

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
NURSING,

Petitioner,

vs.

Case No. 18-2802PL

JACQUELINE JEAN, C.N.A.,

Respondent.

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RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018),<sup>1/</sup> on November 6, 2018, by video teleconference sites in Tallahassee and Sebastian, Florida.

APPEARANCES

For Petitioner: Lindsey H. Frost, Esquire  
Adam David Gonzalez Wright, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: Jacqueline Jean, pro se  
1191 Saturn Street  
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STATEMENT OF THE ISSUE

The issue in this matter is whether the Department of Health should discipline Respondent's certified nursing assistant license.

PRELIMINARY STATEMENT

On March 8, 2018, Petitioner, Department of Health, Board of Nursing (the "Department"), issued an Administrative Complaint notifying Respondent, Jacqueline Jean ("Respondent"), that the Department intended to discipline her for alleged misconduct that occurred on or about January 16, 2018. The Department seeks to sanction Respondent for committing unprofessional conduct in violation of section 464.018(1)(h), Florida Statutes, and Florida Administrative Code Rule 64B9-8.005(13).

Respondent timely requested an administrative hearing challenging the Department's action. On May 31, 2018, the Department referred the matter to the Division of Administrative Hearings ("DOAH") and requested assignment to an Administrative Law Judge ("ALJ") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on November 6, 2018.<sup>2/</sup> The Department presented the testimony of D.D.<sup>3/</sup> Department Exhibits 1 and 2 were admitted into evidence. Respondent testified on her own behalf. Respondent did not present any exhibits.

A one-volume Transcript of the final hearing was filed with DOAH on December 4, 2018. At the close of the hearing, the parties were advised of a ten-day timeframe following receipt of the hearing transcript at DOAH to file post-hearing submittals. The Department filed a Proposed Recommended Order, which was duly considered in preparing this Recommended Order.

#### FINDINGS OF FACT

1. The Department is the state agency charged with regulating the practice of nursing assistance in Florida. See § 20.43 and chs. 456 and 464, Fla. Stat.

2. Respondent is a certified nursing assistant ("CNA") in the State of Florida, having been issued certification number CNA 16962.

3. The Department seeks to sanction Respondent based on an incident that occurred on January 16, 2018. The Department's Administrative Complaint specifically alleges that "Respondent struck Patient J.H. at least one time on Patient J.H.'s head."

4. The Department asserts that Respondent violated section 464.018(1)(h) by committing "unprofessional conduct" as defined by a rule of the Board of Nursing. Rule 64B9-8.005(13) defines "unprofessional conduct" to include using force against a patient or striking a patient. Section 464.204 authorizes the Department to discipline Respondent up to and including permanent revocation or suspension of her assistant nursing certificate.

5. On the date of the incident, Respondent was working as a CNA at Avante, a rehabilitation center located in Melbourne, Florida.

6. At that time, J.H. was a patient on hospice care at Avante. J.H. was staying in a semi-private room with two beds. J.H.'s roommate was D.D.

7. At the final hearing, the Department represented that J.H. is mentally incapacitated. J.H.'s records from Avante indicate that she suffers from a variety of ailments which have resulted in an altered mental status, impaired ability to communicate, and impaired ability to control sporadic movements of her limbs. (Both D.D. and Respondent testified that J.H. had difficulty speaking.) Therefore, she is not able to testify about the incident.

8. D.D., however, was present in the room on January 16, 2018. D.D. testified at the final hearing about what she observed between Respondent and J.H. on the evening of January 16, 2018.

9. Initially, D.D. explained that the beds in the room she shared with J.H. were positioned side-by-side, about four-to-six feet apart. The beds were also separated by a privacy curtain. A sink was located on the wall opposite the beds. Above the sink was a mirror.

10. When the encounter between Respondent and J.H. occurred, D.D. was sitting at the sink facing the mirror. Respondent was tending to J.H. in her bed. At some point, D.D. heard a sound coming from J.H.'s bed. When she turned to look, D.D. saw that J.H. seemed annoyed, and Respondent's glasses were askew on top of her head. Respondent then left the room.

11. About an hour later, after D.D. had returned to her bed, D.D. stated that Respondent reentered the room. Respondent walked over to J.H. who was lying in her bed. D.D. testified that she then heard Respondent say, "Don't you ever hit me again." D.D. then saw Respondent hit J.H. twice on her forehead with her balled-up fist. D.D. did not see J.H. move or react after Respondent struck her.

12. At the final hearing, D.D. disclosed that she did not directly observe the incident because she was sitting in her bed, and the privacy curtain obstructed her line of sight. Instead, D.D. revealed that she watched Respondent's actions through the mirror over the sink. D.D. commented, however, that when she sat up in her bed, she had a clear view through the mirror to J.H.'s bed. D.D. exhorted that she had no difficulty seeing Respondent hit J.H.

13. D.D. was astounded by what she saw. She had no way of notifying anyone of the incident that night. The next morning,

however, D.D. promptly reported the incident to her physical therapist.

