

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
NURSING,

Petitioner,

vs.

Case No. 14-0004PL

DARLINE SUE PEGUERO, R.N.,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case before Edward T. Bauer, an Administrative Law Judge of the Division of Administrative Hearings, on March 5, 2014, by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Matthew G. Witters, Esquire
Ana M. Gargollo-McDonald, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Darline Sue Peguero, pro se
Apartment 11G
1720 Harrison Street
Hollywood, Florida 33020

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the violation alleged in the Administrative Complaint and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On June 12, 2013, Petitioner, Department of Health ("Department"), filed a one-count Administrative Complaint ("Complaint") against Respondent, Darline Sue Peguero. In the Complaint, the Department alleges that Respondent violated section 456.072(1)(hh), Florida Statutes, in that she was terminated from a treatment program for impaired practitioners for failure to comply, without good cause, with the terms of her monitoring contract.

Respondent timely requested a formal hearing to contest the allegations and, on January 2, 2014, the matter was referred to the Division of Administrative Hearings ("DOAH") and assigned to Administrative Law Judge John G. Van Laningham. On February 28, 2014, Judge Van Laningham transferred the instant matter to the undersigned for further proceedings.

As noted above, the final hearing in this matter was held on March 5, 2014, during which the Department presented the testimony of six witnesses (Richard Rubin, Dr. Loren Hayes, Linda Smith, Jean D'Aprix, Patrice Ward, and Respondent) and introduced eight exhibits into evidence, numbered 1 through 4, 6, 8, 10,

and 11. Respondent testified on her own behalf and introduced one exhibit.

The final hearing Transcript was filed with DOAH on March 25, 2014. Thereafter, the Department timely submitted a Proposed Recommended Order, which the undersigned has considered in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.^{1/}

FINDINGS OF FACT

1. The Department and the Board of Nursing have regulatory jurisdiction over licensed nurses such as Respondent. The Department furnishes investigative services to the Board and is authorized to file and prosecute an administrative complaint, as it has done in this instance, when cause exists to suspect that a licensee has committed one or more disciplinable offenses.

2. On January 5, 1999, the Department issued Respondent license number RN3344322, which authorized her to practice as a registered nurse in the state of Florida. Respondent's address of record is 1720 Harrison Street, Apartment 11G, Hollywood, Florida.

3. Though the record is less than explicit, it appears that, in or around July 2011, Respondent was suspected of misappropriating a small quantity of diazepam, a Schedule IV controlled substance. Although the administrative charges stemming from that allegation were ultimately dismissed,

Respondent entered into an advocacy contract ("Contract") with the Intervention Project for Nurses ("IPN"), a program^{2/} which contracts with the Board of Nursing to monitor practitioners struggling with substance abuse issues or other problems.

4. The Contract, which Respondent executed on October 5, 2011, mandated that she abstain from all mood-altering substances—including alcohol—for a period of two years; submit to random toxicology screens; and inform any potential employer of her participation in IPN. Further, by signing the Contract, Respondent acknowledged that she had reviewed the IPN Participant Manual ("Manual") and would abide by its terms. Significantly, the Manual provided that, upon a relapse,^{3/} Respondent would be required, as a condition of continued enrollment in IPN, to refrain from nursing until such time that an IPN-facilitated evaluation could be performed.^{4/}

5. Subsequently, on or about December 20, 2011, Respondent obtained employment with Wound Technology Center as a "call-center nurse." In connection with this position, which required licensure as a registered nurse, Respondent provided consultation services to clinicians regarding wound treatment.

6. Thereafter, on January 18, 2012, IPN requested that Respondent furnish a sample of her urine for testing. The results, which IPN received on January 24, 2012, revealed the presence of ethyl glucuronide (a metabolite of ethyl alcohol) and

ethyl sulfate. That very afternoon, Patrice Ward, an IPN case manager, contacted Respondent by telephone to discuss the positive test result. During the ensuing conversation, Respondent admitted that she had consumed a glass of wine^{5/} with dinner, at which point Ms. Ward instructed Respondent to immediately refrain from nursing practice.

