

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
NURSING,

Petitioner,

vs.

Case No. 16-1787PL

RAPHAEL SANDERS, L.P.N.,

Respondent.

RECOMMENDED ORDER

On May 27, 2016, Administrative Law Judge, J. Lawrence Johnston, held the final hearing in this case by video teleconference between sites in Tallahassee and Tampa.

APPEARANCES

For Petitioner: Kristen M. Summers, Esquire
Rob F. Summers, Esquire
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For Respondent: Raphael Sanders, L.P.N.
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STATEMENT OF THE ISSUE

The issue in this case is whether the Board of Nursing should discipline the Respondent on charges set out in an Administrative Complaint filed by the Petitioner.

PRELIMINARY STATEMENT

The Administrative Complaint charges the Respondent with: Count I, violating section 456.072(1)(v), Florida Statutes (2015), by engaging or attempting to engage, or inducing or attempting to induce a patient to engage in, verbal or physical sexual activity outside the scope of the professional practice of practical nurses; and, Count II, violating section 464.018(1)(h) by engaging in unprofessional conduct as defined by board rule, specifically Florida Administrative Code Rule 64B9-8.005(13) for using force against a patient, and rule 64B9-8.005(1) for using abusive, threatening or foul language in front of a patient or directing such language towards a patient.^{1/} The Respondent disputed the allegations and asked for a hearing under section 120.57(1).

At the hearing, the Petitioner called as witnesses: patients K.M. and A.M.; Jameson Norton, chief executive officer of North Tampa Behavioral Health (NTBH); and Tara Giberga, NTBH's risk manager. The Petitioner's Exhibits 1 through 6, 10, 11, and 13 were admitted in evidence. The Respondent testified and called one witness, Jennifer Vita.

A Transcript of the final hearing was filed on June 27. The Respondent did not file a proposed recommended order. The Petitioner filed one that has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Respondent is a practical nurse who holds Florida license PN 5182360. He has held the license for seven to eight years. He has worked in mental health counseling facilities since 2010.

2. On July 1, 2015, the Respondent began working at North Tampa Behavioral Health (NTBH) doing intake assessments. On July 15, he did an assessment on K.M. During the assessment, the patient revealed that she was abusing substances and suffering from anxiety and depression after her boyfriend's death by illegal drug overdose. The Respondent initiated a personal conversation with the patient and told her that he was lonely, thought she was physically attractive, and would like to spend time with her after-hours.

3. The Respondent denied that this personal conversation took place. He also denied asking the patient for personal contact information, insisting that the patient found his contact information on Facebook and telephoned him. He finally recanted this denial after being presented with clear evidence at the final hearing that he texted K.M. right after she left NTBH that day. It also is clear from the evidence that the Respondent continued to use his cell phone to engage in frequent text and voice communications with her.

4. The Respondent admitted to one sexual encounter with K.M. within days of meeting her. According to him, the personal relationship and sexual encounter was at her insistence, and agreed only because she told him she was not a patient of NTBH. He admitted that he visited K.M. at her residence and socialized with her regularly that month, but only had one sexual encounter. He testified that he did not learn until later in July that K.M. actually was a patient of NTBH. He also went to on-the-job training on July 29, where he says he learned for the first time that it was against NTBH policy for him to have any personal relationship with a patient, much less a sexual relationship. He later changed his testimony and admitted he knew it was wrong for him to have a personal relationship with a patient. He testified that he tried to break off the personal relationship after July 29. Nonetheless, he admits that he continued to have a personal relationship with K.M. in July, August, and September, which included overnight stays in her residence. He maintained that he did so only to "appease" her because he was afraid she would jeopardize his job by reporting their relationship to his employer if he tried to end it. He also testified that she badgered him to resume their sexual relationship, but says he resisted and declined. He says that their personal relationship, as he described it, continued until

September 23, but only because he was afraid she would report it to his employer, as she threatened to do.

5. The Respondent's only corroboration of his version of his relationship with K.M. was a single cell phone voice message and the testimony of his current girlfriend, Jennifer Vita, who had broken up with him by July 15, 2015, but got back together with him later in the summer. The voice message was from September 17, 2015, as follows:

Hey, it's K.[M.] Trying to clarify what's going on to let you know that when I said I was done, I was done with my appointment, which you told me to let you know when I was done with my appointment. So I've called a hundred million times and you haven't picked up. So I guess you don't want to hang out. Goodbye.

