

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
BOARD OF NURSING, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-5800PL  
 )  
MICHAEL N. HEIMUR, C.N.A., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On February 12, 2009, a formal administrative hearing in this case was held in Sarasota, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Michael N. Heimur, C.N.A., pro se  
4901 South Salford Boulevard  
North Port, Florida 34287

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

By Administrative Complaint dated June 26, 2008, the Department of Health (Petitioner) alleged that a random drug test administered to Michael N. Heimur (Respondent) reported a positive result for marijuana, in violation of Florida statutes and administrative rules identified in the Complaint.

The Respondent disputed the allegation and requested a formal hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of two witnesses and had three exhibits admitted into evidence. The Respondent testified on his own behalf and had two exhibits admitted into evidence.

A Transcript of the hearing was filed on February 25, 2009. The Petitioner filed a Proposed Recommended Order. The Respondent filed a letter that has been treated as a Proposed Recommended Order. Both were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was a licensed certified nursing assistant, holding Florida license number 113243.

2. On or about December 14, 2008, the Petitioner submitted to a drug screening urinalysis test at the request of an employer, Maxim Healthcare Services (Maxim).

3. The sample was collected at a Maxim facility located at University Park, Florida.

4. The Forensic Drug Testing Custody and Control Form and the urine sample collection container bear handwritten dates of December 13, 2008. At some point, the dates on the form and the container were overwritten to indicate that the sample was collected on December 14, 2008.

5. According to the Respondent's Response to the Petitioner's Request for Admissions, the sample was collected on April 14, 2008.

6. The Petitioner presented an expert witness who testified as to the testing procedures, including custody and storage of the urine samples to be tested. The expert witness' testimony regarding sample collection and transportation, calibration of equipment, sample storage and testing methodology, and reporting of test results, was persuasive and has been fully credited.

7. According to the documentation presented by the Petitioner's expert witness, the sample collection container was received by the testing laboratory on December 15, 2008, with

all transportation packaging and the sample container seal intact.

8. According to the expert witness, the test for which Maxim paid, screened for ten drugs, including marijuana.

9. According to the expert witness, the testing equipment was properly calibrated at the time the Respondent's urine sample was tested.

10. The initial immunoassay test result indicated the presence of a recognized by-product of marijuana (delta nine tetrahydrocannabinol carboxylic acid) in the Respondent's urine sample.

11. Because the first result was positive, a second test was performed using a gas chromatography/mass spectrometry device, which confirmed the presence of delta nine tetrahydrocannabinol carboxylic acid in the Respondent's urine sample.

12. The Respondent denied using marijuana.

13. The Respondent asserted that the test results were inaccurate.

14. The Respondent testified that he had a prescription for, and was taking, hydrocodone at the time he provided the urine sample for the test at issue in this proceeding, but that the test results did not indicate the presence of hydrocodone.

The Respondent asserted that the test result was either the result of lab error or that the sample was not his urine.

15. The Petitioner's expert witness testified that the screening tests purchased by Maxim included limited testing for opiates and would not have indicated the presence of hydrocodone in the Respondent's urine.

16. Although the Respondent testified that he had been told by Maxim personnel that the test results should have revealed the presence of hydrocodone, the Respondent's testimony in this regard was uncorroborated hearsay and was insufficient to support a finding of fact.

17. Although the Respondent asserted that the sample tested was either not his urine or was otherwise tampered with, the evidence failed to support the assertion. There was no evidence that the sample was tampered with in any manner when the sample was obtained or during transportation to the testing laboratory. There was no evidence that the seal on the sample collection container was not intact at the time the sample was provided or transported. There was no evidence that the sample was stored improperly. There was no evidence that the testing equipment was not properly calibrated or that the tests were improperly performed.

18. The Respondent testified, without contradiction, that over the course of 20 years in nursing work both before and

after the tests at issue in this proceeding, his test results have never reported the presence of marijuana.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

20. The Petitioner has the burden of proving by clear and convincing evidence the allegations against the Respondent. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The burden has been met.

21. The evidence clearly and convincingly established that the Respondent's urine sample indicated the presence of a marijuana by-product.

22. The Administrative Complaint alleged that the Respondent violated Florida Administrative Code Rule 64B9-8.005(2)(k), which states in relevant part as follows:

(2) Failing to meet or departing from minimal standards of acceptable and prevailing nursing practice shall include, but not be limited to, the following:

\* \* \*

(k) Testing positive for any drugs under Chapter 893, F.S., on any drug screen when the nurse does not have a prescription and legitimate medical reason for using such drug.

23. Marijuana is a Schedule I substance as set forth at Section 893.03, Florida Statutes (2007). The evidence establishes that the Respondent violated Florida Administrative Code Rule 64B9-8.005(2)(k).

24. The Administrative Complaint alleged that the Respondent violated Subsection 464.018(1)(n), Florida Statutes (2007), which states in relevant part as follows:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

\* \* \*

(n) Failing to meet minimal standards of acceptable and prevailing nursing practice, including engaging in acts for which the licensee is not qualified by training or experience.

25. The evidence establishes that by violating Florida Administrative Code Rule 64B9-8.005(2)(k), the Respondent violated Subsection 464.018(1)(n), Florida Statutes (2007).

26. The Administrative Complaint alleged that the Respondent violated Subsection 464.204(1)(b), Florida Statutes (2007), which states 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.

27. The evidence establishes that the Respondent committed a violation of Subsection 464.204(1)(b), Florida Statutes (2007).

28. In the Proposed Recommended Order, the Petitioner seeks a reprimand, a fine of \$50, and suspension of the Respondent's license until such time as an Intervention Project for Nursing (IPN) evaluation has been completed and the Respondent complies with any conditions resulting from the IPN evaluation. Florida Administrative Code Rule 64B9-8.006(3)(nn) provides that the applicable minimum penalty for a drug screening test violation is a penalty of a \$250 fine, an evaluation by the IPN, and probation. The cited rule provides a maximum penalty of a \$500 fine, denial of licensure, an IPN evaluation, suspension and probation.

29. Based on the facts established during the hearing, and the apparent lack of any previous disciplinary violations, the following recommendation is made.

RECOMMENDATION

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

RECOMMENDED that the Petitioner enter a final order assessing a fine of \$250, requiring completion of an IPN evaluation, and imposing a 12-month period of probation.



DONE AND ENTERED this 31st day of March, 2009, in  
Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

---

WILLIAM F. QUATTLEBAUM  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of March, 2009.

COPIES FURNISHED:

Dr. Ana M. Viamonte Ros, Secretary  
State Surgeon General  
Department of Health  
4052 Bald Cypress Way, Bin A-00  
Tallahassee, Florida 32399-1701

Rick Garcia, MS, RN, CCM  
Executive Director  
Board of Nursing  
Department of Health  
4052 Bald Cypress Way, Bin C-02  
Tallahassee, Florida 32399-1701

Patricia Dittman, Ph.D(C), RN, CDE  
Board of Nursing  
Department of Health  
4052 Bald Cypress Way, Bin C-02  
Tallahassee, Florida 32399-1701

Josefina M. Tamayo, General Counsel  
Department of Health  
4052 Bald Cypress Way, Bin A-02  
Tallahassee, Florida 32399-1701

Megan M. Blanco, Esquire  
Carla Schell, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

Michael N. Heimur, C.N.A.  
4901 South Salford Boulevard  
North Port, Florida 34287

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.