14. No evidence indicates that J.H. suffered any injuries from the encounter.

15. At the final hearing, Respondent adamantly denied hitting J.H. Respondent further denied that she has ever abused a patient in her care or been accused of hitting a patient. Respondent asserted that she did not do anything wrong involving, or use any force against, J.H.

16. Respondent stated that she has held a CNA license for over 20 years. She has worked at Avante since 2007.

17. Respondent explained that when she approached J.H. in her bed on the evening of January 16, 2018, she discovered that J.H. had wet herself. Therefore, Respondent proceeded to change her. In that process, J.H. knocked Respondent's glasses off her head. The glasses fell onto the bed. Respondent then reached down, grabbed her glasses, and replaced them on her face. She then finished changing J.H. and left the room.

18. At the final hearing, Respondent claimed that D.D.'s statement is false. Respondent declared that D.D. is confused about the incident and, maybe, does not care for Respondent. Respondent also asserted that, because she was sitting in her bed, D.D. could not accurately see what happened when she changed J.H.

19. Following the incident, Avante terminated Respondent's employment.

20. Based on the competent substantial evidence presented at the final hearing, the clear and convincing evidence in the record does not establish that Respondent hit J.H. on January 16, 2018. Accordingly, the Department failed to meet its burden of proving that Respondent committed "unprofessional conduct," which would support discipline under section 464.204, Florida Statutes.

#### CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1).

22. The Department charges Respondent with committing "unprofessional conduct" as defined by Board of Nursing rules. See § 464.018(1)(h), Fla. Stat. Board of Nursing rule 64B9-8.005(13) defines "unprofessional conduct" to include:

Using force against a patient, striking a patient, or throwing objects at a patient.

The Department alleges that Respondent violated section 464.018(1)(h) and rule 64B9-8.005(13) by intentionally hitting J.H. on the head.

23. For violations of section 464.018(1)(h) and rule 64B9-8.005(13), section 464.204 authorizes the Board of Nursing to

discipline a CNA up to and including permanent revocation or suspension of a nursing assistant certificate.

24. The Department's action to discipline Respondent is penal in nature. Accordingly, the Department bears the burden of proving the grounds for disciplinary action by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); see also Fla. Dep't of Child. & Fams. v. Davis Fam. Day Care Home, 160 So. 3d 854, 856 (Fla. 2015).

25. Clear and convincing evidence is a heightened standard that "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" Clear and convincing evidence is defined as an intermediate burden of proof that:

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.

S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 872-73 (Fla. 2014) (quoting 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., 590 So. 2d 986, 988 (Fla. 1991).

26. Further, it is a well-established rule that “penal statutes . . . are construed in favor of the licensee and against the regulatory authority.” Djokic v. Dep’t of Bus. & Prof’l Reg., Div. of Real Estate, 875 So. 2d 693, 695 (Fla. 4th DCA 2004); see also Munch v. Dep’t of Prof’l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992) (Disciplinary statutes and rules “must be construed strictly, in favor of the one against whom the penalty would be imposed.”).

27. The competent substantial evidence in the record does not prove, by clear and convincing evidence, that Respondent committed “unprofessional conduct” by using force against or striking J.H. The Department’s case rests solely on the testimony of D.D. Without credible evidence corroborating D.D.’s version of events, the Department’s evidence at the final hearing was not sufficiently persuasive to reach the level of clear and convincing.

28. D.D. testified with confidence and conviction. However, Respondent refuted D.D.’s testimony with equal conviction and believability. In addition, the undersigned finds certain ambiguities surrounding the incident that create some “hesitancy” in concluding that Respondent hit J.H. in the head. First, D.D. did not have a direct view of Respondent’s

interaction with J.H. She relied upon what she perceived through a reflection in a mirror from the angle at which she was sitting in her bed. Second, no evidence establishes that J.H. suffered any injuries from the encounter. Consequently, the question remains whether D.D. observed Respondent actually "using force" or "striking" J.H. (Perhaps D.D. glimpsed some other, less physical, contact that occurred when Respondent changed J.H.) Finally, the Department did not offer testimony from the victim or any other Avante employee or state investigator that might have corroborated D.D.'s account.<sup>4/</sup>

29. Conversely, during her testimony, Respondent adamantly denied assaulting J.H., as she has consistently maintained since the incident. No competent substantial evidence presented at the final hearing effectively challenged Respondent's credibility.

30. Consequently, the testimony and evidence presented at the final hearing does not establish, by clear and convincing evidence, that Respondent "struck Patient J.H. at least one time on Patient J.H.'s head" on January 16, 2018. Therefore, the Department did not meet its burden of proving, by clear and convincing evidence, that Respondent committed unprofessional conduct involving a patient in her care.

