

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF NURSING,

Petitioner,

vs.

Case No. 21-0828PL

FRANSETTA COEN D'AMICO, R.N.,

Respondent.

_____ /

RECOMMENDED ORDER

An administrative hearing was conducted in this case on May 4, 2021, via Zoom conference, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Logan A. White, Esquire
Matthew G. Witters, Esquire
Judson Searcy, Esquire
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Fransetta Coen D'Amico, R.N., pro se
593 Gondolier Terrace
Deltona, Florida 32725

STATEMENT OF THE ISSUES

Whether Respondent should be subject to action against her registered nursing license for alleged unprofessional conduct and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On April 8, 2019, the Department of Health (Petitioner or Department) filed an administrative complaint (Administrative Complaint) alleging that Respondent violated section 464.018(1)(h), Florida Statutes (2017),¹ by engaging in unprofessional conduct as defined by Florida Administrative Code Rule 64B9-8.005(13), to include using force against a patient, striking a patient, or throwing objects at a patient. Respondent timely filed an Election of Rights disputing the allegations of the Administrative Complaint and requesting a formal hearing pursuant to sections 120.569(2)(a) and 120.57(1), Florida Statutes. The case was referred to DOAH on March 3, 2021.

At the final hearing, which was held as scheduled on May 4, 2021, the Department presented the testimony of the mother of patient A.S. and introduced two exhibits received into evidence without objection as Petitioner's Exhibit P-A (a password-protected flash drive containing video of Respondent and Patient A.S., taken on May 4, 2018) and Petitioner's Exhibit P-B (a certified copy of Respondent's registered nursing licensure file). The undersigned was unable to access the USB drive containing Petitioner's Exhibit P-A during the hearing, but the video was played for all parties at the hearing over Zoom conference without issue. Respondent testified on her own behalf but offered no other exhibits.

The proceedings were recorded and a transcript was ordered. The parties were given until 30 days after the filing of the transcript within which to file their respective proposed recommended orders. As authorized at the hearing, on May 5, 2021, the Department filed an additional copy of Petitioner's Exhibit P-A in a compact disk format that is not password-protected.

¹ Unless otherwise indicated, all references to the Florida Statutes and Florida Administrative Code are to the 2017 versions in effect at the time of the alleged violation in this case.

The one-volume Transcript of the proceedings was filed with DOAH on May 27, 2021. Thereafter, on June 25, 2021, Petitioner timely filed its Proposed Recommended Order and Respondent filed a document challenging the testimony of Petitioner's witness, which document is considered as Respondent's Proposed Recommended Order in this case. Both Proposed Recommended Orders have been 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, and chapters 456 and 464, Florida Statutes.
2. At all times material to this proceeding, Respondent was a licensed registered nurse (RN) within the state of Florida, having been issued license number RN 9184977.
3. At all pertinent times, Respondent was employed as an RN by PSA Healthcare (PSA), a home health agency in Daytona Beach, Florida.
4. Prior to and on May 4, 2018, Respondent was assigned by PSA to provide care to Patient A.S.
5. Patient A.S. was a 19-year-old female patient who suffered from cognitive and developmental disabilities, including cerebral palsy, autism spectrum disorder, and epilepsy, and required around-the-clock supervision and care.
6. Patient A.S. was visually impaired, deaf, and nonverbal. Patient A.S. communicated via basic signs signifying the words "no," "stop," "eat," "sleep," and "drink."
7. Patient A.S.'s mother, S.S., employed nurses to act as caregivers for Patient A.S. in her home.

8. To monitor the care her daughter was receiving while S.S. was away, S.S. installed home security video cameras in multiple rooms in the house and informed caregivers who entered the home of their presence.

9. After returning home on May 4, 2018, S.S. reviewed the home security video footage from that day.

10. The security footage from that day shows Respondent and Patient A.S. seated in the living room of S.S.'s home. The video is clear, and the individuals in the video are readily identifiable. The video also has audio.

11. In the video, Respondent is seated in a recliner with her legs extended, and Patient A.S. is seated to the Respondent's right in a loveseat that was adjacent to the recliner.

12. Patient A.S. can be seen reaching toward the ground on the side of the loveseat with her left arm.

13. As Patient A.S. reached down, Respondent reacted by extending her right arm towards Patient A.S. and coming into contact with Patient A.S.'s upper left arm with a quick, open-handed movement.

14. The contact was quick and deliberate but was not intended to harm Patient A.S., but rather to get her attention.

15. As a follow-up, Respondent took hold of Patient A.S.'s left arm and pulled it upwards and away from the side of the loveseat.

16. Patient A.S. reacted to the contact by quickly sitting up and making eye contact with Respondent. When Patient A.S. made eye contact, Respondent gave Patient A.S. the hand sign for "no."

17. Respondent credibly explained at the hearing that her actions that day were to get Patient's A.S.'s attention and prevent Patient A.S. from extending the loveseat's legs with controls that Respondent believed were located on the side of the loveseat where Patient A.S. was reaching with her left arm. Respondent reasonably feared that extension of the loveseat's legs would have trapped Patient A.S.'s legs under the already extended portion of Respondent's recliner.

CONCLUSIONS OF LAW

18. 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.

19. 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).

20. 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).

21. 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).

22. In determining whether Petitioner has met its burden of proof, the evidence presented should be evaluated considering 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).

23. The Administrative Complaint charged Respondent with violating section 464.018(1)(h) by engaging in unprofessional conduct as defined by rule 64B9-8.005(13). Section 464.018(1)(h), which relates to the practice of nursing, provides in pertinent part:

(1) The following acts shall constitute grounds for denial of a license or disciplinary action . . .:

* * *

(h) Unprofessional conduct, as defined by board rule.

24. Rule 64B9-8.005(13) provides in pertinent part:

Unprofessional conduct shall include:

* * *

(13) Using force against a patient, striking a patient, or throwing objects at a patient;

25. Considering the evidence and burden of proof in this case, it is found that the evidence was less than clear and convincing to prove the charge against Respondent.

26. Rather than showing that Respondent used force against or struck a patient as charged, the evidence indicates that Respondent's actions were designed to warn and protect the patient.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Nursing enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 30th day of June, 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 30th day of June, 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.