

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
NURSING,

Petitioner,

vs.

Case No. 18-4813PL

ADENIKE ADEBIYI, R.N.,

Respondent.

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RECOMMENDED ORDER

On October 29, 2018, a hearing was held in Miami, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Angela Chiang, Esquire
Judson Searcy, Esquire
Florida Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Adenike Adebisi, pro se
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent was terminated from a treatment program for impaired practitioners for failure to comply, without good cause, with the terms of the monitoring contract entered into by the licensee, in violation of

section 456.072(1)(hh), Florida Statutes (2016),^{1/} as set forth in the Administrative Complaint; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On June 16, 2017, the Department of Health (Petitioner or Department) filed an Administrative Complaint against Adenike Adebisi, R.N. (Respondent or Ms. Adebisi), on behalf of the Board of Nursing (Board). The complaint charged Respondent with being terminated from a treatment program for impaired practitioners for failure to comply, without good cause, with the terms of her monitoring contract. Respondent disputed material facts alleged in the complaint and requested an administrative hearing, which was held on October 29, 2018.

Although Respondent failed to timely respond to Petitioner's First Request for Admissions, she disputed some of them during a telephone hearing on Petitioner's Motion to Deem Admissions Admitted and to Relinquish Jurisdiction, and she was permitted to withdraw those admissions. At the hearing, Admissions 1, 3, 6, and 12 were not disputed, were accepted, and to the extent relevant, have been made a part of the Findings of Fact below.

Petitioner offered the telephone testimony of Dr. Shannon Large, chief executive officer at Intervention Program for Nurses (IPN), and that of Ms. Miranda Bullington, a case manager at IPN. Petitioner also offered four exhibits. Exhibit P-1 was admitted

over Respondent's objection, and Exhibits P-2 through P-4 were admitted into evidence without objection.

Respondent testified on her own behalf and offered five exhibits at hearing. Exhibit R-1 was rejected as not relevant, and Exhibits R-2 through R-5 were admitted. Respondent was given ten days after hearing to late-file additional exhibits, with Petitioner's objections to be filed within five days thereafter. Respondent timely filed nine additional exhibits: Exhibits R-6 through R-14. Petitioner filed objections to seven of the late-filed exhibits, followed by Respondent's response to those objections. All late-filed exhibits were admitted, consisting of: Exhibits R-6, an email from Ms. Adebisi to Ms. King, dated March 10, 2015; R-7, a handwritten note from the Circuit Court of Cook County, Illinois, dated February 27, 2007; R-8, a handwritten note on Sinai Health System letterhead advising that Ms. Adebisi's depression is in remission; R-9, a typed "Emergency Request to Be Heard by the Board of Nursing" signed by Ms. Adebisi, dated November 30, 2015, with certificate of service; R-10, a six-page Petition for Hearing Rights/Mediation addressed to the Board, dated March 13, 2015; R-11, a certificate of service, dated April 22, 2016, preceded by the final paragraph of a document requesting the Board to terminate Ms. Adebisi's relationship with IPN; R-12, a letter from Community Mental Health Council, dated April 24, 2007, advising that Ms. Adebisi

has not been diagnosed with, and is not experiencing symptoms of, mental illness; R-13, a letter from Dr. Theodore Treese to IPN, dated September 22, 2015 (already contained at pages 248-250 of Petitioner's Exhibit P-2); and R-14, a Final Order of the Board, dated December 21, 2012, in Case No. 2011-02946 (a duplicate of Petitioner's Exhibit P-3).

The final hearing Transcript was filed on November 16, 2018. Respondent filed a "Potential Resolution to this case" on November 5, 2018, and Petitioner filed a Proposed Recommended Order on November 26, 2018, both of which were considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating the practice of nursing on behalf of the State of Florida, pursuant to section 20.43 and chapters 456 and 464, Florida Statutes. The Board is charged with final agency action with respect to nurses licensed pursuant to chapter 464.

2. At all times material to this proceeding, Ms. Adebiyi was a registered nurse, having been issued license number RN 9429602. As a registered nurse, Ms. Adebiyi was subject to regulation by the Department.

