

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
NURSING,

Petitioner,

vs.

Case No. 18-0504PL

TONY L. MCGEE, C.N.A.,

Respondent.

RECOMMENDED ORDER

This case was heard on April 11, 2018, by video-teleconference at sites in Tallahassee and Orlando, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kristen M. Summers, Esquire
Hannah Phillips, Esquire
Department of Health
Prosecution Services Unit
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Tallahassee, Florida 32399-3265

For Respondent: Tony L. McGee, C.N.A., pro se
5713 Ibizan Court
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STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent engaged in unprofessional conduct by using force against or striking a patient, in violation of sections 464.204(1)(b) and

464.018(1)(h), Florida Statutes, and Florida Administrative Code Rule 64B9-8.005, as alleged in the Administrative Complaint; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On September 18, 2017, Petitioner, Department of Health (Department or Petitioner), issued an Administrative Complaint against Respondent, Tony McGee (Respondent), a certified nursing assistant (CNA). The complaint charged that Respondent engaged in unprofessional conduct by using force against, or striking, J.B., who was a patient at the Darryl Strawberry Recovery Center in DeLand, Florida.

On or about December 18, 2017, Respondent filed an Election of Rights disputing the facts alleged in the Administrative Complaint. The Election of Rights indicated that Respondent received the Administrative Complaint on December 14, 2017. That statement was not disputed by the Department, and the Election of Rights is found to have been timely filed.

On January 31, 2018, the matter was referred to the Division of Administrative Hearings; was set for hearing, to commence on April 11, 2018; and was convened on that date as scheduled.

At hearing, the Department offered Department Exhibits 1 through 3, which were received in evidence. Department Exhibits 1 and 2 are discovery responses from Respondent. Department Exhibit 3 is the transcript of Respondent's deposition

taken on March 7, 2018, which includes as exhibits Respondent's Election of Rights, and a video recording of the February 18, 2017, incident that forms the basis of this proceeding. The Department offered no witness testimony.

Respondent testified on his own behalf, and offered no exhibits.

The one-volume final hearing Transcript was filed on May 10, 2018. The Department timely filed a Proposed Recommended Order that was considered in preparation of this Recommended Order. Respondent did not file a post-hearing submittal.

The actions that form the basis for the Administrative Complaint occurred on February 18, 2017. 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 and rules are to the versions in effect on that date, 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 286629.

3. Respondent's current address of record is 5713 Ibizan Court, Orlando, Florida 32068.

4. Respondent has practiced as a CNA for approximately 30 years. Except for this incident, Respondent has never been subject to discipline against his CNA certification in either New York or Florida.

5. Prior to moving to Florida, Respondent worked for 22 years at a New York prison psychiatric ward, and at the Nassau University Health Center, both located in the state of New York.

6. Upon moving to Florida, Respondent worked as a CNA at Halifax Health Behavioral Services, and then at Florida Hospital in the medical/surgical unit.

7. Respondent is currently employed at Orlando Health. His duties include working with psychiatric patients, assisting them with everyday living skills, maintaining the living unit, and interacting with patients for their care. There was no evidence as to whether Respondent's employment at Orlando Health is as a CNA. Nonetheless, Respondent has had no issues during his time at Orlando Health.

8. Over the course of his career, Respondent has had extensive interactions with dangerous and aggressive patients.

That experience required training on de-escalating potentially violent situations. He was instructed to talk to patients; learn and know their movements, including eye contact and body movements; and keep a safe distance from and not stand directly in front of patients.

9. Respondent started working at the Darryl Strawberry Recovery Center in DeLand in November 2016. He took the job as a part-time second job to help pay for his upcoming wedding. His brother worked at the facility and advised him of the opening. His duties were to monitor patients, collect data from them, and assure a safe and therapeutic environment. Among his duties, Respondent was also to serve as a driver, picking up patients from various places around the state for admission to the facility, and taking them back to their home cities upon discharge.

10. Although Respondent had received de-escalation training for other jobs, the Darryl Strawberry Recovery Center offered no such training. There were, according to Respondent, no protocols provided to staff on how to de-escalate and handle aggressive patients. Had such been provided, then a standard protocol of having two staff persons involved in an intervention could have been employed. Without such protocols, Respondent was left to address the situation described herein as capably and safely as possible.

11. In December 2016, Respondent picked up J.B., who was living on the streets of Cocoa Beach, to transport him to the Darryl Strawberry facility. J.B. suffered from alcohol and drug addiction. During the ride from Cocoa Beach to DeLand, they discussed J.B.'s mixed martial arts (MMA) training, J.B.'s opinion that bigger guys no longer have a fighting advantage because MMA fighting has leveled the field, and that J.B. believed he was able to disarm any combatant and win every fight in which he is involved. J.B.'s statements are hearsay, but they are being recited here not for the truth of the matters asserted, but to establish Respondent's mental state during the confrontation that followed.

