

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
NURSING,

Petitioner,

Case No. 21-1638PL

vs.

KISHMA AFIA SMITH, L.P.N.,

Respondent.

RECOMMENDED ORDER

On July 20, 2021, Robert S. Cohen, Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”), conducted the final hearing by Zoom teleconference.

APPEARANCES

For Petitioner: Gerald C. Henley, Esquire
Kristen M. Summers, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Kishma Afia Smith, pro se
1440 The Pointe Drive
West Palm Beach, Florida 33409

STATEMENT OF THE ISSUES

The issues are whether Respondent engaged in unprofessional conduct by striking a patient in violation of section 464.018(1)(h), Florida Statutes, and Florida Administrative Code Rule 64B9-8.005(13); and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On December 17, 2020, Petitioner, Department of Health, Board of Nursing (“Petitioner” or “Department”), filed an Administrative Complaint (“A.C.”) alleging that Respondent, Kishma Smith, L.P.N. (“Respondent” or “Ms. Smith”), engaged in unprofessional conduct in violation of section 464.018(1)(h) by striking Patient J.A. in violation of rule 64B9-8.005(13). The A.C. seeks a range of discipline from revocation or suspension to corrective action or continuing education.

Respondent timely requested an administrative hearing involving disputed issues of material fact. The Department transmitted the file to DOAH on May 20, 2021, and a final hearing was held on July 20, 2021.

At the hearing, the Department offered the testimony of Kerline Bien-Aime, C.N.A., an eyewitness, and offered into evidence Petitioner’s Exhibits 1 through 7, including a deposition in lieu of live testimony from Maria Santiago, L.P.N., the resident care director at Savannah Court of the Palm Beaches (“Savannah Court”). Ms. Smith testified on her own behalf and did not offer any exhibits.

The one-volume Transcript was filed on August 18, 2021. The Department timely filed Petitioner’s Proposed Recommended Order (“PRO”) on August 23, 2021. Ms. Smith submitted a letter on July 21, 2021. The Department’s PRO, Ms. Smith’s July 21 letter, plus the exhibits and testimony adduced at hearing, have been duly considered in writing this Recommended Order. Unless otherwise indicated, citations to the Florida Statutes or the Florida Administrative Code refer to the version in effect during the time that the violation was committed.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating the practice of nursing in the state of Florida, pursuant to section 20.43 and chapters 456 and 464, Florida Statutes.

2. At all times material to this proceeding, Ms. Smith was licensed as a practical nurse in Florida, having been issued license number PN 5177737. Her address is 1440 The Pointe Drive, West Palm Beach, Florida 33409.

3. At all times material to the A.C., Ms. Smith practiced nursing at Savannah Court, an assisted living facility located in West Palm Beach, Florida.

4. In the course of her employment, Ms. Smith was assigned to care for residents in “the cottage,” a self-contained unit at Savannah Court designated for patients suffering from Alzheimer’s disease and other cognitive impairment issues.

5. In September 2020, J.A., an 86-year-old woman, resided in the cottage at Savannah Court. J.A. suffered from advanced Alzheimer’s disease. She was wheelchair-bound, elderly, and frail. As a result of her mental condition, she was often combative with her caregivers.

6. Respondent provided care to J.A. over the course of several months and described her at hearing as her “favorite patient.”

7. Kerline Bien-Aime is a certified nursing assistant. Ms. Bien-Aime works for Elite Premier Services, a staffing agency. At all times material to the A.C., Ms. Bien-Aime was assigned to work at Savannah Court.

8. On September 19, 2020, Ms. Bien-Aime assisted J.A. with getting dressed and changed so that she could be transported to the dining facility in the cottage.

9. J.A. became combative and struck Ms. Bien-Aime twice. Ms. Bien-Aime asked Respondent to assist her in getting J.A. dressed and ready to eat.

10. Ms. Smith entered J.A.’s room to assist Ms. Bien-Aime. At this time, the record reflects that J.A. did not have any redness or swelling on her face.

11. J.A. struck Ms. Smith across the face, knocking her glasses off. Ms. Smith first testified that this was the first time she had ever been struck in the face by a resident. On cross-examination, however, she admitted she had been hit by residents before, but “not as hard.”

