STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF NURSING,	)	
Petitioner,	)	
vs.	)	Case No. 10-3121PL
DONALD HUGH TAYLOR, R.N.	)	
Respondent.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee, Florida, on August 16, 2010. The parties, attorneys for the parties, witnesses, and court reporter participated by videoconference in Miami, Florida.

APPEARANCES

For Petitioner: William F. Miller
R. Kathleen Brown-Blake
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Prosecution Services Unit
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For Respondent: Donald Hugh Taylor, *pro se*
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STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of failing to meet minimal standards of acceptable and prevailing nursing practice, in violation of Section 464.018(1)(n), Florida Statutes, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated April 13, 2010, Petitioner alleged that, on July 2, 2009, while employed as a registered nurse at North Shore Medical Center in Miami, Respondent was assigned to care for patient L. V. in the telemetry unit. After applying leads to L. V.'s arm, Respondent allegedly sat on her bed and rubbed her arm. The Administrative Complaint alleges that these actions made L. V. uncomfortable, so she told him to stop rubbing her arm, but Respondent continued to do so. Respondent allegedly stopped rubbing L. V.'s arm and stood up when L. V.'s roommate opened the curtains to see what was happening.

The Administrative Complaint alleges that Respondent violated the cited statute by rubbing L. V.'s arm and not stopping after she told him to stop touching her. The Administrative Complaint seeks penalties ranging from reprimand to revocation.

At the hearing, Petitioner called three witnesses and offered into evidence two exhibits. Respondent called three

witnesses and offered into evidence one exhibit. With the consent of the Administrative Law Judge, Petitioner took a post-hearing deposition and filed the transcript as an additional exhibit. All exhibits were admitted except that Petitioner Exhibit 1 was not admitted for the truth and Respondent Exhibit 2 was proffered.

The court reporter filed the Transcript on September 2, 2010. The parties filed Proposed Recommended Orders by September 10, 2010.

FINDINGS OF FACT

1. At all material times, Respondent has been a licensed registered nurse, holding license number RN 9212031. He has not been previously disciplined.

2. On July 2, 2009, Respondent was employed at the North Shore Medical Center in Miami and assigned to the telemetry unit. He was working at the time of patient L. V.'s arrival in the unit shortly after 3:00 a.m. L. V. was assigned to a semi-private room, which she shared with patient M. M.

3. L. V. had been admitted to hospital emergency room late the preceding day with shortness of breath and chest pains. L. V. has a heart condition and had previously been hospitalized for these symptoms.

4. After introducing himself to L. V., Respondent applied the leads of a heart-monitoring device to L. V.'s chest. This

required that he touch the flesh of L. V.'s breasts. Based on her prior experience with having leads placed on her breasts, L. V. did not think at the time that this touching was inappropriate. Respondent had some difficulty applying the leads, including a claim of a dead battery, but L. V. was untroubled by this part of her treatment.

5. Respondent then assessed L. V. This process required Respondent to conduct a physical examination and take a medical history. In conducting the physical examination, Respondent had to touch L. V., such as placing a stethoscope to the chest of the patient, and he had to ask some personal questions. Again, L. V. testified that nothing in this part of her treatment made her uncomfortable.

6. During the assessment, Respondent had drawn closed the curtains surrounding L. V.'s bed. This is consistent with hospital policy to respect the privacy of its patients. Hospital policy also requires that the employee open the curtains if the patient requests, but L. V. did not ask Respondent to open the curtains.

7. Much of the time that Respondent had been attending to her, L. V. had been watching a movie on her personal DVD player. After completing the assessment, Respondent sat down beside L. V., on her bed, which is in violation of hospital policy, and began to rub her arm in a soft, caressing manner, which is also

in violation of hospital policy. As he did so, he leaned over to view the DVD screen and asked what L. V. was watching. She replied by naming the movie. Respondent asked if they could watch a movie together and whether L. V. had any x-rated movies.

8. L. V. told Respondent that she did not watch that kind of movie and he needed to go back to work. Pulling her arm away, L. V. shouted, "no," clearly meaning for Respondent to stop rubbing her arm. Respondent whispered, "shh," and continued to rub her arm. L. V. loudly shouted, "no" a second time.

9. Although M. M. could not hear the conversation between L. V. and Respondent, she had heard the first "no." She attributed it to a patient who was resisting a painful procedure, such as the insertion of an IV line. When she heard the second "no," M. M. leaned over and snatched open the curtains.

