

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASHLEY Q. WARREN,

Petitioner,

vs.

Case No. 14-5243

BOARD OF NURSING,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in St. Petersburg and Tallahassee, Florida, on January 14, 2015, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ashley Q. Warren, pro se
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St. Petersburg, Florida 33711-2307

For Respondent: Lee Ann Gustafson, Esquire
Department of Legal Affairs
The Capitol, Plaza Level 01
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STATEMENT OF THE ISSUE

Whether Petitioner's application for certification as a certified nursing assistant (CNA) should be approved or denied.

PRELIMINARY STATEMENT

By Notice of Intent to Deny dated August 13, 2014, Respondent Board of Nursing (Respondent or Board) notified Petitioner Ashley Q. Warren (Ms. Warren) that it intended to deny her application for certification as a CNA by examination (Application). Respondent's decision was based on Ms. Warren's alleged misrepresentation of her criminal history on her Application and her not passing the level 2 criminal background screening. Ms. Warren timely requested a formal hearing, and on November 6, 2014, Respondent referred the matter to the Division of Administrative Hearings, where the formal hearing was conducted by the undersigned.

Both parties attended the formal hearing, and Ms. Warren was the only witness to testify. Petitioner's Exhibit 1 and Respondent's Exhibit 1 were both received into evidence.

A Transcript of the formal hearing was filed on January 21, 2015. On January 30, 2015, Petitioner filed a statement wherein she outlines the reasons why her Application should be approved. Respondent did not file a proposed recommended order. Petitioner's statement was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On or about October 15, 2013, Ms. Warren submitted to Respondent an application for certification as a CNA. On or

about August 15, 2014, Respondent informed Ms. Warren that her Application was being denied for two reasons. The first reason offered for denial is that Ms. Warren violated sections 464.018(1)(a) and 456.072(1)(h), Florida Statutes (2014),^{1/} by checking the "no" box, instead of the "yes" box, when asked about her criminal history on the Application. The second reason offered for denial is that Ms. Warren is not eligible for licensure because she did not pass the criminal background screening required by section 400.215, Florida Statutes.^{2/}

A. Criminal Background Screening

2. On March 5, 2012, Ms. Warren entered a plea of nolo contendere to a single count of "resisting an officer with violence" in violation of section 843.01, Florida Statutes. The offense occurred during calendar year 2010. Section 843.01 provides, in part, that any person found to be in violation of this section "is guilty of a felony of the third degree." According to the Order of Probation for this charge, the court withheld adjudication, and Ms. Warren was placed on probation for a period of 30 days. On April 4, 2012, the Florida Department of Corrections sent Ms. Warren a notice of "Termination of Supervision" and noted therein that "[y]ou are hereby notified that you completed your term(s) of supervision on 4/4/12 . . . and are no longer under the supervision of the Department of Corrections."

3. Section 464.203 provides, in part, that "[t]he board shall issue a certificate to practice as a CNA to any person who demonstrates a minimum competency to read and write and successfully passes the required background screening pursuant to s. 400.215."

4. Section 400.215 provides, in part, that "[t]he agency shall require level 2 background screening for personnel as required in s. 408.809(1)(e)," Florida Statutes. Section 408.809(1)(e) provides, in part, that individuals, like Ms. Warren, shall be subject to a level 2 background screening pursuant to chapter 435. Section 435.04(2), Florida Statutes, provides, in part, that "security background investigations under this section must ensure that no persons subject to the provisions of this section have . . . entered a plea of nolo contendere" to "[s]ection 843.01, relating to resisting arrest with violence." The preponderance of the evidence establishes that Ms. Warren failed her background screening test as a result of her plea of nolo contendere to the offense of resisting arrest with violence.

B. Alleged Application Misrepresentation

5. The Notice of Intent to Deny provides, in part, as follows:

This matter came before the Board of Nursing at a duly-noticed public meeting on August 8, 2014, in Orlando, Florida. The

applicant has applied for certification as a certified nursing assistant by examination. The applicant entered a plea of nolo contendere to a charge of resisting an officer with violence in 2012. The application includes the following question:

Have you EVER been convicted of, or entered a plea of guilty, nolo contendere or no contest to, a crime in any jurisdiction other than a minor traffic offense? You must include all misdemeanors and felonies, even if adjudication was withheld. The applicant answered the question NO.

