

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF HEALTH, BOARD OF  
NURSING,

Petitioner,

vs.

Case No. 21-1435PL

BENJAMIN DALLAS STOE, R.N.,

Respondent.

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RECOMMENDED ORDER

On July 6 and 7, 2021, pursuant to section 120.57(1), Florida Statutes, a duly-noticed hearing was held by Zoom video conference before Administrative Law Judge Yolonda Y. Green of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Ellen LeGendre Carlos, Esquire  
Dirlie Anna McDonald, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: Benjamin Dallas Stoe, pro se  
805 Sunday Road  
Chipley, Florida 32428

STATEMENT OF THE ISSUE

Whether Respondent is unable to practice nursing with reasonable skill and safety by reason of illness or use of alcohol, in violation of section 464.018(1)(j), Florida Statutes (2020); and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On February 24, 2021, Petitioner, Department of Health (Petitioner or Department), filed an Administrative Complaint against Respondent's (Respondent or Mr. Stoe) nursing license. The complaint alleged Respondent was unable to practice nursing with reasonable skill and safety due to his moderate alcohol-use disorder and/or use of alcohol.

Respondent timely requested a formal disputed-fact hearing. Petitioner then referred this case to DOAH for assignment to an administrative law judge to conduct a hearing.

The hearing was scheduled for July 6 and 7, 2021, and the undersigned conducted a pre-hearing conference with the parties regarding the procedural aspects of the hearing.

Prior to the hearing, the parties filed a Pre-Hearing Stipulation. To the extent relevant, all stipulated facts have been adopted and incorporated into the Findings of Fact below.

The hearing commenced as scheduled. At the final hearing, Petitioner presented the lay person testimony of five witnesses as follows: Rohan Anderson; Ashley Hall, R.N.; Loyd Thomas Simmons, APRN; Janet Smith, R.N.; and David Anthony Whisonant, CLP. Petitioner also presented Terrance R. Reeves, M.D., to testify as an expert in addiction medicine.

Petitioner's Exhibits 1 through 7 were admitted into evidence.<sup>1</sup> Respondent did not offer any witnesses and offered Respondent's Exhibit 1, a letter of reference, though he did not have the document with him at the hearing. While the undersigned admitted Respondent's exhibit into evidence, subject to receipt as a late-filed exhibit, it was not received by the undersigned. Thus, the exhibit is not an Exhibit in the record.<sup>2</sup>

The two-volume final hearing Transcript of the hearing was filed at DOAH on July 27, 2021. Petitioner timely filed its Proposed Recommended Order on August 5, 2021, which has been considered in preparing this Recommended Order. Respondent did not file a post-hearing submittal.

This proceeding is governed by the law in effect at the time of the commission of the acts alleged in the Administrative Complaint. *See McCloskey v. Dep't of Fin. Servs.*, 115 So. 3d 441 (Fla. 5th DCA 2013). Unless otherwise noted, all statutory and regulatory references shall be to the 2020 versions.

#### FINDINGS OF FACT

Based upon the credibility of witnesses and evidence presented at the final hearing and stipulated facts, the following Findings of Fact are found:

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<sup>1</sup> Respondent objected to Petitioner's admission of Exhibit 7, which was a close-captioned television video recording of Respondent and others on July 2, 2020. Respondent argued that Petitioner only offered a portion of the recordings from that day, and, thus, Petitioner should offer the complete video. To address Respondent's objection, Petitioner was instructed to contact Mr. Anderson to verify whether additional recordings were available for July 2, 2020. However, Mr. Anderson was not available. Given the location of the camera and the area of treatment, the video camera may have captured Respondent leaving the emergency room. After considering the record, however, additional recordings would not have changed the outcome of the undersigned's findings in this matter.

<sup>2</sup> Respondent indicated at hearing that he was offering the reference letter as his sole exhibit. He was permitted to file the exhibit with DOAH after the hearing. Instead, Respondent filed a copy of a certificate of completion for nursing continuing education courses. The reference letter was not filed and, thus, is not a part of the record.

### Stipulated Facts

1. At all times material to this complaint, Respondent was licensed as a registered nurse within the State of Florida, having been issued license number RN 3349322.

2. Respondent's address of record is 805 Sunday Road, Chipley, Florida 32428.

3. At all times material to this complaint, Respondent was employed by Doctors Memorial Hospital (DMH), located in Bonifay, Florida.

4. Respondent submitted to a blood alcohol test, which returned positive at a level of 0.2637 g/dl.

### Facts Related to the Events on July 2, 2020

5. On July 2, 2020, several colleagues of Respondent observed Respondent's behavior at work, which raised questions regarding whether Respondent was impaired.

6. Janet Smith, a registered nurse, worked at DMH. She had worked with Respondent for approximately 10 years before July 2, 2020.

