

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF NURSING,)
)
Petitioner,)
)
vs.) Case No. 09-0611PL
)
NANCY ELLEN CUNNINGHAM, R.N.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 15, 2009, a duly-noticed hearing was held by means of video teleconferencing with sites in Daytona Beach and Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Walter T.S. Widener, Esquire
William Freeman Miller, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Paul Kwilecki, Esquire
629 Peninsula Drive
Daytona Beach, Florida 32118

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent committed the violation alleged in the Administrative Complaint and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On October 27, 2008, the Department of Health (Petitioner or Department) filed an Administrative Complaint alleging that Respondent violated Section 464.018(1)(hh), Florida Statutes (2007), by being terminated from a treatment program for impaired practitioners for failure to comply without good cause with the terms of the monitoring or treatment contract or not successfully completing any drug or alcohol treatment program. Respondent filed an Election of Rights disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to Section 120.57(1), Florida Statutes. The case was referred to the Division of Administrative Hearings (DOAH or the Division) for assignment of an administrative law judge.

A Notice of Hearing issued February 13, 2009, scheduling the final hearing for April 15, 2009, by means of video teleconferencing, and the case proceeded as scheduled. At hearing, Joint Exhibit A was admitted into evidence. The Department presented the testimony of two witnesses and Petitioner's Exhibits A through M were admitted into evidence. Respondent testified on her own behalf, but presented no exhibits.

The proceedings were recorded and the Transcript was filed with the Division on May 5, 2009. Proposed Recommended Orders were submitted by both parties on May 14, 2009, and have been carefully considered in the preparation of this Recommended

Order. Unless otherwise indicated, all references to the Florida Statutes are to the codification in effect at the time of the conduct giving rise to this proceeding, i.e., 2007.

FINDINGS OF FACT

1. Respondent is a licensed registered nurse in the State of Florida, holding license number RN 2802012.

2. In late 2004, Respondent was employed as a nurse by Florida Hospital Deland. At that time, Respondent was experiencing a problem with alcohol use that resulted in complaints of alcohol on her breath when she reported to work and possible intoxication on the job.

3. As a result, she was referred to the Employee Assistance Program (EAP) at the hospital, and suspended from work for a period of three days. The EAP Program referred her to the Intervention Project for Nurses (IPN).

4. IPN is an alternative to discipline program established by legislation in 1983. It is a program authorized pursuant to Section 456.076, Florida Statutes. IPN works through a contract with the Department of Health, Board of Nursing and monitors nurses with substance abuse, dependence, psychiatric illnesses, physical illnesses, and sexual misconduct issues and attempts to assure that licensees with the above-referenced problems are receiving adequate treatment and are safe to practice.

5. On December 8, 2004, Respondent was evaluated by Nancy Ackerman of the Orlando Regional Chemical Dependency Program. Respondent was diagnosed with alcohol dependence, rule out depression, chemical dependency. Based upon this evaluation and diagnosis, the IPN Treatment Team recommended that Respondent receive intensive outpatient treatment, no less than 3 days per week, and contract with IPN for monitoring.

6. The length of a contract with IPN depends on the diagnosis a participant receives. If a participant is diagnosed with alcohol abuse, the contract is generally for two years, with review for completion after one year of compliant monitoring. A diagnosis of alcohol dependence, as with Respondent, requires a five-year contract. The difference between the two contracts is based upon the difference in criteria for the two diagnoses.

7. Consistent with the criteria in the Diagnostic and Statistical Manual IV (DSM-IV), dependence has more factors to consider in terms of consequences for alcohol use. A longer contract for persons with a dependence diagnosis is geared toward reducing the chance of relapse by providing for a longer monitoring period.

8. On or about January 28, 2005, Respondent voluntarily entered into a monitoring contract with IPN. As part of her contract, she was required to complete intensive outpatient treatment, attend weekly nurse support group meetings, attend AA/NA meetings, and participate in random drug testing.

9. At the time Respondent signed her contract with IPN, she was provided with a copy of the Participant Manual, which outlines IPN's policies and requirements.

10. IPN uses urine drug screens to determine whether a participant is using mood-altering drugs or alcohol.

11. A urine sample is considered to be too dilute for testing if the creatinine and specific gravity levels are low. When a sample is too dilute for testing, there is a concern that the sample can be masking the use of a mood-altering substance.

12. For the period from February 2, 2005, to March 31, 2008, Respondent provided 44 urine samples for random drug screening. The majority of her urine samples registered low creatinine levels but were sufficient for testing purposes. Of those 44 samples, however, eight were too dilute for testing. Those urine screens were submitted on the following dates: March 28, 2007; June 25, 2007; September 25, 2007; October 5, 2007; October 23, 2007; December 27, 2007; January 14, 2008; and February 5, 2008.