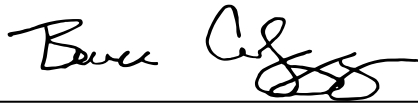
31. In sum, the competent substantial evidence in the record does not establish that Respondent violated section 464.018(1)(h) and rule 64B9-8.005(13). Accordingly, the

Department did not meet its burden of proof in order to sanction Respondent under section 464.204.

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, Jacqueline Jean.

DONE AND ENTERED this 30th day of January, 2019, in Tallahassee, Leon County, Florida.



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J. BRUCE CULPEPPER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of January, 2019.

ENDNOTES

<sup>1/</sup> Unless otherwise stated, all statutory references are to the 2018 codification of the Florida Statutes.

<sup>2/</sup> This matter was initially scheduled for a final hearing on August 8, 2018. Following the Department's motion, the final hearing was continued to November 6, 2018, on which date this matter was heard.

<sup>3/</sup> D.D. and J.H. are patients at a licensed facility in Florida. Accordingly, their confidentiality is maintained in this administrative proceeding. See §§ 395.3025 and 456.057, Fla. Stat.

<sup>4/</sup> In its Proposed Recommended Order, the Department points to its Investigative Report, dated January 31, 2018 (Petitioner's Exhibit "1"), as supplemental evidence supporting the allegation that Respondent hit J.H. The Department contends that the out-of-court statements contained within the Investigative Report should be used as a basis for the findings of fact in this matter.

The Investigative Report is replete with hearsay (including double and triple hearsay). See § 90.801(1)(c), Fla. Stat. Under the Administrative Procedure Act, "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." § 120.57(1)(c), Fla. Stat. The Department did not offer any exceptions to the hearsay rule which would allow the admission of the unsworn, out-of-court statements contained in its Investigative Report into evidence at the final hearing. Consequently, the undersigned makes no findings of fact based solely on the Investigative Report.

Further, the undersigned finds the hearsay evidence in the Investigative Report simply too unreliable to buttress the Department's efforts to prove, by clear and convincing evidence, that Respondent hit J.H. Specifically,

a. The social worker's report: A social worker who interviewed D.D. the day after the incident included "findings" in her written report that do not appear to be based on competent substantial evidence. For example, the social worker reported that "J.H.'s arms were flailing when [Respondent] was providing care." D.D. and Respondent were the only other individuals present during the encounter. However, no evidence or testimony records D.D. describing J.H.'s "flailing" behavior either to Avante, the Department, the social worker, or during the final hearing. The social worker also wrote in J.H.'s progress notes on the day after the incident that J.H. was "unable to provide [a] statement due to impaired cognition." Consequently, because the undersigned finds that the social worker's (apparently embellished) report is not sufficiently credible on its face, her narrative description of the event cannot serve as a basis for a finding of fact in this matter.

b. The police report:

1) A Melbourne police officer interviewed J.H. on January 24, 2018, eight days after the incident. The police officer wrote that:

I made contact with [J.H.]. She advised me that she remembered the incident. She advised that the nurse hit her on her head twice with her hand. She advised that she was being mean not in a playful manor [sic].

Based on the undisputed evidence that J.H.'s ability to communicate in January 2018 was extremely impaired, the undersigned is skeptical that J.H. could have described the incident to the police officer in any meaningful way.

2) Initially, D.D. testified at the final hearing that J.H. had "difficulty speaking." Further, throughout the Investigative Report, J.H. was noted to suffer from a number of ailments that affected her ability to effectively communicate, including a cerebral infarction, a psychiatric history of bipolar disorder, a frontal lobe injury, and an altered mental status. J.H. was also described as "confused and has speech difficulties"; "J.H. cannot hold a full conversation and her communication is garbled"; J.H. has a "difficult time expressing herself. It's hard to understand her"; J.H. "cannot say a full sentence, does not make sense"; J.H. "can say 2-3 words at a time, but they are 'jargled' and do not make sense"; J.H. suffers from aphasia and "mixes up words and cannot think of words. She yells and says yes when she means no." In light of these remarks, the undersigned determines that the police officer's report, based on what other individuals told him about the incident, is not reliable enough to be used as a basis for a finding of fact.

c. J.H.'s aunt:

1) The Investigative Report includes notes from a telephone conversation the Department's investigator had with J.H.'s aunt on January 30, 2018. J.H.'s aunt disclosed that she visited J.H. the day after the incident. During her visit, J.H.'s aunt asked J.H. if someone hit her. J.H.'s aunt relayed to the investigator that J.H. nodded "yes."

2) As with the other unsworn, out-of-court statements, the undersigned finds that this double and triple hearsay account of

the incident does not provide reliable enough evidence to prove that Respondent hit J.H. (See also the social worker's observation on January 17, 2018, that J.H. was "unable to provide [a] statement due to impaired cognition.")

Consequently, the Department's Investigative Report, on its face, lacks the indicia of reliability necessary to support the Department's allegations. Therefore, the factual findings and conclusions in this matter rest solely on the testimony produced at the final hearing.

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.