

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,

Petitioner,

vs.

Case No. 18-5513

ANTHONY CHAMBERS, C.N.A.,

Respondent.

_____ /

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),^{1/} on December 4, 2018, by video teleconference with sites in Tallahassee and Sebastian, Florida.

APPEARANCES

For Petitioner: Ross Daniel Vickers, Esquire
Florida Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Anthony Chambers, pro se
Apartment 604
1946 Otterbein Avenue
Cocoa, Florida 32926

STATEMENT OF THE ISSUE

The issue in this matter is whether Respondent timely requested an administrative hearing to contest an Administrative Complaint.

PRELIMINARY STATEMENT

On June 28, 2017, Petitioner, Department of Health (the "Department"), issued an Administrative Complaint against Respondent, Anthony Chambers ("Respondent"), for alleged misconduct.

On April 11, 2018, Respondent requested an administrative hearing disputing the material facts alleged in the Administrative Complaint.

On October 17, 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 Department specifically asked DOAH to determine whether Respondent timely submitted to the Department his Election of Rights form requesting an administrative hearing.

The final hearing was held on December 4, 2018. The Department presented the testimony of Kristen Summers. Department Exhibits A through I were admitted into evidence. Respondent testified on his own behalf. Respondent did not present any exhibits.

A one-volume Transcript of the final hearing was filed with DOAH on December 26, 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(3)(g)8. and 464.201-.208, Fla. Stat.

2. Respondent is a certified nursing assistant ("CNA") in the State of Florida, having been issued certification number CNA 95701.

3. On June 28, 2017, the Department filed an Administrative Complaint against Respondent's CNA certificate. The Administrative Complaint alleged that Respondent committed "unprofessional conduct" in April 2017 while working at Titusville Rehabilitation & Nursing Center.

4. On June 29, 2017, the Department mailed the Administrative Complaint to Respondent's address of record with the Department via Certified U.S. Mail. At that time, Respondent's address of record was 844 Faull Drive, Apartment A, Rockledge, Florida 32955.

5. On August 2, 2017, the Administrative Complaint was returned to the Department as "unclaimed."

6. On both August 24, 2017, and September 5, 2017, the Department attempted to personally serve the Administrative Complaint on Respondent at the 844 Faull Drive, Rockledge, Florida, address. The service by hand was not successful. Thereafter, the Department published a Notice of Action in Brevard County, Florida, in the Florida Today newspaper for four consecutive weeks beginning on October 2, 2017.

7. On November 8, 2017, Respondent called the Department. He reached Kristen Summers. Ms. Summers is the Department attorney assigned to Respondent's case and works in the Department's Prosecution Services section. During the call, Respondent expressed to Ms. Summers that he had not received the Administrative Complaint. Respondent also apprised Ms. Summers that he had a new mailing address of 1946 Otterbein Avenue, Apartment 604, Cocoa, Florida 32926.

8. That same day, November 8, 2017, Ms. Summers arranged for the Department to mail the Administrative Complaint, together with an Election of Rights form, to Respondent at his new address of 1946 Otterbein Avenue, Apartment 604, in Cocoa, Florida.

9. At the final hearing, Respondent admitted that he received the Administrative Complaint, as well as the Election of Rights form, on November 20, 2017.

10. The Administrative Complaint included a NOTICE OF RIGHTS, which stated:

A request for petition for an administrative hearing must be in writing and must be received by the Department within 21 days from the day Respondent received the Administrative Complaint, pursuant to Rule 28-106.111(2), Florida Administrative Code. If Respondent fails to request a hearing within 21 days of receipt of this Administrative Complaint, Respondent waives the right to request a hearing on the facts alleged in the Administrative Complaint pursuant to Rule 28-106.111(4), Florida Administrative Code.

11. The Election of Rights form included a provision, which stated:

In the event that you fail to make an election in this matter within twenty-one (21) days from receipt of the Administrative Complaint, your failure to do so may be considered a waiver of your right to elect a hearing in this matter, pursuant to Rule 28-106.111(4), Florida Administrative Code, and the Board may proceed to hear your case.

