

**STATE OF FLORIDA**  
**DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF HEALTH, BOARD OF  
NURSING,

Petitioner,

Case No. 21-1517PL

vs.

WALTER LINDSEY KEMP, JR., L.P.N.,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on August 17, 2021, via Zoom, before Garnett W. Chisenhall, a duly designated Administrative Law Judge of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Amanda M. Godbey, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: Walter Lindsey Kemp, Jr., pro se  
855 Limoges Way  
Pensacola, Florida 32505

STATEMENT OF THE ISSUES

The issues are whether Respondent is in violation of section 464.018(1)(j), Florida Statutes (2020),<sup>1</sup> by being unable to practice nursing with reasonable skill and safety; and, if so, the appropriate penalty.

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<sup>1</sup> Unless stated otherwise, all statutory references shall be to the 2020 version of the Florida Statutes. See *McClosky v. Dep’t of Fin. Serv.*, 115 So. 3d 441 (Fla. 5th DCA 2013)(stating that a proceeding is governed by the law in effect at the time of the commission of the acts alleged to constitute a violation of law).

### PRELIMINARY STATEMENT

The Department of Health (“the Department”) issued an Administrative Complaint on December 30, 2020, alleging that Respondent (“Walter Lindsey Kemp, Jr., L.P.N.”) was in violation of section 464.018(1)(j), by being unable to practice nursing with reasonable skill and safety due to “severe alcohol use disorder, post-traumatic stress disorder, and depressive disorder.” Mr. Kemp disputed the Department’s allegation, and the Department referred this matter to DOAH for a formal administrative hearing. After granting one continuance, the undersigned issued a notice scheduling the final hearing for August 17, 2021.

The Department filed a Motion to Relinquish Jurisdiction on June 14, 2021, asserting that Mr. Kemp’s responses to a Request for Admissions demonstrated there were no disputed issues of material fact. After considering the aforementioned motion during a telephonic conference on June 17, 2021, the undersigned issued an Order that same day denying the Motion to Relinquish Jurisdiction because “it was apparent that [Mr. Kemp] does dispute any allegation that he is unable to practice nursing with reasonable skill and safety due to alcohol use, PTSD, and/or depressive disorder.”

The final hearing took place as scheduled. The Department presented testimony from Belinda Kaye Bass and Rosie Burr. Petitioner’s Exhibits 1<sup>2</sup> through 3, 5 and 6 were accepted into evidence. Mr. Kemp testified on his own behalf but did not attempt to move any exhibits into evidence.

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<sup>2</sup> The Department’s expert witness, Dr. Joseph Iserman, was deposed in lieu of live testimony, and his deposition is Petitioner’s Exhibit 1.

The one-volume final hearing Transcript was filed on September 2, 2021. Both parties filed timely proposed recommended orders that were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, the entire record of this proceeding, and matters subject to official recognition, the following Findings of Fact are made:

1. The Department of Health, Board of Nursing, is the state agency charged with regulating nursing in the State of Florida, pursuant to chapters 456 and 464, Florida Statutes.

2. Mr. Kemp is a combat veteran who participated in Operation Desert Storm. In 2004 or 2005, he earned a nursing degree from Virginia College and became licensed in the State of Florida as a licensed practical nurse (“LPN”).

3. Mr. Kemp suffers from post-traumatic stress disorder (“PTSD”), anxiety, and depression. Three or four years ago, Mr. Kemp participated in an outpatient, substance abuse treatment program in Gulf Breeze, Florida. He successfully completed the program but was diagnosed with alcohol abuse disorder.

4. During the Summer of 2020, Mr. Kemp was employed as the Assistant Director of Nursing at a healthcare facility called The Waterford at Creekside (“Creekside”). Belinda Kaye Bass was Creekside’s Director of Nursing and had known Mr. Kemp for approximately 10 years due to previously working with him at Southern Oaks Nursing Home.

5. On approximately Tuesday, June 30, 2020, Mr. Kemp called Ms. Bass to tell her that he was having issues with his father. Mr. Kemp did not report for work the next day, and Ms. Bass became concerned when she was unable

to reach him by telephone.<sup>3</sup> Because she was already scheduled to leave Creekside’s campus for business purposes on July 2, 2020, Ms. Bass decided to visit Mr. Kemp’s home that morning in order to check on him.

6. Mr. Kemp was at home that morning and had been drinking liquor prior to Ms. Bass’s arrival. At some point during her visit, she was alone in a room of the house and noticed a box containing a bottle of morphine on the floor. Upon picking it up, she discovered that the morphine belonged to a Creekside resident. When Mr. Kemp returned to the room, Ms. Bass asked him about the morphine, and he responded by telling her to leave and accused her of attempting to set him up. Ms. Bass thought that Mr. Kemp was acting paranoid and seemed impaired.<sup>4</sup>

7. Ms. Bass returned the morphine to Creekside and called the police. The seal on the morphine bottle was intact, and the police declined to pursue charges against Mr. Kemp.