6. It is undisputed that Ms. Warren checked the "no" box in response to the question. It is also undisputed that Ms. Warren should have checked the "yes" box in response to the question given that on March 5, 2012, she entered a plea of nolo contendere to the felony charge of resisting an officer with violence.

7. By correspondence dated August 15, 2014, the Board informed Ms. Warren that it was the Board's intent to deny her Application because she did not truthfully answer the question about her criminal background. In response to the Notice of Intent to Deny, Ms. Warren, by correspondence dated August 21, 2014, informed Respondent of the following:

To the State of Florida Board of Nursing, I Ashley Warren made a mistake and checked off the wrong box. I was reading so fast and I was not aware of what I checked off in the box. I had checked off the wrong question. If possible, can I do another application because I would love to become a CNA, and I

really hate I made [a] mistake in checking the wrong box.

8. One of the sections of the Application submitted by Ms. Warren is titled, "Initial Licensure - Individual." This section asks multiple questions with subparts. Question 1 of this section directs that if the applicant "responded 'no,' skip to #2." Even though Ms. Warren answered "no" to the question, she, nevertheless, proceeded to answer questions 1.a., 1.b., 1.c., and 1.d. Question 3 of this section directs that if the applicant responds "[n]o, do not answer 3.a." Even though Ms. Warren answered "no" to question 3, she, nevertheless, proceeded to answer question 3.a. The same pattern was repeated with respect to question 4 wherein Ms. Warren answered "no" and then disregarded the directive not to answer questions 4.a. and 4.b. The multiple errors made by Ms. Warren when completing the Application support her contention that she was rushing while completing the Application.

9. During the formal hearing, Ms. Warren testified as follows:

Q: Okay. Now, you were arrested again in 2010?

A: Yes.

* * *

Q: And you were charged with resisting an officer with violence?

A: Yes.

* * *

Q: Did they put you in jail?

A: Yes.

Q: And you went to court on that charge?

A: Yes.

Q: Okay. I'm looking at page 20 of the exhibit, your Honor. You had an order withholding adjudication; is that correct?

A: Yes.

Q: And you pled nolo contendere or no contest to that charge?

A: Yes.

Q: Were you put on probation?

A: I was put on PYT.

Q: All right. What is PYT?

A: It's something like a probation that you complete and it will be off your record.

* * *

Q: Okay. Now, on the application the question concerning criminal history says "have you ever been convicted of or entered a plea of guilty, nolo contendere or no contest to a crime in any jurisdiction other than a minor traffic offense." What about that don't you understand?

A: I really don't understand none of it.

* * *

Q: Yes. You testified earlier that in your 2010 charge you pled nolo contendere or no contest to resisting an officer with violence. You said that was correct. Is that correct?

A: Yes.

Q: So did you understand what a nolo contendere plea was in 2010?

A: No.

Q: Did your lawyer advise you to plead nolo contendere?

A: Yes.

Q: Did your lawyer explain to you what that kind of plea meant?

A: No.

Q: Did the judge explain to you what that kind of plea meant?

A: Yes.

Q: Once it was explained to you, you decided to plea nolo contendere?

A: I didn't understand the question when I was reading over it.

Formal hearing Transcript, pp. 17-21.

10. Additionally, Ms. Warren also testified as follows:

Q: In responding to the criminal history question, if you didn't understand it, why didn't you just leave it blank?

A: Because I didn't know if I would have sent it off and leave it blank if I would have got my license, but, at the same time,

when I had went through the probation office and everything, they told me that everything was going to be off my record, that I completed all my terms and everything because it was my first time on having adult charge. So I really didn't understand none of that. So I'm going by their word. So I'm thinking if I don't have it on my record, I completed it, I can put "no" on the answer. It's not on my record.

Formal hearing Transcript, pp. 24-25.

11. Ms. Warren's testimony that she believed it was proper to answer "no" to the criminal background question on the Application is credible. The fact that Ms. Warren made multiple mistakes on her Application, coupled with her genuine belief that the charge of resisting an officer with violence was no longer on her record, indicates that Ms. Warren acted honestly and did not intend to misrepresent her criminal history when completing her Application.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2014).

