

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF NURSING,

Petitioner,

Case No. 20-5438PL

vs.

STEPHANIE McCAULEY, R.N.,

Respondent.

_____ /

RECOMMENDED ORDER

An administrative hearing was conducted in this case on February 23, 2021, via Zoom, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Ann L. Prescott, Esquire
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Stephanie Paige McCauley, R.N., pro se
457 Lobelia Road
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STATEMENT OF THE ISSUES

Whether Petitioner should be subject to action against her Registered Nursing license because of failure to comply with requirements of the Intervention Project for Nurses, and if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On October 26, 2020, the Department of Health (Petitioner or Department) filed an administrative complaint (Administrative Complaint) alleging that Respondent violated section 456.0172(1)(hh), Florida Statutes,¹ by being terminated from a treatment program for impaired practitioners, overseen by an impaired practitioner consultant as described in section 456.076, for failure to comply, without good cause, with the terms of the monitoring or treatment contract entered into by Petitioner. Respondent timely filed an Election of Rights disputing the allegations of the Administrative Complaint and requesting a hearing pursuant to section 120.57(1), Florida Statutes. The case was referred to DOAH on December 17, 2020.

At the final hearing, which was held as scheduled on February 23, 2020, Petitioner presented the testimony of Dr. Shannon Opie and Ms. Patrice Ward from the Intervention Program for Nurses, and introduced Petitioner's composite exhibit 1, consisting of Respondent's case file, Bates-stamped 1 through 1660, which was admitted into evidence as Exhibit P-1. Respondent testified on her own behalf and submitted a 133-page composite exhibit which was electronically filed on the docket on December 5, 2020, admitted as Respondent's Exhibit R-1, and three more exhibits admitted as Respondent's Exhibits 3, 3a, and 3b.

The proceedings were recorded, and a transcript was ordered. The parties were given 10 days after the filing of the Transcript within which to file their respective proposed recommended orders. The one-volume Transcript of the proceedings was filed with DOAH on March 12, 2021. Thereafter, Petitioner's Proposed Recommended Order was timely filed on March 22, 2021, which has been considered in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.

¹ Unless otherwise indicated, all references to the Florida Statutes and Florida Administrative Code are to the current versions, which have not substantively changed during the relevant time period in this case.

On March 23, 2021, Respondent filed a document entitled “Pro SE’s Intent to File Exceptions to Petitioner’s Findings and Recommended Order” (Respondent’s Intent to File Exceptions), and on March 25, 2021, filed a document entitled “Respondent’s Exceptions to [Petitioner’s Proposed] Recommended Order” (Respondent’s Exceptions). Thereafter, Petitioner filed a Motion to Strike Respondent’s Intent to File Exceptions and Respondent’s Exceptions. As Respondent’s Intent to File Exceptions and Respondent’s Exceptions were untimely and not otherwise authorized, the Motion to Strike was granted and those documents filed by Respondent were not considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the regulation of the practice of nursing pursuant to section 20.43, chapter 456, and chapter 464, Florida Statutes.
2. Respondent is a licensed registered nurse (RN) in the state of Florida, currently holding license number RN 9473971, issued in November of 2017. Respondent was first licensed as an RN in Florida in 1990, under license number RN 2166302.
3. The Intervention Project for Nurses (IPN) is the consultant contracted by Petitioner to operate an impaired practitioner program for nurses, in accordance with section 456.076.
4. The mission of IPN is to protect public health and safety and to provide education, support, and monitoring to nurses throughout the State of Florida.
5. IPN acts as a facilitator, assisting nurses by providing monitoring, coordinating evaluations, and if necessary, treatment.
6. Participants are referred to IPN in a variety of ways, including self-referral (e.g. voluntary contact directly from the nurse), employer referrals (e.g. hospitals or clinics who have concerns about safe practice), and Board of Nursing (Board) referrals (either through conditional licensure or through the disciplinary process).

7. Dr. Shannon Opie has been the chief executive officer for IPN since 2018; Patrice Ward is currently a senior case manager with IPN.

8. As chief executive officer, Dr. Opie provides clinical expertise to IPN staff and other leadership, assists with consultative services to the Department on issues of nursing impairment, provides education about IPN and potential impairment, and acts as liaison between IPN and the Department.

