

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
NURSING,

Petitioner,

vs.

Case No. 17-1628PL

ANDREA R. DELPOZZO, C.N.A.,

Respondent.

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RECOMMENDED ORDER

A hearing was held in this case on May 3, 2017, by video teleconference between sites in Sarasota and Tallahassee, before J. Lawrence Johnston, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Christopher A. Jurich, Esquire  
Kate M. Holmes, Esquire  
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Prosecution Services Unit  
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For Respondent: Steven D. Brownlee, Esquire  
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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent's license as a certified nursing assistant should be revoked or otherwise

disciplined because she intentionally violated section 464.204(1)(b), Florida Statutes (2015),<sup>1/</sup> by using force against or striking a patient, which Florida Administrative Code Rule 64B9-8.005(13)<sup>2/</sup> defined as unprofessional conduct.

#### PRELIMINARY STATEMENT

The Petitioner, Department of Health (DOH), Board of Nursing (Board), filed an Administrative Complaint against the Respondent, Andrea R. Delpozso. The Respondent disputed the charges and requested a hearing under section 120.57(1), Florida Statutes (2016).<sup>3/</sup>

At the hearing, the Petitioner called four witnesses who worked with the Respondent at Sunnyside Village Retirement Community: Deborah Harcup, R.N., the former director of nursing; two physical therapy assistants, Thomas Wilson and Megan Campbell; and an occupational therapy assistant, Rebecca Cirillo. The Respondent testified and re-called Nurse Harcup. The Petitioner's Exhibits 1 and 2, and the Respondent's Exhibit 1 were received in evidence. The Petitioner also proffered Exhibit 3, the Respondent's deposition transcript. The Respondent objected. The objection was sustained except to the extent that the exhibit could be used in rebuttal. Ruling on the use of the exhibit in rebuttal was reserved, and the Petitioner was required to specify the rebuttal in its proposed recommended order (PRO).

The Transcript of the hearing was filed on May 24, 2017. The parties filed PROs. The Petitioner's PRO did not specify any rebuttal, or provide the exhibit, and the objection to the Petitioner's Exhibit 3 is sustained. The PROs have been considered.

FINDINGS OF FACT

1. The Respondent is 25 years old. She is a certified nursing assistant (CNA) who holds Florida license CNA274235. Her license was first issued in December 2012. Her license was renewed in 2015, is clear and active, and was scheduled to expire on May 31, 2017. The Respondent has no history of any past license discipline.

2. On December 27, 2015, the Respondent was employed at Sunnyside Village Retirement Community (Sunnyside Village), located in Sarasota, as a CNA in the skilled nursing unit. Patient A.B. was a patient there.

3. A.B. was 98 years old and was considered frail in that she needed assistance with daily activities, could not move about easily, and used a wheelchair. She suffered from dementia that had worsened to mid-stage, and she was combative with staff at times. Although considered frail, she was a tall and fairly large woman. Her exact weight was not clear from the evidence. Estimates by the witnesses varied widely, from 110-115 pounds, to

130 pounds, to 190-200 pounds. When upset, she sometimes threw pictures, threw patient charts, and tried to bite and hit staff.

4. The skilled nursing unit at Sunnyside Village had a secured area for the protection of patients like A.B. The area was not locked, but the dementia patients had wander guards that triggered an alarm to alert staff if the patients attempted to leave the secured area. A.B. had a wander guard attached to her wheelchair.

5. On the morning of December 27, 2015, the Respondent was helping patients get ready for a church service when A.B. attempted to leave the secured area. Her wander guard triggered the alarm system, and a licensed professional nurse at the facility instructed the Respondent to get A.B. away from the exit doors. As the Respondent began to wheel A.B. away from the doors, the patient indicated that she wanted to go outside. The Respondent testified that she tried to "console" A.B. by saying she would take her outside after she finished getting the other patients ready for church. The patient did not seem to understand or accept what the Respondent was saying. Then, the Respondent started to wheel A.B. towards the T.V. room, which was near the nursing station at the other end of the hallway. A.B. became upset, took her feet off the footrests, planted them on the ground to stop the wheelchair, and attempted to swing her arm behind her to hit the Respondent.

