STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF NURSING,

Petitioner,

vs. Case No. 17-1249PL

LANNETTE THOMPSON, C.N.A.,

Respondent.
_______________________________/

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings (Division), on April 10, 2017, by video teleconference at sites located in St. Petersburg and Tallahassee, Florida.

APPEARANCES

For Petitioner: Rob F. Summers, Esquire
Lindsey H. Frost, Esquire
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For Respondent: Lannette Thompson, C.N.A., pro se
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated section 464.204(1)(b), Florida Statutes, by intentionally

violating section 456.072(1)(z), Florida Statutes, due to being unable to practice as a nursing assistant with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, or chemicals or any other type of material or as a result of any mental or physical condition; and, if so, what penalty shall be imposed.

PRELIMINARY STATEMENT

Petitioner filed its one-count Administrative Complaint against Respondent on November 1, 2016, with the Board of Nursing. Respondent filed a request for a hearing involving disputed issues of material fact on January 10, 2017. The matter was referred to the Division on February 23, 2017. The matter was assigned to Administrative Law Judge J. Lawrence Johnston to preside over this matter.

On February 28, 2017, a Joint Response to the Initial Order was filed, and this matter was set for hearing by video teleconference on April 10, 2017, at sites located in St. Petersburg and Tallahassee, Florida.

On March 3, 2017, this matter was transferred to the undersigned to conduct the final hearing.

At the final hearing, Petitioner presented the testimony of Officer Michael F. Karayianes, St. Petersburg Police Department (SPPD); and offered Exhibits 1 through 16, all of which were admitted into evidence. These exhibits included the depositions

taken in lieu of live testimony of Dr. Lawrence S. Wilson, an expert in addiction medicine, and SPPD Officer Daniel E. L'Esperance. Respondent testified on her own behalf and presented the testimony of Charles Pettis, Candace Thompson, and Jakayla Hudson; and offered Exhibits 1 through 4, all of which were admitted into evidence.

The Transcript of the proceedings was filed with the Division on April 28, 2017. Respondent filed her post-hearing submittal on April 18, 2017. Petitioner filed its Proposed Recommended Order on May 8, 2017. Both filings have been carefully considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2016), unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of nursing assistants, pursuant to section 20.43, and chapters 456, and 464, Florida Statutes.

2. At all times material to the Administrative Complaint, Respondent was a certified nursing assistant (C.N.A.) in the State of Florida, having been issued Certificate No. CNA 165217.

3. Respondent is a convicted felon, having been convicted in 1988 of the felony offenses of grand theft and forgery. The conviction constitutes a crime of dishonesty.

4. In 1989, Respondent was convicted of felony possession of cocaine and sale of cocaine.

5. In 1992, Respondent was convicted of robbery, a felony.

6. In 1998, Respondent was convicted of possession of cocaine, a felony.

7. Respondent was sentenced and incarcerated in 2003 to a term of three-and-a-half years. In addition to the numerous felony charges, Respondent committed multiple misdemeanors over the past 30 years.

8. In 2007, Respondent applied to be a C.N.A. in Florida.

9. Respondent explained her criminal history in her application to become a C.N.A., as follows:

> The charges that were committed happen [sic] at a time in my life when I was living on the streets. I stole out of stores in order to get clothes to wear and sell to support my addiction. I use [sic] drugs and alcohol to escape. I hung around a lot of wrong people who did drugs and stole for a living. To me this was normal. I did everything under the sun in order to get high. My life was very unmanageable. I wrote checks out of my mother's checking account to purchase drugs and alcohol.
>
> I unchanging [sic] sex for drugs, so before long the relationships that I got involved in boyfriend's would dealt [sic] drugs. I would sell drugs in order to get the drugs to [sic] and get enough money to make whomever I was dating at the time happy [sic].
>
> I have been drug free since 2000. I have maintained steady employment, and stable housing. I attend A.A. meeting [sic] on a

> regular basis. I have successfully completed Parenting, and Behavioral Healthcare Technical training classes given by the Operation PAR Incorporation. I am currently in my second year of school at St. Petersburg College in the Human Service Program. With hopes [sic] of earning a [sic] associate degree in Substance Abuse Counseling. I have positive friends and role models that do not indulge in any criminal activities or drugs. I also attend church services, and participate in church functions. Also, I have been raising two children as a single parent. In conclusion, I have successfully completed probation and as well have not committed any new offenses.