9. Dr. Opie testified credibly and consistently as to the mission and purpose of IPN, the terms and requirements for most participants, and some specifics of Respondent's participation, including reasons for her termination from the program.

10. Ms. Ward has worked as a case manager at IPN for over 18 years.

11. In her role as a senior case manager, Ms. Ward monitors nurses' compliance with their monitoring contracts to ensure public safety and provides case consultation, memo and contract review, and mentorship to other case managers.

12. All IPN contracts are composed of two parts. Part 1 consists of the individualized requirements for monitoring for that specific participant. Part 2 is the Participant's Manual, which outlines the general requirements, guidelines, and protocols of the IPN program.

13. The Part 1 individualized contract requirements are designed to protect public safety by ensuring that the participant receives proper monitoring and treatment and by enabling the participant to demonstrate safe nursing practice.

14. The contract requires the participant to demonstrate safe clinical nursing practice for 12 months, as determined by work performance evaluations completed by the participant's direct supervisor and submitted quarterly to IPN.

15. Depending on the nature of the participant's issues, this requirement may be modified by the addition of a controlled-substance restriction prohibiting the participant from handling or administering controlled substances to patients for a period of 12 months, to facilitate the recovery process and as a safety measure within the clinical setting. This was the case for Respondent.

16. After demonstrating safety to practice clinical nursing without handling controlled substances, this restriction would be lifted to allow the nurse participant

to demonstrate safe nursing practice while being allowed to administer controlled substances.

17. The total time required for demonstration of safe nursing practice is outlined in Part I of each participant's contract.

18. If a nurse participant is unable to complete all requirements of the contract within the projected active monitoring period, IPN will offer a contract extension to allow enough time for the participant to complete those requirements and prove that he or she was able to practice nursing safely and that the public could be protected absent further monitoring. Contracts remain in effect until a participant meets all completion criteria.

19. IPN communicates with participants through a system called Affinity. Records of Affinity communications are kept as notes in each participant's file, along with any clinical consultation notes regarding participation.

20. It is each participant's responsibility to provide IPN with updated contact information for communication purposes.

21. In May of 2000, Respondent first contacted IPN to self-report possible impairment issues. She signed a contract (Contract #1) for monitoring with IPN, which was terminated on or about September 30, 2004.

22. In about April of 2005, Respondent re-engaged with IPN, undergoing an evaluation in August of 2005, and subsequently signing a second Contract (Contract #2) with IPN. Contract #2 was terminated in May or June of 2007.

23. In June of 2008, a Final Order was filed by the Board against Respondent's previous R.N. license in case number 2007-19353, suspending her license for a specific time prior to her reappearance before the Board and imposing terms for reinstatement to include psychiatric evaluation, re-entry plans, proof of counseling and treatment, if recommended, and documented sobriety.

24. Respondent's R.N. license subsequently went to null and void status in 2013 due to nonrenewal between approximately 2007 and 2011.

25. In June of 2015, Respondent reapplied for licensure with the Board.

26. Respondent was required to appear before the Board to discuss her pending application for licensure by endorsement on June 5, 2015, as her previous license had gone null and void.

27. When Respondent appeared, the Board issued a Notice of Intent to Approve with Conditions (Notice of Intent), approving her application for licensure and granting a conditional license.

28. The Notice of Intent also required Respondent to complete a remedial course in nursing, which is not an issue in this matter.

29. By the terms of the Notice of Intent, Respondent was required to undergo an evaluation coordinated by IPN and comply with all terms and conditions imposed by IPN because of the evaluation prior to her nursing license being approved.

30. Respondent underwent an evaluation with Scott Teitelbaum, M.D., (Dr. Teitelbaum) a physician specializing in addiction medicine and psychiatry, on or about July 2, 2015, after which Dr. Teitelbaum opined that Respondent could not currently practice nursing with reasonable skill and safety to patients and recommended IPN monitoring.

31. On or about July 30, 2015, Respondent entered a third contract (Contract) with IPN pursuant to Dr. Teitelbaum's recommendations.

32. Respondent's Contract had a projected active monitoring period from on or about March 3, 2014, through on or about March 2, 2019.