12. Ms. Smith was surprised by J.A.’s actions and responded with a “knee-jerk” reaction. She first told J.A., “Bitch, I hit back.” She followed this statement by striking J.A. twice across the face.

13. Ms. Bien-Aime witnessed the altercation, after which she escorted J.A. to the dining hall and reported Respondent’s conduct to her agency supervisor.

14. Ms. Bien-Aime then reported Ms. Smith’s conduct to Maria Santiago, the resident care director at Savannah Court. Ms. Santiago then investigated the allegations made by Ms. Bien-Aime.

15. Ms. Santiago’s investigation revealed that on September 19, 2020, Respondent was in a “bad mood.” Additionally, Ms. Santiago observed that J.A.’s face and eye were red and swollen. Further, she noted that J.A.’s eye was bloodshot as if someone had put their finger in it.

16. As a result of the investigation, Ms. Santiago terminated Respondent’s employment.

17. Ms. Bien-Aime’s testimony was given without reservation, was clear and concise, and is credited.

18. Respondent testified that she did not strike J.A. on the day in question, or at any time. Respondent further testified that she saw a small blood spot on the corner of J.A.’s left eye prior to the incident, and stated that it could have been caused by J.A.’s blood thinner medication, Eliquis.

19. However, the photographic evidence at hearing shows that J.A.’s right eye and face were injured, red, and swollen. These injuries were not and cannot be explained as a worsening condition of J.A.’s left eye.

20. Additionally, Respondent admitted that she was not aware of any instance in which a blood thinner medication caused spontaneous redness, without some form of contact or trauma to the affected area.

21. Moreover, Respondent admitted that the redness and swelling on J.A.'s face was not present before her interaction with the resident, and she could not explain at hearing how it occurred.

22. Ms. Smith attempted to discredit Ms. Bien-Aime by alleging that Ms. Bien-Aime made up the allegations as a form of retribution after she had accused Ms. Bien-Aime of stealing another patient's ring.

23. Ms. Santiago, the Savannah Court employee responsible for handling internal allegations of employee misconduct, including patient theft, however, was unaware of these purported allegations and testified that Ms. Bien-Aime was never under suspicion for stealing from a patient at Savannah Court. Rather, she testified that Ms. Bien-Aime is a "quiet" and "very pleasant" employee.

24. Ms. Smith, however, had a history of engaging in verbal altercations with other staff members at Savannah Court and had previously been terminated from a customer service job (not at Savannah Court) based on her unprofessional interactions with a customer. She was internally cited by the administration at Savannah Court for aggressive behavior towards other staff, including the use of profanity directed at others.

25. Based on Ms. Bien-Aime's credible eyewitness account corroborated by the redness and bruising on J.A.'s face, the Department proved by clear and convincing evidence that Ms. Smith engaged in unprofessional conduct by striking J.A. Ms. Smith's version of the interaction with J.A. and her statement that she did not strike J.A. are not credited.

CONCLUSIONS OF LAW

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

27. 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). The applicable statute must be strictly construed in favor of the licensee. *See Camejo v. Dep't of Bus. & Prof'l Reg.*, 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); *Breesmen v. Dep't of Prof'l Reg., Bd. of Med.*, 567 So. 2d 469, 471 (Fla. 1st DCA 1990).

28. Because this is a proceeding whereby Petitioner seeks to suspend or revoke Respondent's license to practice nursing, the Department has the burden to prove the allegations in the A.C. by clear and convincing evidence. *Reich v. Dep't of Health, Bd. of Med.*, 973 So. 2d 1233, 1235 (Fla. 4th DCA 2008) (citing *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996)); and *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida:

[C]lear 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 lacking in confusion as to the facts at issue. The evidence must be of such a 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. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

29. The grounds proving the Department's assertion that Ms. Smith's license should be disciplined must be those specifically alleged in the A.C. *See, e.g., Trevisani v. Dep't of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005); *Kinney v. Dep't of State*, 501 So. 2d 129 (Fla. 5th DCA 1987); and *Hunter v. Dep't of Prof'l Reg.*, 458 So. 2d 842 (Fla. 2d DCA 1984).

