STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF NURSING,

Petitioner,

vs. Case No. 14-2195PL

FRANKLA M. LAFERGOLA, R.N.,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by telephone conference on July 15, 2014, at sites in Tallahassee and Blountstown, Florida.

APPEARANCES

For Petitioner: Jodi-Ann V. Livingstone, Esquire
Yolanda Y. Green, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Frankla M. LaFergola, pro se
Calhoun Correctional Institution
19562 Southeast Institution Drive
Blountstown, Florida 32424-5156

STATEMENT OF THE ISSUES

The primary issue in this case is whether Respondent pleaded no contest to, or was convicted of, crimes which directly relate to the practice of nursing. If so, then it will be necessary to determine an appropriate penalty for each such

plea or conviction. In addition, a penalty must be formulated for Respondent's undisputed failures to tell the Board of Nursing about a plea he entered, and a conviction he suffered, within 30 days after the respective events.

PRELIMINARY STATEMENT

On January 7, 2013, Petitioner Department of Health issued an Amended Administrative Complaint against Respondent Frankla M. LaFergola, R.N. The Department alleged, in Count One, that Mr. LaFergola had pleaded no contest in 1999 to a charge of child abuse, and that, in 2008, he had been convicted of lewd computer solicitation of a child. The Department alleged that each of these crimes directly relates to the practice of nursing, and therefore that Mr. LaFergola had committed the offense defined in section 464.018(1)(c), Florida Statutes, which makes it a disciplinable act to enter a plea to, or be convicted of, such a crime. In Counts Two and Three, respectively, the Department alleged that Mr. LaFergola had failed to report the plea and the conviction to the Board of Nursing within 30 days after each event, thereby twice committing the disciplinable offense defined identically in section 455.624(1)(w), Florida Statutes (1999), and section 456.072(1)(x), Florida Statutes (2007).

Mr. LaFergola timely requested a formal hearing, and on May 13, 2014, the Department filed the pleadings with the

Division of Administrative Hearings, where an administrative law judge was assigned to preside in the matter.

The final hearing took place on July 15, 2014, with Mr. LaFergola appearing by telephone. The Department's only witness was Christine F. Gurk, R.N., whose deposition was admitted in lieu of live testimony as Petitioner's Exhibit D. In addition, Petitioner's Exhibits A, B, and C were received in evidence, without objection. Mr. LaFergola testified on his own behalf and presented the testimony of Ben D. Taylor, LMHC. He did not offer any exhibits.

At hearing, Mr. LaFergola admitted that he had entered the plea and suffered the conviction alleged in Count One of the Amended Administrative Complaint, but he denied that either the plea or the conviction was for a crime which directly relates to the practice of nursing. Mr. LaFergola admitted having failed to report his no-contest plea and criminal conviction to the Board of Nursing, as charged in Counts Two and Three. Thus, all that remains to be decided with regard to these disciplinable acts is the recommended punishment.

The one-volume final hearing transcript was filed on July 30, 2014. Accordingly, proposed recommended orders were due, pursuant to the time frame agreed upon at the conclusion of the hearing, on August 20, 2014. The parties' respective

proposed recommended orders, which were timely filed, have been considered.

FINDINGS OF FACT

1. At all times relevant to this case, Respondent Frankla M. LaFergola, R.N. ("LaFergola"), was a Florida-licensed registered nurse, having been issued license number RN2915432.

2. Petitioner Department of Health (the "Department") has regulatory jurisdiction over registered nurses such as LaFergola. In particular, the Department is authorized to file and prosecute an administrative complaint against a nurse, as it has done in this instance, when a panel of the Board of Nursing has found that probable cause exists to suspect that the licensee has committed a disciplinable offense.

3. Exercising its prosecutorial authority, the Department has charged LaFergola with two such offenses, namely, (1) being found guilty of, or pleading to, a crime which directly relates to the practice of nursing or the ability to practice nursing (two instances); and (2) failing timely to report a conviction or plea to the Board of Nursing (two instances).

4. On September 23, 1999, in the Circuit Court of the Seventeenth Judicial Circuit, Broward County, LaFergola was sentenced to probation with conditions after entering a plea of no contest to one count of child abuse as defined in section

827.03(1)(b), Florida Statutes (1998). The court withheld adjudication of guilt.

5. The elements of the crime to which LaFergola pleaded no contest were defined, in relevant part, as follows:

> (1) "Child abuse" means:
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> * * *
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> (b) An intentional act that could reasonably be expected to result in physical or mental injury to a child;
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> * * *
>
> A person who knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 827.03, Fla. Stat. (1998).