10. Respondent was first licensed as a C.N.A. in the State of Florida in April 2008.

11. On April 24, 2015, Respondent attended a party where she consumed alcohol. Early the next morning, SPPD Officer Daniel L'Esperance observed a vehicle parked at an odd angle in the parking lot of a closed gas station. Respondent was asleep behind the wheel of the vehicle with the keys in the ignition. The officer noticed a strong odor of alcohol coming from her breath, slurred speech, unsteadiness on her feet, and watery, bloodshot eyes.

12. Officer L'Esperance told Respondent to call a friend to come pick her up because he believed she was under the influence of alcohol or drugs. Respondent could not find her phone and gave Officer L'Esperance consent to look for her phone in the vehicle.

13. While searching for Respondent's phone, Officer L'Esperance found a crumpled up dollar bill in the driver's seat containing what he believed to be cocaine residue. The officer arrested Respondent for the felony offense of cocaine possession.

14. On or about April 26, 2016, at approximately 11:15 p.m., SPPD officers responded to a car accident involving two motor vehicles. Respondent was one of the drivers involved. She had consumed alcohol prior to the accident.

15. Respondent was wearing black scrubs at the time of the car accident. She had slurred speech; glassy, watery, and bloodshot eyes; and alcohol on her breath. She was unsteady on her feet and was disoriented. She exhibited further signs of impairment while participating in the field sobriety exercises.

16. SPPD Officer Michael Karayianes arrested Respondent for driving under the influence of alcohol or drugs. Respondent refused to provide a breath sample for alcohol testing.

17. On August 3, 2016, Lawrence S. Wilson, M.D., a physician specializing in addiction medicine, and hereby found to be an expert in this field, evaluated Respondent pursuant to Department order. Respondent admitted she first consumed alcohol at age 15. She reported that in her past she would consume 12 beers in one drinking session, and she would consume approximately 750ml of liquor every weekend. She consumed alcohol approximately once or twice per month in the two to three

months leading up to the evaluation. Respondent reported consuming a maximum of four alcoholic drinks in one sitting during this time period. She stated she had most recently consumed alcohol two days prior to her evaluation.

18. Respondent acknowledged to Dr. Wilson that she is an alcoholic.

19. Respondent acknowledged she first used cocaine at age 15. She most recently used cocaine two days prior to the evaluation. Respondent stated that, other than the use of cocaine two days prior to the evaluation, she had not used cocaine in approximately 20 to 30 years. She acknowledged she has a problem with cocaine.

20. Respondent told Dr. Wilson that she had not admitted herself nor been admitted to any detox facilities, any inpatient treatment, or any outpatient treatment programs. During the evaluation and in her testimony at hearing, Respondent claimed to be in active recovery, attending Alcoholics Anonymous (AA) meetings three to five times per week for the past year. Respondent claimed to have a sponsor and home group. Respondent chaired meetings, but had never told her story as a speaker.

21. On August 3, 2016, Respondent submitted to toxicology tests at Dr. Wilson's request. The tests were positive for both cocaine and alcohol. These results, which were professionally

obtained and are deemed credible, were inconsistent with Respondent's reported use of alcohol and cocaine.

22. The toxicology results indicated repetitive and frequent use of cocaine in the past two to three months. The toxicology results indicated heavy repeated alcohol use or binging.

23. Respondent's participation in AA has not prevented her from continuing both alcohol and cocaine use. Her "participation" in AA, at best, can be described as passive and, at worst, as embellished or untrue.

24. Dr. Wilson agrees with the latter assessment, calling Respondent's reporting of her alcohol and drug abuse "dishonest and deceptive." He further concluded that Respondent's minimization and deceptive reporting of her drug and alcohol use indicated that she was in denial of her alcohol and cocaine use disorders. Not surprisingly, Dr. Wilson diagnosed Respondent with severe alcohol use disorder and severe cocaine use disorder.

25. Dr. Wilson recommended Respondent participate in an Intervention Project for Nurses (IPN) monitoring agreement and complete an inpatient treatment program for her cocaine use disorder and alcohol use disorder.

26. Due to Respondent's current addictions, Dr. Wilson concluded that Respondent is not able to practice as a nursing assistant with the necessary skill and safety to adequately serve

patients. Dr. Wilson stated that his opinion would not change even if Respondent participated in AA meetings multiple times a week because the Respondent’s participation in AA is not effectively treating her addiction disorders. He believes she needs more intensive treatment due to her disease and addiction being active. The undersigned finds Dr. Wilson’s opinions and ultimate findings credible and well-substantiated.