6. There was evidence that Sunnyside Village had policies that staff should back off and re-approach an agitated patient. It was not clear from the evidence how the policy was supposed to be applied in the situation the Respondent faced on December 27, 2015. In any event, it would not necessarily follow that a violation of this policy would result in unprofessional conduct.

7. To get the patient to the T.V. room, the Respondent tilted the wheelchair to lift the patient's feet off the ground and make it possible to wheel the patient down the hall. To accomplish this, the Respondent had to put her foot on a bar at the bottom of the back of the wheelchair, press down on the hand grips at the top of the back of the wheelchair, and elevate the front wheels enough to balance the chair on two wheels as she proceeded down the hallway. This was not easy to do, especially because the patient was considerably larger than the Respondent. The Respondent weighed about 100 to 105 pounds. She testified that she is "five feet, five." However, she appeared to be closer to five feet tall than to five feet, five inches tall.

8. The Respondent thought it was only necessary to raise the front wheels two or three inches, but it does not seem plausible that she could maintain that position for long while pushing the wheelchair down the hallway. Witnesses who saw the Respondent perform the maneuver later thought the front wheels

were closer to 12 inches off the ground, creating close to a 45-degree angle of recline.

9. The Respondent thought this wheelchair maneuver was acceptable under the circumstances. There was testimony that it would be acceptable to raise the front wheels to prevent a patient who planted his or her feet on the ground from pitching forward and falling out of a wheelchair, but not to wheel a patient a long distance on two wheels. The Respondent was not charged with the use of force against the patient by wheeling her on two wheels for a long distance, and there was no evidence doing so constituted the use of force against the patient.

10. The Respondent left A.B. in the T.V. room and went back to the other patients getting ready for the church service. Almost immediately after being left in the T.V. room, A.B. left the room and wheeled herself back down the hallway to the same exit doors, again setting off the alarm. When she heard the alarm, the Respondent walked back down the hallway to the exit doors to get A.B. and return her to the T.V. room.

11. The Respondent repeated her attempt to console the patient and began to wheel her back to the T.V. room. The Respondent was speaking in a loud voice in order to be heard by A.B., who had removed her hearing aids. The patient was agitated and combative and also very loud.

12. The loud commotion drew the attention of a physical therapy assistant named Megan Campbell, who was in the patient room closest to the exit door, and by another physical therapy assistant named Mr. Thomas Wilson, who was in the second patient room from the exit door. At approximately the same time, an occupational therapist named Rebecca Cirillo was walking towards the exit door from the nursing station about 50 feet away.

13. Mr. Wilson thought the Respondent sounded "pretty angry." Ms. Campbell thought the Respondent was speaking loudly and seemed frustrated. Ms. Cirillo heard the patient "hollering" and the Respondent "yelling" and sounding "irritated" and "agitated." None of them were aware that the patient was not wearing her hearing aids and that the Respondent had to speak loudly just to be heard by the patient.

14. Mr. Wilson was kneeling on the floor putting footrests on a wheelchair as the Respondent and her patient passed by the door of the room he was in. He looked up and saw them from their left sides. By the time Ms. Campbell reached the doorway of the patient room she was in, the Respondent already had passed. Her view of the Respondent and her patient was from their back and left side. Ms. Cirillo's view was from the front.

15. All three witnesses thought they saw the Respondent angrily and intentionally strike the patient with her right hand and jerk the front wheels of the wheelchair up and down. Mr.

Wilson and Ms. Campbell saw the Respondent's right arm and hand swing quickly forward towards the patient's right side. Ms. Campbell described an intentional and forceful "slap-like" motion across the Respondent's body towards the right side of the wheelchair. Mr. Wilson thought the Respondent's hand landed in the area of the patient's head, neck, or shoulder. Mr. Wilson and Ms. Campbell admitted that they did not have a clear view and could not see actual physical contact. Mr. Wilson said he heard the patient make a grunt-like noise and flinch from what he thought was a hand-strike. Ms. Campbell did not hear the patient make a noise or flinch. Ms. Cirillo said she had a clear view and saw the Respondent slap the patient on her right arm. Ms. Cirillo and Ms. Campbell saw the Respondent move laterally to the left to avoid the patient's arms and hands, which she was flailing over her head in an attempt to hit the Respondent.

