

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

KELLI A. BURTON, R.N.,

Petitioner,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D13-2009

STATE OF FLORIDA,
DEPARTMENT OF HEALTH,

Respondent.

Opinion filed July 24, 2013.

Petition for Review of Non-Final Agency Action.

Monica L. Rodriguez, Dresnick, Rodriguez & Perry, P.A., Miami, for Petitioner.

Lucy Schneider and Therese A. Savona, Assistant General Counsels, Florida
Department of Health, Tallahassee, for Respondent.

CLARK, J.

Dr. Kelli A. Burton, R.N.,¹ petitions this Court for review of non-final agency action. She contends the Department of Health (the Department) exceeded its authority when it, by emergency order, suspended her license to practice nursing through summary proceedings and without a hearing. We have jurisdiction under

¹ Ms. Burton, while maintaining her license as a registered nurse, recently received

sections 120.60(6) and 120.68(1), Florida Statutes, and Rule 9.100(c)(3), Florida Rules of Appellate Procedure. We agree with Dr. Burton and quash the Department's emergency suspension order (ESO).

While the Department is entitled to emergently suspend a nursing license pending full proceedings, because it does so without a hearing it must meet strict requirements. See Nath v. State Dep't of Health, 100 So. 3d 1273, 1276 (Fla. 1st DCA 2012). Among those requirements, the Department must show the ESO to be necessary and narrowly tailored; i.e., "why less harsh remedies . . . would have been insufficient to stop the harm alleged." Id. (internal quotations omitted) (quoting Preferred RV, Inc. v. Dep't of Highway Safety & Motor Vehicles, 869 So. 2d 713, 714 (Fla. 1st DCA 2004)).

Here, instead, the Department chose suspension of Dr. Burton's nursing license—without detailing why a host of other options at its disposal would be insufficient. By way of example, the Department could have ordered her to submit to drug testing if she desired to practice pending final resolution; or, it could have ordered her to have clearance from the Intervention Project for Nurses. The Department thus failed to provide for the least restrictive and narrow option available to it; the emergency suspension must therefore be quashed. See Nath, 100 So. 3d at 1276 (quashing emergency suspension of acupuncturist accused of sexual misconduct with

her medical degree in osteopathic medicine.

two patients; emergency order could have provided for supervised patient sessions); Machiela v. State, Dep't of Health, Bd. of Optometry, 995 So. 2d 1168, 1169 (Fla. 4th DCA 2008) (quashing emergency suspension of optometrist who pled guilty to indecent exposure, for exposing himself to minor patients during eye examinations, as optometrist entitled to “less restrictive, but equally effective, means to protect the public”; e.g., parental supervision of exams).

Ultimately, the Department may well be able to restrict, suspend, or revoke Dr. Burton’s license—after a full hearing, affording her an opportunity to be heard and defend herself against the Department’s contentions. We make no comment as to this subject. But, summary, emergency suspension pending this final resolution is different, and requires the Department meet a high burden. Bio-Med Plus, Inc. v. State, Dep't of Health, 915 So. 2d 669 (Fla. 1st DCA 2005). Here, the Department has not.

Accordingly, we GRANT the petition for review, and QUASH the Emergency Suspension Order.

VAN NORTWICK, J., CONCURS, and OSTERHAUS, J., DISSENTS.

OSTERHAUS, J., DISSENTING.

I think the Department of Health has adequately stated the facts and reasons underlying its emergency suspension of Petitioner's nursing license and its conclusion that she presents an immediate danger to public health, safety, and welfare. So I would deny her petition.

With respect for my colleagues' views, I do not see "a host of other options" for the Department to deal with nurses who have a multi-year history of abusing painkilling opioids and will not accede to drug screening or intervention efforts. Petitioner has shunned accountability. In fact, both of the other options suggested by the majority opinion—conditioning Petitioner's license on drug testing pending final resolution and ordering her to have clearance from the Intervention Project for Nurses (IPN)—resemble the Department's basic conclusion to suspend her license, in part, because Petitioner has not cooperated with available testing or monitoring options. The Department concluded that Petitioner "is not monitored by IPN" and that it has no other restriction available to ensure that she is sober.

I think the Department has met the high factual burden for its emergency suspension order by finding specifically that Petitioner:

- abused an addictive opioid drug for many years;
- received the drug through a doctor with whom she once had a romantic relationship and who wrote her multiple prescriptions at a time for many years, often without an exam;
- filled prescriptions for the drug more than 130 times in the 22-month period leading up to a sheriff's department investigation in early 2012

(and admittedly filled these prescriptions at different pharmacies so that she could “avoid detection”);

- likely had the drug in her system while treating patients (along with another sedation-causing drug that Petitioner took twice daily);
- declined every opportunity to provide urine and hair samples to show that she no longer used opioid medications or illicit drugs; and
- has not contacted or availed herself of help from the IPN.

Based on these facts, the Department concluded that an immediate suspension of Petitioner’s nursing license was necessary because she could not practice nursing with reasonable skill, safety, mental alertness, and emotional stability. And that, in her condition, Petitioner was very likely to cause harm to the health, safety, and welfare of patients. Under these circumstances, I see no legal problem with the Department’s decision to suspend her license for the time being.

It bears emphasizing that Petitioner ultimately retains the opportunity to keep her nursing license after a full proceeding in her case, which must “be promptly instituted and acted upon.” § 120.60(6)(c), Fla. Stat. Emergency suspension is meant only as an interim solution addressing immediate dangers until a full hearing can be completed. I would deny her petition.