

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
NURSING,)
)
Petitioner,)
)
vs.) Case No. 11-6177PL
)
DEBORA JEAN ELWELL, L.P.N.,)
R.N.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 7, 2012, by video teleconference with sites in Lakeland and Tallahassee, Florida, before Susan Belyeu Kirkland, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John J. Truitt, Esquire
Michael Lawrence, Esquire
Department of Health
4052 Bald Cypress Way, Bin C65
Tallahassee, Florida 32399-3265

For Respondent: Debora Jean Elwell, pro se
928 Winnie Lane
Lakeland, Florida 33813

STATEMENT OF THE ISSUES

The issues are whether Respondent violated sections 456.072(1)(q) and 456.072(1)(hh), Florida Statutes (2010),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On June 16, 2011, Petitioner, Department of Health (Department), filed a two-count Administrative Complaint before the Board of Nursing (Board), alleging that Respondent, Debora Jean Elwell, L.P.N., R.N. (Ms. Elwell), violated section 456.072(1)(q) by violating the Board's Notice of Intent to Approve with Conditions filed on April 21, 2008, and section 456.072(1)(hh) by being dismissed from Intervention Project for Nurses (IPN); failing to comply without good cause with the terms of her monitoring or treatment contract; and for not successfully completing any drug or alcohol treatment program.

Ms. Elwell requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on December 5, 2011, for assignment to an administrative law judge to conduct a final hearing.

Official Recognition was taken of section 20.43, Florida Statutes (2007-2011); section 456.072; section 456.076; and Florida Administrative Code Rule 64B9-8.006 by Order dated January 31, 2012.

At the final hearing, the Department called the following witnesses: William Earl Spooner, Jean D'Aprix, and Jeanne Marie King. Petitioner's Exhibits 1 through 17 were admitted in evidence. Ms. Elwell testified in her own behalf. Respondent's Composite Exhibit 1 was admitted in evidence.

The one-volume Transcript was filed on February 21, 2012. 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 February 29, 2012. As of the date of this Recommended Order, Respondent has not filed a post-hearing submittal.

FINDING OF FACTS

1. The Department is the state agency charged with regulating the practice of nursing pursuant to section 20.43, chapter 456, and chapter 464, Florida Statutes.

2. At all times material to this proceeding, Ms. Elwell was a licensed practical nurse (LPN) in the state of Florida, having been issued license number PN1342121. Ms. Elwell is a licensed registered nurse in the state of Florida, having been issued license number RN9285922.

3. On July 31, 2002, the Department issued an Emergency Suspension Order (ESO) against Ms. Elwell. Ms. Elwell became a participant in IPN and progressed satisfactorily in the program

to the extent that the Department entered an Order Lifting Emergency Suspension Order on July 21, 2004.

4. On June 21, 2005, the Department issued an Administrative Complaint against Ms. Elwell for working as a LPN while her license was suspended. A Final Order was issued on October 25, 2005, reprimanding Ms. Elwell's license and suspending her license until such time as she entered the IPN program and complied with any and all terms and conditions imposed by IPN.

5. On December 7, 2005, Ms. Elwell entered into a contract with IPN. The length of the contract was from December 1, 2005, through December 1, 2010. The terms of her contract required her to attend weekly support group meetings, to attend Alcoholic Anonymous meetings three times per week; to participate in random drug testing; to participate in individual therapy and provide quarterly reports completed by the therapist; to provide a quarterly work performance evaluation by her employer; to assure the submission of quarterly reports from her nurse support group facilitator; and to provide a personal letter quarterly if not employed in nursing or medical/healthcare. As part of the contract, Ms. Elwell was to remain free of all mood-altering, controlled, or addictive substances (including alcohol), over-the-counter drugs, and prescriptive drugs.

