

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
NURSING,

Petitioner,

vs.

Case No. 16-0595PL

EKEMI A. TINSON, C.N.A.,

Respondent.

RECOMMENDED ORDER

An administrative hearing in this case was held on March 18, 2016, in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Shoshana Jean Silver, Esquire
Louise Wilhite-St Laurent, Esquire
Amy C. Thorn, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Ekemi A. Tinson, C.N.A.
6620 Livingston Avenue North
St. Petersburg, Florida 33702

STATEMENT OF THE ISSUE

The issue in this case is whether the allegations set forth in the Administrative Complaint filed by the Department of Health

(Petitioner) against Ekemi A. Tinson, C.N.A. (Respondent), are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated August 11, 2015, the Petitioner alleged that the Respondent, a certified nursing assistant (C.N.A.), violated statutes and rules set forth therein. The Respondent disputed the allegations and requested an administrative hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of three witnesses, and had Exhibits 1 through 10, 12, 14, and 15 admitted into evidence. The Respondent presented the testimony of one witness.

A Transcript of the hearing was filed on April 4, 2016. The Petitioner filed a Proposed Recommended Order that was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the state agency charged by statute with regulating the practice of nursing in Florida.

2. At all times material to this case, the Respondent was licensed as a certified nursing assistant in the State of Florida, holding license number 262882.

3. At all times material to this case, the Respondent was employed as a C.N.A. to provide personal care and assistance to M.U., an elderly female suffering from dementia and Parkinson's disease.

4. The Respondent initially provided her services to M.U. through a company identified as "Hopewell Home Healthcare."

5. Towards the end of 2013, the Respondent began to provide her services to M.U. by private agreement with J.U., M.U.'s husband.

6. During the time of the Respondent's employment by J.U., J.U. exhibited signs of short-term memory loss. The Respondent was aware of the continuing decline in J.U.'s memory, and on occasion, accompanied J.U. to physician appointments when his memory was included in the topics discussed.

7. By the time of the hearing, J.U. had suffered a stroke resulting in memory loss and an inability to communicate ("dysphasia").

8. M.U. required in excess of 20 hours of care per day. When the Respondent began to work for the couple privately, the Respondent recruited other caretakers to assist in providing the required care, but the Respondent remained the primary caregiver, working for approximately 60 hours per week.

9. In addition to the services the Respondent initially provided to M.U., as time passed, she also helped J.U. in other

ways, performing cooking and light household tasks, answering phone calls, scheduling and keeping appointments, and assisting in shopping errands and paying bills.

10. The Respondent was paid by the hour for the services she provided to M.U. and J.U.

11. In December 2013, the Respondent purchased a car through a loan that was co-signed by J.U. The loan amount was in excess of \$24,000. As a co-signer, J.U. was responsible for payment of the loan in the event that the Respondent failed to make the required installment payments.

12. The Petitioner has implied that the Respondent influenced and manipulated J.U.'s participation in the transaction because J.U. exhibited a decline in short-term memory abilities. The evidence is insufficient to establish that J.U. was not competent and capable of making financial decisions at the time of the loan execution.

13. While employed by J.U., the Respondent was authorized to use a credit card issued to J.U. to make various purchases of food, medications and household items for the couple.

14. The Respondent also used J.U.'s credit card, without authorization, to make various personal purchases and to pay her own car insurance and cable TV bills.

15. Beginning in February 2014, S.U., the son of M.U and J.U., assumed powers of attorney for his parents.

16. In February 2015, S.U. became aware that the monthly amount of charges routinely made to J.U.'s credit card account had increased. He reviewed the credit card account statements, and observed charges unrelated to the services being provided by the Respondent to J.U. and M.U.

17. After speaking with his father about the statements, S.U. met with the Respondent on February 28, 2015, to discuss the charges. During the discussion, the Respondent admitted she had used J.U.'s credit card to pay her personal expenses, but claimed that J.U. had given her permission to use the cards. She thereafter provided a check in the amount of \$1,060 to repay a portion of the expenses she had charged to J.U.'s card.