12. Based on the receipt date of November 20, 2017, 21 days after Respondent received the Administrative Complaint was December 11, 2017.

13. At the final hearing, Ms. Summers conveyed that she further communicated with Respondent between November 20, 2017, and December 11, 2017. During their conversation, Ms. Summers notified Respondent that the Department had not received his Election of Rights form. She also stressed to Respondent that, in

order to contest the Administrative Complaint, he must submit a written request to the Department before the expiration of the 21-day deadline.

14. In response to Ms. Summers' remarks, Respondent claimed that he had faxed an Election of Rights form to the Department. Thereafter, Ms. Summers "never looked harder" to locate a fax from Respondent. After a thorough search, however, she concluded that the Department had not received Respondent's Election of Rights form, or any other document requesting an administrative hearing, on or before December 11, 2017.

15. Despite the fact that she had no record that Respondent had timely submitted an Election of Rights form by December 11, 2017, Ms. Summers magnanimously agreed to extend the deadline for Respondent to file a written request for a hearing. At the final hearing, Ms. Summers explained that during her communications with Respondent, he expressed his desire to contest the Administrative Complaint. However, for some reason his attempt to do so had been unsuccessful. Therefore, in December 2017 (but after December 11, 2017), Ms. Summers told Respondent that, if he still wished to dispute the allegations against him, she would accept his Election of Rights form. Ms. Summers did not give Respondent a specific deadline in which to comply.

16. By March 2018, however, after waiting approximately three months, Ms. Summers still had not received Respondent's

Election of Rights form. She determined that she could not extend the deadline any longer.

17. Therefore, on March 20, 2018, Ms. Summers sent a letter to Respondent at all of his known addresses via Certified U.S. Mail. In her letter, Ms. Summers wrote that the Department's records indicated that Respondent had received the Administrative Complaint on November 20, 2017. However, the Department still had no evidence that he had submitted the Election of Rights form, or any other responsive pleading, contesting the Administrative Complaint. The letter then specifically instructed Respondent to return the Election of Rights form to Ms. Summers' office "via mail, fax, or electronic mail within ten days of the mailing of this letter." Ms. Summers concluded her letter by warning Respondent that "[f]ailure to return the Election of Rights form within this period of time will result in your case being forwarded to the Board of Nursing for determination of waiver and entry of a final order." Ten days from the date of Ms. Summers' letter was March 30, 2018.

18. With her letter, Ms. Summers included another copy of the Administrative Complaint and the Election of Rights form. Both the letter and the Election of Rights form included Ms. Summers' address, telephone number, and fax number at the Department.

19. On March 28, 2018, Respondent received, and signed for, Ms. Summers' letter at his address on 1946 Otterbein Avenue in Cocoa, Florida.

20. On April 11, 2018, 22 days after the date of Ms. Summers' letter (and 14 days after Respondent signed for the letter), the Department received, in the mail, an Election of Rights form completed by Respondent. On the form, Respondent indicated that he disputed the allegations of material facts contained in the Administrative Complaint. Respondent also wrote:

I have been cleared from [the Department of Children and Families] and a settlement has been reached [with] Titusville Rehabilitation and Nursing Center. I have been going thru some [sic] much and I'm so anxious to get back [to] my profession and what I love to do. I was with this company for 10 1/2 years. I've suffered enough humility and false allegations.

21. With his Election of Rights form, Respondent included a letter, dated December 22, 2017, entitled ACKNOWLEDGMENT OF RECEIPT OF SETTLEMENT CHECK (the "Acknowledgment Letter"). The body of the Acknowledgment Letter, which was prepared by a law firm, recorded that Anthony Chambers (Respondent) acknowledged receipt of a check to settle the matter of "Anthony Chambers (SEIU-1199) v. Fl-Titusville Rehabilitation and Nursing Center."

22. At the final hearing, Respondent fervently declared that he is innocent of the underlying allegations of misconduct

at the Titusville Rehabilitation & Nursing Center. Respondent professed that the Florida Department of Children and Families has cleared him of all wrongdoing. Therefore, he was extremely frustrated that the Department continues to pursue this matter, which is preventing him from returning to work as a CNA.