13. As the applicant for certification, Ms. Warren bears the ultimate burden of proving by a preponderance of the evidence that her Application should be approved. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

14. The standard of proof that Ms. Warren must meet is by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat. The preponderance of the evidence standard requires proof by "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

15. Respondent denied Ms. Warren's Application based on alleged violations of sections 464.018(1)(a) and 456.072(1)(h). These statutes provide that attempting to procure a license to practice nursing by knowing misrepresentations, fraudulent misrepresentations, or deceit constitutes grounds to deny the license.

16. To the extent Respondent seeks to deny Ms. Warren's Application on these grounds, Respondent bears the burden of presenting evidence of these allegations of wrongdoing on Ms. Warren's part. See M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 761 (Fla. 2d DCA 2008) ("[I]f the licensing agency proposes to deny the requested license based on specific acts of misconduct, then the agency assumes the burden of proving the specific acts of misconduct that it claims demonstrate the applicant's lack of fitness to be licensed."); Dep't of Banking & Fin., Div. of Sec. and Inv. Prot. v. Osborne Stern and Co., 670 So. 2d 932, 934-935 (Fla. 1996).

17. As discussed above in the Findings of Fact, the preponderance of the evidence establishes that Ms. Warren failed her background screening test, and as a consequence thereof, it is appropriate for Respondent to deny her Application.

18. As for the allegation that Ms. Warren made certain misrepresentations on her Application, section 464.018 provides, in pertinent part, as follows:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(a) Procuring, attempting to procure, or renewing a license to practice nursing by bribery, by knowing misrepresentations, or through an error of the department or the board.

* * *

(2) The board may enter an order denying licensure or imposing any of the penalties in s. 456.072(2) against any applicant for licensure or licensee who is found guilty of violating any provision of subsection (1) of this section or who is found guilty of violating any provision of s. 456.072(1).

19. Contrary to this allegation, Ms. Warren is not attempting to secure a "nursing license" within the meaning of section 464.018, but is, instead, attempting to secure "certification" as a "certified nursing assistant" within the meaning of section 464.204. Section 464.204 sets forth disciplinary sanctions for CNAs or those seeking to become one. Specifically, section 464.204(1)(a) provides, in part, that "the

board may impose disciplinary sanctions" against an applicant who "attempt[s] to obtain certification . . . by bribery, misrepresentation, deceit, or through an error of the board."

20. It is a well-settled rule of statutory construction that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959). For reasons not explained, Respondent did not charge Ms. Warren with violating section 464.204, which by its express terms applies to Ms. Warren as an applicant for certification to become a CNA. Under the principle of statutory construction espoused in Adams v. Culver, Respondent erroneously charged Ms. Warren with violating statutory provisions which are inapplicable to her circumstances. Accordingly, Ms. Warren, under the facts present in the instant case, did not violate, as a matter of law, sections 464.018 and 456.072, as alleged. Respondent failed to meet its burden of proof as to this allegation. Furthermore, even if Respondent had properly charged Ms. Warren with violating section 464.204, the preponderance of the evidence does not establish that Ms. Warren misrepresented her criminal history on the Application, but instead acted honestly when completing the same.

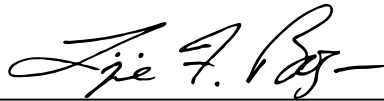
21. Because Ms. Warren failed the level 2 background screening, it is appropriate for Respondent to deny her

Application. It is not appropriate, however, for Respondent to deny Ms. Warren's Application on the grounds that she violated sections 464.018 and 456.072, as alleged in the Notice of Intent to Deny.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Board of Nursing, enter a final order denying Petitioner, Ashley Q. Warren's, Application for certification as a CNA due to her failure to pass the level 2 background screening.

DONE AND ENTERED this 17th day of February, 2015, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of February, 2015.

ENDNOTES

^{1/} All statutory references are to 2014 Florida Statutes, unless otherwise indicated.

^{2/} Respondent, as part of the background screening process, requested that Ms. Warren provide information related to a misdemeanor charge that she received when she was 15 years of age. Counsel for Respondent advised during the formal hearing that "[o]bviously [Ms. Warren] did not have to report that in response to the question [about her criminal background] because she was adjudicated delinquent." Formal hearing Transcript, pp. 15-16. Accordingly, there will be no discussion of the "juvenile charge" in this Recommended Order.

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.