

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
RESPIRATORY CARE,

Petitioner,

vs.

Case No. 18-5694PL

JENNIFER ABADIE, R.R.T.,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division), conducted the final hearing in this case on May 20, 2019, by video teleconference at locations in St. Petersburg and Tallahassee, Florida.

APPEARANCES

For Petitioner: Mary A. Iglehart, Esquire  
Christina Arzillo Shideler, Esquire  
Florida Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: Kennan George Dandar, Esquire  
Dandar & Dandar, P.A.  
Post Office Box 24597  
Tampa, Florida 33623

STATEMENT OF THE ISSUE

Did Respondent, Jennifer Abadie, R.R.T., violate sections 468.365(1)(q), 468.365(1)(x), 456.072(1)(v), or 456.063(1), Florida Statutes (2018),<sup>1/</sup> by committing sexual misconduct?

PRELIMINARY STATEMENT

On August 22, 2018, Petitioner, Department of Health, Board of Respiratory Care (Board), issued an Administrative Complaint alleging Ms. Abadie engaged in conduct with a patient, G.B., that violated sections 468.365(1)(q), 468.365(1)(x), 456.072(1)(v), and 456.063(1), Florida Statutes. "Sexual misconduct" is the crux of the charges.

Ms. Abadie filed an Answer and Defenses and requested a formal administrative hearing. On October 26, 2018, the Board referred the matter to the Division for conduct of the hearing. On November 19, 2018, the hearing was set to begin January 3, 2019. The parties moved jointly for a continuance on December 5, 2018. The motion was granted. The undersigned rescheduled the hearing to begin February 25, 2019. On February 14, 2019, Ms. Abadie moved to continue the hearing because of counsel's medical problems. The Board opposed the motion. The motion was granted. The hearing was rescheduled for May 20 and 21, 2019. The undersigned conducted the hearing as noticed.

The Board presented testimony from Charity Forest, L.P.N.; Sean Flynn, L.P.N.; Lisa Isabelle; and Ruth Schneck, L.P.N. The

Board also submitted the deposition testimony of William Hall, R.R.T., characterized as expert witness testimony, as Petitioner's Exhibit 3.

The parties entered 14 joint exhibits: Jt. Ex. 1 - Jt. Ex. 14. The Board entered three additional exhibits, Pet. Ex. 1 - 3.

Ms. Abadie testified on her own behalf. Ms. Abadie did not offer additional exhibits.

The Transcript of the proceeding was filed June 18, 2019. The Board filed Petitioner's Exhibit 3 on June 26, 2019. The parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Section 20.43 and chapters 456 and 468, Florida Statutes, charge the Board with regulating the practice of respiratory care in Florida.

2. Ms. Abadie is a licensed registered respiratory therapist in Florida.

3. Ms. Abadie worked for Comprehensive Healthcare of Clearwater (Comprehensive) from October 24, 2017, through February 4, 2018, at its Pinellas County, Florida, location. Comprehensive is a residential rehabilitation and nursing facility.

4. Ms. Abadies's 89-year-old father was a patient at Comprehensive from before she started working there until his

death. He suffered from dementia. Ms. Abadie visited her father frequently, before and after her shifts and when she was not working.

5. G.B. was a severely ill patient at Comprehensive trying to recover from multiple strokes. G.B. was only 56 years old. However, he had extensive medical conditions. They included hypertension, congestive heart failure, fibromyalgia, diabetes, blindness and end-stage renal (kidney) disease. G.B. received dialysis three times a week for his kidney disorder. He took dozens of medications daily.

6. G.B. also had a tracheostomy. A tracheostomy is a tube that goes into the trachea to help people with impaired breathing breathe. The heavy treatment load weighed on G.B. psychologically and caused him anxiety and depression.

7. Ms. Abadie provided respiratory therapy services to G.B.

8. G.B. recognized Ms. Abadie from an earlier time when she worked at Florida Hospital where he had been a patient. He reminded her of that time and established a friendship with her. Over time, the friendship grew closer. As a result of their friendship and Ms. Abadie's compassion for G.B., Ms. Abadie and G.B. spoke regularly. When Ms. Abadie visited her father, she usually checked on G.B. He and Ms. Abadie talked about the range of subjects that acquaintances talk about including families, children, marital status, holiday plans, and day-to-day lives.

They spoke regularly by telephone as well as in person. Although they spoke regularly, Ms. Abadie and G.B. did not always speak at length. Sometimes she just waved and poked her head in to say hello. At G.B.'s request, Ms. Abadie brought him items from outside the facility, such as toiletries and a blanket.

9. G.B. grew very fond of Ms. Abadie and wanted her as his girlfriend and eventually his wife. Ms. Abadie did not encourage or reciprocate these feelings or intentions.