3. As stipulated by the parties, IPN is the impaired practitioners program of the Board, designated pursuant to section 456.076. IPN monitors the evaluation, care, and

treatment of impaired nurses. IPN also provides for the exchange of information between treatment providers and the Department for the protection of the public.

4. In a Final Order of the Board issued December 21, 2012, Ms. Adebiyi's earlier license to practice as a registered nurse was suspended until she appeared before the Board to demonstrate her ability to safely practice nursing, including an in-depth psychological evaluation coordinated through IPN. The basis for the suspension was that she had failed to timely report that she had been found guilty of crimes that constituted grounds for disciplinary action. This earlier license subsequently expired.

5. In March 2015, as part of her efforts to reinstate her license, Ms. Adebiyi contacted IPN. After communication with the Board, IPN requested that she submit to an independent medical evaluation and gave her a list of approved providers.

6. On April 15, 2015, Dr. Jack Abramson conducted an evaluation of Ms. Adebiyi, which included some psychological testing. His report diagnosis under Axis I of DSM-5 was delusional disorder, ruling out manic psychosis. Though he admitted that the diagnosis was not firmly established because it was based upon only one period of examination, he stated it was clear that Ms. Adebiyi would not be able to practice nursing with reasonable skill and safety at that time, and recommended mental

health treatment and monitoring on a regular basis by an organization such as IPN.

7. After discussing her disagreement with portions of Dr. Abramson's evaluation with IPN, Ms. Adebisi wanted a second opinion, and set up an evaluation on July 15, 2015, with Dr. Theodore Treese. She did not notify IPN about this evaluation until after it had been completed. Dr. Treese diagnosed Ms. Adebisi with unspecified psychosis; major depressive disorder, recurrent episode, in partial or unspecified remission; and unspecified personality disorder.

8. Dr. Treese recommended that Ms. Adebisi undergo "a full battery of psychological/psychometric testing for diagnostic clarification, treatment recommendations, and clarification of cognitive functioning to include ability of demonstration for safety to practice," but ultimately was unable to find a psychologist who could perform the testing in Ms. Adebisi's native language, Yoruba.

9. Dr. Treese concluded that Ms. Adebisi might benefit from having individual psychotherapy and psychiatric support, IPN participation, and continued diagnostic workup including UDS (urine drug screen) testing, as this approach might allow her to later complete psychological testing without difficulty and to ultimately be capable of practicing nursing.

10. On October 30, 2015, Ms. Adebiyi signed and entered into a monitoring contract with IPN. The IPN program to which she agreed had a projected active monitoring period from October 2, 2015, through October 1, 2020, and required compliance with both the monitoring contract and the IPN Participant Manual, which outlines the terms of IPN participation.

11. Under the IPN program, Ms. Adebiyi was required to undergo random toxicology screening, participate in individual therapy, and submit quarterly self-reports. She was required to immediately notify and obtain approval from IPN prior to starting employment or making any change in any healthcare-related position. She was further required to participate in and successfully complete therapy, and to provide her therapist with a copy of the monitoring requirement. Ms. Adebiyi understood these conditions and knowingly entered into the IPN program.

12. Dr. Large is certified as an advanced practice addictions nurse and serves as the chief executive officer at IPN. She credibly testified, and it is found, that even if a professional has a mental health diagnosis with no evidence of drug use, if there has been a specific recommendation from an evaluator, IPN may include testing because the use of psychoactive substances like alcohol or drugs may negatively impact someone's psychiatric state. The IPN Participant Manual provides that three instances of material noncompliance,

including unexcused missed toxicology screens, are grounds for IPN termination.

13. On November 13, 2015, Ms. Adebiyi submitted an application for nursing licensure by endorsement to the Board. On March 3, 2016, the Board filed its Notice of Intent to approve Ms. Adebiyi's application with conditions, requiring her to comply with any and all terms and conditions imposed by IPN.