7. Ms. Smith arrived to work at 8:00 a.m. She observed Respondent at the emergency room desk from a distance of 10 feet for approximately 10 to 15 minutes. She testified that Respondent's speech was "different, it was drawn out, and he was talkative, more friendly than usual."

8. Ms. Smith had more than 30 years of experience working in the emergency room and was familiar with the behavior of persons under the influence of alcohol. Based on her experience, she believed that "[Respondent] appeared drunk."

9. Concerned about Respondent's behavior, Ms. Smith shared her concerns with other staff members, including Ashley Hall, Debra Smitty, Rohan Anderson, and Dr. Contini. Dr. Contini and Ms. Smitty were not offered as witnesses at the final hearing.

10. Although Ms. Smith had concerns about Respondent's behavior on July 2, 2020, she otherwise believed he was a strong nurse.

11. Rohan Anderson also observed Respondent on July 2, 2020, after Debra Smitty shared her concerns about Respondent's behavior. Mr. Anderson works at DMH as the Chief Operating Officer and Director of Information Technology. Mr. Anderson had also worked with Respondent at another hospital and did not recall any prior impairment issues.

12. Similar to Ms. Smith, Mr. Anderson observed Respondent from a distance of 10 to 15 feet near the emergency room desk. He also noticed that Respondent's speech was different than usual. Mr. Anderson testified that Respondent was "slurring his words ... the way he was controlling the pitch of his voice. And I knew something was going on based on that."

Mr. Anderson then shared his concerns about Respondent's behavior with Dr. Ulhaq, the emergency room director.

13. Mr. Anderson unequivocally testified that Respondent was known for being a good nurse and was used as an example for training purposes.

14. Loyd Simmons, an advanced registered nurse practitioner, was working in the emergency room on July 2, 2020. At Dr. Ulhaq's request, Mr. Simmons evaluated Respondent based on the reports of suspected alcohol use. Mr. Simmons noted that Respondent was not acting like his "normal" self and he appeared to be unsteady on his feet. Respondent experienced difficulty with upward gaze. However, he was alert, oriented, with clear speech. Mr. Simmons performed a physical examination of Respondent, where he did not find any bruises or signs of a recent fall. He also conducted a neurological examination with Dr. Ulhaq, which revealed a positive Babinski. A positive Babinski result may be an indicator of a problem in the central nervous system. It may, however, also be related to alcohol use.

15. Mr. Simmons interpreted findings of Respondent's EKG and CT scan as within normal limits. Mr. Simmons found Respondent's EKG and CT scan results did not indicate a condition that would affect his blood alcohol level. The hematology results returned normal results. The blood alcohol level test

returned a result of 263.7 mg/dc, meaning .263 g/dcl.<sup>3</sup> The chemical analyzer machine used to perform the blood alcohol test was working properly, calibrated properly, and the machine properly reported correct blood alcohol test results for Respondent.

16. Based on his findings, Mr. Simmons diagnosed Respondent with alcohol intoxication. There was no evidence deduced from the tests performed that Respondent suffered from liver complications or COVID-19 that would cause his significantly high alcohol level results.

17. Mr. Simmons testified that he had no prior personal knowledge of Respondent being impaired at work.

18. Ms. Hall worked with Respondent on July 2, 2020. She observed Respondent for approximately 30 minutes while working together. She testified that he was more “jolly” than usual on that day and his mannerisms were exaggerated. She then shared her belief with the Director of Nursing that Respondent appeared to be impaired. Ms. Hall was present during Respondent’s evaluation in the emergency room. She assisted with placing an IV catheter to withdraw a blood sample from Respondent. She followed the standard process by cleaning the insertion site with isopropyl alcohol, and allowing the area to dry before inserting the catheter. She withdrew the blood sample and then delivered the sample to the lab drop-off window for testing. She had no further contact with the blood sample. Although Ms. Hall primarily worked a different shift than Respondent, she had never witnessed Respondent exhibiting similar behavior as he exhibited on July 2, 2020.

19. Overall, each witness who worked with Respondent on July 2, 2020, reported that he was not behaving like normal and his behavior was consistent with alcohol impairment.

Evaluation on January 14, 2021

20. Respondent was placed on administrative leave and ultimately, terminated for “being at work while under the influence of alcohol.” He was

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<sup>3</sup> The legal limit in Florida for intoxication is considered a blood alcohol level of .08 or above.

presented with the option to voluntarily report to Intervention Project for Nurses (IPN) in lieu of a complaint filed with the Department, and he agreed to contact IPN. Respondent subsequently elected not to voluntarily participate in IPN because he could not “afford it.” The Department then issued an Order requiring Respondent to undergo an evaluation with Dr. Reeves.