6. LaFergola failed to report his no-contest plea to the Board of Nursing within thirty days after entering the plea.

7. At the time LaFergola pleaded no contest to the charge of child abuse, section 464.003(3)(a) defined the term "practice of professional nursing" to mean

> the performance of those acts requiring substantial specialized knowledge, judgment, and nursing skill based upon applied principles of psychological, biological, physical, and social sciences which shall include, but not be limited to:
> 1. The observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care; health teaching and counseling of the ill, injured, or infirm;

> and the promotion of wellness, maintenance of health, and prevention of illness of others.
> 2. The administration of medications and treatments as prescribed or authorized by a duly licensed practitioner authorized by the laws of this state to prescribe such medications and treatments.
> 3. The supervision and teaching of other personnel in the theory and performance of any of the above acts.

(Emphasis added).

8. There is a negative correlation between (a) the commission of an intentional act that could reasonably be expected to result in physical or mental injury to a child and, e.g., (b) the promotion of wellness, maintenance of health, and prevention of illness of others. That is, there is an inverse relationship between operations (a) and (b) inasmuch as an act of child abuse damages another person's health, whereas the promotion of wellness aims to enhance or restore another person's health; the performance of one, in short, undoes the effect of the other. Because both types of action——child abuse and professional nursing——affect the health and welfare of others, albeit in opposite ways, they are logically connected as diametric behaviors. Consequently, the crime of child abuse directly relates to the practice of nursing.

9. On March 25, 2008, in the Circuit Court of the Nineteenth Judicial Circuit, St. Lucie County, a judgment of conviction was entered against LaFergola, who had been found

guilty by a jury of the crime of soliciting a child via computer to engage in lewd behavior. To secure LaFergola's conviction of this particular crime, the government proved the following constituent elements beyond a reasonable doubt:

> CERTAIN USES OF COMPUTER SERVICES PROHIBITED.--Any person who knowingly utilizes a computer on-line service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, relating to sexual battery; chapter 800, relating to lewdness and indecent exposure; or chapter 827, relating to child abuse, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 847.0135(3), Fla. Stat. (2005).

10. LaFergola failed to report to the Board of Nursing, within 30 days after being convicted, that he had been found guilty of lewd computer solicitation of a child.

11. Based on this conviction, the court sentenced LaFergola to a term of 28.05 months' incarceration, to be followed by 31 months of Sex Offender Probation. The conditions of Sex Offender Probation generally prohibited LaFergola from having contact with or being near children under the age of 18, among other restrictions on his liberty.

12. The crime of lewd online solicitation of a child directly relates to the practice of nursing for the same

reasons, previously discussed, that the crime of child abuse directly relates to the practice of nursing.[1/]

Ultimate Factual Determinations

13. The Department has established by clear and convincing evidence that LaFergola entered a plea of no contest to a crime (child abuse) which directly relates to the practice of nursing. LaFergola is therefore guilty of the offense defined in section 464.018(1)(c), Florida Statutes (1999).

14. The Department has established by clear and convincing evidence that LaFergola was found guilty of a crime (lewd online solicitation of a child) which directly relates to the practice of nursing. LaFergola is therefore guilty of the offense defined in section 464.018(1)(c), Florida Statutes (2007).

15. The Department has established by clear and convincing evidence that LaFergola failed to report to the Board of Nursing, within 30 days after the event, that he had entered a plea of no contest to a charge of child abuse. Consequently, LaFergola is guilty of the offense defined in section 455.624(1)(w), Florida Statutes (1999).

16. The Department has established by clear and convincing evidence that LaFergola failed to report to the Board of Nursing, within 30 days after the event, that he had been found guilty of lewd online solicitation of a child. For that reason,

LaFergola is guilty of the offense defined in section 456.072(1)(x), Florida Statutes (2007).

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

18. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against LaFergola by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

19. 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:

> 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 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). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

20. In the Amended Administrative Complaint, the Department charged LaFergola under section 464.018(1)(c), which at all relevant times provided in pertinent part as follows:

> (1) The following acts shall be grounds for disciplinary action set forth in this section:
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> * * *
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> (c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of nursing or to the ability to practice nursing.

21. In determining whether a crime directly relates to the practice of, or ability to practice, nursing, the analysis starts, necessarily, with identifying the elements of the crime to which the licensee pleaded no contest or of which he was found guilty. These are found in the statutes, where the legislature has defined the crimes for which perpetrators may be prosecuted. If the legal definition of the crime provides a sufficient basis, in itself, for determining whether an adequate nexus exists between the crime and the professional practice, then it is not necessary, in making ultimate findings relating to guilt,[2/] to examine the licensee's conduct which gave rise to the conviction or no-contest plea.

