

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF NURSING,)
)
Petitioner,)
)
vs.) Case No. 09-4301PL
)
DONNA K. STEVENS, C.N.A.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 20, 2009, a duly-noticed hearing by video teleconference was held with sites in Tallahassee and Gainesville, Florida, before Lisa Shearer Nelson, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael G. Lawrence, Jr., Esquire
William F. Miller, Esquire
Department of Health
4052 Bald Cypress Way Bin C-65
Tallahassee, Florida 32399

For Respondent: Donna K. Stevens, pro se
Post Office Box 402
McIntosh, Florida 32664

STATEMENT OF THE ISSUES

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

PRELIMINARY STATEMENT

On April 27, 2009, the Department of Health filed an Administrative Complaint against Respondent, Donna Stevens, alleging violations of Section 464.204(1)(b), Florida Statutes (2007, 2008)^{1/} and Section 456.072(1)(q), Florida Statutes. Respondent disputed the allegations and requested a hearing pursuant to Section 120.57(1), Florida Statutes. On August 13, 2009, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On August 24, 2009, a Notice of Hearing by Video Teleconference was issued setting the hearing for October 20, 2009. Petitioner filed Petitioner's Motion for Official Recognition on October 12, 2009, requesting official recognition of Sections 20.43, 464.204, 456.072, and Section 456.002(4), Florida Statutes, and Florida Administrative Code Rule 64B9-15.009. The Motion was granted at the commencement of the hearing, which proceeded as scheduled.

At hearing, Petitioner presented testimony of Shaila Washington, and Petitioner's Exhibits 1-4 were admitted into evidence. Respondent testified on her own behalf and submitted no exhibits. The proceedings were recorded and the Transcript was filed with the Division on November 2, 2009. Although afforded the opportunity to do so, Respondent indicated at hearing that she would not file a proposed recommended order and has not done so. Petitioner timely filed a Proposed Recommended

Order, which has been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating the practice of nursing assistance pursuant to Section 20.43 and Chapters 456 and 464, Florida Statutes.

2. At all times relevant to these proceedings, Respondent was a certified nursing assistant, having been issued license number 84961. Her address with the Department of Health is Post Office Box 402, McIntosh, Florida 32664.

3. On June 25, 2007, a Final Order was entered by the Board of Nursing against Respondent.

4. The Final Order required Respondent to pay a fine of \$50.00, enroll in and successfully complete courses in Legal Aspects for Nursing Assistants, and placed Respondent on probation for two years.

5. A condition of the two-year probation was "[w]hether employed as a nurse or not, the licensee shall submit written reports to the Nursing Compliance Officer which shall contain the licensee's name, license number, and current address; the name, address, and phone number of each current employer; and a statement by the licensee describing her employment. This report shall be submitted to the Nursing Compliance Officer every three (3) months in a manner as directed by the Nursing Compliance Officer." (Emphasis supplied.)

6. Respondent's probation required that she "be responsible for assuring that reports from nursing supervisors will be furnished to the Nursing Compliance Officer every three (3) months. That report shall describe the licensee's work assignment, work load, level of performance, and any problems."

7. Quarterly self-reports and reports from her nursing supervisor, if any, were due to the Department on September 24, 2007, December 24, 2007, March 24, 2008, June 24, 2008, September 24, 2008, December 24, 2008, March 24, 2009, and June 24, 2009.

8. Failure to comply with the terms of probation contained in the Final Order without prior written consent from the Board of Nursing was a violation of Respondent's probation.

9. As part of the Final Order a Notice of Appeal Rights was included, indicating that Respondent had 30 days to file a Notice of Appeal with the clerk of the department pursuant to Section 120.68, Florida Statutes, if she wanted to challenge the Final Order.

10. Shaila Washington, a compliance officer for the Board of Nursing, was Respondent's compliance officer.

11. As Respondent's compliance officer, Ms. Washington mailed Respondent the Board of Nursing's standard information packet on July 18, 2007. The packet outlines the terms imposed by the Board and summarizes what the Respondent needed to do in order to comply, including definite due dates listed above.

