

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,  
BOARD OF NURSING,

Petitioner,

vs.

Case No. 16-6421PL

BRANDON YOUNG, C.N.A.,

Respondent.

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RECOMMENDED ORDER

This case was heard on November 30, 2016, in Jacksonville, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brynna J. Ross, Esquire  
Angela Chiang, Esquire  
Prosecution Services Unit  
Department of Health  
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For Respondent: Edwin A. Bayó, Esquire  
William M. Furlow, Esquire  
Paul Drake, Esquire  
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STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent committed sexual misconduct against a patient, in violation of

sections 464.204(1) (b) and 456.072(1) (v), Florida Statutes, as alleged in the Administrative Complaint and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On October 5, 2016, Petitioner, Department of Health (Department or Petitioner), issued an Administrative Complaint against Respondent, Brandon Young (Respondent), a certified nursing assistant (CNA). The complaint charged that Respondent engaged in sexual misconduct with a patient in violation of sections 464.204(1) (b) and 456.072(1) (v).

On or about October 10, 2016, Respondent timely filed a Petition for Hearing Involving Disputed Issues of Material Fact in which he disputed material facts alleged in the Administrative Complaint and requested an administrative hearing. On October 27, 2016, Respondent filed an Amended Petition for Hearing Involving Disputed Issues of Material Fact and Demand for Immediate Administrative Hearing.

On November 1, 2016, the petitions were referred to the Division of Administrative Hearings. A scheduling conference was held by teleconference, and a final hearing date of November 30, 2016, was agreed upon by the parties.

On November 29, 2016, the parties filed their Joint Prehearing Stipulation (JPS), which contained 27 stipulations of fact, each of which, unless conflicting with more persuasive

testimonial evidence, is adopted and incorporated herein. The JPS contained an additional 11 facts that were not disputed, but for which the Department maintained a relevance objection. Those facts are accepted, and will be given the weight deemed appropriate.

The final hearing was convened on November 30, 2016, as scheduled.

At hearing, the Department offered the testimony of M.C., the victim of Respondent's alleged sexual misconduct. Department Exhibit 1, consisting of page 12 of 21 of the exhibit identified in the JPS as Department Exhibit 1, and Department Exhibit 11, consisting of page 16 of M.C.'s deposition, were received in evidence. Department Exhibit 11 was offered in lieu of recalling M.C. for rebuttal and, by stipulation, the deposition excerpt has been considered and given the same weight as though M.C. testified in person on rebuttal.

Respondent testified on his own behalf, and offered the testimony of Matthew Graham, risk manager for St. Vincent's Medical Center (St. Vincent's or the hospital), and Michele Holt, an assistant nurse manager at St. Vincent's. Respondent's Exhibit 2 was received in evidence. Respondent proffered the testimony of Jazmine Brin, a CNA employed by

St. Vincent's, which was segregated within the transcript, and not considered by the undersigned.

The one-volume final hearing Transcript was filed on December 14, 2016. Both parties timely filed Proposed Recommended Orders that were considered in preparation of this Recommended Order.

The actions that form the basis for the Administrative Complaint occurred on May 21, 2016. This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes are to Florida Statutes (2015), unless otherwise noted.

#### FINDINGS OF FACT

1. The Department of Health, Board of Nursing, is the state agency charged with regulating the practice of nursing, including nursing assistants, pursuant to section 20.43, Florida Statutes, and chapters 456 and 464.

2. At all times material to this proceeding, Respondent was a CNA in the state of Florida, holding certificate number CNA 275789.

3. Respondent's current address of record is 2049 Hunters Trace Circle, Middleburg, Florida 32068.

4. Respondent has worked at St. Vincent's since April 2015. He started as a security officer. In December 2015, upon receiving his certification as a nursing assistant, he began work as a patient care technician (PCT). Respondent has not previously been subject to discipline by the Department.

5. Prior to May 21, 2016, M.C. was admitted to St. Vincent's. She had difficulty breathing, and ultimately had a new stent put in.

6. M.C. lives in an assisted living facility. At the hearing, she could not remember its name or address.

7. Respondent was not on duty at St. Vincent's on Friday, May 20, 2016. He did work there on Saturday, May 21, 2016. The preponderance of the evidence indicates that the alleged incident described herein occurred on May 21, 2016.