33. To complete her Contract, Respondent was required to comply with the terms of completion outlined in Part 1 of the Contract to include the following:

- a. Compliance with all terms of this Monitoring Contract;
- b. Negative drug screens;
- c. Minimum of six (6) consecutive months of negative/normal toxicology screens;
- d. If participant submitted an abnormal/dilute drug screen within the last 12 months, a negative 14 panel hair test and PETH will be required before completion;
- e. Satisfactory work performance in a nursing clinical position for a minimum of one year;

f. Satisfactory recommendation for completion by the Facilitated Support Group leader and treatment provider, if applicable.

34. The employment expectations section of the Contract provided in its pertinent part:

1. Upon entry into practice:

a) Prior to accepting a position, you are required to inform your immediate supervisor that you are an IPN participant.

b) [Respondent's] position must include direct supervision by another licensed healthcare professional who is:

1) Aware of your IPN participation;

2) Working on the premises or same unit with periodic observation;

3) Readily available to provide assistance and intervention;

4) Willing to complete required employer report each quarter.

35. The Contract employment parameters also included guidelines for shift times to include a minimum of 12 eight-hour shifts per quarter, but not more than 40 hours per week and/or more than 84 hours bi-weekly, if working 12-hour shifts.

36. The Contract further provided that, upon being approved to return to nursing, Respondent would be prohibited from "access to or administer[ing] any controlled/locked (Schedules I-V) medications that are mood/mind-altering for a period of one year after [you] return to clinical nursing."

37. The Contract also provided that if Respondent performed successfully in a clinical nursing capacity under the controlled substance restriction for a minimum of one year, that restriction would be lifted. After that, the Contract required Respondent to work successfully for six additional months.

38. IPN's employment requirements did not dictate the specific type of work setting required for satisfactory completion of the Contract, but only the duration of time required and the supervisory requirements, which included the requirement that Respondent's supervisor be a licensed healthcare professional.

39. When Respondent signed her Contract on July 30, 2015, she was not approved to engage in nursing practice. When she was approved to return to the clinical practice of nursing, on June 15, 2017, she was notified by a letter detailing general employment expectations and directing her to Part 1 of her Contract or her IPN Case Manager for details or clarification.

40. Ms. Ward communicated with Respondent as her case manager regarding employment expectations and requirements throughout the duration of Respondent's Contract.

41. On April 10, 2018, Respondent submitted to a random toxicology screen which returned a positive result for alcohol on April 18, 2018.

42. Per the terms of her Contract, Respondent was required to refrain from the practice of nursing and to participate in an IPN-facilitated substance use disorder/mental health/fitness for duty evaluation.

43. On April 27, 2018, Respondent submitted to an evaluation with William M. Greene, M.D., a physician specializing in addiction medicine and psychiatry, after which Dr. Greene opined that the positive alcohol screen did not indicate relapse behavior and that Respondent should continue to comply with her Contract.

44. On November 26, 2018, Respondent began working in a clinical nursing position at Halifax Health Care (Halifax) in Daytona, Florida.

45. In January of 2019, she received a satisfactory workplace evaluation at Halifax, and no work issues were reported.

46. On March 19, 2019, Respondent told Ms. Ward she had concerns about work. As a result, Ms. Ward contacted Respondent's supervisor, who indicated a concern about the safety of patients under Respondent's care.

47. When a supervisor reports safety to practice concerns about an IPN participant, the issue goes before the IPN clinical team to see if an evaluation is warranted.

48. On March 22, 2019, because of her employer's concerns, Respondent was required to refrain from practice and undergo an evaluation.

49. On April 15, 2019, Respondent underwent an evaluation with Dr. Teitelbaum, who recommended that Respondent engage in further assessment with psychological evaluation and neuropsychological testing.

50. On May 27, 2019, Respondent underwent neurocognitive psychometric testing with Gregory Van Dam, Psy.D., coordinated through IPN, who provided a new diagnosis of autism spectrum disorder and recommended additional therapy.

51. Respondent also submitted to a neuropsychological evaluation on April 29, 2019, with Beth K. Rush, Ph.D. (Psychology), which was not coordinated through IPN, after which Dr. Rush diagnosed Respondent with nonpsychiatric cognitive deficit.

