

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
NURSING,

Petitioner,

vs.

Case No. 17-5488PL

FRANCOISE GLORIA HECTOR UTEGG,^{1/}
C.N.A.,

Respondent.

_____ /

RECOMMENDED ORDER

On December 8, 2017, Administrative Law Judge (ALJ)
J. Lawrence Johnston of the Division of Administrative Hearings
(DOAH) conducted a disputed-fact hearing in this case by video
teleconference at sites in Orlando and Tallahassee.

APPEARANCES

For Petitioner: Kristen M. Summers, Esquire
Lindsey H. Frost, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Francoise Gloria Hector Utegg, pro se
7007 Belroi Street
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STATEMENT OF THE ISSUES

The issues are whether the Respondent should be disciplined
under sections 464.204(1)(b) and 456.072(1)(z), Florida
Statutes^{2/}; and, if so, the appropriate discipline.

PRELIMINARY STATEMENT

On April 26, 2017, the Petitioner filed an Administrative Complaint against the Respondent. The Administrative Complaint charged the Respondent with the statutory violations for being unable to practice as a nursing assistant due to her mental condition, schizophrenia.

The Respondent disputed the charges and requested a hearing. The Petitioner forwarded the case to DOAH for assignment to an ALJ. It was designated DOAH case 17-5488PL and scheduled for hearing on December 8, 2017.

At the hearing, the Petitioner introduced two exhibits, including the transcript of the deposition of Jamie Smolen, M.D., and called the Respondent to testify. The Respondent introduced no evidence other than her testimony.

The Petitioner ordered a transcript, and the parties were given ten days from the filing of the transcript to file proposed recommended orders. The Respondent filed a closing argument of sorts on December 12, but nothing after the filing of the Transcript on January 16. The Petitioner filed a Proposed Recommended Order. Both filings have been considered.

FINDINGS OF FACT

1. The Petitioner regulates the practice of nursing and nursing assistants in Florida. The Respondent holds license CNA 140254, which allows her to work as a certified nursing

assistant (CNA). She became licensed in 2006 and worked as a CNA at Quality Health Care Center ("Quality Health Care") in Winter Garden from 2007 through 2016. There is no evidence that the Petitioner was aware of any concerns about the Respondent's ability to practice as a CNA with reasonable skill and safety until May 2016.

2. In May 2016, the Respondent sent an e-mail to the Petitioner's Medical Quality Assurance Consumer Services Unit that said:

Hi this is Francoise Utegg license # 140254
CNA. I m impossible since 2005 after I
bought an house with my husband at 2004
Kruger Dr Modesto CA 95355 Since in the next
day we finished repair the house I m
impossible they executed me and video track
me I face cults culture deaths I'm living an
abandoned live people talking inside me it s
not in my brain you can verify my work and I
never give up to work I found out a gang
tracking me to force me to give up my life.
I was at work yesterday someone talk in me
said I will cheats you, They pushed me down
verbal harassing terracing terrified
terrorize everywhere I m it s feel like I
don't have any right They say that I m
assaulted to take care of children. They
dissolution my married and pushed me down
they wasting me in nightmares
Thanks for your concern. It s can be
anyone's else

3. The Respondent's intent in sending this e-mail was to do a public service by alerting the Petitioner to the possibility that many other people might come under similar attacks, to the detriment of their health and safety. The result was that the

Petitioner immediately began an investigation into the Respondent's ability to practice with reasonable skill and safety due to a physical or mental illness. The investigation included an interview with the Respondent and an inquiry to the Intervention Project for Nurses (IPN), which reported that the Respondent was not a program participant. In July 2016, the Petitioner ordered the Respondent to undergo a mental and physical examination to determine her ability to practice and the need for IPN. An examination by Jamie Smolen, M.D., was scheduled for February 13, 2017.

4. In December 2016, the Respondent was at work in the dining room at Quality Health Care when she began hearing voices telling her that she was "a domestique," i.e., in her native Haitian patois, no more than a common house maid. This insulted and angered the Respondent, who was very proud of having passed her licensure examination and worked as a licensed nursing assistant for almost ten years. The Respondent controlled her anger while working with her patients but then began to angrily and loudly dispute what the voices were saying and angrily threw dirty dishes and utensils into a wash tub, which made loud crashing sounds.