10. Lisa Isabelle was G.B.'s only other visitor. G.B. was a friend of her husband. She had known G.B. for most of their lives. Ms. Isabelle rented G.B. a residence on her property. Ms. Isabelle described her relationship with G.B. as "love-hate." Ms. Isabelle held a durable power of attorney for G.B. His family lived out of town and decided it would be good for somebody local to hold the power of attorney.

11. On Sunday, February 4, 2018, Ms. Abadie came to Comprehensive to visit her father. She wanted to watch the Eagles play in the Super Bowl with him. Their family is from Philadelphia. Ms. Abadie stopped at G.B.'s room first.

12. Charity Forest, L.P.N., was on-duty that day. G.B. was one of her patients.

13. Towards the end of the first of her two shifts, Ms. Forest noticed that the curtain by G.B.'s bed was pulled

halfway around his bed, which was unusual. The door was open. Ms. Forest entered G.B.'s room and looked around the curtain.

14. She saw G.B. and Ms. Abadie sitting on the bed, on top of the covers. The head of the bed was raised about 45 degrees to provide a backrest. G.B. was wearing long pajama pants but not wearing a shirt. Ms. Abadie was wearing jean shorts, a T-shirt, and Keds®. Ms. Abadie was resting her feet on her iPad® so she would not dirty the covers. G.B. and Ms. Abadie were not touching each other. They were talking, watching television, and looking at pictures on Ms. Abadie's telephone. The room was a two-bed room. There was a patient in the other bed.

15. Ms. Forest thought that the two sitting on the bed was inappropriate and left in search of her supervisor. Ms. Forest could not locate her supervisor. But she met another L.P.N., Ruth Schneck. Ms. Forest told Ms. Schneck what she had observed.

16. Ms. Schneck went to G.B.'s room. The door was open. Ms. Schneck briefly entered the room. G.B. and Ms. Abadie were still sitting on the bed. Ms. Schneck left immediately, closing the door behind her. She joined the search for the supervisor. Neither Ms. Schneck nor Ms. Forest could locate the supervisor.

17. While looking for the supervisor, Ms. Forest and Ms. Schneck encountered Sean Flynn, L.P.N. They told him what they had seen. Mr. Flynn was a licensed practical nurse and a

case manager at Comprehensive. He had come to the facility briefly that day in order to take care of some paperwork.

18. After talking to Ms. Forest and Ms. Schneck, Mr. Flynn went to G.B.'s room and opened the door. Ms. Abadie and G.B. were sitting on the edge of the bed facing the door. Mr. Flynn asked them if anything was going on. They said no.

19. Mr. Flynn left the room and called Nicole Lawlor, Comprehensive's Chief Executive Officer. Ms. Lawlor told Mr. Flynn to return to G.B.'s room, instruct Ms. Abadie to leave, and tell her that she would be suspended pending an investigation.

20. He returned to G.B.'s room with Ms. Forest and Ms. Schneck. G.B. and Ms. Abadie were still sitting on the bed. Mr. Flynn asked Ms. Abadie to step outside. She did. G.B. soon followed in his wheelchair. Mr. Flynn told Ms. Abadie that she was suspended and had to leave. G.B. overheard this and became very upset and aggressive. He insisted that Ms. Abadie was his girlfriend and that he wanted her to stay.

21. Ms. Abadie asked to visit her father before she left. Mr. Flynn agreed. Ms. Abadie visited her father for a couple of hours. Ms. Abadie also called Ms. Isabelle to tell her that Mr. Flynn asked her to leave and that G.B. was very upset.

22. After Ms. Abadie's departure, G.B. became increasingly upset and loud. His behavior escalated to slamming doors and

throwing objects. Comprehensive employees decided G.B. was a danger to himself and others and had him involuntarily committed under Florida's Baker Act at Mease Dunedin Hospital.

23. On her way home, Ms. Abadie received a telephone call offering her full-time employment at Lakeland Regional Hospital. February 4, 2018, at 6:08 p.m., Ms. Abadie submitted her resignation from Comprehensive in an e-mail to Ms. Lawlor.

24. Ms. Abadie's only patient/caregiver relationship with G.B. was through her employment with Comprehensive. As of 6:08 p.m. on February 4, 2018, G.B. was not a patient of Ms. Abadie. She no longer had a professional relationship with him.

25. Ms. Lawlor suspended Ms. Abadie on February 4, 2018. She based her decision on the information that Ms. Forest, Ms. Schneck, and Mr. Flynn told her, not all of which is persuasively established or found as fact in this proceeding. Still, Ms. Lawlor's memorandum suspending Ms. Abadie reveals that the nature of G.B.'s relationship with Ms. Abadie and the events of February 4, 2018, were not sexual. Ms. Lawlor's Employee Memorandum suspending Ms. Abadie does not identify a state or institution rule violated in the part of the form calling for one. She wrote "Flagrant violation of code of conduct." The description in the "Nature of Infraction" section of the form reads, "Employee was found cuddling in bed with a resident during



her time off." There is no mention of sex, breasts, genitalia, or sexual language.