18. There is no evidence that the Respondent was authorized by J.U., or by anyone else, to use J.U.'s credit card to make personal purchases or to pay her own household bills.

19. The Respondent's employment by J.U. and M.U. was terminated on February 28, 2015.

20. The Respondent charged approximately \$19,000 of personal expenses to J.U.'s credit card.

21. The Respondent eventually defaulted on the car loan. The lender has been attempting to collect the net amount due on the loan of \$10,493.83 from J.U.

CONCLUSIONS OF LAW

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

23. In this case, the Petitioner is seeking to impose discipline against the Respondent's license. In order to prevail, the Petitioner must demonstrate the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

24. In order to be "clear and convincing," 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." See Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

25. Because the discipline imposed for the violations addressed herein are penal in nature, the statutes alleged to have been violated must be strictly construed in favor of the licensee. See Breesmen v. Dep't of Prof'l Reg., Bd. of Med., 567 So. 2d 469 (Fla. 1st DCA 1990); Farzad v. Dep't of Prof'l Reg., 443 So. 2d 373 (Fla. 1st DCA 1983); Bowling v. Dep't of Ins., 394 So. 2d 165 (Fla. 1st DCA 1981).

26. Here, the evidence establishes that the Respondent was authorized to use a credit card belonging to J.U. to pay for certain expenses related to J.U. and to his wife, and that the Respondent used the credit card for the authorized purchases. The evidence also establishes that the Respondent used J.U.'s credit card, without authorization, to pay for personal items, and for car insurance and cable television bills.

27. Although the Respondent did not testify at the hearing, the Respondent has previously asserted that the expenditures she charged to J.U.'s credit card were a "loan" from him, and that she intended to pay J.U. back. There is no credible evidence to support the assertion. There is no credible evidence that J.U. authorized the Respondent to use his credit card to pay such expenses.

28. The evidence also establishes that, during the period of time she provided care to J.U. and his wife, the Respondent financed the purchase of a vehicle through a loan, and that J.U. co-signed the loan application that facilitated the Respondent's purchase. While there is evidence that J.U.'s cognitive ability was in decline when the Respondent worked for the couple, the evidence is insufficient to establish that J.U. lacked the cognitive ability to understand his participation in the loan transaction at the time it occurred, or that the Respondent manipulated J.U. into co-signing the loan documentation.

29. Count I of the Administrative Complaint charges the Respondent with violating section 464.204(1)(b), Florida Statutes, which provides that the Petitioner may impose disciplinary sanctions for intentionally violating any provision of chapters 464 or 456, Florida Statutes, or the rules adopted by the Board of Nursing. Section 456.072(1)(n) prohibits "exercising influence on the patient or client for the purpose of financial gain of the licensee or a third party." The evidence is insufficient to establish that the Respondent exercised influence on the client for the purpose of financial gain.

30. Count II of the Administrative Complaint charges the Respondent with violating section 464.204(1)(b) by violating section 456.072(1)(m), which prohibits "making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession." The evidence establishes that Respondent violated section 456.072(1)(m) by improperly, and without authorization, utilizing the credit card referenced herein to pay personal expenses unrelated to the client.

31. Count III of the Administrative Complaint charges the Respondent with violating section 464.204(1)(b) by violating section 464.018(1)(h), which subjects a licensee to discipline for "unprofessional conduct, as defined by board rule." Florida Administrative Code Rule 64B9-8.005(4) defines unprofessional

conduct to include "stealing from a patient." The Respondent's improper and unauthorized use of a client's credit card to pay personal expenses constitutes stealing from a patient, an act of unprofessional conduct, which warrants discipline.

32. Florida Administrative Code Rule 64B9-15.009 sets forth the disciplinary guidelines applicable to this case. The following recommended penalty is within the referenced guidelines for the violations established in this proceeding.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Petitioner enter a final order finding the Respondent guilty of the statutory violations set forth herein and revoking the Respondent's license to practice as a certified nursing assistant.

DONE AND ENTERED this 4th day of May, 2016, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of May, 2016.

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.