27. Respondent has not actively entered into an IPN monitoring agreement nor has she entered or completed an inpatient treatment program for her cocaine use disorder and alcohol use disorder.

28. As recently as August 9, 2016, Respondent submitted a urine sample for a drug screening as a condition of her criminal probation. The sample returned positive for cocaine. In order to have a positive result, the individual tested must have consumed cocaine within 48 to 72 hours of submitting the sample.

29. Even the witnesses called by Respondent to testify at hearing confirmed her alcohol abuse issues. Her sister, Candace Thomas testified that she had last drunk alcohol with Respondent a month or two prior to the hearing, and recalled having drinks with Respondent at least once a week.

30. Another witness called by Respondent, Jakayla Hudson, testified that Respondent’s drinking habits were about the same as they had been years earlier, before she had been incarcerated.

31. Respondent denied the allegations of alcohol and drug abuse. She claims that Dr. Wilson and Officers Karayianes and L'Esperance fabricated their testimony to exaggerate the extent of her impairment.

32. Respondent claims to have last consumed alcohol on or about August 1, 2016, which is inconsistent with her sister's testimony at the hearing. She testified that she is not an alcoholic and does not have a problem with alcohol. Respondent's testimony was inconsistent with her statement that alcohol is her drug of choice, her history of alcohol abuse, her regular attendance at AA meetings since 2007, and her own previous statements.

33. When asked if she still used cocaine, Respondent testified that alcohol is her drug of choice. She testified she had not used cocaine in many years, yet a drug test showed she had ingested cocaine within the past year. When these conflicting statements are viewed with her history of alcohol and cocaine abuse, her regular hosting of AA meetings, regardless of her active participation in them, since 2007, and her own previous statements about the frequency of her drinking and cocaine abuse, the evidence clearly and convincingly strongly supports her being both an alcohol and cocaine abuser.

34. Respondent's criminal history, combined with the established fact that she has been and continues to suffer from

severe alcohol use disorder and severe cocaine use disorder, both of which appear to be voluntary, prove she is unable to practice as a nursing assistant with reasonable skill and safety to patients.

CONCLUSIONS OF LAW

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

36. Chapters 456 and 464, Florida Statutes, and Florida Administrative Code Chapter 64B9-15, regulate the practice of certified nursing assistants.

37. Section 464.204(1)(b) provides:

> The following acts constitute grounds for which the board may impose disciplinary sanctions as specified in subsection (2):
>
> * * *
>
> (b) Intentionally violating any provision of this chapter, chapter 456, or the rules adopted by the board.

38. Section 456.072(1)(z) provides:

> The following acts constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (z) Being unable to practice [as a nursing assistant] with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any

> other type of material or as a result of any
> mental or physical condition. . . .

39. 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 such discipline, Petitioner must prove the allegations in the Administrative Complaint 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). However, in an earlier opinion from the First District Court of Appeal, Boedy v. Department of Professional Regulation, 463 So. 2d 215 (1985), the court found that charges against a physician whose ability to practice with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, etc., was not penal, and rejected his claim for fifth-amendment protection against self-incriminating evidence. Since, as noted below, the Department is not seeking a revocation in this matter, but a penalty that allows Respondent to seek the help she needs to overcome her alcohol and drug addictions, the current matter comports with the holding in Boedy.

40. What constitutes clear and convincing evidence was described in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1989) as follows:

> [C]lear 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.

41. 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 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 the evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) (citations omitted), rev. denied, 599 So. 2d 1279 (Fla. 1992).

42. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887,

888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee." (citing State v. Pattishall, 126 So. 147 (Fla. 1930)).

43. The grounds proven in support of the Department's assertion that Respondent's license should be disciplined must be those specifically alleged in the Administrative Complaint. See e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987); and Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842 (Fla. 2d DCA 1984). Due process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Vill. Prop. Owners' Ass'n v. Dep't of Envtl. Prot., 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

44. The Department presented clear and convincing evidence to establish that Respondent suffers both from severe alcohol use disorder and severe cocaine use disorder. The Department

presented clear and convincing evidence to establish that Respondent's use of cocaine and alcohol is voluntary.