16. All three witnesses saw the Respondent jerk the front wheels of the wheelchair up twice, the second time after they had dropped back down hard. Mr. Wilson and Ms. Cirillo thought the front wheels were six to twelve inches off the ground, closer to twelve. Ms. Campbell could not give an estimate in inches but said saw the Respondent "very roughly jerk" the front wheels up "a good amount." The way the wheelchair "snapped back" made Ms. Cirillo concerned for the patient's safety. As she passed



the Respondent in the hallway, Ms. Cirillo said, "you can't do that." The Respondent testified that she told Ms. Cirillo the patient's hearing aids were out and that Ms. Cirillo replied, "whatever."

17. The Respondent testified that she actually was not angry at the patient because she understood the patient could not help her dementia. She explained that she was not speaking loudly in anger, but only to be heard by the patient, who had taken her hearing aids out. She also explained that she was not striking the patient but trying to prevent the patient from hitting her in the face. She said she tried to defend herself by moving to the left and holding her right arm out to block the patient's hand and arm. Finally, she explained that she lifted the front wheels of the wheelchair to keep the patient from injuring herself by pitching forward and falling out of the chair. She claimed she was able to softly lower the front wheels by quickly moving her right hand back to the wheelchair's hand grip after removing it to block the patient's arms and hands, which seems improbable.

18. After the incident, the three therapists briefly discussed what they had witnessed. All three thought the Respondent's actions were inappropriate. When Mr. Wilson and Ms. Campbell returned to the physical therapy section of the facility, they reported to their supervisor, who said they should

file a report. There were no report forms in the therapy area, so Mr. Wilson got some from the nursing area. The therapists filled out the reports and filed them. The reports were brought to the attention of the facility's director of nursing, Deborah Harcup, R.N., when she arrived at the facility at about noon that day. Nurse Harcup investigated by talking to the patient, the Respondent and the reporters, and by viewing a surveillance video of the hallway.

19. A.B. did not respond when asked about the incident. There was no physical evidence that the patient had been struck or injured in any way, nor any emotional or psychological evidence that she had been abused by the Respondent.

20. Nurse Harcup testified that the surveillance video was taken from a fisheye-lens camera that was in the hallway about where Ms. Cirillo was when she witnessed the incident. The video was grainy and indistinct, and it was impossible to discern anything from it.

21. Nurse Harcup testified that the complaints against the Respondent were surprising to her. She knew the Respondent to be a good nursing assistant and not the kind who would become angry at a patient, much less use force or violence against a patient. Ultimately, Nurse Harcup decided to terminate the Respondent's employment, not because of any conclusion she reached as to what actually happened, but simply because she was unable to determine

with certainty from the various witness statements what actually had happened.

22. The Respondent seemed to suggest that she might have been the victim of a conspiracy and falsely accused by the therapists because of workplace acrimony at Sunnyside Village. She testified that she previously had some kind of a problem with Ms. Cirillo that required the intervention of supervisors. There was no evidence as to what the problem was. Another indication of possible problems between the nursing staff and the therapy staff was Mr. Wilson's concern that there would be repercussions from the nursing staff if it was made known to them that the therapists were filing abuse reports on an employee of the nursing staff. However, the Respondent's conspiracy theory is rejected.

23. The evidence, taken as a whole, was clear and convincing that the Respondent intentionally slapped at A.B.'s flailing arm, and did not just defensively hold her right arm out to block the patient's arm and hand. However, the therapists misinterpreted the loudness of the Respondent's voice as anger and frustration because they did not know the patient had removed her hearing aids, and they misinterpreted the force of the hand-slap and the reason for the abrupt movement of the wheelchair. The wheel chair movement was not as smooth as the Respondent thought and testified, but it was not the intentional use of

force against the patient. The hand-slap was intentional, but it was not intended to be, and was not, violent or hard enough to harm or punish the patient. As Nurse Harcup testified, that would have been completely out of character for the Respondent.