12. After the transport in December 2016, Respondent had no contact with J.B. until February 18, 2017.

13. On February 18, 2017, Respondent was scheduled to transport three patients who were being released from the facility. Two patients were to be transported to Cocoa Beach, and one to Miami. When Respondent arrived, there was a "discrepancy" as to who he was to transport, with there being talk of adding another patient. He did not know who the patient was to be, but did notice J.B. lying on a bench at the far side of a small recreational area.

14. Respondent's testimony was that J.B. was "dope sick," having used drugs the previous evening, and that he was "back to

the beginning." He was belligerent, spewing vulgar and racist epithets, and generally creating a scene. Shortly after Respondent's arrival at the facility, he returned the telephones, wallets, and property to the patients that he was to be transporting, items which are normally not allowed on-premises. Since there was still a delay caused by the debate on J.B.'s departure (i.e., whether the facility "was essentially kicking him out" for using drugs at the facility), he had to retrieve the items, which caused additional issues beyond the scope of this proceeding.

15. The incident that forms the basis for the Administrative Complaint is depicted on a surveillance video. The video was taken from a fixed position. It depicts the side of a building, the end of a parking lot, and a small recreational area with several benches and a cornhole game area. The video of the incident was grainy, with poor resolution. It had no audio. Although the video indicated that it covered the period from 10:15 a.m. to 11:15 a.m., it was only 23 minutes and 6 seconds in length, with roughly 30 seconds of that time taken up with the title and a privacy warning. The video has unexplained gaps that occur at critical times, including a two-and-a-half minute gap immediately before the incident (from 10:34:54 a.m. to 10:37:27 a.m.), and a 30-second gap immediately after the incident (from 10:38:02 a.m. to 10:38:33 a.m.).

16. The beginning of the video at 10:14:56 a.m. shows quite a few people milling about the building and the recreation area talking, playing cornhole, and exchanging greetings, hugs, and handshakes. The crowd is consistent until it begins to disperse starting at around 10:31:50 a.m. By 10:33:00 a.m., the area is virtually vacant, with a person sitting alone on one of the benches on the left side of the recreation area. The video is too grainy to discern who that person is, or who else might be in the area. At 10:34:00 a.m., a black male walks out, converses with another gentleman, sips his drink, and sits on a bench at the right side of the frame, at which time the two-and-a-half minute gap occurs. When the video picks back up, the person on the right side bench remains, the person on the left side bench has disappeared, and J.B. can be seen sprawled on a bench near the rear of the recreation area. Whether the person on the left side bench and J.B. were one in the same is unknown.

17. At 10:37:38, J.B. is seen to spring from his bench, strip off his jacket, and walk quickly towards the building. His posture and demeanor can only be described as agitated and aggressive, with chest-thumping followed by outstretched arms.

18. Respondent is seen walking from the side of the building. Although he "closed the gap" with J.B., his approach was calm, and towards J.B.'s side, which was consistent with his earlier testimony that one should not approach from the front.

Respondent's hands were at his side and were not tensed, nor were his hands clenched. The reasons for moving toward J.B. were two-fold -- to continue to talk with him in an effort to de-escalate the situation, and to move away from the other nearby patients to minimize the possibility of their involvement. He recalled J.B.'s statements regarding his MMA training, and was concerned with J.B. "getting off a punch." He tried to defuse the situation, telling J.B., "Listen, calm down man. You know this -- this is not going to go anywhere. There's better ways to handle it."

19. J.B. turned to face Respondent, head bobbing and clearly continuing to talk. Respondent testified that J.B. stood at that time, with fists clenched, and stated "I'm sick of you fucking niggers." That action first caused Respondent to believe that he was in danger. Respondent's testimony is consistent with J.B.'s gesticulations. J.B. moved his head towards Respondent, and Respondent testified that J.B. then feigned a blow, that "[h]e flinches." Although it is difficult to discern on the poor quality video, Respondent's testimony is credible and accepted. Respondent, in what can best be characterized as a reflexive act of self-preservation, determined that "[n]ow in my head I'm hit so I swung, connected." There is no question that Respondent struck J.B. more than once in rapid succession. It is this act that forms the sole basis for the Administrative Complaint.

20. After the initial blows, the scene was, understandably, chaotic. J.B. was back on his feet. At that point, the video experienced another gap of 30 seconds. When the video picked back up, Respondent is clearly speaking to J.B., with another person keeping them separated. Respondent testified that he "continued to ask him, you know, 'Put your hands down. It don't have to go any further. Stop. You know, just relax, relax, relax.'" There was no evidence to the contrary, and Respondent's testimony is accepted.

21. There was testimony as to things that happened in the following time period that Respondent testified were "to de-escalate the whole entire thing." However, post-incident actions were not pled as being pertinent to the allegations warranting discipline.

22. Respondent has not disputed that he struck J.B. Thus, the undersigned considers this proceeding as including a determination of whether Respondent's action was defensive and reactive, and bearing on the severity of the appropriate penalty within the range established in the penalty guidelines.