21. Dr. Reeves, a licensed medical doctor in the State of Florida since 1994, has specialized in addiction medicine since 2010. Dr. Reeves is board certified in addiction medicine and a member of several professional organizations for addiction treatment providers. Dr. Reeves serves as the Medical Director for two treatment facilities, South Walton Medical Group and Sacred Heart Hospital of the Emerald Coast. Prior to practicing addiction medicine, he worked as a vascular surgeon. Dr. Reeves has written articles and delivered presentations on the topic of addiction medicine. Dr. Reeves has testified in other legal proceedings within the past 10 years and has never been disqualified as an expert. Dr. Reeves was accepted as an expert on addiction medicine in this matter.

22. Dr. Reeves performed an independent medical examination (IME) of Respondent on January 14, 2021. Dr. Reeves routinely conducts IMEs of health care professionals to determine whether an individual has an issue with addiction or addictive substances, including alcohol. Dr. Reeves follows a process for conducting an IME. He reviews the available records, any medical history, and witness statements. Dr. Reeves then meets with the individual to conduct an in-person evaluation, which includes assessment tests and screening exams.

23. Dr. Reeves testified that he understood that Respondent was referred to him for alleged alcohol intoxication while at work. Dr. Reeves was concerned as alcohol is a depressant and directly affects the judgement and decision-making functions in the brain.

24. Dr. Reeves discussed the events that gave rise to the Department's complaint and subsequent referral for evaluation. Respondent explained to Dr. Reeves that he began drinking more often while he was quarantined with COVID-19. Respondent told Dr. Reeves that he had increased his drinking from two to three beers a night to three to four beers per night, four to five times per week.

25. Respondent stated that he drank several drinks the night before he returned to work to help him sleep. He did not believe that he drank a lot and was surprised that his test results reflected a significantly elevated alcohol level. He denied being intoxicated at work on July 2, 2020.

26. Respondent completed a questionnaire after he arrived for his evaluation, which Dr. Reeves reviewed with him during the evaluation. Respondent suggested in his questionnaire that perhaps the alcohol level was because he had taken Nyquil<sup>4</sup> while driving to work. Respondent later retracted that statement.

27. Regarding assessments, the evaluation included an ethyl glucuronide (ETG) test, which was performed upon Respondent's arrival to Dr. Reeves office. An ETG test is a urine test that measures the level of ethyl glucuronide in the body. An ETG test would generally yield positive results within two to five days after alcohol is ingested. Respondent's test was negative. Dr. Reeves testified that the negative test results suggest Respondent had not drank alcohol within the prior three to five days.

28. Dr. Reeves also asked Respondent to undergo a phosphatidylethanol (PEth) test, which tests a blood sample to measure intake of alcohol. The PEth test has a longer timeframe for measurement than the ETG test, as it measures alcohol in the system for up to 14 days after ingestion. To maintain the validity of the test, it must be completed within 48 hours of the request.

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<sup>4</sup> Dr. Reeves testified that a dose of Nyquil contains approximately the same amount of alcohol as a glass of wine. He estimated that a person would need to consume 10 to 15 doses of Nyquil to achieve a result of .2637 gm/dcl (Respondent's test results).



Respondent did not complete the test within that timeframe. Thus, there were no PEth test results for Dr. Reeves to consider. Dr. Reeves testified that the PEth test was not a necessary factor for diagnosing an alcohol-use disorder, as he had sufficient objective data from his evaluation to make a diagnosis.

Expert Opinion

29. Based upon his evaluation, Dr. Reeves diagnosed Respondent with moderate alcohol disorder. Dr. Reeves relied upon the criteria established in the Diagnostic Statistic Manual-5 (DSM-5), which sets out the standard of care for diagnosis of psychiatric disorders. The DSM-5 includes alcohol-use disorder as a psychiatric diagnosis.

30. Dr. Reeves testified that if you meet two or more of 11 alcohol-use disorder criteria used in the DSM-5, the individual meets the criteria for that level of the disorder. Applying objective factors identified during his evaluation of Respondent, Dr. Reeves determined that Respondent met four of the 11 criteria for moderate alcohol-use disorder. Specifically, Dr. Reeves identified the following criteria in making his assessment:

1. Alcohol is often taken in larger amounts or over a longer period than was intended;

\* \* \*

5. Recurrent alcohol use resulting in a failure to fulfill major role obligations at work, school, or home;

\* \* \*

8. Recurring alcohol use in situations in which it is physically hazardous; and

\* \* \*

10. Tolerance is defined by (a) a need for markedly increased amounts of alcohol to achieve intoxication or desired effect, or (b) a markedly diminished effect with continued use of the same amount of alcohol.