26. None of the varying and sometimes inconsistent accounts of the day mention touching or exposure of breasts, buttocks, or genitalia. None of the accounts describes or even alludes to sex acts or statements about sex. The only kiss reported is a kiss on the cheek that G.B. reportedly forced upon Ms. Abadie as she was leaving.

27. The deposition testimony of the Board's "expert," offers many statements showing that what the Board complains of might be called "inappropriate" or a "boundary violation" but does not amount to sexual misconduct. He testified about the strain a patient expressing romantic feelings toward a therapist puts on the professional relationship. He says the professional should tell the patient that the statements are inappropriate. The witness says that if the patient starts expressing the romantic feelings by touching the therapist, the therapist must tell the patient that his behavior is inappropriate and begin recording the events for the therapist's protection so that "no inappropriate allegations are made later." (Jt. Ex. 3, p. 3). Asked his opinion about allegations that Ms. Abadie was laying on G.B.'s bed, the witness says the behavior "crossed a professional boundary" and that he was not aware of the "behavior being appropriate in any situation." (Jt. Ex. 3, p. 16). The witness

acknowledged that a hug is not inherently sexual. (Jt. Ex. 3, pp. 24 & 30).

28. In addition, the training and experience of the witness do not qualify him as someone whose opinion should be entitled to significant weight. Among other things, he has never written about, lectured about, or testified to an opinion about sexual misconduct. Had the deposition not been offered without objection, whether the testimony would have been admissible is a fair question. § 90.702, Fla. Stat.

29. After February 4, 2018, Ms. Abadie attempted to continue her friendship with G.B. by telephone calls and visits. However, Comprehensive refused for several weeks, against G.B.'s wishes, to allow Ms. Abadie to visit G.B. and would only permit Ms. Abadie brief, supervised visits with her father. G.B. was very upset by Comprehensive's prohibition of visits from Ms. Abadie. He began refusing food and treatment, including medications and dialysis. G.B.'s condition deteriorated to the point that he was admitted to hospice care.

30. At that point, on February 24, 2018, Comprehensive contacted Ms. Abadie and gave her permission to visit G.B and lifted restrictions on visiting her father. A February 27, 2018, e-mail from Shelly Wise, Director of Nursing, confirmed this and admitted that the Agency for Health Care Administration had advised that G.B.'s right as a resident to visitors trumped

Comprehensive's concerns. Ms. Abadie resumed visiting her friend, G.B. On May 21, 2018, G.B. passed away.

31. G.B. was a lonely, mortally ill man. He initiated a friendship with Ms. Abadie that she reciprocated. Ultimately, he developed unfounded feelings about her being his girlfriend and them having a future together. The clear and convincing evidence does not prove that the relationship was more than a friendship or that it was sexual in any way.

#### CONCLUSIONS OF LAW

32. Sections 120.569 and 120.57, Florida Statutes, confer jurisdiction of this matter on the Division.

33. The Board has authority to investigate claimed violations of and file administrative complaints charging violations of the laws governing delivery of respiratory care services. §§ 456.073, 468.354, and 468.353, Fla. Stat.

34. Because the Board seeks to impose a penalty upon Ms. Abadie, it must prove its charges 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)).

35. The Florida Supreme court describes the clear and convincing burden of proof this way:

This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of

the witness 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 In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

36. The burden of proof affects the findings of fact in this case. Mr. Flynn testified about skin-to-skin contact between G.B. and Ms. Abadie, for instance. Other testimony disputed that. The testimony about skin-to-skin contact was not sufficiently persuasive and corroborated to convince the undersigned without hesitancy that it was accurate. Ms. Abadie convincingly denied the claim as well. Other inconsistencies undermined the persuasiveness of testimony. For instance, several witnesses said that Ms. Abadie was wearing a T-shirt on April 4, 2018. But Mr. Flynn said she was wearing a red blouse.

37. Conflicting testimony from Ms. Forest and Ms. Schneck about when Ms. Forest's shift ended impaired the ability to conclude without hesitancy that all of their testimony was accurate. In addition, the witnesses were excited and agitated during the events of February 4, 2018. This adds to doubts about whether their observations are clear and without confusion. Similar uncertainty affects the testimony of Ms. Schneck that she saw G.B. and Ms. Abadie with covers pulled up to their waist.

38. There was also conflicting testimony about whether G.B. pulled at Ms. Abadie when she was leaving and forced a kiss upon her cheek. However, even the testimony about a kiss stated that G.B. forced it and that Ms. Abadie resisted.

