

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
NURSING,)
)
Petitioner,)
)
vs.) Case No. 10-0855PL
)
FEDELINE GEORGES, C.N.A.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 1, 2010, in Lakeland, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas L. Dickens, Esquire
William Miller, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Bradley Laurent, Esquire
550 Bumby Avenue, Suite 280
Orlando, Florida 32803

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Subsections 464.204(1)(b) and 464.018(1)(h), Florida Statutes

(2008),¹ and Florida Administrative Code Rule 64B9-8.005(1)(h), and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On December 17, 2009, the Department of Health (Department) filed an Administrative Complaint before the Board of Nursing (Board), alleging that Respondent, Fedeline Georges, C.N.A. (Ms. Georges), violated Subsections 464.204(1)(b) and 464.018(1)(h), Florida Statutes, and Florida Administrative Code Rule 64B9-8.005(1)(h), by stealing a patient's wallet. Ms. Georges requested an administrative hearing, and, on February 17, 2010, the case was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the final hearing.

On March 17, 2010, the Department filed a Motion for Taking Official Recognition of Subsections 464.204(1)(b) and 464.018(1)(h) and Section 20.43, Florida Statutes, and Florida Administrative Code Rules 64B9-8.005(1)(h) and 64B9-8.006. The motion was granted by Order dated April 6, 2010.

A telephonic pre-hearing conference was held on March 18, 2010. The parties agreed at the pre-hearing conference that a patient who would be testifying at hearing could testify through the use of a "word board" because of her limited ability to communicate orally. The parties agreed that the witness would touch letters on the word board in response to questions and

that the undersigned would read the letters to which the witness pointed.

During the pre-hearing conference, the Department made an ore tenus motion to correct a scrivener's error in the Administrative Complaint. The motion was granted, and the Department filed its Amended Administrative Complaint on March 18, 2010.

At the final hearing, the parties agreed to certain facts contained in Section E of each of the parties' unilateral pre-hearing statements. Those facts have been incorporated into this Recommended Order, to the extent relevant.

At the final hearing, the Department called the following witnesses: Christina Barrett, Sherry Harden, Pamela Rawlinson, and T.K. Petitioner's Exhibits 1 through 3 were admitted into evidence. At the final hearing, Ms. Georges testified in her own behalf and presented no exhibits for admission into evidence.

The one-volume Transcript was filed on April 14, 2010. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. The Department filed Petitioner's Proposed Recommended Order on April 26, 2010, and Ms. Georges filed her proposed recommended order on April 8, 2010. Both parties' proposed recommended orders have been given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

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

2. At all times material to this proceeding, Ms. Georges was a certified nursing assistant (CNA) within the State of Florida, having been issued license number CNA 139966.

3. On May 10, 2009, Ms. Georges was employed at Valencia Hills Health and Rehabilitation Center (Valencia Hills) in Lakeland, Florida, as a CNA.

4. T.K. is a patient at Valencia Hills and suffers from a muscular disease, which prohibits her from being able to communicate orally. At the final hearing, T.K. appeared to be mentally alert and responded well to the questions being asked of her. She communicates through the use of a word board, which contains letters of the alphabet and numbers. When she wants to communicate, she points to the letters of each of the words she is trying to convey. She can convey affirmative and negative answers with nods and shakes of her head. T.K. is not ambulatory.

5. On May 10, 2009, Ms. Georges worked a double shift at Valencia Hills from 3:00 p.m. to 11:00 p.m. and from 11:00 p.m. to 7:00 a.m. She was assigned to T.K. for both shifts. Ms. Georges was not regularly assigned to provide care for T.K.,

and her assignment on May 10, 2009, was only the second time that she had provided care for T.K.

6. Sometime during the day of May 10, 2009, T.K. left the facility and visited with her family. She returned to the facility and went to bed around 10:30 p.m. She was tired, but did not fall asleep immediately.

7. T.K. kept her wallet and her cellular telephone in her purse at the foot of her bed. Around 10:45 p.m. on May 10, 2009, T.K. saw a shadow of a person taking the wallet from T.K.'s purse and placing the wallet inside the waist of the person's pants. T.K. identified the shadow as Ms. Georges based on Ms. Georges' hair. T.K. did not report the theft until the following morning when she was brought her breakfast. T.K. did not report the theft earlier because she was tired and wanted to sleep.

8. On the morning of May 11, 2009, T.K. advised Shirley (last name unknown), who was the activities assistant at Valencia Hills, that her wallet had been stolen by Ms. Georges. T.K. told Shirley that there was ten dollars in her wallet. T.K. also told Sherry Harden that her wallet had been taken and the amount of money that was in the wallet. Ms. Harden was a nurse manager at Valencia Hills and was in charge of managing nurses and CNAs.

9. Ms. Harden notified the assistant director of nursing at Valencia Hills and the risk manager. The police were notified that a possible theft had occurred and Officer Christina Barrett was dispatched to Valencia Hills to investigate.