8. Creekside fired Mr. Kemp on July 3, 2020, for “gross misconduct.”

9. Pursuant to its authority under section 464.018(1)(j), the Department ordered Mr. Kemp to undergo an evaluation of his mental and physical condition.<sup>5</sup> Part of that evaluation was a phosphatidyl ethanol (“PEth”) test

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<sup>3</sup> Mr. Kemp testified that he had told an unidentified person in authority at Creekside on approximately June 30, 2020, that he was resigning because his workload was excessive. Ms. Bass was unaware of Mr. Kemp’s resignation, and her testimony on this point is credited.

<sup>4</sup> Mr. Kemp denied that Ms. Bass found a resident’s medication in his home and asserted that Ms. Bass and his ex-wife were conspiring against him. Mr. Kemp’s testimony on this point is not credited.

<sup>5</sup> Section 464.018(1)(j) subjects LPNs to discipline for “[b]eing unable to practice nursing with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, or chemicals or any other type of material or as a result of any mental or physical condition. In enforcing this paragraph, the department shall have, upon a finding of the State Surgeon General or the State Surgeon General’s designee that probable cause exists to believe that the nurse is unable to practice nursing because of the reasons stated in this paragraph, the authority to issue an order to compel a nurse to submit to a mental or physical examination by physicians designated by the department. If the nurse refuses to comply with such order, the department’s order directing such examination may be enforced by filing a petition for enforcement in the circuit court where the nurse resides or does business.”

of Mr. Kemp's blood. PEth levels are used to determine if someone drinks heavily or engages in binge drinking.

10. A "normal" or "healthy" PEth level is 20 nanograms per milliliter. Mr. Kemp's blood contained 317 nanograms per milliliter, and that amount is 15 to 16 times what is considered to be a healthy level.

11. Mr. Kemp's evaluation also consisted of a two-hour assessment by Dr. Jordan Iserman<sup>6</sup> on November 2, 2020. Dr. Iserman considered Mr. Kemp's PEth test result to be an indication of "pretty serious heavy binge drinking."<sup>7</sup>

12. Dr. Iserman also evaluated Mr. Kemp based on the criteria for severe alcohol use disorder set forth in the Diagnostic and Statistical Manual of Mental Disorders – Fifth Edition ("the DSM-5").<sup>8</sup> If a person satisfies at least two of the 11 criteria set forth in the DSM-5, then that person is thought to suffer from severe alcohol use disorder.

13. Dr. Iserman thought that several of the DSM-5 criteria applied to Mr. Kemp, but two seemed particularly applicable to Mr. Kemp. For example, the DSM-5 indicates that one sign of severe alcohol use disorder is that the person in question has given up important social, occupational, or recreational activities. Dr. Iserman believes that criterion applies to Mr. Kemp because he was "more than comfortable just deciding he wasn't going back to work." Also, rather than giving Creekside a two weeks' notice, he just stopped coming to work.

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<sup>6</sup> Dr. Iserman is licensed to practice medicine in Florida and is a board-certified psychiatrist and addictionologist. He has been qualified to render opinions regarding addiction medicine in at least 50 other legal proceedings, and the undersigned found him to be qualified to render opinion testimony regarding addiction medicine and related disorders.

<sup>7</sup> In addition, a test of Mr. Kemp's hair indicated that he had been using marijuana.

<sup>8</sup> Using the criteria set forth in the DSM-5 to diagnose severe alcohol disorder is an accepted practice in addiction medicine.

14. The DSM-5 also identifies “tolerance” as an indicator of severe alcohol use disorder. In other words, someone with an alcohol use disorder requires markedly increased amounts of alcohol in order to achieve intoxication. Dr. Iserman believes this criterion applies to Mr. Kemp because his PEth test indicated he has a high tolerance for alcohol.

15. As for why someone with depression, PTSD, and severe alcohol use disorder would be unable to practice nursing with reasonable skill and safety, Dr. Iserman explained that alcohol use disorder exacerbates the symptoms of PTSD:

Well, actually when you talk about someone with post-traumatic stress disorder, that is a very troubling syndrome whereby the person is continuously revisited by traumatic, sometimes near-death experiences, that have transpired in the past or they had seen a loved one shot and killed in front of them, something tremendous like that. And these people have terrible problems resting, sleeping, they become emotionally numb, they don't want to have anything to do with people. And so clearly, and many times what they will reach for first is some alcohol because that's going to numb them up. All right? But that only makes the depression and the anxiety from the post-traumatic stress disorder worse because the hallmark symptom of alcohol withdrawal is anxiety. So you're sort of – it's a downward spiral here with one acting on the other, each one acting on the other, to make them both worse.