10. As the curtains opened, Respondent jumped up off the bed, revealing to both women an erection in his pants. M. M. shouted, "pervert," as Respondent scurried from the room.

11. These findings are based on the testimony of L. V., M. M., and Respondent. As noted below in the detailing of Respondent's testimony, it is not entirely clear what he is claiming that he did not do, although he seems to be contending that he never stroked L. V.'s arm after she told him "no."

However, Respondent admits to sufficient facts to erase any doubts about essentially what took place.

12. Respondent's admissions are important because none of the three main witnesses is entirely credible. Respondent and M. M. were evasive. L. V. and M. M. offered testimony that was, at certain points, implausible. L. V. was accompanied at the hearing by her personal attorney, suggesting that all of the litigation arising out of this incident will not end with the final order in this case.

13. One of the most jarring aspects of the testimony of L. V. and M. M. is the incongruity between the fear that they claim they felt at the time of the incident and the anger and disbelief--but not fear--that they displayed while testifying about the incident. It is impossible to watch either woman testify about the incident and believe that she felt even a passing fear at the time of the incident or at any time after the incident.

14. Each time L. V. or M. M. demonstrated the "no" vocalized by L. V. that morning, the result was a loud, angry shout. Perhaps this fact may be discounted due to an inability of either witness to inject fear into her voice (but not, more broadly speaking, to act). However, the two witnesses recounted their roles in repudiating Respondent so as to suggest their joint triumph over the pathetic attempt of Respondent to engage

L. V. sexually while she was a patient in his care. L. V. angrily dismissed Respondent from her room, and M. M. denounced him as a "pervert." In contrast to the fear and trauma that L. V. and M. M. claimed to have suffered stands their recollection that L. V. had to ask M. M. if she had dreamed the incident or if it had really happened.

15. The testimony of L. V. and M. M., especially the latter, is also undermined by inconsistencies. M. M. testified at different times to two and three shouts of "no." M. M. testified that she heard Respondent make the remark about the x-rated movies during one of his return visits to the room after the incident; L. V. testified that Respondent made the remark while seated beside her on her bed. L. V. claims that she left her street clothes on under her gown due to fear of Respondent, even though it appears that she would have replaced her clothes with a hospital gown in the hours that she had been in the hospital prior to the incident.

16. Most importantly, the testimony of L. V. and M. M. is undermined by its implausibility concerning what they did after the incident. Each witness tried to depict the two of them, huddled helplessly in the darkened room, fearing the return of Respondent and sleeping in shifts. However, M. M. had a different nurse, who, she reported, never responded to any of her multiple activations of the nurse-call button. M. M.

eagerly speculated that Respondent remained at the nurses' station all night to ensure that he alone would take all of their calls, but this failed to account for the fact that Respondent had seven other patients to whom he had to respond that night and other nurses and nurse assistants needed to respond to calls from other patients during the night.

17. In describing their situation after the incident, the testimony of L. V. and M. M. failed to account for the nurses' assistant, who was also available to them. M. M. testified that she got out of bed and found the nurses' assistant, but testified that the assistant did nothing. Essentially, M. M. implies that the assistant elected to cover up Respondent's behavior, rather than report it to a supervisor.

18. L. V. stated that she used her cellphone to call her fiancé. Undoubtedly, she did so to tell him about the incident. The next morning, based on L. V.'s warning about her fiancé's temper, hospital supervisors sent Respondent to another floor to avoid a physical altercation. But this hot-tempered fiancé apparently did nothing that night to protect L. V. He did not drive to the hospital. He did not call the police or hospital security. Nor did L. V. do any of these things, even though, as a program director, she has the requisite skills and initiative to do initiate these communications and the means to do so.

19. Both L. V. and M. M. are lying about their reaction to the incident. Perhaps they feel so outraged by Respondent's behavior that they feel justified in their embellishments. Perhaps the prospect of additional litigation provides L. V. with some incentive to exaggerate her reaction to the incident, and M. M. wants to be supportive. Although the motive for fabrication is unclear, the fact of fabrication is not.

20. Disbelieving the testimony of L. V. and M. M. about their reaction to the incident raises questions about their credibility in describing the incident itself. However, Respondent's testimony dispels any such questions. Respondent admits to much of the underlying incident, and his peculiar beliefs and attitudes require crediting the remaining testimony of L. V. and M. M. about the incident itself.