23. Respondent testified that he sent proof to the Department before April 2018 that he did not commit the alleged unprofessional misconduct. At the final hearing, Respondent explained that his proof was the Acknowledgment Letter.

24. As stated above, the Acknowledgment Letter was dated December 22, 2017. When confronted with this fact at the final hearing, Respondent conceded that he did not provide this letter to the Department until after that date. However, he insisted that he submitted it before Christmas via Certified Mail. Respondent did not offer evidence to support this statement.

25. Conversely, Ms. Summers maintained that the Department did not receive any documents from Respondent in December 2017. More importantly, Ms. Summers testified that the Department did not receive an Election of Rights form from Respondent until April 11, 2018. Respondent did not dispute Ms. Summers' representation that the first time he submitted his Election of Rights form was in April 2018.

26. Based on the evidence set forth at the final hearing, the Department established that Respondent did not file a petition

requesting administrative review within 21 days of receipt of the Administrative Complaint. Further, Respondent did not prove that he may circumvent the filing deadline based on the defense of equitable tolling. Therefore, Respondent's petition for an evidentiary hearing must be dismissed.

CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

28. In the Administrative Complaint, the Department seeks to discipline Respondent for committing "unprofessional conduct" as defined by Board of Nursing rules. See §§ 464.018(1)(h) and 464.204(1)(b), Fla. Stat.; and Fla. Admin. Code R. 64B9-8.005(13).

29. 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).

30. 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).

31. Before reviewing the substance of the Administrative Complaint, however, the Department asserts that Respondent waived his right to an evidentiary hearing because he failed to timely file a petition for hearing. Accordingly, the legal issue to determine in this matter is whether Respondent's petition (the Election of Rights form) submitted to the Department on April 11, 2018, should be dismissed as untimely filed. Or, whether Respondent may circumvent the filing deadline based on the defense of equitable tolling.

32. Unless otherwise provided by law, persons seeking a hearing regarding an agency decision shall file a petition for hearing with the agency within 21 days of receipt of the agency's written notice. Fla. Admin. Code R. 28-106.111(2). Any person who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. Fla. Admin. Code R. 28-106.111(4). A request for hearing that has been untimely filed shall be dismissed. § 120.569(2)(c), Fla. Stat.

33. Filing "shall mean received by the office of the agency clerk during normal business hours." Fla. Admin. Code R. 28-106.104(1). As detailed above, to meet with the 21-day filing requirement, Respondent's petition for hearing was to be received by the Department no later than December 11, 2017. The undisputed facts establish that the Department received Respondent's petition (the Election of Rights form) on April 11, 2018. Therefore, pursuant to section 120.569(2)(c), Respondent's petition for hearing must be dismissed. See Cann v. Dep't of Child. and Fam. Servs., 813 So. 2d 237 (Fla. 2d DCA 2002); and Whiting v. Fla. Dep't of Law Enf., 849 So. 2d 1149 (Fla. 5th DCA 2003).

34. Notwithstanding the above, however, the doctrine of equitable tolling may excuse an untimely filed petition for hearing under the appropriate facts. § 120.569(2)(c), Fla.

Stat.; and Fla. Admin. Code R. 28-106.111(4). See Williams v. Dep't of Corr., 156 So. 3d 563, 565 (Fla. 5th DCA 2015) ("The doctrine of equitable tolling can be applied to extend an administrative filing deadline.").

35. Under the doctrine of equitable tolling, a late-filed petition should be accepted when a party "has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum," provided that the opposing party will suffer no prejudice. Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988); Madison Highlands, LLC v. Fla. Hous. Fin. Corp., 220 So. 3d 467, 472 (Fla. 5th DCA 2017).

36. Based on the competent substantial evidence in the record, Respondent failed to establish a defense of equitable tolling of the 21-day filing deadline.