5. The family of one of the patients heard and saw this incident and reported it to the administration of Quality Health Care. Quality Health Care investigated the family's report and

required the Respondent to be evaluated and cleared before returning to work.

6. Dr. Smolen examined the Respondent as scheduled on February 13, 2017. He diagnosed schizophrenia, paranoid type, continuous.

7. Schizophrenia is a mental disorder characterized by abnormal social behavior and a failure to understand what is real. Symptoms include: delusions; hallucinations; and disorganized speech.

8. Dr. Smolen recommended that the Respondent did not have reasonable skill and safety to return to practice as a CNA; that she should receive psychiatric medication management; that she should agree to a mental health monitoring contract with IPN; that she should not be allowed to return to work until she demonstrated full compliance with the IPN contract, including medication management and psychiatric follow-up to confirm remission in response to treatment; and that she should be evaluated at that time for recovery status and return to work.

9. Dr. Smolen's opinion is based in part on information provided to him by the Respondent. She is a Haitian woman, aged approximately 50, who married a Canadian and accompanied him when he returned to Canada in 1996. They moved to Modesto, California, and in 2005 they undertook to renovate a home they purchased there. They worked long and hard. As the repairs were

being finished, the Respondent perceived strange things happening to her. She believed something was in the house trying to harm her. She also believed she was under video surveillance and that a remote-controlled device was implanted in her abdomen. She also began to suffer from auditory hallucinations, hearing disembodied voices speaking French creole. She believed the voices may have been spirits, a "gang cult" in the air, or a "satanic legion." She thought she had been "voodoo-ized." She suffered physical symptoms, such as weight loss, recurrent headaches, and abdominal pain that she attributed to the implanted device. She also imagined being hit in the face by an invisible hand and an invisible tightening around her hands.

10. The Respondent's husband did not believe she was cursed, but instead believed she suffered from schizophrenia, and he took her to a doctor for treatment. The Respondent called the doctor a "witch psychologist" who prescribed Risperdal, an anti-psychotic medication. The Respondent thought the dosage she received caused her to "float as though she did not exist" and feel "limp like a snake." In the Respondent's mind, this confirmed that she was cursed, not schizophrenic.

11. The Respondent had blood drawn for her examination by the "witch psychologist." She later saw marks, possibly hematomas, where the blood was drawn. The Respondent interpreted the marks as signs that something evil was happening to her.

12. After what happened to her in Modesto, the Respondent and her husband divorced, and she moved to Orlando, Florida. In Orlando, the Respondent's abdominal pain persisted. When the Respondent sought medical advice, she was referred to mental health specialists, and the Respondent refused treatment. Not only did she not believe she had a mental illness, she seemed to believe the mental health professionals were part of the "attack" against her by the evil spirits, or whoever or whatever was tormenting her.

13. In 2006, despite her troubles, the Respondent somehow managed to become licensed as a nursing assistant, and managed to get a job as a CNA at Quality Health Care Center. It appears that she held the job for approximately ten years. The Respondent proudly reports that she frequently was asked to work overtime. No testimony or evidence was presented from anyone other than the Respondent concerning her job performance during those ten years. It is possible that her work was uninterrupted by her torments, but not likely, given the Respondent's self-reporting of some of the incidents during those ten years.

14. The Respondent testified that she has called the police more than ten times over the years to report the harassing voices she hears because she thinks they could harm others, too. The usual police response has been to handcuff the Respondent and transport her to a mental health facility for observation and

treatment. Typically, the Respondent refuses treatment or discontinues it after a period of compliance, and the pattern repeats itself.

15. On February 22, 2017, the Respondent was admitted to Aspire Healthcare on an inpatient status. She stayed for five days and was discharged on Zyprexa, an anti-psychotic medication, with clearance to return to work. She returned to work at Quality Health Care shortly after that and was compliant with her medication for a time. There was no evidence of any incidents at work after that.

16. In April 2017, the Petitioner filed an Administrative Complaint against the Respondent alleging her inability to practice as a nursing assistant with reasonable skill and safety by reason of her mental illness and her intentional refusal to comply with recommended treatment. At some point, Quality Health Care was informed about the Administrative Complaint and placed the Respondent on leave from her employment. When the Respondent received the Administrative Complaint in June 2017, she disputed the charges and asked for a hearing. All of this greatly upset the Respondent, who stopped taking her Zyprexa, as futile, and decompensated. A neighbor witnessed bizarre behavior in her home garden and reported her to the police, who handcuffed her and transported her to a mental health facility for observation and treatment.