8. Upon entering M.C.'s room on May 21, 2016, Respondent smelled urine. He asked M.C. if she had wet herself, and she replied in the affirmative. Although M.C. was able to turn herself in bed, and could use the bedside commode with assistance, she was not able to clean herself.<sup>1/</sup> Respondent determined that he would have to provide her with routine perianal care (pericare).

9. Pericare is the washing of the genitals and anal area. Pericare for female patients involves having the patient open her legs, whereupon the health care provider cleans the outer

part of her vagina, and then cleans the genital area from front to back. Pericare can be done during a bath or as a separate procedure. Depending on the extent of the incontinent incident, cleaning can extend beyond the immediate genital area. Pericare prevents breakdown of the perianal area, itching, burning, odor, and infections.

10. St. Vincent's has no policy restricting the gender of PCTs providing pericare, and there was no violation of established protocol in having Respondent provide pericare for a female patient.

11. Respondent got cleaning supplies, wipes, clean linens and a gown, washed his hands with soap, and put on gloves.

12. Respondent first performed some general cleaning of M.C.'s legs, arms, and back. Respondent then performed pericare by having M.C. turn on her side, when he cleaned her buttocks from front to back, and then having her roll over to clean her front, again wiping her. Respondent stated that he had no conversation with M.C. during this care.

13. Respondent testified that the door to M.C.'s room remained cracked open during the time he was providing pericare to M.C. His testimony was credible, and is accepted.

14. Respondent stripped the bed linens, made the bed with fresh linens, and provided M.C. with a fresh gown.

15. Prior to May 21, 2016, M.C. had been cleaned by female hospital staff. She had never before been cleaned by male hospital staff, an occurrence that, during her testimony, appeared to bother her independent of any alleged misdeeds.

16. On May 24, 2016, case manager Kendra Crossway and Robin Copeland, P.A., went to M.C.'s room to discuss her discharge. During that meeting, M.C. first alleged Respondent's sexual misconduct.

17. At the hearing, M.C. testified that she reported the incident "[t]he next day." The preponderance of the evidence indicates that the report was made on May 24, 2016, three days after the alleged incident.

18. Ms. Crossway reported to Ms. Holt that M.C. had stated that she would never come to St. Vincent's again, and that M.C. further stated that her PCT had fondled her private parts.

19. Upon being advised of the patient's allegation, Ms. Holt interviewed M.C. regarding the allegation of sexual misconduct. Ms. Holt was told that Respondent put his fingers inside of M.C.'s vagina and then, upon her protest, he said, "Okay, okay" and left the room.<sup>2/</sup>

20. Ms. Holt reported her conversation to Mr. Graham and Genevieve Lanouette, who interviewed M.C. around 10:00 or 11:00 a.m. on May 24, 2016. M.C. indicated that Respondent came to her room on "Friday" (which would have been May 20, 2016) in

the late afternoon.<sup>3/</sup> M.C. related that Respondent told her that he was there to clean her up. She advised them that she had been inappropriately touched on her "private areas" by "a fat black man who thought he was funny," who put his fingers inside her vagina. Both the hospital's investigative report and the stipulated facts indicate that M.C. identified Respondent by name.

21. M.C. testified at the hearing that Respondent put two or three fingers into her vagina, pushing them in as far as they would go, and held them there for two minutes. She could not recall if Respondent was using a wipe or gloves.

22. M.C. testified that she told Respondent to "stop" when he put his fingers in her vagina. She testified earlier, in deposition, that she told him to stop when he first began cleaning her stomach area.

23. Mr. Graham and Ms. Lanouette also interviewed Respondent. He was asked to describe how he provides pericare to patients, was asked to describe his care of M.C., and was ultimately advised of the allegation made by M.C.

24. Respondent denied putting his fingers in M.C.'s vagina, or otherwise acting in any way inappropriately, both during the investigation and at the hearing.

25. Respondent was suspended by the hospital on May 24, 2016, pending the outcome of the investigation.



26. At the conclusion of its internal investigation, St. Vincent's determined that Respondent did not engage in sexual misconduct, and he was reinstated on May 28, 2016. Nonetheless, the allegation of sexual misconduct was reported to the Department of Health on June 2, 2016.

#### CONCLUSIONS OF LAW

##### A. Jurisdiction

27. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 456.073(5), 120.569, and 120.57(1), Fla. Stat. (2016).