6. The contract provides the following concerning dismissal from IPN:

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

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

7. The contract further defines "failure to progress" as follows:

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

1. Failure to comply with the 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.

8. The contract defines "satisfactory progress" as follows:

Progress in the area of concern that precipitated your referral to the IPN must be demonstrated while being monitored by the IPN. Progress is demonstrated by:

1. Compliance with all aspects of your individualized IPN Advocacy Contract.
2. Consistent positive reports from Nurse Support Group Facilitators and treatment provider(s) indicating stability, progress, and consistent attendance at required appointments and meetings.
3. Consistent positive reports from employers indicating ability to practice with reasonable skill and safety to patients.
4. Negative random drug screens substantiating continued abstinence if required by IPN Advocacy Contract.
5. Consistent attendance and verification of required meetings.

9. Ms. Elwell's initial diagnosis at the beginning of her contract in 2005 was alcohol dependence in remission since January 26, 2003.

10. In 2008, Ms. Elwell applied for licensure as a registered nurse. On April 21, 2008, the Board issued a Notice of Intent to Approve with Conditions. The notice stated:

It is therefore ORDERED that the application for certification to be licensed of DEBORA JEAN ELWELL is hereby APPROVED subject to the following conditions:

The license of DEBORA JEAN ELWELL will be issued conditioned on her successful completion of the IPN contract. The licensee shall comply will all conditions of the IPN Advocacy Contract or she will be in violation of the Board Order.

11. Ms. Elwell failed to attend a nurse support group meeting scheduled for June 5, 2008. By letter dated June 6, 2008, Ms. Elwell's case manager, Jeanne King, advised Ms. Elwell

that IPN had received information from Ms. Elwell's nurse group support facilitator (NGSF) that Ms. Elwell had failed to attend the mandatory nurse support group meeting on June 5, 2008. The letter stated:

A "no-show" or unexcused absence is considered noncompliance. Per IPN Policy and DOH Monitoring Guidelines, this is your first occurrence of material noncompliance.

Any further report of unexcused absence at Nurse Support Group and/or any other material noncompliance will require either an IPN-facilitated evaluation and execution of a Voluntary Withdrawal from practice, or IPN dismissal.

12. The Department provides guidelines for the consequences for material noncompliance with the contract. Ms. Elwell was aware of these guidelines, which provide:

On the first incident of material non-compliance with or inability to progress under the program contract, IPN will require the licensee to refrain from practice as a condition of continued enrollment. If the licensee refuses to refrain or otherwise fails to comply with program requirements, IPN will immediately refer the matter to the DEPARTMENT.

On the second incident of material non-compliance with or inability to progress under the program contract, the licensee will have the option of (1) being terminated from the program and referred immediately to the DEPARTMENT for potential emergency action or prosecution, not more than five business days after confirmation of an incident of material compliance [sic], or (2) entering into a voluntary withdrawal from practice in the

form attached hereto and complying with all other requirements of the program. . . .

On the third incident of material non-compliance with or inability to progress under the program contract, IPN will report the matter to the DEPARTMENT not more than five business days after confirmation of an incident of material non-compliance. IPN will either 1) refer the licensee for termination from the program; 2) continue the voluntary withdrawal of the licensee from practice if a filed withdrawal form is still in effect; 3) allow the licensee to again enter into a voluntary withdrawal from practice using the form attached hereto and until the licensee has complied with all other requirements of the program.

Failure to attend group meetings, failure to submit to random drug testing, and relapses are considered to be material non-compliance.

13. The Department guidelines also provide:

First, second and third incidents of material non-compliance or inability to progress are counted beginning the date a participant first enters the program, whether voluntarily or not, until the participant has successfully completed the program, regardless of subsequent or sequential contracts or other interruptions in participation prior to successful completion of the program. Prior successful completion of the program shall not be counted against a practitioner in tabulating the number of material non-compliances in the event the practitioner re-enters the program.

14. By letter dated June 16, 2008, Ms. King notified Ms. Elwell that based on the information provided by Ms. Elwell's NGSF concerning the unexcused absence from the nurse support

group meeting and Ms. Elwell's negative urine drug screen, the letter served as a warning.

15. On August 4, 2008, Ms. King wrote Ms. Elwell advising that Ms. Elwell's NGSF had advised IPN that Ms. Elwell's attendance at the nurse support group meetings had been sporadic during July and that Ms. Elwell had advised her NGSF that she had been absent for medical reasons. The letter advised that any further absences due to illness would require documentation from a hospital or physician before the absence would be considered to be an excused absence.