10. Officer Barrett talked to T.K., who identified Ms. Georges as the person who took her wallet. After obtaining Ms. Georges' telephone number from staff at Valencia Hills, Officer Barrett called Ms. Georges and asked to meet with her. Officer Barrett went to Ms. Georges' home and told Ms. Georges that T.K. had accused her of taking T.K.'s wallet. Ms. Georges' first response was not a denial of the allegation, but the following statement: "How can she report that, she cannot even speak?" To Officer Barrett, Ms. Georges appeared that she "was more concerned about [T.K.'s] inability to be able to report this crime versus her [Ms. Georges'] involvement in it."

11. Ms. Georges returned to Valencia Hills, where Officer Barrett, T.K., Ms. Georges, and staff from Valencia Hills met in a vacant patient's room to discuss the issue. Ms. Georges became agitated and at one point stated: "I can't believe that you are going to charge me for ten dollars?" Ms. Georges claims that Officer Barrett had told her the amount of money that was in the wallet. In response to the question at final hearing of whether she had told Ms. Georges the amount of money in the

wallet, Officer Barrett replies: "Not that I recall." There is no reference in Officer Barrett's report concerning the amount of money that was in the wallet or that she told Ms. Georges the amount. Ms. Harden, who knew the amount of money in the wallet, did not tell Ms. Georges how much was in the wallet.

12. During the interview, Ms. Georges became confrontational with T.K. to the point that the assistant director of nursing had Ms. Georges escorted from the facility. Ms. Georges attempted to reenter the room where the interview was being held and was again escorted from the facility. Ms. Georges' employment at Valencia Hills was terminated because of her actions during the interview.

13. Ms. Georges told Officer Barrett that she had found T.K.'s cellular telephone and her wallet in a bag with some urine-soaked clothes that T.K. had brought back from her trip home that day. According to Ms. Georges, she put the wallet in the cabinet next to T.K.'s bed. T.K. told Officer Barrett that Ms. Georges did not place the wallet in the cabinet. At the final hearing, T.K. testified that Ms. Georges put the wallet in her pants. Having observed the demeanor of the witnesses, Ms. Georges' testimony that she put the wallet in the cabinet is not credited.

14. At the final hearing, T.K. was adamant that she saw Ms. Georges take her wallet. T.K. physically pointed to

Ms. Georges at the final hearing, identifying her as the culprit. Despite her difficulties in communicating, T.K. did not waiver from her identification of Ms. Georges. T.K.'s testimony is credited that Ms. Georges stole her wallet.

CONCLUSIONS OF LAW

15. 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. (2009).

16. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

17. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing' . . . 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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

Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983); see also In re Adoption of Baby E. A. W., 658 So. 2d 961, 967 (Fla. 1995)("The evidence [in order to be clear and convincing] must be of sufficient weight to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991). Shore Village Property Owners' Ass. Inc. v. Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002).

18. The Department alleges that Ms. Georges violated Subsection 464.204(1)(b), Florida Statutes, which provides that the intentional violation of any provisions of Chapters 464 and 456, Florida Statutes, or the rules promulgated by the Board is a ground for discipline. The Department also alleges that Ms. Georges violated Subsection 464.018(1)(h), Florida Statutes, which provides that unprofessional conduct as defined by the Board's rules shall constitute a ground for disciplinary action. The Department alleges that Ms. Georges has violated Florida Administrative Code Rule 64B9-8.005(4), which provides that unprofessional conduct includes stealing from a patient.

19. The evidence is clear and convincing that Ms. Georges took T.K.'s wallet while under her care at Valencia Hills. The Department has established that Ms. Georges has committed unprofessional conduct as defined by Florida Administrative Code Rule 64B9-8.005 and, therefore, is guilty of violating Subsections 464.204(1)(b) and 464.018(1)(h), Florida Statutes.

20. Based on the disciplinary guidelines set forth in Florida Administrative Code Rule 64B9-8.006, an appropriate penalty would be imposition of a \$250.00 administrative fine and placing Ms. Georges on probation for two years under conditions prescribed by the Board.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Ms. Georges violated Subsections 464.204(1)(b) and 464.018(1)(h), Florida Statutes, and Florida Administrative Code Rule 64B9-8.005; imposing an administrative fine of \$250; and placing Ms. Georges on probation for two years under conditions as prescribed by the Board.

DONE AND ENTERED this 17th day of May, 2010, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
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 17th day of May, 2010.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida
Statutes are to the 2008 version.

COPIES FURNISHED:

Bradley Laurent, Esquire
550 Bumby Avenue, Suite 280
Orlando, Florida 32803

Thomas L. Dickens, Esquire
William Miller, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

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

Dr. Jessie M. Colin, RN, Chair
Board of Nursing
Department of Health
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701

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.