13. When a participant has a urine specimen that is too dilute for testing, IPN's policy is to contact the participant to submit to an additional test. If two specimens in a row are dilute, IPN will send a warning letter to the participant, counseling them about the need to have the urine samples provided first thing in the morning and advising the participant to decrease their water intake before providing the sample. This

letter also advises the participant that there may be a physical condition causing the dilute specimens that should be evaluated. If there is a second incident where two consecutive drug specimens are too dilute for testing, the participant would receive a second letter advising them that the dilute urine samples cannot be treated as a negative drug screen, and advising the participant to schedule an appointment with his or her medical provider to rule out a physical cause for the dilute specimens.

14. On October 5, 2007, Respondent submitted a urine sample that was too dilute for testing. It was her second consecutive dilute sample. Consistent with IPN policy, on October 9, 2007, Lorraine Busch, Respondent's Case Manager, sent her a letter advising her that she had submitted two consecutive dilute samples. The letter advised,

Dilute urine drug screens may indicate a physical condition that you should have evaluated. For urine drug screen purposes, IPN recommends that you attempt to give the most concentrated specimen possible in order to avoid questions about the accuracy of your urine drug screen.

You may need a physical examination to determine if there is a physiological basis for your urine to be dilute. If you are someone who ingests a lot of fluids, you may need to cut down on your intake of liquids several hours prior to your urine drug screen. You may also want to try to submit an early morning urine specimen, which tends to be more concentrated.

15. There is no clear indication how Respondent responded to this letter. However, on February 5, 2008, and February 13, 2008, Respondent again had consecutive urine specimens that were considered dilute. On February 26, 2008, Ms. Busch wrote to Respondent, advising her that the clinical team had discussed her recurrent dilute urine specimens and directed her to schedule an appointment with her primary care provider to discuss the issue. She also provided a letter to present to the Respondent's primary care provider, which requested a comprehensive physical exam to determine if there was a physical condition causing the recurrent dilute screens. The letter requested that results of the physical exam be sent to the IPN office, along with the primary care provider's impression regarding any physical condition that may produce the results.

16. Respondent made an appointment to see her primary care provider, Dr. Patel. A urinalysis was performed and the results forwarded to IPN which indicated normal levels. However, Respondent took issue with IPN's directions and Dr. Patel's suggested course of action, and on March 28, 2008, wrote to her Case Manager, stating in pertinent part:

I feel the need to communicate to IPN of how insane I believe the request for a humane being to be subjected to the medical system for tests no one knows nothing about. To imply someone might have a physical problem is a psychic hit. How many times we have seen Drs. think they know something and so surg and nothing there and they die.

With more people in holistic health & science, we know if you tell someone they are sick they become sick. The mind, body conscience is an amazing study.

I am sending you information on the water I drink. I eat a healthy diet. Excercise. I feel great. I went to my primary Dr. and got an urinalysis. After decreasing my water intake x 1 week. My specific gravity remains <. He doesn't know why. The next thing he would order another urinalsis with complete dehydration x 24 hours. Now I am asking IPN in their group conscience if this is something they want to be a part of to another human being.

It is against my spritual beliefs to be submitted to the medical system and unneeded tests.

I am very grateful to IPN I was very lost & didn't know what to do. You showed me the way. The knowledge, wisdom & higher consciencness that is achievable is amazing. Thanks to yall, I am able to share it. Thanks for letting me share. (Spelling and grammar as in original.)

17. On April 22, 2008, Ms. Busch responded to Respondent's letter, reminding her that the urine drug screen is an important monitoring tool and a part of the contract Respondent signed. Ms. Busch instructed Respondent to have Dr. Patel send documentation to IPN indicating whether or not he feels there is a diagnosis to support her dilute urine drug screens.

18. Ms Cunningham sent another letter dated April 15, 2008, and received by IPN on April 22, 2009, stating:

I am requesting an early end to my contract. My enrollment as student healer, medium, & minister will be very involved with classes and study. This is my chosen path now. I prefer to keep an untarnished nursing

license, however its in Gods hands now. I thank you for putting me towards my path.

19. Generally, a participant in IPN is allowed to terminate his or her contract early for good cause. A participant is considered to have good cause for early termination when he or she is deployed for active duty in the armed forces. Compassionate release is also allowed when a nurse is no longer physically or mentally able to practice his or her profession and will not be practicing as a nurse ever again. Personal feelings toward the practice of traditional medicine, the desire to consume large quantities of oxygenated water, making healthy lifestyle changes, a reluctance to submit to physical examinations or taking classes toward spiritual pursuits are not considered good cause for early termination of the IPN contract.

20. The Participant Manual which Respondent received specifically addresses failure to progress and dismissal from the IPN program. The Manual provides in pertinent part:

Failure to progress is defined as IPN Advocacy Contract noncompliance that results in dismissal from IPN and subsequent report to the DOH/BON. The primary elements indicating failure to progress are:

1. Failure to comply with terms of your IPN Advocacy Contract and the requirements of IPN participation.
2. Failure to obtain IPN facilitated evaluation(s) and/or comply with treatment as recommended by evaluator(s) and required for IPN participation.

3. Unacceptable or limited demonstration of progress as determined by the IPN clinical team and treatment providers.

The statutes and rules that govern IPN mandate that IPN participants must demonstrate progress while being monitored by IPN. By law, any IPN participant is to be reported to DOH/FDON if failure to progress occurs.