16. IPN did not receive an evaluation of Ms. Elwell's work performance, which was due on March 1, 2009. By letter dated March 16, 2009, Ms. King advised Ms. Elwell that IPN had not received a quarterly report from Ms. Elwell's employer concerning Ms. Elwell's work performance and required Ms. Elwell to submit the paperwork by March 30, 2009. The letter contained the legend "IMPENDING DISMISSAL" at the top, which meant that failure to comply with the directive could result in Ms. Elwell's being dismissed from the IPN program. Ms. Elwell sent IPN a letter stating that she was unemployed during the evaluation time period.

17. By letter dated April 23, 2009, Ms. King confirmed a conversation she had had with Ms. Elwell on the same date concerning Ms. Elwell's terminations from employment due to

frequent absences and Ms. Elwell's frequent absences from nurse support group meetings. Frequent absences from employment and group meetings are of concern because they may be indicative of relapse or instability in recovery. Ms. Elwell was required to have a recovery evaluation performed by one of three evaluators listed in the letter.

18. Ms. Elwell was evaluated by Louise Buhrmann, M.D., who recommended that Ms. Elwell submit monthly monitoring reports from her employer. By letter dated May 13, 2009, Ms. King advised Ms. Elwell that she would be required to submit monthly reports from her employer.

19. The contract provides that participants who are in five-year contracts would be eligible for transitional monitoring in the fourth and fifth years of the contract. Participants who meet the requirements for transitional monitoring will have some of their contract restrictions lifted or modified to allow for more flexibility in their monitoring requirements. By letter dated May 13, 2009, Ms. King advised Ms. Elwell that the review for Ms. Elwell's transitional monitoring would be delayed six months because of the concerns voiced by Ms. Elwell's NGSF and employers. Additionally, Ms. Elwell was advised that she had to demonstrate a period of six months without any concerns from her NGSF or employers in order to be eligible for transitional monitoring.

20. Ms. Elwell had an unexcused absence from her nurse support group meeting on January 28, 2010, and she failed to provide a drug screen when she was randomly selected for testing on January 27, 2010. By letter dated February 2, 2010, Ms. King notified Ms. Elwell that she was required to refrain from all nursing practice and to enter into a Voluntary Withdrawal from practice. Ms. Elwell was also required to have a fitness-for-duty evaluation performed by one of three evaluators listed in the February 2, 2010, letter.

21. A progress evaluation from Ms. Elwell's therapist and a work performance evaluation from Ms. Elwell's employer were due to be filed with IPN by March 1, 2010. IPN did not receive the evaluations and sent a letter dated March 24, 2010, to Ms. Elwell advising that the evaluations had not been received by IPN. Ms. Elwell was given until April 7, 2010, to submit the paperwork. The letter contained the legend "IMPENDING DISMISSAL," and provided that if the paperwork was not received that Ms. Elwell would be dismissed from the IPN program.

22. In April 2010, Ms. Elwell had an admitted relapse and drank alcohol. IPN had been unable to reach Ms. Elwell by telephone and sent her a letter dated April 29, 2010, stating that IPN had learned that Ms. Elwell had relapsed. Ms. Elwell was required to refrain from nursing practice and to engage in in-patient treatment at an IPN-approved facility.

23. As a result of this relapse, Ms. Elwell entered into a second contract with IPN which extended the IPN time for Ms. Elwell to June 20, 2015. The same conditions listed in the above-paragraphs 5, 6, 7, and 8 for the contract entered into in December 2005 were contained in the June 2010 contract.

24. A progress evaluation from Ms. Elwell's therapist was due to be filed on September 1, 2010. IPN did not receive the report. By letter dated September 20, 2010, IPN informed Ms. Elwell that the paperwork had to be submitted no later than October 4, 2010. The letter contained the legend "IMPENDING DISMISSAL" and further provided:

If IPN does not receive your paperwork, I will process your dismissal and forward all information regarding any alleged violations of the Nurse Practice Act to the Department of Health.