28. The Department has authority to investigate and file administrative complaints charging violations of the laws governing CNAs. § 456.073, Fla. Stat. (2016).

##### B. Standards

29. Section 464.204(1)(b) establishes, as grounds for which the Board of Nursing may impose disciplinary sanctions, "[i]ntentionally violating any provision of [chapter 464], chapter 456, or the rules adopted by the board."

30. Section 456.072(1)(v) provides that:

The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

\* \* \*

(v) Engaging or attempting to engage in sexual misconduct as defined and prohibited in s. 456.063(1).

31. Section 456.063(1) provides that:

Sexual misconduct in the practice of a health care profession means violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of such health care profession. Sexual misconduct in the practice of a health care profession is prohibited.

32. A CNA who intentionally inserts his fingers into a patient's vagina while performing pericare would be guilty of sexual misconduct.

C. Burden and Standard of Proof

33. The Department bears the burden of proving the specific allegations that support the charges alleged in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Fox v. Dep't of Health, 994 So. 2d 416 (Fla. 1st DCA 2008); Pou v. Dep't of Ins. & Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

34. 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). The clear and convincing evidence level of proof:

[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.

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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, 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 Electric Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

35. A proceeding 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). Penal statutes must be construed in terms of their literal meaning and words used by the Legislature may not be expanded to broaden the application of such statutes. Thus, the provisions of law upon which this disciplinary action has been brought must be strictly construed, with any ambiguity construed against Petitioner. Elmariah v. Dep't of Bus. & Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); see also Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Whitaker v. Dep't of Ins., 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Dyer v. Dep't of Ins. & Treasurer, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

36. The allegations of fact set forth in the Administrative Complaint are the grounds upon which this proceeding is predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); see also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Thus, the scope of this proceeding is properly restricted to those matters as framed by Petitioner. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

E. Analysis

37. The Administrative Complaint alleges that "Respondent intentionally engaged or attempted to engage Patient M.C. in sexual misconduct when he inserted his fingers into Patient M.C.'s vagina."

38. The evidence in this case consisted almost entirely of the statements of the two primary actors -- M.C. and Respondent. There were no other witnesses, and no physical evidence to substantiate the claim. The alleged act was not reported until several days after it occurred, despite numerous intervening opportunities in which M.C. was with hospital staff outside of the presence of Respondent. The initial report was that the alleged incident occurred on a day that Respondent was not on duty -- a detail not suggesting that Respondent did not provide pericare to M.C., but suggesting a degree of imprecision in M.C.'s memory. Though not dramatic, there were inconsistencies in M.C.'s description of the incident over time. In particular, in her discussion with Ms. Holt, M.C. described an incident shorter in duration, and more possible of being the result of a misperception of normal pericare,<sup>4/</sup> than the incident described at hearing.<sup>5/</sup> Although M.C. seemed credible, so was Respondent. There was nothing in Respondent's deportment at the hearing to suggest evasiveness or prevarication.

39. As indicated above, the burden on the Department to prove the allegations of the Administrative Complaint is fairly high. In light of the complete record, the evidence adduced in this case was not clear and convincing that Respondent committed the act alleged in the Administrative Complaint.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Nursing, enter a final order dismissing the Administrative Complaint against Respondent, Brandon Young, C.N.A.

DONE AND ENTERED this 5th day of January, 2017, in Tallahassee, Leon County, Florida.



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E. GARY EARLY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of January, 2017.

ENDNOTES

<sup>1/</sup> Although M.C. indicated that she could clean herself at home, she acknowledged that during stays in the hospital, hospital

staff cleans her, stating "[t]here's a difference between the hospital and home."

<sup>2/</sup> The statements made by M.C. to various hospital staff, including Ms. Crossway, Ms. Holt, and Mr. Graham, are recognized as being out-of-court statements. However, they are not recited here for the truth of the matters asserted, but are rather set forth as comparisons with her testimony at hearing to determine whether the facts were distinctly remembered, and whether the complainant exhibited any degree of confusion as to the facts in issue.

<sup>3/</sup> As indicated previously, Respondent was not on duty on May 20, 2016.

<sup>4/</sup> Tr. 94:22-95:5.

<sup>5/</sup> Tr. 56:23-57:9.

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.