14. On or about March 23, 2016, the Board issued Ms. Adebiyi a license to practice as a registered nurse in Florida conditioned upon, among other things, her continued participation with IPN.

15. On September 6, 2016, Ms. Adebiyi was selected to provide a urine sample for random toxicology screening, as required under her monitoring contract. Ms. Adebiyi left a phone message around noon telling IPN that she would be unable to provide a sample that day. Ms. Bullington returned her call and advised her that if she failed to provide a sample it would count as an instance of material noncompliance. Ms. Adebiyi did not provide a sample on September 6, but completed a self-test the following day. Ms. Bullington advised Ms. Adebiyi that the self-test would "resolve" her material noncompliance and advised her that she must provide a sample on the day she was selected.

16. On September 22, 2016, Ms. Bullington and Suzanne Kinkle, IPN's chief nursing director, placed a telephone call to

Ms. Adebiyi regarding documentation that Ms. Adebiyi had submitted from Mr. Vega, Ms. Adebiyi's therapist, regarding her ability to safely return to work. Ms. Bullington advised Ms. Adebiyi that her return to work evaluation must be completed by an approved IPN provider and again provided her with a list of IPN-approved evaluator options.

17. On October 25, 2016, Ms. Adebiyi submitted to a fitness-for-duty independent medical evaluation conducted by Dr. Treese. Again, Ms. Adebiyi did not notify IPN that she was undertaking this examination until after it was completed and IPN had to send Dr. Treese the referral paperwork afterward. In his report dated November 1, 2016, Dr. Treese noted no signs that would suggest that Ms. Adebiyi was suffering from a substance abuse disorder, assessed problems related to psychosocial circumstances, and concluded that she was capable of practicing as a registered nurse with reasonable safety and skill provided that she remained in compliance with IPN.

18. On November 4, 2016, IPN sent a letter to Ms. Adebiyi notifying her that IPN approved her return to work in nursing. Among other requirements, the letter notified Ms. Adebiyi that she was required to notify and obtain approval from IPN prior to starting employment or making any change in any healthcare-related position.

19. Ms. Adebiyi was selected to provide a urine sample for random toxicology screening on November 18, 2016. She failed to do so. IPN notified Ms. Adebiyi that the missed screening was considered a material noncompliance.

20. Respondent again failed to provide a urine sample for toxicology screening on January 23, 2017. Due to the number of missed random toxicology screenings, IPN policy required Ms. Adebiyi to refrain from nursing practice and participate in an IPN-facilitated evaluation. On January 24, 2017, Ms. Bullington sent a letter to Ms. Adebiyi advising her that IPN required her to immediately refrain from nursing practice. The letter also required Ms. Adebiyi to participate in an IPN-facilitated evaluation and provided a list of three IPN-approved evaluators. The letter advised that failure to schedule and keep an appointment would result in her immediate termination from IPN.

21. On January 27, 2017, Ms. Bullington placed a call to Ms. Adebiyi. Ms. Adebiyi stated that she refused to undergo an evaluation or refrain from practice and told Ms. Bullington that she was going to continue working as a nurse part-time.

22. Dr. Large credibly testified, and it is found, that refusing to refrain from practice, once instructed to do so, constitutes material noncompliance and is grounds for termination of a monitoring contract.

23. Ms. Adebiyi's IPN contract was terminated on January 27, 2017, based on the determination that Ms. Adebiyi refused to refrain from practice.

24. Ms. Adebiyi participated in IPN from October 2015 until January 27, 2017, approximately 15 months. During that time, she complied with the terms of her monitoring contract, providing samples for toxicology screening on approximately 15 different occasions and submitting four quarterly self-reports for 2017.

25. Ms. Adebiyi testified that she only agreed to an evaluation through IPN and that she never entered into a monitoring contract. She also testified that she was not required to participate in the random drug screening tests because she had never used drugs. Ms. Adebiyi's testimony on these matters was not credible and is rejected. Ms. Adebiyi did not have good cause for her failure to comply with the terms of her monitoring contract. However, Ms. Adebiyi's testimony that it has never been shown that she uses drugs and that the screening tests were costly to her is accepted. Ms. Adebiyi credibly testified that the cost of the monitoring program created a financial hardship on her.