31. Dr. Reeves testified that a nursing professional is considered a safety sensitive occupation, which requires good decision-making ability. Since alcohol significantly impairs judgement and decision-making ability, an individual who is impaired by alcohol is not safe to practice as a nurse. Dr. Reeves credibly opined that Respondent is not safe to practice as a nurse due to his diagnosis of moderate alcohol-use disorder. Dr. Reeves' opinion is accepted.

32. Dr. Reeves recommended a course of intensive outpatient treatment for a specified period of time. Even if Respondent indicated he stopped drinking, without treatment, Dr. Reeves maintains that Respondent is not safe to practice nursing.

33. Based on his review of the records obtained from DMH, Dr. Reeves concluded that Respondent's records reflected no symptoms to demonstrate that he suffered from a transient ischemic attack (TIA)<sup>5</sup> as Respondent suggested.

34. There was no evidence offered at hearing that Respondent harmed patients while he was impaired. Other than his behavior exhibiting impairment, the testimony overwhelmingly supported that he was considered a good nurse.

#### Ultimate Findings of Fact

35. Petitioner presented clear and convincing evidence to demonstrate that Respondent was impaired while at work on July 2, 2020.

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<sup>5</sup> A TIA is a temporary period of symptoms similar to a stroke.

36. Petitioner presented clear and convincing evidence to demonstrate that Respondent is unable to practice nursing with reasonable skill and safety to patients due to his moderate alcohol-use disorder and alcohol use.

#### CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 456.073, Florida Statutes (2021).

38. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). Thus, to impose discipline, Petitioner must prove the allegations in an administrative complaint by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 933-34 (Fla. 1996) (citing *Ferris v. Turlington*, 510 So. 2d 292, 294-95 (Fla. 1987)); *Nair v. Dep't of Bus. & Pro. Regul., Bd. of Med.*, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

39. Clear and convincing evidence “require[s] that the witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; ... the testimony must be clear, direct and weighty, and the witnesses must be lacking in confusion as to the facts in issue.” *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). Additionally, 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 precise facts in issue.” *Id.*

40. Penal statutes must be construed in terms of their literal meaning and words used by the Legislature may not be expanded to broaden the application of such statutes. Thus, the provisions of law upon which this disciplinary action has been brought must be strictly construed, with any ambiguity in favor of the one against whom the penalty would be imposed. *Elmariah v. Dep't of Pro. Regul., Bd of Med.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); see also *Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d

929, 931 (Fla. 1st DCA 2011); *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 100 (Fla. 1st DCA 2008); *Whitaker v. Dep't of Ins. & Treas.*, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); *Dyer v. Dep't of Ins. & Treas.*, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

41. The allegations of fact set forth in the Administrative Complaint are the grounds upon which this proceeding is predicated. *Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); *see also Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Thus, the scope of this proceeding is properly restricted to those matters as framed by Petitioner. *M.H. v. Dep't of Child. & Fam. Servs.*, 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

42. The Administrative Complaint alleges that Respondent violated section 464.018(1)(j), by being unable to practice nursing with reasonable skill and safety to patients due to Respondent's moderate alcohol-use disorder and/or Respondent's alcohol use.

43. Section 464.018(1)(j) subjects a registered nurse to disciplinary action for being unable to practice nursing with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition.

44. Based on the Findings of Fact herein, Petitioner proved, by clear and convincing evidence, that Respondent is unable to practice nursing with reasonable skill and safety by reason of moderate alcohol-use disorder and alcohol use, in violation of section 464.018(1)(j).

#### Penalty

45. Penalties in a licensure discipline case may not exceed those in effect at the time a violation was committed. *Willner v. Dep't of Pro. Regul., Bd. of Med.*, 563 So. 2d 805, 806 (Fla. 1st DCA 1990), *rev. denied*, 576 So. 2d 295 (Fla. 1991).

46. Section 456.079 requires the Board of Nursing to adopt disciplinary guidelines for specific offenses. Penalties imposed must be consistent with

any disciplinary guidelines prescribed by rule. *See Parrot Heads, Inc. v. Dep't of Bus. & Pro. Regul.*, 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

47. 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.

48. Rule 64B9-8.006(1)(g) provides that the recommended range of discipline for a first-time violation of section 464.018(1)(j) is \$250 fine, suspension, and IPN evaluation to \$500 fine, suspension, or revocation.

49. Given that there was no patient harm, a mitigating factor, the record supports a slight departure from the disciplinary guidelines, such as no monetary fine.

#### 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:

- A. Respondent violated section 464.018(1)(j), Florida Statutes (2020); and
- B. suspending Respondent's registered nursing license, until such time that Respondent enters into IPN and complies with any and all terms and conditions imposed by IPN.

DONE AND ENTERED this 26th day of August, 2021, in Tallahassee, Leon County, Florida.



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YOLONDA Y. GREEN  
Administrative Law Judge  
1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of August, 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.