Third District Court of Appeal

State of Florida

Opinion filed November 20, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-730
Lower Tribunal No. 16-26623

Maribel Galvan, R.N.,
Appellant,

vs.

Department of Health,
Board of Nursing,
Appellee.

An Appeal from the Department of Health, Board of Nursing.

André Gibson, Chartered, and André A. Gibson, for appellant.

Sarah Young Hodges (Tallahassee), Chief Appellate Counsel, for appellee.

Before SALTER, HENDON, and GORDO, JJ.

HENDON, J.

Maribel Galvan. R.N. ("Galvan") appeals from the final order of the Department of Health, Board of Nursing ("Board") permanently revoking her license to practice nursing in Florida. We reverse and remand for a formal hearing before an administrative law judge at the Division of Administrative Hearings.

Galvan was a registered nurse, licensed since 2006. In 2008, she started a business operating group homes. Galvan was found to have accepted cash from a pharmacy for doing business with it. She subsequently pleaded guilty to one count of receiving a kickback from a pharmacy in connection with the Medicaid program, a violation of 42 U.S.C. § 1320(a). The Department of Health ("DOH") commenced an administrative action by suspending Galvan with an Emergency Order of Suspension followed by a three-count administrative complaint seeking to revoke Galvan's license as a registered nurse. The DOH alleged that Galvan's federal guilty plea is 1) a violation of section 456.072(1)(ii), Florida Statutes; 2) a crime which relates to health care fraud, and 3) a crime that directly related to the practice of nursing, which is the basis for discipline. Galvan argued that her guilty plea was not directly related to the practice of nursing. In response, the DOH filed a second amended complaint dismissing Counts 2 and 3, the two charges that alleged Galvan's plea was directly related to the practice of nursing. Although the DOH dismissed the two counts in the first administrative complaint that directly related to the practice of

nursing, it retained the first count in the second administrative complaint alleging that Galvan violated section 456.072(1)(ii), Florida Statutes (2017), which provides:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2)[1] may be taken: . . . (ii)

[1]Subsection (2) provides:

> When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:
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> (a) Refusal to certify, or to certify with restrictions, an application for a license.
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> (b) Suspension or permanent revocation of a license.
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> (c) Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.
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> (d) Imposition of an administrative fine not to exceed $10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of $10,000 per count or offense.
>
> (e) Issuance of a reprimand or letter of concern.
>
> (f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not

> Being convicted of, or entering a plea of guilty or nolo contendere to, any misdemeanor or felony, regardless of adjudication, under 18 U.S.C. s. 669, ss. 285-287, s. 371, s. 1001, s. 1035, s. 1341, s. 1343, s. 1347, s. 1349, or s. 1518, or 42 U.S.C. ss. 1320a-7b, relating to the Medicaid program.

The DOH in the "wherefore" clause of the second amended complaint requested the Board to impose one or more penalties out of a list of potential penalties, which included permanent revocation, restriction of practice, imposition of a fine, reprimand, probation, or any other relief. The penalty guideline the Board relied

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> limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.
>
> (g) Corrective action.
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> (h) Imposition of an administrative fine in accordance with s. 381.0261 for violations regarding patient rights.
>
> (i) Refund of fees billed and collected from the patient or a third party on behalf of the patient.
>
> (j) Requirement that the practitioner undergo remedial education.
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> In determining what action is appropriate, the board, or department when there is no board, must first consider what sanctions are necessary to protect the public or to compensate the patient. Only after those sanctions have been imposed may the disciplining authority consider and include in the order requirements designed to rehabilitate the practitioner. All costs associated with compliance with orders issued under this subsection are the obligation of the practitioner.

§ 456.072, Fla. Stat. (2018).

upon, Florida Administrative Code Rule 64B9-8.006(3)(c), requires a "direct relationship" between a guilty plea and the practice of nursing or ability to practice nursing (collectively, "direct relationship").

Galvan requested a formal administrative hearing before an administrative law judge ("ALJ") at the Division of Administrative Hearings ("DOAH"), arguing that by alleging a violation of section 456.072(1)(ii), the DOH cannot rely on Rule 64B9-8.006(3)(c) as the penalty guideline because that regulation applies only to crimes "directly related to the practice of nursing." Galvan maintained that her crime does not relate to the practice of nursing, thus the maximum penalty of revocation pursuant to Rule 64B9-8.006(3)(c) was inappropriate. The DOH refused to amend the complaint, denied her request for a formal hearing, and concluded that Galvan failed to dispute an issue of material fact, i.e., that she pled to a federal Medicaid kickback crime. Although the DOH denied the request for a formal hearing, it revised its complaint to allow for a probable cause panel (PCP) hearing.

At the PCP hearing, Galvan agreed that her guilty plea was a basis for a probable cause finding but continued to maintain that there was no basis to permanently revoke her nursing license because her crime did not involve the direct practice of nursing. The PCP relied on an Investigative Report that allegedly contained several material errors, conflating the kickbacks with healthcare fraud, indicating eleven episodes of kickbacks when there was only one, and including the

assertion that her crime was directly related to the practice of nursing. Galvan argued that because the DOH dismissed Counts 2 and 3, the only counts that involved the practice of nursing, DOH should amend its complaint to remove revocation as a penalty. DOH denied the request.

The matter went before an informal panel[2] of the Board. Counsel for the DOH conceded that the Investigative Report contained several material errors on which the allegations in the second amended complaint were based, but the Board continued to seek revocation as the ultimate penalty. At the informal hearing, the Board learned that Galvan did not practice nursing while operating the group homes. Galvan argued that since she has been barred by Medicare and Medicaid from operating a group home, she needs to fall back on her nursing degree to make a living. Galvan argued that the Board should terminate the informal hearing and allow her to pursue a formal hearing at DOAH because of the dispute of material fact whether her crime encompasses the direct practice of nursing[3] in order to apply the sanction of

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[2] See Autoworld of Am. Corp. v. Dep't of Highway Safety, 754 So. 2d 76, 77 (Fla. 3d DCA 2000) (stating that the purpose of informal hearings is to arrive at conclusions of law as to whether agreed facts amount to a violation of the statutes and, if so, to determine penalties).