22. Finding the statutory definitions of child abuse and lewd computer solicitation of a child to be facially sufficient to resolve the issues of relatedness, the undersigned considered, but ultimately deemed irrelevant, evidence regarding the conduct which put LaFergola in criminal jeopardy. Thus, it was unnecessary to make findings of fact about what LaFergola did that led to his respective arrests and resulting no-contest plea to the charge of child abuse and conviction for lewd online solicitation of a child.

23. To ascertain whether a crime directly relates to the practice of nursing or to the ability to practice nursing requires, as the next analytical step, that the nature of the

professional practice be described. The provisions of chapter 464, which is known as the Nurse Practice Act, should ordinarily suffice to establish what professional nursing entails, and in this case they did. Thus, while the undersigned considered the expert testimony which the Department elicited about the practice of nursing, there was ultimately no need to resort to such evidence in resolving the issues presented.

24. Once these two variables——the crime and the professional practice——are clearly in view, it can be decided whether the crime "directly relates" to the practice or ability to practice. An affirmative answer to the question requires only that there be a close logical connection between the two, not necessarily that "the statutory definition of a particular profession . . . specifically refer to acts involved in the crime committed" or that the criminal conduct have reflected (or cast doubt upon) the licensee's technical ability to practice his profession. See, e.g., Doll v. Dep't of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007). Thus, a licensee can be found guilty of this administrative offense notwithstanding that he might be an excellent nurse, or that the commission of the crime required none of his nursing skills or expertise. Similarly, to prove a disciplinable act under section 464.018(1)(c), the Department need not demonstrate that the licensee's plea or conviction will impair, restrict, or hinder the licensee's

ability to practice nursing, or render him ineffective or otherwise incapable of performing the professional responsibilities of a nurse.

25. In this case, the undersigned determined, for reasons explained above, that sufficient relationships exist between (a) the respective crimes of child abuse and lewd online solicitation of a child, on one hand, and (b) the practice of nursing, on the other, to sustain ultimate findings of guilt under section 464.018(1)(c). This determination followed from the undersigned's application of the plain statutory language to the largely undisputed material facts as an exercise of legal reasoning. Thus, the expert opinion testimony that the Department presented——to the effect that the crimes at issue directly relate to the practice of nursing——was considered but not relied upon in resolving the legal and factual controversies at hand.

26. The Department additionally charged LaFergola with twice failing to report to the Board of Nursing the disposition of a criminal proceeding. At all relevant times, a licensee committed a disciplinable offense by:

> Failing to report to the board, or the department if there is no board, in writing within 30 days after the licensee has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction. Convictions, findings, adjudications, and

> pleas entered into prior to the enactment of this paragraph must be reported in writing to the board, or department if there is no board, on or before October 1, 1999.

§ 456.072(1)(x), Fla. Stat. (2007); § 455.624(1)(w), Fla. Stat. (1999).

27. LaFergola confessed that he had never reported to the Board of Nursing either his no-contest plea to the charge of child abuse or his conviction for lewd online solicitation of a child. His guilt as to these administrative charges, therefore, was never in doubt.

28. The Board of Nursing imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B9-8.006.

29. For a nurse found guilty of the offense defined in section 464.018(1)(c), Florida Statutes (1999), whose crime was a felony such as child abuse, the penalty range is from "fine of $500, referral to IPN, [i.e., the Intervention Project for Nurses,] two years suspension and probation for the duration of court ordered probation to revocation and $1000 fine." Fla. Admin. Code R. 64B9-8.006(3)(f)(1999).[3/]

30. Having been convicted of lewd online solicitation of a child, LaFergola is guilty of the offense defined in section 464.018(1)(c), Florida Statutes (2007). For first-time offenders such as LaFergola,[4/] the prescribed penalty range for

this offense is from "$250 fine" to "$500 fine and suspension to be followed by a term of probation." Fla. Admin. Code R. 64B9-8.006(3)(d)(2006).

31. For the offense of failing timely to report a conviction or plea to the Board of Nursing, as defined in section 455.624(1)(w), Florida Statutes (1999), there was, at the time LaFergola missed the reporting deadline, no penalty guideline in place, in contravention of section 455.627, Florida Statutes (1999).[5/] The absence of a penalty range means that, although LaFergola committed the offense, no penalty can lawfully be imposed against him therefor. Fernandez v. Dep't of Health, 82 So. 3d 1202, 1204-05 (Fla. 3d DCA 2012).