7. Regrettably, Respondent failed to comply, without good cause, with Ms. Ward's directive to refrain from practice; indeed, the evidence demonstrates that Respondent continued to perform her regular nursing duties over the next two work days. Respondent's failure to refrain from nursing was quickly brought to the attention of IPN's executive director, who, consistent with the Contract's express provisions, terminated Respondent from IPN on January 26, 2012.

CONCLUSIONS OF LAW

A. Jurisdiction

8. DOAH has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. Burden and Standard of Proof

9. This is a disciplinary proceeding in which the Department seeks to discipline Respondent's nursing license. Accordingly, the Department must prove the allegations contained in the Administrative Complaint by clear and convincing evidence.

Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

10. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards."

The court held that:

[C]lear 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 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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994).

C. The Charge; Penalty

11. In the Complaint, the Department alleges that Respondent is in violation of section 456.072(1)(hh), which provides:

(1) The following acts shall constitute grounds for which . . . disciplinary actions . . . 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.

(emphasis added).

12. Based upon the Findings of Fact contained herein, the Department has sustained its burden of proof. As detailed previously, Respondent was terminated from IPN by virtue of her failure to abstain from nursing—without good cause—following her unauthorized consumption of alcohol. The evidence further demonstrates, clearly and convincingly, that Respondent's termination from IPN was consistent with the terms of her advocacy contract. Accordingly, Respondent is in violation of section 456.072(1)(hh).

13. Turning to the issue of an appropriate penalty, the disciplinary guidelines in effect at the time of Respondent's misconduct (i.e., January 26, 2012, the date Respondent was terminated from IPN) provide the following range for a violation of section 456.072(1)(hh):

Minimum: \$250 fine and suspension until successful completion or receipt of written confirmation from program that further treatment is neither required nor indicated.

Maximum: Permanent revocation or denial of licensure.

Fla. Admin. Code R. 64B9-8.006(3)(aaa); see also Orasan v. Ag. for Health Care Admin., 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996) ("[T]he case was properly decided under the disciplinary guidelines in effect at the time of the alleged violations.").

14. The Department contends, and the undersigned agrees, that the appropriate disposition is to suspend Respondent's nursing license until such time that an IPN-facilitated evaluation is completed and Respondent is deemed fit to return to practice. In the event the evaluation demonstrates the need for further treatment, Respondent shall enter into a monitoring agreement with IPN and comply with each of the terms and conditions set forth therein. Finally, the undersigned recommends a waiver of the minimum fine in light of Respondent's lack of disciplinary history. See Fla. Admin. Code R. 64B9-8.006(5)(b)2. (providing that a licensee's disciplinary history may be considered for purposes of mitigation or aggravation).

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 Respondent guilty of violating section 456.072(1)(hh); suspending Respondent's nursing license until such time that an

IPN-facilitated evaluation is completed and Respondent is deemed fit to return to practice; and ordering Respondent to enter into a monitoring agreement with IPN, should the IPN-coordinated evaluation demonstrate the need for further treatment.

DONE AND ENTERED this 8th day of April, 2014, in Tallahassee, Leon County, Florida.



EDWARD T. BAUER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of April, 2014.

ENDNOTES

^{1/} Unless otherwise noted, all statutory and rule references are to the versions in effect at the time of the alleged misconduct.

^{2/} IPN is an "impaired practitioner program" pursuant to section 456.076, Florida Statutes.

^{3/} The IPN Participant Manual defines "relapse" to include, *inter alia*, the use of mood-altering chemicals, including alcohol. See Pet. Ex. 3, IPN Manual, pp. 26-27.

^{4/} The IPN Participant Manual provides that, upon a first incident of "material non-compliance"—which includes, among other things, the ingestion of alcohol—the licensee will be "require[d] . . . to refrain from practice as a condition of continued enrollment." See Pet. Ex. 3, IPN Manual, p. 29. The

Manual further provides that, if the licensee "refuses to refrain or otherwise fails to comply with program requirements, IPN will immediately refer the matter to the Department." Id.

^{5/} Respondent's assertion that she did not admit to consuming alcohol is rejected in favor of the credible and persuasive testimony of Ms. Ward.

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.