* * *

DISMISSAL

Specific circumstances which are considered grounds for dismissal of an IPN participant include:

1. Non-compliance with the IPN Advocacy Contract.
2. Failure to progress.
3. Attempting to work or working in nursing without IPN approval.
4. Relocation outside of the State of Florida without IPN approval.
5. Request for dismissal by the IPN participant.

At the time of dismissal, IPN will forward a written report to the DOH/FBON with information regarding any alleged violations of the Nurse Practice Act, reasons for dismissal, and any safety concerns the dismissed nurse may present. . . .

21. Consistent with IPN policy and the express terms of the Participation Manual, on April 22, 2008, Respondent was advised by letter that her request for early termination of her contract had been denied, and that she needed to complete her contract, which would end January 20, 2010. She was reminded that "[s]ince IPN is a voluntary program, if you wish to discontinue participation, you may do so. However, as you know, your file

will be sent to the Department of Health for whatever action they deem appropriate."

22. On April 24, 2009, Respondent again wrote to her Case Manager, stating,

I have decided to discontinue my participation in IPN after much prayer and meditation. I live to share experience strength & hope, actively in AA and to everyone. Its wonderful to live your spitual Truths. I will remain forever grateful to IPN for showing me how to get help. I had so much fear then, today its faith experience strength & hope. (Spelling and grammar as in original.)

Thanks again,

Nancy Cunningham

23. As a result, on April 29, 2009, Ms. Busch sent Respondent a letter notifying her that she had been dismissed from the IPN effective immediately for failure to comply with the conditions of her contract. She was also notified that her file would be forwarded to the Department of Health.

CONCLUSIONS OF LAW

24. 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 (2008).

25. Petitioner is the state agency charged with the licensing and regulation of nursing pursuant to Section 20.43 and Chapters 456 and 464, Florida Statutes.

26. Because this is a license disciplinary proceeding,

Petitioner has the burden to prove the allegations against Respondent by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

27. The Administrative Complaint charged Respondent with violating Section 456.072(1)(hh), Florida Statutes, which provides:

456.072 Grounds for discipline; penalties; enforcement.--

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

* * *

(hh) 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 monitoring or treatment contract entered into by the licensee, or for not successfully completing any drug treatment or alcohol treatment program.

28. The Department has proven the allegations in the Administrative Complaint by clear and convincing evidence. The terms of Respondent's IPN contract make it abundantly clear that submission of urine specimens for testing is an essential aspect of her contract with IPN. It is also abundantly clear that the specimens submitted must be suitable for testing. IPN's policies for dealing with dilute specimens are reasonable and necessary to insure that appropriate monitoring of drug and alcohol use may take place.

29. Respondent's reasons for not wanting to comply with IPN's request for consultation with her physician would not be good cause. She was not deployed by the military and she was not prevented from practicing nursing by reason of a physical or mental disability. She simply did not want to do what was requested of her, despite the terms of her IPN contract, which she entered voluntarily. However, the Department made it clear at hearing that she was not dismissed for failure to follow her doctor's suggestions. She was dismissed from the IPN program because she chose to be dismissed. Quite simply, she no longer wanted to comply with IPN's requirements and chose not to do so.

30. Respondent has argued that her compliance for approximately three years of her five-year contract should be considered substantial compliance. This claim is without merit. As stated in the findings of fact, the contract for those nurses suffering from alcohol dependence is five years because of considerations listed in the DSM-IV, and the many life situations that could lead a participant to relapse. Further, nearly 20 percent of her urine specimens submitted for testing during the course of her contract were too dilute for monitoring purposes. Her resistance to any sort of testing to ensure that there was no physiological basis for these dilute screens, coupled with the repetitive nature of dilute screens and her decision to no longer submit to the requirements of the program, is inconsistent with the claim of substantial compliance.

31. The Board of Nursing has adopted Florida Administrative Code Rule 64B9-8.006, which identifies the range of penalties for violations of Chapters 456 and 464, Florida Statutes. The rule also identifies aggravating and mitigating circumstances to consider in determining the appropriate penalty to be imposed. The minimum penalty for a first violation of Section 456.072(1)(hh) is a \$250 fine and suspension until successful completion or receipt of written confirmation from the treatment program that further treatment is neither required nor indicated.^{1/} No significant evidence of aggravating or mitigating factors has been identified.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered finding that Respondent has violated Section 456.072(1)(hh), Florida Statutes; imposing a \$250 fine; and suspending Respondent's license until such time as she undergoes an IPN evaluation and complies with any and all recommendations IPN may make, including resumption of her IPN contract, consistent with Florida Administrative Code Rule 64B9-8.006(1)(d).

DONE AND ENTERED this 9th day of June, 2009, in Tallahassee,
Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 2009.

ENDNOTE

^{1/} The rule identifies the violation as §456.072(1)(gg), Fla. Stat. However, the violation was renumbered in § 456.072 as (hh) in 2006. §2, Ch. 2006-207, Laws of Fla. The rule has not been amended since that time.

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.