25. Ms. Elwell's case was presented to the clinical team at IPN for a determination of whether she should be dismissed from the program. It was determined by the clinical team that dismissal was appropriate because Ms. Elwell was failing to progress under the terms of her contract based on the ongoing concerns from the NGSF regarding the continued absences, possible impairment, and difficulty in sustaining employment. By letter dated October 4, 2010, IPN dismissed Ms. Elwell from the IPN program for failure to comply with the stipulations of her contract and the Final Order of the Board.

26. Ms. Elwell did not provide any information that would be considered good cause for dismissal from the IPN program. Examples of good cause would include death, active military duty or documentation from a physician that a nurse could never practice again because of a disabling medical condition. Ms. Elwell does not deny that she was terminated from four jobs for poor attendance, that she failed to timely appear for a drug test, and that she missed nurse support group meetings.

CONCLUSIONS OF LAW

27. 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. (2011).

28. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

29. The Department alleges that Ms. Elwell violated section 456.072(1)(q), which 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.

30. The Department alleges that Ms. Elwell violated section 456.072(1)(q) by violating the Board's Notice of Intent to Approve with Conditions filed on April 21, 2008, by being dismissed from IPN and by failing to successfully complete her IPN contract.

31. The Department alleges that Ms. Elwell violated section 456.072(1)(hh), which provides:

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

32. The Department alleges that Ms. Elwell violated section 456.072(1)(hh) by being terminated from a treatment program for impaired practitioners, which is overseen by an impaired practitioner consultant as described in section 456.076; by failing to comply, without good cause, with the terms of the monitoring or treatment contract entered into by Ms. Elwell; and by not successfully completing any drug treatment or alcohol treatment program.

33. Ms. Elwell was in a treatment program for impaired nurses, IPN. She was dismissed from the IPN program without good cause. The dismissal from IPN was due to Ms. Elwell's conduct. During the five-year contract period which began on December 1, 2005, Ms. Elwell missed mandatory nurse support group meetings, failed to timely submit required quarterly reports, failed to timely have a drug screen done when selected to do so, and was terminated from jobs for excessive absences. In April 2010, Ms. Elwell relapsed and drank alcohol.

34. As a result of her relapse, Ms. Elwell was required to engage in in-patient treatment at an IPN-approved facility. She was also required to extend the contract beginning April 20, 2010, for another five years. Ms. Elwell was to file her therapist report with IPN on September 1, 2010, but by September 20, 2010, IPN still had not received the report. Based on Ms. Elwell's conduct there was sufficient justification to dismiss her from the IPN program. There were no circumstances present which would constitute good cause for dismissal.

35. The Notice of Intent to Approve with Conditions issued by the Board on April 21, 2008, required Ms. Elwell to successfully complete her IPN contract and to comply with all conditions of the IPN contract. Ms. Elwell did not successfully complete her IPN contract and she did not comply with all the conditions of her IPN contract. Therefore, the Department

established by clear and convincing evidence that Ms. Elwell violated section 456.072(1)(q).

36. Ms. Elwell was dismissed from IPN, and Ms. Elwell failed to comply with the conditions of her contract with IPN without good cause. Therefore, the Department has established by clear and convincing evidence that Ms. Elwell violated section 456.072(1)(hh).

37. Pursuant to rule 64B9-8.006(5)(b)2, a prior disciplinary action can be considered as an aggravating factor in determining the appropriate discipline to be imposed. Ms. Elwell was previously disciplined for practicing while her license was suspended.

38. The Board's order granting a conditional license was predicated upon Ms. Elwell's completing her IPN contract and compliance with all conditions of the IPN contract. Ms. Elwell has failed to meet these conditions; therefore, the appropriate disciplinary action is revocation of her license.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Nursing enter a final order finding that Ms. Elwell violated sections 456.072(1)(q) and 456.072(1)(hh) and revoking her registered nursing license.

DONE AND ENTERED this 6th day of March, 2012, in
Tallahassee, Leon County, Florida.

Susan Belyeu Kirkland

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of March, 2012.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida
Statutes are to the 2010 version.

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.