Far from corroborating the Respondent's version of their relationship, the message is ambiguous. The Respondent had no good explanation why he had no other texts or voice messages to better corroborate his version of the relationship. Ms. Vita's testimony corroborated parts of the Respondent's testimony but was inconsistent with other parts. For example, she was still believing and repeating the story he had told her about being contacted by K.M. on Facebook, even after he had recanted it. Her knowledge was incomplete, and except for knowing K.M. called the Respondent repeatedly and spoke loudly on one occasion, was based on what the Respondent told her, which basically was a

self-serving denial that he was having an ongoing relationship with K.M.

6. K.M. testified that she and the Respondent dated in July, August, and September 2015, and their personal relationship included overnight stays at her residence and sex. A.M., who was another NTBH patient and a friend of K.M., corroborated K.M.'s testimony. She testified she visited K.M.'s residence when the Respondent was there in mid-August, which the Respondent does not deny. Both K.M. and A.M. testified that the Respondent was in bed upstairs when A.M. arrived. A.M. testified that the Respondent asked her to get in bed with him, but she refused and went back downstairs. She said he followed her and at one point reached around her and grabbed her breast. She said she moved his hand away and continued on. She said she left the residence a short time later to get ingredients for mimosas for her and K.M. and coffee for the Respondent. She testified that they then sat and talked and drank mimosas and coffee on K.M.'s veranda for a while and later went inside and were sitting on the living room couch when the Respondent initiated sex with K.M. in A.M.'s presence. K.M.'s testimony corroborated the gist of A.M.'s testimony.

7. The Respondent denied the testimony of K.M. and A.M. about what happened that day in August. He attempted to impeach their testimony by questioning why A.M. would have gone upstairs

to use the bathroom, as she said, since there was a bathroom downstairs. The attempt at impeachment was not effective, as there may have been any number of reasons why A.M. chose to go upstairs.

8. Despite taking the position that he wanted to end his personal relationship with K.M., the Respondent admits that he socialized with K.M. at a restaurant on September 23, 2015, and returned to K.M.'s residence afterwards. He says he went to the restaurant because she promised she would end the relationship after they talked there. The Respondent testified that he was surprised when A.M. appeared at the restaurant and joined them.

9. The women testified that they drove to the restaurant together in K.M.'s car with the intention of meeting the Respondent. They testified that the Respondent expected both women to be there, that all three were drinking alcoholic beverages at the restaurant, and that K.M. became inebriated. The Respondent denied drinking and denied that either of them drank very much. A.M. testified that K.M. drank several margaritas and was falling-down drunk and in no condition to drive her car when they left, so A.M. drove them back to K.M.'s residence. A.M. testified that her friend seemed somewhat coherent, in that she responded to questions. K.M. testified that she blacked out and has no recollection of returning to her residence.

10. The Respondent testified that he drove himself to the residence because he had to finish his conversation with K.M. about ending the relationship, which was interrupted when A.M. showed up and joined them at the restaurant. He said he was surprised again when A.M. followed them to K.M.'s residence.

11. A.M. testified that back at the residence, she told K.M. to sleep off her intoxication and started to leave when the Respondent said something to her about them owing him cigarettes, which she said she would get for him if he followed her in his car. A.M. testified that the Respondent followed her to the door, accosted her in the garage, tried to kiss her, and asked her to return to his residence with him to engage in sex, using the sex toys he had there. According to her, she said no, kicked him, and left. She thought he was going to leave also, but he went back inside.

12. The Respondent attempted to impeach parts of the women's testimony by maintaining that A.M. was the last to arrive at the restaurant. As supposed proof, he questioned how A.M. could have driven in K.M.'s car to the restaurant and later departed from the residence in her own car since the residential complex where K.M. lived had restricted, gated access. This attempt at impeachment made little sense because K.M. logically could have given A.M. permission to enter the gate as a visitor

before they both drove to the restaurant in K.M.'s car, as they testified.

13. The Respondent also maintained that he does not smoke and that he did not say anything to A.M. about them owing him cigarettes. Ms. Vita corroborated his denial of smoking, but it was not clear she was talking about tobacco cigarettes. In addition, it was clear from the evidence that the Respondent was keeping secrets from her. This attempt by the Respondent to impeach the testimony of K.M. and A.M. also was not effective.