32. For a first offense under section 456.072(1)(x), Florida Statutes (2007), which LaFergola committed when he failed to tell the Board of Nursing——within 30 days after the event——that he had been convicted of lewd computer solicitation of a child, the applicable penalty range is from "$250 fine and probation" to "denial of licensure or revocation." Fla. Admin. Code R. 64B9-8.006(3)(d)(2006).

33. Rule 64B9-8.006 sets forth aggravating and mitigating circumstances, which, if found to exist, may provide grounds to depart from the disciplinary guidelines. The undersigned does not find cause to deviate from the guidelines and therefore

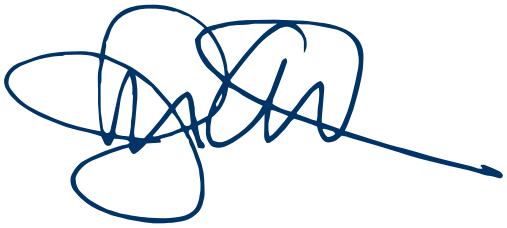
recommends that the Board of Nursing impose a penalty that falls within the recommended range.

34. The Department proposes that LaFergola's license be permanently revoked. This penalty is within the guidelines, except for the qualification that the revocation be *permanent*. The undersigned therefore recommends that the Board of Nursing revoke LaFergola's license without barring him from ever applying for a new license. The undersigned further recommends the imposition of a $1,500 fine.

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 LaFergola guilty of the offenses charged in the Amended Administrative Complaint. It is further RECOMMENDED that the Board of Nursing revoke LaFergola's license, thereby denying him the right to practice nursing in the state of Florida unless he obtains a new license, for which he may not apply until after the expiration of a period of ineligibility not exceeding 10 years; and impose an administrative fine of $1,500.

DONE AND ENTERED this 3rd day of September, 2014, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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 September, 2014.

ENDNOTES

[1]/ The statutory definition of the term "practice of professional nursing" remained the same in March 2008 as it had been nine years earlier when LaFergola pleaded no contest to the charge of child abuse for which he was placed on probation.

[2]/ The facts and circumstances underlying the conviction or plea might nevertheless be relevant in determining the appropriate penalty, should the licensee be found guilty of a disciplinable offense.

[3]/ Had LaFergola been *found guilty* of the crime of child abuse, instead of *pleading no contest* to the charge, he would have been subject to discipline under § 464.018(1)(d)6., Fla. Stat. (1999), which made it an offense to be found guilty of a "violation of chapter 827, relating to child abuse." For that administrative offense, the penalty guideline extended upward to "denial or revocation if aggravated abuse." Fla. Admin. Code R. 64B9-8.006(3)(n)(1999)(emphasis added). "Aggravated child abuse" was defined as occurring when a person:

> (a) Commits aggravated battery on a child;
> (b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
> (c) Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.
>
> A person who commits aggravated child abuse commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 827.03(2), Fla. Stat. (1998). Aggravated child abuse is obviously a far more serious crime than that to which LaFergola pleaded. Because LaFergola was neither charged with nor pleaded to aggravated child abuse, much less was found guilty of such crime, he should not be disciplined with revocation under rule 65B9-8.006(3)(f), even though revocation is within the penalty range, for that would be a harsher penalty than rule 65B9-8.006(3)(n) prescribed for even worse misconduct.

[4]/ Although the Department here has charged LaFergola with two separate violations arising from a no-contest plea and a later, unrelated conviction, neither violation can be viewed fairly as a "second offense." This is because, until now, LaFergola has never been disciplined for an act punishable under § 464.018(1)(c). Each disciplinable event——the plea and the conviction——is thus effectively a first offense, and each should be punished as such.

[5]/ The Department never identified an applicable penalty range for this offense, and the undersigned was unable to locate one in the historical rule 64B9-8.006 of which official recognition was taken at the Department's request.

COPIES FURNISHED:

Jodi-Ann V. Livingstone, Esquire
Yolanda Y. Green, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265
(eServed)

Frankla M. LaFergola
Calhoun Correctional Institution
19562 Southeast Institution Drive
Blountstown, Florida 32424-5156

Joe Baker, Jr., Executive Director
Board of Nursing
Department of Health
4052 Bald Cypress Way, Bin C-02
Tallahassee, Florida 32399-3252
(eServed)

Lavigna A. Kirkpatrick, BS, RN, Chair
Board of Nursing
Department of Health
4052 Bald Cypress Way, Bin C-02
Tallahassee, Florida 32399-3252

Jennifer A. Tschetter, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1701
(eServed)

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.