45. The Department presented clear and convincing evidence to establish that Respondent is unable to practice as a nursing assistant with reasonable skill and safety to patients due to her severe alcohol use disorder and severe cocaine use disorder.

46. Based on the foregoing, the Department presented clear and convincing evidence that Respondent violated sections 464.204(1)(b) and 456.072(1)(z).

47. The Board may impose the following penalties under section 456.072(2): suspension or permanent revocation of a license, restriction of practice of license, imposition of an administrative fine, issuance of a reprimand or letter of concern, placement of the licensee on probation for a period of time, corrective action, and/or require that the practitioner undergo remedial education. Here, the Department is not seeking permanent revocation of Respondent's license, but offers a suspension that will allow Respondent to get addictions under control if she chooses to comply.

48. Rule 64B9-15.009(3)(ee) further provides that the Board shall, when it finds a licensee has violated section 456.072(1)(z), impose penalties ranging from a $50 fine, IPN evaluation, and probation, to denial of certification or a

$100 fine, IPN evaluation, and suspension to be followed by a term of probation.

49. Rule 64B9-15.009(5)(b) provides that in applying the penalty guidelines, the following aggravating and mitigating circumstances are to be taken into account:

> 1. The danger to the public.
> 2. Previous disciplinary action against the registrant in this or any other jurisdiction.
> 3. The length of time the registrant has practiced.
> 4. The actual damage, physical or otherwise, caused by the violation.
> 5. The deterrent effect of the penalty imposed.
> 6. Any efforts at rehabilitation.
> 7. Attempts by the registrant to correct or stop violations, or refusal by the registrant to correct or stop violations.
> 8. Cost of treatment.
> 9. Financial hardship.
> 10. Cost of disciplinary proceedings.

50. Factors (1), (5), (6), (7), (8), (9), and (10) are relevant in this case. The evidence and testimony establish that Respondent, if allowed to practice as a C.N.A. at this time, is and would continue to be a danger to the public unless she is able to commit to getting the help she needs to become alcohol and drug free. The fact that she fails to acknowledge her alcohol and drug issues further supports the danger of her working with persons suffering from illness or disability.

51. The penalty imposed here must be severe enough to send a message to Respondent that it is time for her to get her life

in order, whether to allow her to work as a C.N.A. in the future or to hold any gainful employment. Further, the fact that she has never voluntarily sought rehabilitation through counseling, inpatient, or outpatient care further aggravates any penalty that is imposed. Without professional help, Respondent poses a danger to potential patients she would serve as a C.N.A.

52. Additionally, Respondent's criminal history is filled with serious violations that have resulted in her incarceration, as well as her paying fines, being subjected to probation, and having mandatory periodic drug and alcohol testing. None of these prior criminal behaviors, which have spanned over 30 years, support anything other than serious discipline being imposed on Respondent. Therefore, factors (1), (5), (6), and (7) are relevant aggravating factors in imposing a penalty against Respondent.

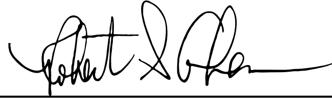
53. Respondent offered no evidence to mitigate the penalty the Department seeks to impose. She did not testify she could not afford the cost of treatment, much of which could be subsidized or provided by the Department or its sister agencies. Further, although she has hosted AA meetings for years, Respondent has not benefited from the life-altering help such meetings can provide, if only she had taken to heart the credo of AA and made a good faith effort to turn her life around.

54. While being unable to work as a C.N.A. would obviously impair Respondent's ability to earn more than as an unlicensed worker, she presented no evidence to prove she could seek or find no other work to support her family. Moreover, she has caused the Department to expend public funds to prosecute this matter and offered little in the way of a viable defense to her actions. In fact, the very witnesses she called as "her own" testified to their personal knowledge of the alcohol and drug addictions Respondent continues to suffer.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be issued finding that Respondent violated sections 464.204(1)(b) and 456.072(1)(z); imposing a suspension of her license until such time as Respondent personally appears before the Board and can demonstrate the present ability to engage in the safe practice of a nursing assistant, and the demonstration shall include at least one IPN evaluation, in which the evaluator finds Respondent is presently able to engage in the safe practice of a nursing assistant or recommend the conditions under which safe practice could be attained; requiring compliance with IPN recommendations and contract conditions, if any; requiring the payment of an administrative fine in the amount of $150; and awarding costs incurred in the prosecution of this case to the Department.

DONE AND ENTERED this 18th day of May, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.