17. On November 3, 2017, Dr. Smolen re-evaluated the Respondent. His opinion as to the Respondent's mental illness and ability to practice with reasonable skill and safety did not change.

18. The Respondent denies that she has a mental illness. As a result, she does not recognize the need for treatment or medication or monitoring. Nonetheless, she has shown some willingness to do what is necessary to remove the restrictions on her license so she can return to work, and she claims to have tried to contact IPN, but without success. However, she has not followed through for long before she gets frustrated with how long it takes to get cleared to return to work. When that happens, she stops treatment and medication.

CONCLUSIONS OF LAW

19. Because the Petitioner seeks to impose license discipline, it has the burden to prove the allegations by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This "entails 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). See

also Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "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., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

20. 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))).

21. The grounds proven in support of the Petitioner's assertion that the 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); Hunter v. Dep't of Prof'l Reg.,

458 So. 2d 842 (Fla. 2d DCA 1984). Due process prohibits the Petitioner from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instruments, unless those matters have been tried by consent. See Shore Vill. Prop. Owners' Ass'n, Inc. v. Dep't of Env'tl. Prot., 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

22. The Administrative Complaint charges the Respondent with a violation of section 464.024(1)(b), Florida Statutes, by an intentional violation of section 456.072(1)(z), for being unable to practice with reasonable skill and safety to patients by reason of illness or as a result of any mental or physical condition (schizophrenia).

23. The evidence was clear and convincing that the Respondent is unable to practice with reasonable skill and safety to patients by reason of her mental illness (schizophrenia) unless she is treated, in compliance with treatment (including necessary medications), and being monitored for compliance by IPN.

24. The alleged violation of section 464.024(1)(b) is less clear. The Petitioner's theory is that the Respondent intentionally violated section 456.072(1)(z) because she has been repeatedly made aware of her diagnosis, hospitalized for treatment, and made aware that she must undergo medication

management and treatment for her condition in order to relieve herself of her mental impairment. However, the Respondent does not accept the diagnosis and does not think treatment is necessary. For that reason, her refusals to be treated cannot be said to be intentional (although they are evidence of her mental illness).

25. Penalties in a licensure discipline case may not exceed those in effect at the time a violation was committed. Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

26. Section 456.079 requires the Board of Nursing (Board) to adopt disciplinary guidelines for specific offenses. Penalties imposed must be consistent with any disciplinary guidelines prescribed by rule. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

27. 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.

28. Florida Administrative Code Rule 64B15-15.009(3)(ee)^{3/} 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 a \$100 fine, IPN evaluation, and suspension to be followed by a term of probation.

29. Rule 64B15-15.009 provides that the Board is entitled to deviate from the guidelines upon a showing of aggravating or mitigating circumstances by clear and convincing evidence.

30. Rule 64B15-15.009(5)(b) provides the following circumstances which may be considered for purposes of mitigation or aggravation of penalty:

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.

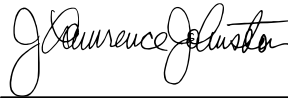
Consideration of these factors warrants a deviation from the penalty range by eliminating the fine (as suggested in the Petitioner's Proposed Recommended Order).

31. Section 456.072(4) provides that, in addition to any other discipline imposed for violation of a practice act, the Board shall assess costs related to the investigation and prosecution of the 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 to be in violation of section 456.071(1)(z); suspending her license until she enters into a mental health contract with IPN, and appears before the Board to demonstrate, through an evaluation by IPN, that she can practice as a nursing assistant with reasonable skill and safety to patients; imposing such additional conditions and/or probation at the time of reinstatement; and imposing costs of investigation and prosecution.

DONE AND ENTERED this 6th day of February, 2018, in
Tallahassee, Leon County, Florida.



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 6th day of February, 2018.

ENDNOTES

^{1/} The Respondent's last name is Utegg. It was misspelled in the Administrative Complaint and almost all subsequent filings by the Petitioner. The caption is amended to reflect the correct last name.

^{2/} The statutory citations are to the 2017 codification of the Florida Statutes.

^{3/} All rule citations are to the rules that were in effect in 2017.

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.