21. As to the first point, Respondent admits that he sat on L. V.'s bed and stroked her arm--to calm her, not to assist in diagnosis or treatment. Respondent admits that he even inquired about x-rated movies. Respondent testified to an "innocent" question of what the x's meant beside certain movies listed in the DVD's display of loaded movies. Respondent testified that he told L. V. that he sometimes watched x-rated movies, but found them boring because different people keep doing the same things over and over. A most remarkable point in the hearing occurred when, conducting cross-examination about

the claim that he had an erection while at L. V.'s bedside, Respondent turned to the Administrative Law Judge and stated: "Alright, so I had a bulge. Alright. I'm a man; I can't help it."

22. As to the second point, Respondent testified to a hands-on nursing style that certainly predisposes him to ignoring a patient's request not to touch her. Trying to cast this case as an unjust prosecution of him merely because he is a caring and compassionate nurse, Respondent revealed that "big girls," such as L. V. (who described herself as "morbidly obese"), often do not like to be touched by men--a feature shared by "Palestinians," whom Respondent later broadened to Muslims, and "Jews." Respondent explained that, when assigned to "Palestinians" and "Jews"--but evidently not "big girls"--he asks his supervisor to be reassigned to a different patient. Rather than underscore Respondent's cultural sensitivity, as he had intended, this testimony instead reveals the opposite and implies that Respondent is unable or unwilling to refrain from providing his special touch to female patients, regardless of their desire not to be touched except for therapeutic purposes.

23. Thus, although Respondent never admits to continuing to stroke L. V.'s arm after she had told him to stop and while broaching the topic of x-rated movies, his testimony about his

nursing practices makes it impossible not to credit the testimony of L. V. and M. M. about the incident itself.

24. It is below the minimal standard of acceptable and prevailing nursing practice for a nurse to continue to stroke a patient's arm after the patient has reasonably told the nurse to cease doing so. Aggravating circumstances--namely, Respondent's discussion of x-rated movies while seated on patient's bed in the middle of the night and erection--suggest that Respondent had a sexual motive in this conduct.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

26. Section 464.018(1)(n), Florida Statutes, authorizes the Board of Nursing to impose discipline against a licensee for "[f]ailing 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."

27. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

28. Petitioner has proved that Respondent failed to meet minimal standards of acceptable and prevailing nursing practice.

Section 456.072(2), Florida Statutes, authorizes Petitioner to impose a broad range of discipline.

29. As pleaded, this is a case of a nurse violating the minimal standards of acceptable and prevailing nursing practice by the mere fact that he continued to stroke a patient's arm after the patient told him to stop. The aggravating circumstances noted above establish that this was potentially a more serious matter than merely touching a patient after being told not to.

30. Florida Administrative Code Rule 64B9-8.006 provides penalty guidelines for various violations. Although the rule does not set a penalty for a Section 464.018(1)(n), Rule 64B9-8.006(1)(d) states:

> Suspension until evaluation by and treatment in the Intervention Project for Nurses [IPN]. In cases involving substance abuse, chemical dependency, sexual misconduct, physical or mental conditions which may hinder the ability to practice safely, the Board finds participation in the IPN under a stayed suspension to be the preferred and most successful discipline.

31. Florida Administrative Code Rule 64B9-8.006(3)(jj) provides penalty guidelines for "[e]ngaging or attempting to engage in sexual misconduct as defined and prohibited in Section 456.063(1), F.S. (Section 456.072(1)(v), F.S.)." For a first offense, the penalties range from a fine of $250-$500,

evaluation by the IPN, and probation to suspension followed by a term of probation or revocation.

32. In its Proposed Recommended Order, Petitioner proposes a $250 fine, five years' probation, and educational courses in patients' rights and nurses' ethics. This punishment overlooks the underlying problem and the potential risk to patient safety. An appropriate penalty would be a fine of $250, educational courses in patients' rights and nurses' ethics, an evaluation by the IPN, suspension until the submission and a determination by the IPN that Respondent can practice safely, and five years' probation after completion of the suspension.

RECOMMENDATION

It is

RECOMMENDED that the Board of Nursing enter a final order finding Respondent guilty of violating Section 464.018(1)(n), Florida Statutes, and imposing a fine of $250, a requirement to take educational courses in patients' rights and nurses' ethics, a requirement of submission to an evaluation by the IPN, and suspension until the submission and a determination by the IPN that Respondent can practice safely, and five years' probation after completion of the suspension.

DONE AND ENTERED this 21st day of September, 2010, in Tallahassee, Leon County, Florida.

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ROBERT E. MEALE
Administrative Law Judge
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Filed with the Clerk of the
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this 21st day of September, 2010.

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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.