26. There was no showing in the record that Ms. Adebiyi has ever caused actual damage, physical or otherwise, to a patient under her care, or that her violations of IPN procedures caused such damage.

CONCLUSIONS OF LAW

27. 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), Florida Statutes (2018).

28. A proceeding to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Petitioner must therefore prove the charges against Respondent by clear and convincing evidence. Fox v. Dep't of Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)).

29. The clear and convincing standard of proof has been described by the Florida Supreme Court:

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 Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

30. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conser. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992).

31. Petitioner charged Respondent with violation of section 456.072(1)(hh), which provided, in relevant part:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(hh) Being terminated from a treatment program for impaired practitioners, which is overseen by an impaired practitioner consultant as described in s. 456.076, for failure to comply, without good cause, with the terms of the monitoring or treatment contract entered into by the licensee, or for not successfully completing any drug treatment or alcohol treatment program.

32. Petitioner proved by clear and convincing evidence that IPN is a treatment program for impaired practitioners, which is overseen by an impaired practitioner consultant as described in section 456.076.

33. Petitioner proved by clear and convincing evidence that Respondent entered into a monitoring contract with IPN on October 30, 2015, and was terminated from that program for

failure to comply, without good cause, with the terms of that contract on January 27, 2017.

34. Respondent's contention that she never agreed to enter into a monitoring program with IPN, but instead only agreed to an evaluation, is contradicted by the plain language of the agreement that she signed on October 30, 2015. She knowingly entered into a monitoring program and successfully participated in that program for many months.

35. Respondent's secondary argument is that she does not use drugs or alcohol, does not need a treatment program, and was not required to comply with the agreement. This argument is rejected. While the evidence does not prove drug or alcohol abuse by Respondent, the requirement for testing to rule out substance abuse was clearly set forth in the IPN contract that Respondent agreed to, and she was required to comply with its terms regardless of whether or not she was engaged in substance abuse.

36. Respondent did not have good cause for her failure to comply with her IPN monitoring contract.

37. Petitioner proved by clear and convincing evidence that Respondent violated section 456.072(1)(hh).

Penalty

38. The Board imposes disciplinary action upon licensees in accordance with disciplinary guidelines set by rule. Florida

Administrative Code Rule 64B9-8.006(3)(g) provided that the recommended penalty for the first offense of being terminated from a treatment program for impaired practitioners for failure to comply without good cause with the terms of the monitoring contract should range from a "\$250 fine, suspension, and IPN evaluation to a \$500 fine and suspension."

39. Section 456.072(4) provided that in addition to any other discipline imposed under section 456.072, a professional board shall assess costs related to the investigation and prosecution of the case.

40. Rule 64B9-8.006(5)(b) provided circumstances that could be considered for purposes of mitigation or aggravation of the penalty included, but were not limited to, the following:

1. The danger to the public.
2. Previous disciplinary action against the licensee in this or any other jurisdiction.
3. The length of time the licensee 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 licensee to correct or stop violations, or refusal by the licensee to correct or stop violations.
8. Cost of treatment.

9. Financial hardship.

10. Cost of disciplinary proceedings.

41. There was no showing in the record that Respondent has caused actual damage, physical or otherwise, to a patient or that her violation of IPN procedures has caused such damage. An administrative fine would pose financial hardship on Respondent. These mitigating factors in the record warrant slight downward departure from the guideline penalties set forth in the rule.

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 Adenike Adebisi, R.N., in violation of section 456.072(1)(hh), Florida Statutes; suspending her license as a registered nurse until completion of a successful evaluation by the Intervention Program for Nurses; and imposing costs of investigation and prosecution.

DONE AND ENTERED this 11th day of December, 2018, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of December, 2018.

ENDNOTE

^{1/} All references to the Florida Statutes or provisions of the Florida Administrative Code refer to versions in effect in January 2017, when the alleged offense took place, except as otherwise indicated.

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.