16. As for how alcohol use disorder affects someone suffering from depression, Dr. Iserman explained that:

if you're already depressed and then you're drinking alcohol, you're only – you can only expect that you're going to intensify the level of depression that you had previously. And you know, does that push a person to the point where they – they're not in their right mind and they decide to blow their

brains out or drive their car into a tree or whatever it is? Certainly could.

17. Dr. Iserman also described how severe alcohol use disorder and depression can impact an LPN's ability to safely administer medication to patients:

Well, if you go back to, you know, how alcohol impairs a [person's] coordination, focus, and everything like that, I mean, LPNs are passing out medications to different individuals, some of them with morphine and things like that. They could very easily make a medication error and give the wrong person someone else's medication which could have very serious if not lethal effects on the person that they gave it to by mistake. And it clearly would impair their ability to think clearly, focus, concentrate, not to mention the physical repercussions.

\* \* \*

Well, if depression is – again, if it's controlled, then they should be able to perform their chosen profession. Okay? If it's not, depressed people don't have a lot of motivation, they don't have a whole lot of – it can affect them cognitively, emotionally, physically. It will totally destroy motivation, willingness to be [sic] significantly focused in on what it is that they're supposed to do. They don't have the motivation. They don't have the energy. They don't have [the] oomp to, you know, exert that type of energy.

18. In sum, Dr. Iserman opined that Mr. Kemp is unable to practice nursing with a reasonable degree of skill and safety.

19. Mr. Kemp testified that he has substantially curtailed his alcohol consumption since the PEth test described above. He asserts that he stopped drinking liquor in February or March of 2021 and has since restricted his

alcohol consumption to 32 ounces of beer three or four days a week. As for why he supposedly made this change, Mr. Kemp explained that:

I was going through a lot, and I noticed that I was drinking a little too much. I was a caregiver for my mom. My mom had passed, my nephew had passed. So, yeah – and I was going through a divorce. So yeah, I noticed that I was drinking too heavy and I talked to some of my family members, and they told me that I need[ed] to slow it down, and that's what I did.

20. Mr. Kemp's assertions that he has curtailed his alcohol consumption and restricted himself to beer did not change Dr. Iserman's opinion that Mr. Kemp is unable to practice nursing with reasonable skill and safety:

A: Well, because as I indicated before, it doesn't really make any difference about, you know, what the source of the alcohol is. If he says all I'm drinking is beer, well, how much beer is he drinking? Okay? And, you know, I suppose you could go back and do another PEth test, but the fact remains that the behavior hasn't changed. Okay? I mean, this is not an individual, number one, who sees himself as having a problem and so, therefore – you know, that's the great thing about substance abuse, denial. I didn't do that. I don't have a problem. You know, [why] are you coming at me with this stuff? Okay? It allows them to basically continue to go ahead, you know, act out, you know, mistreat[ing] other people plus themselves, or whatever it is that they do, and basically not be bothered by it all. And if they're in denial, they're not going to do anything about it.

Q: In your experience, do people with alcohol abuse disorder tend to minimize their reports of how much alcohol they drink?

A: Oh, routinely.



Q: Okay. At his deposition, Mr. Kemp stated that he drinks a quart of beer at a time three to four times a week. If Mr. Kemp's reports are true, would your opinion that Mr. Kemp is not able to practice nursing with reasonable skill and safety to patients change?

A: No.

Q: Why not?

A: Well, again, I would say using myself as an example, I know that if I put away a quart of beer three to four times a week, I would not be doing very well. Any by the way, there's an unwritten rule, if you talk to somebody and you ask them how [much] they drink – now, this is not scientific, and I can't show it to you in a book. It goes with, you know, experience with this stuff. Whatever [a] person tells you that they drink, double it and you might be at the lower end of what they're really doing.

21. Mr. Kemp underwent additional testing on June 15, 2021, and a second PEth test returned a result of 243 nanograms per milliliter. That result and other results (or lack thereof) from a second round of testing also had no impact on Dr. Iserman's opinion regarding Mr. Kemp's ability to practice nursing with reasonable skill and safety:

Q: Based on Mr. Kemp's [second] PEth test results, has your opinion that Mr. Kemp is not able to practice nursing with reasonable skill and safety to patients changed?

A: No.

Q: Is the PEth test result consistent with someone who drinks a quart of beer three to four times a week?

A: I'm thinking he's drinking more than that.