39. The Board alleges that Ms. Abadie violated sections 468.365(1)(q), 468.365(1)(x), <sup>2/</sup> 456.072(1)(v), or 456.063(1). All of the Board's charges amount to charging Ms. Abadie with sexual misconduct with G.B.

40. Section 468.365(1)(q), Florida Statutes, makes "[e]xercising influence within a respiratory care relationship for the purpose of engaging a patient in sexual activity" grounds for disciplinary action. Section 456.072(1)(v) makes "[e]ngaging or attempting to engage in sexual misconduct," as defined in section 456.063(1) grounds for disciplinary action. Section 456.063(1) defines and prohibits sexual misconduct. It states:

Sexual misconduct in the practice of a health care profession means violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of such health care profession. Sexual misconduct in the practice of a health care profession is prohibited.

41. Well-established principles govern interpretation and application of these statutes. Tribunals must construe disciplinary statutes strictly in favor of the person subject to the penalty. 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). "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." McClung v. Crim. Justice Standards & Training Com., 458 So. 2d 887, 888 (Fla. 5th DCA 1984).

42. Many court opinions and agency orders provide examples of the activities that violate the required narrow interpretation of the charged and similar statutes. Sharing personal sexual stories with a patient, grabbing a patient's buttocks, and forcibly trying to kiss a patient are acts of sexual misconduct. Kruse v. Dep't of Health, 270 So. 3d 475 (Fla. 1st DCA 2019). Furtively touching and rubbing the private areas of female patients is sexual misconduct. Sanchez v. State Dep't of Health, 225 So. 3d 964 (Fla. 1st DCA 2017). Sexual intercourse with a patient during a medical examination is sexual misconduct. Field v. Dep't of Health, 902 So. 2d 893 (Fla. 1st DCA 2005). A male provider who exposes his genitals to minor female patients commits sexual misconduct. Machiela v. Dep't of Health, Bd. of

Optometry, 995 So. 2d 1168 (Fla. 4th DCA 2008). Touching a patient's breasts and buttocks during a massage is sexual misconduct. Nath v. State Dep't of Health, 100 So. 3d 1273 (Fla. 1st DCA 2012). Attempting to forcibly kiss a patient, removing the patient's covering sheet completely, and touching the patient's labia during a chiropractic treatment is sexual misconduct. Dep't of Health v. Kian, Case No. 18-0263PL (Fla. DOAH July 27, 2018; Fla. DOH Sept. 20, 2018). Offering oral sex to a massage therapist client is sexual misconduct. Dep't of Health v. Li, Case No. 18-0898PL (Fla. DOAH May 18, 2018; Fla. DOH Mar. 25, 2019).

43. In contrast, behavior that may be "inappropriate" or a boundary violation does not necessarily amount to a disciplinary offense. See Dep't of Health v. Mahatre, Case No. 12-1705PL (Fla. DOAH May 18, 2018; Fla. DOH Mar. 25, 2019). All sexual misconduct is a boundary violation. All boundary violations are not sexual misconduct. Possible inappropriate behavior or a boundary violation is, at worst, what the clear and convincing evidence in this record proves. A strict construction of statutes that the Board charges Ms. Abadie with violating could not reasonably be construed to cover the actions established by the evidence and recounted in the Findings of Fact. Clear and convincing evidence did not establish sexual misconduct.

44. The Board also seeks to discipline Ms. Abadie for alleged sexual misconduct on May 20, 2018. At that point, G.B. had not been Ms. Abadie's patient for over three and one-half months. Consequently, any actions she took that day did not involve a professional relationship with G.B. and could not be a violation of the statutes. In addition, the record of what happened that day does not establish sexual misconduct by clear and convincing evidence.

RECOMMENDATION

Based on the preceding Findings of Fact and Conclusions of Law, it is recommended that Petitioner, Department of Health, Board of Respiratory Care, dismiss the Administrative Complaint.

DONE AND ENTERED this 17th day of July, 2019, in Tallahassee, Leon County, Florida.



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JOHN D. C. NEWTON, II  
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](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of July, 2019.



ENDNOTES

<sup>1/</sup> All citations to Florida Statutes are to the 2018 codification.

<sup>2/</sup> This order does not discuss section 468.365(1)(x), Florida Statutes, because it is superfluous. The section just makes violating chapters 468 or 456 of the Florida Statutes or implementing Board rules a violation.

COPIES FURNISHED:

Kennan George Dandar, Esquire  
Dandar & Dandar, P.A.  
Post Office Box 24597  
Tampa, Florida 33623  
(eServed)

Mary A. Iglehart, Esquire  
Florida Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399  
(eServed)

Christina Arzillo Shideler, Esquire  
Florida Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399  
(eServed)

Breanna Raspopovich  
Florida Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

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

Allen Hall, Executive Director  
Board of Respiratory Care  
Florida Department of Health  
4052 Bald Cypress Way, Bin C-05  
Tallahassee, Florida 32399  
(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.