14. The Respondent testified that he and K.M. had an argument after A.M. left the residence on September 23, that he again tried to break off their relationship, and that K.M. became furious and threw his cell phone and a glass of water at him. K.M. denied having any recollection of any of that.

15. K.M. testified that her next memory was groggily waking up in pain because the Respondent was having uninvited, nonconsensual anal sex with her. She testified that she asked him to stop, but he continued, saying he was almost finished. She says when he finished, he left. The Respondent denied any sexual encounter that day (or on any day after the sexual encounter he admits), much less uninvited, nonconsensual anal sex.

16. The next day, K.M. communicated with the Respondent by voice phone and text messages. She told him she was in pain and

suffering from rectal bleeding and wanted clarification of what had occurred the day before since her memory was foggy. The evidence included a screen shot from her telephone of the following text message exchange:

[K.M.] "Ray i dont recall all that happened yesterday evening but I know that I am not comfortable with anal sex. It hurt me very badly and dont want. You to try it again. I feel taken advantage of."

[Respondent] "No problem. But don't come at me like I'm some faakin rapist and shit!!"

17. The Respondent maintains that there were voice communications between these texts that alter their apparent meaning. It is unlikely that there were any communications between the texts. Even if there were, the meaning of the texts was plain. He was agreeing, no more anal sex, and was trying to deny that he raped her.

18. After communicating with the Respondent, K.M. reported the incident to A.M. and then to NTBH, which fired the Respondent for having a personal relationship and sex with a patient, both violations of its boundary policies. There was no evidence of any criminal charges being filed against the Respondent as a result of what happened on September 23. However, K.M. filed for and obtained an injunction against the Respondent because she was afraid of him. The Respondent agreed

to the injunction, and the court enjoined him from having any contact with K.M.

19. The testimony of K.M. and A.M. is clear and unambiguous. The totality of the evidence is clear and convincing that their testimony is essentially true. The Respondent's contention that they conspired to falsify a story to ruin him for ending his relationship with K.M., as he described it, is rejected as unworthy of belief.

CONCLUSIONS OF LAW

20. The Department of Health, Board of Nursing, regulates the nursing professions in Florida.

21. The Administrative Complaint in this case charges the Respondent with: Count I, violating section 456.072(1)(v), Florida Statutes (2015), by engaging or attempting to engage, or inducing or attempting to induce a patient to engage in, verbal or physical sexual activity outside the scope of the professional practice of practical nurses; and, Count II, violating section 464.018(1)(h) by engaging in unprofessional conduct as defined by board rule, specifically Florida Administrative Code Rule 64B9-8.005(13) for using force against a patient, and rule 64B9-8.005(1) for using abusive, threatening or foul language in front of a patient or directing such language towards a patient. (The current rule 64B9-8.005 was last revised on April 9, 2014, and is the applicable version.)

22. Disciplinary proceedings are considered to be penal in nature. In prosecuting a disciplinary action, the prosecutor is limited to proving the allegations and charges pled in the administrative complaint. Cf. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Aldrete v. Dep't of Health, Bd. of Med., 879 So. 2d 1244 (Fla. 1st DCA 2004); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805 (Fla. 1st DCA 1990).

23. In a penal proceeding, the prosecutor must prove the allegations and charges by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

24. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court, the standard:

[E]ntails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (citing, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

"Although 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., 590 So. 2d 986, 989 (Fla. 1991).

25. Using these standards, the charges in the Administrative Complaint against the Respondent were proven by clear and convincing evidence.

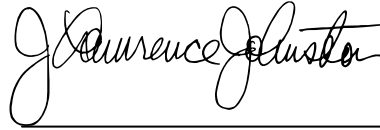
26. The appropriate penalty for the Respondent's conduct, as charged and proven, is revocation of his license, which is within the penalty guidelines adopted by the Board of Nursing. Fla. Admin. Code R. 64B9-8.006(3)(v) (Rev. Nov. 19, 2012).

27. Under section 456.072(4), the Board of Nursing in its final order shall assess costs related to the investigation and prosecution of the case. Costs to be assessed under the statute include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the Department of Health for this case.

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 the Respondent guilty as charged, revoking his license, and assessing costs under section 456.072(4).

DONE AND ENTERED this 20th day of July, 2016, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of July, 2016.

ENDNOTE

^{1/} The statutes alleged to have been violated are in the 2015 Florida Statutes, which also contain the procedural statutes that govern this proceeding. The rules cited are those in effect at the times of the alleged violations in 2015.

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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.