23. Petitioner understandably relies on the video of the event to support its argument. Respondent, in his deposition testimony, discussed the gaps, the angles, the lack of audio, and the "trouble viewing." Those elements highlight the weaknesses and biases inherent in single vantage-point videos. Instead of

reciting the strengths and weaknesses of video evidence, the undersigned hereby adopts and incorporates the thorough and well-considered analysis of video evidence set forth in paragraphs 15 through 25 of Administrative Law Judge John G. Van Laningham's Recommended Order in Indian River County School Board v. Joseph Nathaniel, Case No. 16-0272TTS (Fla. DOAH Jan. 31, 2017; Indian River Co. Sch. Bd. Feb. 27, 2017). Given the issues with the video described herein, the undersigned has accepted the description of the events in the testimony of Respondent, whose deportment and presentation at the hearing gave no suggestion of evasiveness or prevarication.

24. Respondent was arrested for his role in the February 18, 2017, incident. The charges were dismissed.

25. Without doubt, Respondent struck J.B. That response was not one taught in the training Respondent had received in his other jobs. However, under the circumstances here, there was little time to react. CNAs are expected to exercise good judgment and self-restraint when dealing with aggressive and violent patients and, but for this isolated and extreme incident, Respondent has done so for roughly 30 years.

26. Respondent took reasonable measures to de-escalate J.B.'s aggressive and violent actions and to separate other patients from J.B. and himself for the safety of all involved. Respondent's reflexive act when he perceived that J.B.'s blow was

being struck does not indicate a lack of good judgment or moral character necessary to practice as a CNA in a manner that is safe for patients, but was a defensive act of self-preservation, taken in legitimate fear and anticipation of assault.

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 464.018(1)(h) provides that:

The following acts constitute grounds for a denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(h) Unprofessional conduct, as defined by board rule.

31. Rule 64B9-8.005 provides, in pertinent part, that "Unprofessional conduct shall include: . . . (13) Using force against a patient, striking a patient, or throwing objects at a patient."

C. Burden and Standard of Proof

32. 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).

33. 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 Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

34. 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).

35. 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).

D. Analysis

36. The Administrative Complaint alleges that Respondent used force against a patient, and struck a patient. Respondent does not deny that he did so, and the video amply supports the allegation.

37. Respondent's description of the event was delivered directly and consistently. There was nothing in Respondent's deportment at the hearing to suggest evasiveness or prevarication. His testimony as to the circumstances was unrefuted.

38. What is clear from the evidence of record is that Respondent, in attempting to defuse a volatile, belligerent, and

aggressive patient, came to justifiably fear for his own safety and potentially that of others nearby and, when reasonably apprehensive that an assault was imminent, struck the aggressor, J.B., in an effort to neutralize the threat. Perhaps Respondent should have approached J.B. differently, or waited for a second staff person to assist him. However, under the exigencies of the moment, Respondent tried to defuse the patient on his own.

39. Florida Administrative Code Rule 64B9-15.009 establishes the disciplinary guidelines applicable to CNAs. 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).

40. Subsection (3)(ii) provides that the penalty guideline for a first offense of "intentionally engaging in unprofessional conduct, as defined in Rule 64B9-8.005, F.A.C. (Section 464.018(1)(h), F.S.)" as ranging from a minimum of a \$50 fine, reprimand and probation, and continuing education, to a maximum of denial of certification or a \$150 fine, reprimand, suspension followed by probation, or revocation.

41. Rule 64B9-15.009(5)(b) establishes circumstances that could be considered for purposes of mitigation or aggravation of penalty, above or below the penalty guidelines. Given the extremely broad penalty range, deviation is not necessary.

Nonetheless, the record reflects that Respondent has practiced as a CNA for approximately 30 years without prior disciplinary action, which would constitute mitigation to the penalty.

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

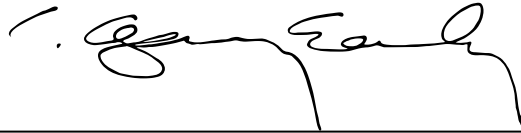
43. The very breadth of the penalty range suggests that, although the act of striking a patient may be clear cut, the penalty to be assessed should take the surrounding circumstances into consideration. The circumstances of this case, as set forth herein, clearly call for a penalty less than the maximum. The objective of discouraging conduct can be met in this case with a penalty consistent with that proposed by the Department in its PRO of probation for one (1) year, with reasonable conditions to be determined by the Board of Nursing, imposing a \$50 fine, and imposing costs of investigation and prosecution.

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: finding that Respondent engaged in unprofessional conduct under sections 464.204(1)(b) and 464.018(1)(h), as defined by rule 64B9-8.005(13), by intentionally striking J.B.; imposing a period of probation for

one year with reasonable conditions to be determined by the Board of Nursing; imposing a fine of \$50; and requiring Respondent to pay the costs related to the investigation and prosecution.

DONE AND ENTERED this 25th day of May, 2018, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of May, 2018.

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.