The letter accompanying the information packet states in bold, "Remember, it is your responsibility to read the final order and ask questions if you do not understand it."

12. Respondent did not contact her compliance officer regarding the information packet mailed to her. She also did not appeal the final order.

13. Ms. Washington testified, and Respondent confirmed, that Respondent failed to submit any of the quarterly reports, by Respondent or any supervisor, as required pursuant to the terms of Respondent's probation.

14. Respondent stated that she did not file any of the reports because she was not working as a CNA. However, the Final Order was clear that even if Respondent was not employed, she was required to follow the probation terms and submit the reports.

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 (2009).

16. Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint 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).

17. Clear 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 lacking in confusion as to the facts at issue. The evidence must be of such a 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983).

18. Sections 456.072 and 464.204, Florida Statutes, give the Board of Nursing the power to impose disciplinary sanctions on a certified nursing assistant for specified violations of the Nursing Practice Act.

19. The Administrative Complaint alleges Respondent violated Sections 464.204(1)(b) and 456.072(1)(q), Florida Statutes. Section 464.204(1)(b) provides in pertinent part:

(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.

20. Section 456.072(1)(q), Florida Statutes, provides:

(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 of the department.

21. In this case, Respondent admits she did not send in the quarterly reports because she was not working at the time.

22. However, the Final Order clearly states "whether employed as a nurse or not" before describing the reporting requirements.

23. Respondent's failure to submit personal reports constitutes an intentional failure to comply with the Final Order of the Board of Nursing.

24. The Final Order of the Board of Nursing is a lawful order of the board as defined in Section 456.072(1)(q), Florida Statutes.

25. A violation of Section 456.072(1)(q), Florida Statutes (2008), is also a violation of Section 464.204(1)(b), Florida Statutes (2008).

26. Therefore, Respondent is guilty of a violation of both Sections 456.072(1)(q) and 464.204(1)(b), Florida Statutes.

27. Florida Administrative Code Rule 64B9-15.009(3)(n) provides guidelines for disciplining a person guilty of violating Section 456.072(1)(q), Florida Statutes. Rule 64B9-15.009(3)(n) provides that for a first time offense, the penalty ranges from a "\$50 fine and compliance with rule or terms of prior order [to a] \$100 fine and suspension until compliance with rule or terms of prior order." The Department's recommended penalty in this case

is consistent with the Disciplinary Guidelines, and is appropriate.

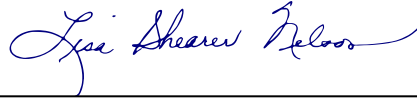
RECOMMENDATION

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

RECOMMENDED:

That the Florida Board of Nursing enter a Final Order finding that Respondent has violated Section 464.204(1)(b) and Section 456.072(1)(q), Florida Statutes. It is further recommended that Respondent's license to practice nursing assistance be reprimanded and that Respondent's license be suspended, with the suspension stayed for 60 days to allow Respondent to comply with the terms of the Board's prior Final Order. If within 60 days Respondent has not complied with the terms of the Board's prior Final Order, it is recommended that the stay will be lifted and the suspension be imposed. The suspension will be lifted upon Respondent's compliance with the Board's prior Final Order.

DONE AND ENTERED this 3rd day of December, 2009, in
Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
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 3rd day of December, 2009.

ENDNOTE

^{1/} The Administrative Complaint alleges both years of the Florida Statutes. With the exception of substituting "State Surgeon General" for "Secretary of the Department" in Section 456.072, there are no changes in any of the statutory provisions at issue in this case. All references shall be to the 2007 Statutes unless otherwise noted.

COPIES FURNISHED:

Michael G. Lawrence, Jr., Esquire
William F. Miller, Esquire
Department of Health
4052 Bald Cypress Way Bin C-65
Tallahassee, Florida 32399

Donna K. Stevens, C.N.A.
Post Office Box 402
McIntosh, Florida 32664

R. S. Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1703

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.