37. Initially, the Department's Notice of Rights and the Election of Rights form explicitly informed Respondent that he had 21 days to file a written request for an administrative hearing with the Department. The Department's notice was proper, and was reinforced by the instructions Ms. Summers provided to Respondent during their telephonic communication. In addition, the fact that Respondent called the Department to discuss the Administrative Complaint establishes that he knew the proper forum in which to submit his request.

38. Further, during the final hearing, Respondent did not offer any credible explanation as to why he failed to timely file a written petition for hearing. Neither did he establish that he was misled or lulled into inaction, was prevented from asserting its rights in some extraordinary way, or that he timely asserted his rights in the wrong forum. On the contrary, Ms. Summers credibly testified that she specifically explained to Respondent when, where, and how to submit his Election of Rights form in order to meet the filing deadline of December 11, 2017.

39. The undersigned finds this matter analogous to Riverwood Nursing Center, LLC v. Agency for Health Care Administration, 58 So. 3d 907 (Fla. 1st DCA 2011). In Riverwood, the day after the deadline for filing a request for hearing had expired, an agency attorney agreed to accept a belated petition. The petitioner then promptly filed its petition one day after the 21-day deadline. The agency, however, issued an order denying the request for hearing as untimely. The court found no merit in petitioner's argument that the filing deadline was equitably tolled because the petitioner "does not allege that any representative of [the agency] extended the deadline by agreement before the deadline expired." Riverwood, 58 So. 3d at 910. See also Xerox Corp. v. Fla. Dep't of Prof'l Reg., 489 So. 2d 1230, 1231 (Fla. 1st DCA 1986) (finding that "the informal and imprecise oral communications which [the protestor] has alleged" were

"insufficient in form and substance to overcome the effect of the prior formal notice as to the necessity of a timely protest."); Whiting, 849 So. 2d 1149, 1151 (Fla. 5th DCA 2003) (holding that the appellant's "mistaken belief as to when the time period ended" was insufficient to support a claim of equitable tolling); and Jancyn Mfg. Corp. v. State, Dep't of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) (wherein the court refused to apply the equitable tolling doctrine where the failure "was the result of appellant's own inattention, and not the result of a mistake or agency misrepresentation").

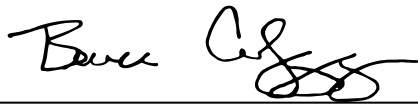
40. As in Riverwood, the Department (Ms. Summers) did not agree to extend the 21-day time period until after the filing deadline had expired. Consequently, Respondent could not have detrimentally relied upon the Department's representation that it would accept his Election of Rights form after the filing deadline of December 11, 2017.^{2/}

41. Respondent has alleged nothing to excuse him from following the clear, written directive contained in the NOTICE OF RIGHTS and the Election of Rights form. Accordingly, because section 120.569(2)(c) compels the dismissal of untimely petitions, and because equitable tolling provides no exception in this case, Respondent's request for an evidentiary hearing to dispute the facts alleged in the Administrative Complaint must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Department of Health enter a final order dismissing Respondent's request for an administrative hearing as untimely filed.

DONE AND ENTERED this 13th day of February, 2019, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of February, 2019.

ENDNOTES

^{1/} Unless otherwise stated, all statutory references are to the 2018 codification of the Florida Statutes.

^{2/} Even if Ms. Summers' March 20, 2018, letter could be considered an extension of the 21-day deadline, Respondent failed to file his Election of Rights form until after the additional time period (10 days) had expired.

COPIES FURNISHED:

Anthony Chambers
Apartment 604
1946 Otterbein Avenue
Cocoa, Florida 32926

Ross Daniel Vickers, Esquire
Florida Department of Health
Prosecution Services Unit
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399-3265
(eServed)

Christina Michelle Smiekle, Esquire
Florida Department of Health
Prosecution Services Unit
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399-3265
(eServed)

Shannon Revels, Agency Clerk
Florida Department of Health
Bin A-05
4052 Bald Cypress Way
Tallahassee, Florida 32399-1703
(eServed)

Louise Wilhite-St Laurent, Interim General Counsel
Florida Department of Health
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399
(eServed)

State Surgeon General
Florida Department of Health
Bin A-00
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701
(eServed)

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.