52. On June 13, 2019, Dr. Teitelbaum issued an addendum to his prior opinion, incorporating Dr. Van Dam's evaluation and recommending that Respondent engage in a course of individual dialectical behavioral therapy (DBT), complete a course in professionalism and disruptive behavior, and remain engaged in and compliant with her Contract.

53. On June 25, 2019, Respondent was notified of these additional recommendations and given a list of course options, with an option to submit any additional courses for consideration.

54. Between June 26 and July 1, 2019, Respondent corresponded with IPN regarding an alternate professionalism and disruptive behavior course. IPN's medical director reviewed the course description and, after consultation with the evaluator, indicated that it did not cover the requisite topics and was, therefore, not approved.

55. On July 11, 2019, Respondent returned a Contract addendum with handwritten comments and annotations expressing questions about its requirements.

56. On or about July 12, 2019, Ms. Ward, Dr. Opie, Elizabeth Tuerk (IPN clinical coordinator), and Respondent had a phone call to discuss these concerns. Thereafter, Respondent returned a properly executed Contract addendum.

57. On October 9 through 11, 2019, November 15, 2019, and January 17, 2020, Respondent attended and completed the Program for Distressed Physicians and related follow-up courses at the University of Florida as recommended by Dr. Teitelbaum.

58. In the meantime, Respondent's employment with Halifax ended in about May of 2019, after approximately six months.

59. IPN did not credit this term of employment as "successful employment," per IPN Contract terms.

60. Respondent admittedly did not meet the requirement listed above in Part 1 of her Contract as a term of completion, (e) satisfactory work performance in a nursing clinical position for a minimum of one year.

61. On May 28, 2020, IPN provided the Board with a memo to be considered with Respondent's request at the June 4 and 5, 2020, Board meeting that she be released from IPN without fulfilling the employment requirement of her Contract. IPN noted that the Board denied that request.

62. On June 1, 2020, IPN offered Respondent a Contract extension through May 28, 2022, to allow for completion of the one-year clinical nursing employment requirements and to demonstrate safety to practice.

63. On June 4, 2020, Respondent returned the Contract extension with "VC" annotated before her signature, by which Respondent intended to indicate that she had signed the Contract under duress. IPN considered the notation as an invalidation of Respondent's signature and it was not accepted.

64. On June 6, 2020, Respondent returned the Contract extension with an ellipsis before her name. As with the "VC" notation, Respondent intended the ellipsis to indicate that she signed under duress, which also invalidated her signature and it was not accepted.

65. Based upon these annotations, the Contract extensions were not properly executed and were not accepted by IPN.

66. Consistent with IPN policy and the express terms of the Participation Manual, on June 8, 2020, Respondent was advised that she needed to return a

properly executed contract addendum on or before June 15, 2020, or her Contract would be terminated. Respondent did not comply.

67. As a result, on June 16, 18, and 22, 2018, IPN sent Respondent letters notifying her that she had been dismissed from IPN effective immediately for failure to return an executed contract addendum. She was also notified that her file would be forwarded to the Department.

68. Respondent did not successfully complete her Contract.

69. At the final hearing, in explaining her reason that she could not sign a valid extension of the Contract, Respondent testified that, because of her diagnosis of autism, the only suitable place for her to be employed would be a health department, and that health departments could not provide licensed health professionals to serve as her supervisors. While that may be Respondent's belief, Respondent did not back up that testimony with credible evidence and otherwise failed to provide evidence that IPN prevented her from obtaining any job. In fact, there is documentation in the IPN file that shows constant communication and encouragement in finding employment to fit the work parameters.

70. Respondent cited instances and examples of jobs that she did not want to pursue for her own personal reasons.

71. Respondent also failed to provide credible evidence that she was restricted to work in only a health department environment. Respondent failed to provide a workplace or occupational evaluation. Instead, Respondent repeatedly testified to what made her "comfortable," not what IPN was requiring her to do or preventing her from doing.

72. It is apparent that Respondent elected to not seek employment based on her own personal requirements, not IPN's contract requirements.