24. Both actions happened quickly, while the Respondent was dodging to the left and simultaneously raising the front wheels of the wheelchair to prevent the patient from pitching forward and hurting herself by falling out the front of the wheelchair onto the floor when she planted her feet.

25. The entire incident was over very quickly, and the Respondent went about the business of returning the patient to the T.V. room without any further incident. The Respondent did not try to hide anything. It all happened out in the open in the middle of the hallway, where anyone around could see it.

#### CONCLUSIONS OF LAW

26. The Petitioner seeks to impose discipline on the Respondent for violating section 464.204(1)(b), Florida Statutes, which made it a violation to intentionally violate any provision of chapter 464, chapter 456, or the rules adopted by the Board. Unprofessional conduct, as defined by Florida Administrative Code Rule 649B-8.005(13), was a violation of sections 464.018(1)(h) and 464.204(1)(b).<sup>4/</sup> Rule 649B-8.005(13) defined unprofessional conduct to include "[u]sing force against a patient, striking a patient, or throwing objects at a patient."

27. 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).

28. 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).

29. In this case, it was not proven by clear and convincing evidence that the Respondent used force against the patient by jerking her wheelchair. However, the Petitioner proved by clear

and convincing evidence that the Respondent struck the patient A.B. in the arm.

30. The Respondent asserted self-defense. Self-defense is the use of non-deadly force to the extent believed to be reasonably necessary to defend against the imminent use of force. Cruz v. State, 971 So. 2d 178, 182 (Fla. 5th DCA 2007). The force used by the Respondent in slapping the patient's arm was not reasonably necessary for self-defense.

31. The penalty guidelines adopted by Florida Administrative Code Rule 64B9-15.009(3)(ii)<sup>5/</sup> for the offense of unprofessional conduct, as defined in rule 64B9-8.005, were (and still are) very broad. The penalty guideline for the first offense ranged from a \$50 fine, reprimand and probation, and continuing education, to a \$150 fine, reprimand, suspension followed by probation, or revocation.

32. Under rule 64B9-15.009(5)(b), circumstances that could be considered for purposes of mitigation or aggravation of penalty, above or below the penalty guidelines, included, but were not limited to: the danger to the public; previous discipline; length of practice; actual damage, physical or otherwise, caused by the violation; the deterrent effect of the penalty; efforts at rehabilitation; attempts to correct or stop violations; cost of treatment; financial hardship; and cost of

disciplinary proceedings. The circumstances present in this case do not justify a deviation from the extremely broad guidelines.

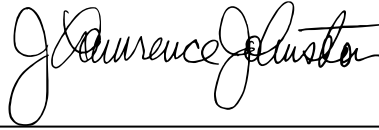
33. The Petitioner seeks to revoke the Respondent's license, but revocation is too harsh under the totality of the circumstances.

34. Section 456.072(4) provided that the Board shall assess costs related to the investigation and prosecution, in addition to other discipline imposed for violating a practice act.

#### 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 of unprofessional conduct, as defined by rule 649B-8.005(13), for intentionally striking the patient A.B. on the arm; suspending her license for 60 days, followed by probation for one year; requiring her to take a relevant course of continuing education; and requiring her to pay the costs related to the investigation and prosecution.

DONE AND ENTERED this 3rd day of July, 2017, in Tallahassee,  
Leon County, Florida.



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J. LAWRENCE JOHNSTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of July, 2017.

ENDNOTES

<sup>1/</sup> Unless otherwise noted, all statutory references are to Florida Statutes (2015), which were the statutes in effect on December 27, 2015, which is the day of the alleged violation.

<sup>2/</sup> References to the Florida Administrative Code are to the version in effect at the time of the alleged violation. This citation refers to the April 9, 2014, revision.

<sup>3/</sup> The Administrative Complaint failed to cite to section 464.018(1)(h), which makes unprofessional conduct a violation warranting discipline. However, the case proceeded as if that statute had been cited, and the issue was tried by consent.

<sup>4/</sup> See note 3.

<sup>5/</sup> See note 2. This citation refers to the October 16, 2012, revision.



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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.