[3] Section 464.003, Florida Statutes, provides:

> (17) "Practice of practical nursing" means the performance of selected acts, including the administration of treatments and medications, in the care of the ill, injured, or infirm; the promotion of wellness, maintenance of health, and prevention of illness of others under the direction of a registered nurse, a licensed physician, a licensed

revocation of her license. The Board disagreed and voted to permanently revoke her license to practice nursing in Florida. Galvan appeals.

This court interprets state administrative rules de novo. Art. V, § 21, Fla. Const. (2018) ("[I]n interpreting a state statute or rule, a state court . . . may not defer to an administrative agency's interpretation of such statute or rule and must instead interpret such statute or rule de novo."). The standard of review of the agency's findings of fact is that of "competent, substantial evidence." § 120.68(7)(b), Fla. Stat. (2012). The Board's imposition of a penalty is reviewed under an abuse of discretion standard. See Dep't of Highway Safety & Motor Vehicles v. Silva, 627 So. 2d 612 (Fla. 1st DCA 1993); Grimberg v. Dep't of Prof'l Regulation, Bd. of Med., 542 So.

> osteopathic physician, a licensed podiatric physician, or a licensed dentist; and the teaching of general principles of health and wellness to the public and to students other than nursing students. A practical nurse is responsible and accountable for making decisions that are based upon the individual's educational preparation and experience in nursing.
> (18) "Practice of professional nursing" means the performance of those acts requiring substantial specialized knowledge, judgment, and nursing skill based upon applied principles of psychological, biological, physical, and social sciences which shall include, but not be limited to:
> (a) The observation, assessment, nursing diagnosis, planning, intervention, and evaluation of care; health teaching and counseling of the ill, injured, or infirm; and the promotion of wellness, maintenance of health, and prevention of illness of others.
> (b) The administration of medications and treatments as prescribed or authorized by a duly licensed practitioner authorized by the laws of this state to prescribe such medications and treatments.
> (c) The supervision and teaching of other personnel in the theory and performance of any of the acts described in this subsection.

2d 457, 457-58 (Fla. 3d DCA 1989) ("The appellate function, on review of penalties imposed by an administrative agency, is to determine whether there are valid reasons in the record in support of the agency's order."). However, a reviewing court may set aside agency action when it finds that the action is dependent on findings of fact that are not supported by substantial competent evidence in the record, there are material errors in procedure, incorrect interpretations of law, or the agency abused its discretion. § 120.68, Fla. Stat. (2018).

There are two elements to Rule 64B9-8.006(3)(c). First, the person must have been convicted, found guilty of, or have taken a plea under, in Galvan's case, section 456.072(1)(ii). Second, that crime must be "directly related to the practice of nursing or to the ability to practice nursing." Galvan admittedly meets the first criterion because she pled to a federal kickback violation, but she vigorously disputed that her crime of accepting a monetary kickback from a pharmacy directly relates to the practice of nursing. She testified at the informal hearing that she did not administer medications or practice nursing at the group homes, but acted as an administrator, ordering medications and supplies for the clients. The record indicates that Galvan's ban from participating in Medicare and Medicaid programs has no impact on her ability to practice nursing.

Statutes authorizing sanctions against a person's professional license "are deemed penal in nature and must be strictly construed, with any ambiguity interpreted

in favor of the licensee." Beckett v. Dep't. Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008) (quoting Elmariah v. Dep't of Prof'l Regulation, Bd. of Med., 574 So. 2d 164, 165 (Fla. 1st DCA 1990)). Thus, any ambiguity as to whether Galvan's federal kickback offense is "directly related to the practice of nursing," such that Rule 64B9-8.006 applies, should have been decided in Galvan's favor by terminating the informal hearing and granting Galvan's request to have the matter decided by an ALJ at a formal administrative hearing, where evidence could be presented and a final order issued. There was no competent substantial evidence adduced at the informal hearing to show a nexus between Galvan's plea to the crime of taking a kickback and the requirement that the pled-to offense be "directly related to the practice of nursing." The record additionally shows that the Board relied on a concededly flawed Investigative Report to support its conclusions. By failing to make any competent and substantial findings of fact regarding whether Galvan's crime is directly related to the practice of nursing, it follows that the Board of Nursing abused its discretion by applying Rule 64B9-8.006 and imposing the maximum sanction of permanent revocation of Galvan's license to practice nursing in Florida.

We therefore reverse the order on appeal and remand with directions that the DOH refer the second amended complaint to DOAH, to allow Galvan a formal hearing before an administrative law judge on the disputed issue of fact in the penalty phase: whether Galvan's plea to accepting a kickback is "directly related to the

practice of nursing," warranting the maximum sanction of revoking her nursing license pursuant to Rule 64B9-8.006(3)(c), or imposition of other appropriate sanction. § 120.569, Fla. Stat. (2018); Aguilera v. Dep't of Health, Bd. of Psychology, 743 So. 2d 1153, 1154 (Fla. 3d DCA 1999) (holding where the issue involved a mixed question of fact and law, the board erred in not submitting this matter to a hearing officer at DOAH); see e.g., Williams v. Castor, 613 So. 2d 97, 99 (Fla. 1st DCA 1993) (holding that because appellant continually maintained that there were disputed issues of material fact, he clearly was entitled to a formal hearing before an ALJ at DOAH).

Reversed and remanded with directions.