CONCLUSIONS OF LAW

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

74. Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof. *See, e.g., Balino v. Dep't of Health & Rehab. Servs.*, 348 So. 2d 349 (Fla. 1st DCA 1977). Because Petitioner seeks to suspend, revoke, or impose other discipline upon a license, this proceeding is penal in nature, *see State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973), and must prove the allegations in the Complaint by clear and convincing evidence. *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

75. Clear and convincing evidence:

[r]equires that 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 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 Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting *Slomowitz v. Walker*, 429 So. 797, 800 (Fla. 4th DCA 1983).

76. Disciplinary statutes and rules “must be construed strictly, in favor of the one against whom the penalty would be imposed.” *Munch v. Dep't of Prof'l Reg., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

77. In determining whether Petitioner has met its burden of proof, the evidence presented should be evaluated in light of the specific factual allegations in the Administrative Complaint. Disciplinary actions against licensees may only be based upon those offenses specifically alleged in the charging document. *See, e.g., Trevisani v. Dep't of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005).

78. The Administrative Complaint charged Respondent with violating Section 456.072(1)(hh), which provides in pertinent part:

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

* * *

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

79. The Department proved the allegations in the Administrative Complaint by clear and convincing evidence. The terms of Respondent's IPN Contract required, among other things, successful employment in a nursing position, supervised by a licensed healthcare professional, for at least 12 months, subject to a controlled substance restriction, with successful nursing employment, supervised by a licensed healthcare professional, for an additional six months without a controlled substance restriction.

80. These terms are reasonable, necessary, and related to Respondent's ability to practice safely.

81. Respondent admittedly failed to complete the required nursing employment monitoring in the time initially provided in her Contract.

82. When IPN gave her an opportunity to have additional time to comply with these terms rather than referring her to the Department, Respondent refused to execute a monitoring Contract extension.

83. Because of her refusal, Respondent's Contract was terminated due to her failure to complete the Contract requirements or to return an executed Contract extension.

84. After considering her employment options, Respondent chose not to comply with IPN's requirements without good cause.

85. Respondent's unsupported assertions that her only viable job opportunities were in health departments, and that health departments do not have enough licensed healthcare professionals to provide supervision, is unsubstantiated. Respondent failed to present credible evidence of IPN obstructing any employment

opportunity. To the contrary, IPN offered Contract extensions to enable Respondent to successfully complete the program.

86. The employment requirements under the Contract, including direct supervision by a licensed healthcare professional, were clearly stated in the Contract that Petitioner signed in July of 2015, as well as in the Contract addenda and extensions she signed in 2016, 2017, and 2018.

87. Respondent later determined, on her own, after signing the Contract, that she did not wish to pursue employment fitting those requirements.

88. The Board relies on IPN as the designated, contracted impaired practitioner consultant under section 456.076 to advise the Board on whether participants can practice nursing with safety to patients for any reason.

89. IPN contracts directly with the referred licensees for monitoring according to IPN's expertise. The Board's contract with IPN does not contemplate entering those contract negotiations with participants. Terms of the monitoring contract are strictly between IPN and the licensee/nurse participant.

90. The Board of Nursing has adopted Florida Administrative Code Rule 64B9-8.006, which identifies the range of penalties for violations of chapters 456 and 464. The rule also identifies aggravating and mitigating circumstances to consider in determining the appropriate penalty to be imposed. The minimum recommended penalty for a first violation of section 456.072(1)(hh) is a \$250 administrative fine, suspension, and IPN evaluation; the maximum recommended penalty is a \$500 administrative fine and suspension. For a second violation, the penalty ranges from a \$500 administrative fine and suspension to revocation.

91. Section 456.072(4) provides that in addition to any other discipline imposed for violation of a practice act, the board shall assess costs related to the investigation and prosecution of the case.

92. The Board should therefore also assess the costs of the Department's investigation and prosecution of Respondent in this matter.

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 that Respondent has violated section 456.072(1)(hh); suspending Respondent's license to practice nursing until Respondent appears before the Board of Nursing with an IPN evaluation and complies with any and all recommendations; and imposing Petitioner's reasonable costs incurred during the investigation and prosecution of this case.

DONE AND ENTERED this 6th day of April, 2021, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of April, 2021.

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.