required to schedule an evaluation with either Martha Brown, M.D.; Chowallur Chacko, M.D.; or Richard Saini, M.D. Additionally, the letter advised Ms. Cassel that her failure to schedule an appointment or failure to keep a scheduled appointment would result in her immediate dismissal from I.P.N. Ms. Cassel did not schedule and did not appear for an evaluation with any of the evaluators listed in the letter. Ms. Cassel did not refrain from the practice of nursing.

15. Ms. Cassel received a letter from I.P.N. dated November 22, 2005, informing her that she had been dismissed from I.P.N. effective immediately for her failure to comply with the conditions of her I.P.N. advocacy contract. The letter also advised Ms. Cassel that the information in Ms. Cassel's I.P.N. file would be forwarded to the Department in the form of a complaint.

16. Ms. Cassel discontinued her participation with I.P.N. prior to the end of her five-year advocacy contract with I.P.N. She did not successfully complete her five-year monitoring contract with I.P.N.

17. On or about February 10, 2006, the Department, through the designee of the secretary of the Department, issued an Order Compelling an Examination to Ms. Cassel. A Department investigator hand-served Ms. Cassel's attorney with a copy of the Order Compelling an Examination. The order specified that the examination was scheduled for March 7, 2006, at 11:00 a.m., at the offices of David Myers, M.D. Ms. Cassel did not provide a written objection to the Department to the Order Compelling an Examination prior to March 7, 2006. Ms. Cassel did not appear at Dr. Myers' office on March 7, 2006, for the scheduled examination.

18. Ms. Cassel objects to the use of a physician chosen by the Department and wants to use a physician of her own choice for an evaluation.

CONCLUSIONS OF LAW

19. 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. (2008).

20. The Department has the burden of establishing the allegations in the Amended Administrative Complaint by clear and

convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). The Department has alleged that Ms. Cassel has violated Subsections 456.072(1)(q) and 456.072(1)(gg), Florida Statutes, which provide:

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

* * *

(q) Violating a lawful order of the department or the board, or failing to comply with a lawfully issued subpoena.

* * *

(gg) Being terminated from a treatment program for impaired practitioners, which is overseen by an impaired practitioner consultant as described in s. 456.076, for failure to comply, without good cause, with the terms of the monitoring or treatment contract entered into by the licensee, or for not successfully completing any drug treatment or alcohol treatment program.

21. The Department has established by clear and convincing evidence that Ms. Cassel violated Subsection 456.072(1)(q), Florida Statutes. The Department entered an Order Compelling an Examination. Ms. Cassel did not file an objection to the order prior to the scheduled time for examination and did not comply with the order.

22. The Department has established by clear and convincing evidence that Ms. Cassel violated Subsection 456.072(1)(gg),

Florida Statutes. Ms. Cassel was dismissed from I.P.N. for failure to comply with the request to be reevaluated following a positive drug screen for alcohol. Ms. Cassel was aware that her contract with I.P.N. provided that if she tested positive for use of alcohol she would be required to be reevaluated.

23. Ms. Cassel stated that she did not want to be in the program because she did not feel that the program had anything to offer her. Her reason for not complying with her I.P.N. contract did not constitute good cause for failing to comply with the terms of her contract.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Jean Cassel, R.N., violated Subsections 456.072(1)(q) and 456.072(1)(gg), Florida Statutes; suspending her license until she undergoes an I.P.N. evaluation and follows any and all recommendations of I.P.N.; and imposing an administrative fine of \$500.00.

DONE AND ENTERED this 2nd day of September, 2008, 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
Division of Administrative Hearings
this 2nd day of September, 2008.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2005 version.

^{2/} Ms. Cassel had objected to a five-year contract at the time she signed the contract and filed a grievance, requesting that the duration of the contract be for two years. Her request was denied by I.P.N.

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.