30. Due process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. *See Shore Vill. Prop. Owners' Ass'n v. Dep't of Envtl. Prot.*, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and *Delk v. Dep't of Prof'l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

31. Section 464.018(1)(h) prohibits nurses from engaging in unprofessional conduct as defined by Board of Nursing rule.

32. Rule 64B9-8.005(13) defines unprofessional conduct to include striking a patient.

33. The Department proved by clear and convincing evidence that Respondent violated section 464.018(1)(h) through a violation of rule 64B9-8.005(13) by striking J.A. on September 19, 2020.

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

35. 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 Business & Prof'l Reg.*, 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

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

37. Rule 64B9-8.006(3)(f)2. provides that the recommended range of penalties for violation of section 464.018(1)(h) through a violation of rule 64B9-8.005(13) is from a reprimand, \$500 administrative fine, and continuing education, to revocation.

38. Rule 64B9-8.006(5)(b) sets forth the following as aggravating or mitigating circumstances for purposes of imposing penalties against violators of the provisions cited in paragraph 37 above, as follows:

(b) Circumstances which may be considered for purposes of mitigation or aggravation of penalty shall include, but are not limited to, the following:

1. The danger to the public.
2. Previous disciplinary action against the licensee in this or any other jurisdiction.
3. The length of time the licensee has practiced.
4. The actual damage, physical or otherwise, caused by the violation.
5. The deterrent effect of the penalty imposed.
6. Any efforts at rehabilitation.
7. Attempts by the licensee to correct or stop violations, or refusal by the licensee to correct or stop violations.
8. Cost of treatment.
9. Financial hardship.
10. Cost of disciplinary proceedings.

39. As for mitigating circumstances in this matter, no evidence was presented that Ms. Smith had been disciplined previously by the Department or any similar agency in another jurisdiction. Ms. Smith has been licensed as a nurse since 2007, which is a substantial length of time without being disciplined by the Department.

40. As for aggravating circumstances in this matter, Ms. Smith has exhibited her temper and use of profanity directed at staff on previous occasions. While no evidence was presented that she had ever struck a resident or patient under her care on previous occasions, her outright denial that J.A. only had a reddened eye after the confrontation, when the photographs of her show a bright red and swollen face that appear to be from trauma, is untruthful. It is not possible for anyone looking at J.A. following the altercation to believe she had not been struck in the face. The red eye was

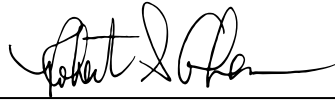
the least noticeable feature of the photograph of her taken shortly after having been struck by Ms. Smith.

41. Despite the combative nature of J.A., who struck both Ms. Bien-Aime and Ms. Smith, no resident, let alone an 86-year-old suffering from dementia, should ever be struck by a nurse or any member of the staff. There is no excuse for Respondent's behavior and, while she expressed remorse for using foul language, she did not even admit what was witnessed by her co-worker, let alone apologize for her behavior. Her having been written up previously at Savannah Court for using foul language only supports her inability to control her temper and language around staff and patients. Her showing no remorse for her actions does not instill confidence that, faced with another combative patient or resident under her care, she would not lash out again. While a substantial suspension of Respondent's license might result in her learning how to better react when faced with a difficult patient, the undersigned is not confident Ms. Smith would return as a changed individual practicing nursing without significant counseling and anger management training. Therefore, as recommended by the Department, a revocation of her license is warranted.

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 Respondent violated section 464.018(1)(h) and rule 64B9-8.005(13), revoking her license to practice nursing, and imposing costs of investigation and prosecution.

DONE AND ENTERED this 27th day of August, 2021, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 2021.

COPIES FURNISHED:

Gerald C. Henley, Esquire
Kristen M. Summers, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Joe Baker, Jr., Executive Director
Board of Nursing
Department of Health
4052 Bald Cypress Way, Bin C-02
Tallahassee, Florida 32399-3252

Kishma Afia Smith
1440 The Pointe Drive
West Palm Beach, Florida 33409

Louise St. Laurent, General Counsel
Office of the General Counsel
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

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.