Q: Did – you mentioned that Mr. Kemp also tested positive for an ETG test; is that correct?

A: Ethyl glucuronide. And actually, when we did the original hair test, he came up positive for marijuana. Now, when we sent him back for the updated PEth test and the urinalysis, we also sent [him] back for another hair test. He arrived there freshly shaven, so there was no hair to test. However, we also have what are called nail tests. Okay? And they can sometimes trace these things back even further. Mr. Kemp refused that test.

Q: Okay. And what does that indicate to you?

A: Well, it would indicate that if I had nothing to hide or anything to be concerned about, you know, my fingernails will grow back. I don't know why I would refuse that test.

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Q: Did [Mr. Kemp] take a urinalysis on June 15, 2021 as well?

A: Yes.

Q: And was that positive?

A: For ethyl glucuronide, yes.

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Q: Does it show – does it tell you how – when the last time someone consumed alcohol?

A: Unlike the phosphatidyl ethanol, the hair testing, the nail testing, and things like that which can go back – nails can go back sometimes almost a year, okay, but ethyl glucuronide does not hang around that long. It is probably going to be gone I would say within a week.

Q: So that positive test would mean that Mr. Kemp had consumed alcohol in the last week, for instance?

A: Recently. I mean, he would have to have had something recently.

22. As for a treatment recommendation, Dr. Iserman would refer Mr. Kemp to the Interventional Project for Nurses (“IPN”), which could lead to an in-patient treatment program of at least 30 days. After completion of such a program, Dr. Iserman would recommended toxicology monitoring, peer meetings such as those in a 12-step program, psychiatric treatment, and participation in a nurses’ support group.

23. The findings set forth above amount to clear and convincing evidence that Mr. Kemp is unable to practice nursing with reasonable skill and safety.

#### CONCLUSIONS OF LAW

24. Pursuant to section 120.57(1), Florida Statutes, DOAH has jurisdiction over the parties and subject matter of this proceeding.

25. A proceeding, such as this one, to impose discipline upon a licensee, is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n.*, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, the Department must prove the charges against Mr. Kemp 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. & Prof'l Reg., Bd. of Med.*, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

26. Regarding the standard of proof, the court in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), stated that:

clear and convincing evidence 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.

*Id.*

27. The Florida Supreme Court later adopted the *Slomowitz* court's description of clear and convincing evidence. *See In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal has also followed the *Slomowitz* test, adding the interpretive comment that "[a]lthough 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., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

28. 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 Prof'l Reg., 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).

29. The Department's Administrative Complaint alleges that Mr. Kemp is in violation of section 464.018(1)(j), by being unable to practice nursing with reasonable skill and safety due to "severe alcohol use disorder, post-traumatic stress disorder, and depressive disorder."

30. 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.

31. As discussed above, the Department proved by clear and convincing evidence that Mr. Kemp is in violation of section 464.018(1)(j). Accordingly, the analysis turns to the appropriate penalty given the circumstances of the instant case.

32. Section 456.079 requires the Board of Nursing to adopt disciplinary guidelines for specific offenses. Penalties must be consistent with any disciplinary guidelines prescribed by rule. *See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Regul.*, 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

33. The Board of Nursing has adopted Florida Administrative Code Rule 64B9-8.006, which identifies the range of penalties for violations of chapter 464. The rule also sets forth aggravating and mitigating circumstances to consider in determining the appropriate penalty.

34. Rule 64B9-8.006(3)(g) provides that the minimum penalty for a first-time violation of section 464.018(1)(j) is a \$250 fine, suspension, and IPN evaluation. The maximum penalty is a \$500 fine, suspension, or revocation.

35. Rule 64B9-8.006(5) sets forth aggravating and mitigating circumstances that may be considered when determining an appropriate penalty. While the Department has proven by clear and convincing evidence that Mr. Kemp's continued licensure as an LPN represents a danger to the public, that aggravating circumstance is offset by the lack of any evidence of actual damage caused by the violation.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Nursing enter a final order: (a) finding Walter Lindsey Kemp, Jr., L.P.N. violated section 464.018(1)(j); (b) imposing

a \$250 fine; and (c) suspending Mr. Kemp's licensed practical nursing license until such time that he enters into a monitoring contract with IPN and complies with any and all terms and conditions imposed by IPN.<sup>9</sup>

DONE AND ENTERED this 4th day of October, 2021, in Tallahassee, Leon County, Florida.

*Garnett Chisenhall*

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G. W. CHISENHALL  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 4th day of October, 2021.

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<sup>9</sup> Section 456.072(4) provides that "[i]n addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, under this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is no board, shall assess costs related to the investigation and prosecution of the case."

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.