

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



Wisconsin Department of Regulation & Licensing Access to the Public Records of the Reports of Decisions

This Reports of Decisions document was retrieved from the Wisconsin Department of Regulation & Licensing website. These records are open to public view under Wisconsin's Open Records law, sections 19.31-19.39 Wisconsin Statutes.

Please read this agreement prior to viewing the Decision:

- The Reports of Decisions is designed to contain copies of all orders issued by credentialing authorities within the Department of Regulation and Licensing from November, 1998 to the present. In addition, many but not all orders for the time period between 1977 and November, 1998 are posted. Not all orders issued by a credentialing authority constitute a formal disciplinary action.
- Reports of Decisions contains information as it exists at a specific point in time in the Department of Regulation and Licensing data base. Because this data base changes constantly, the Department is not responsible for subsequent entries that update, correct or delete data. The Department is not responsible for notifying prior requesters of updates, modifications, corrections or deletions. All users have the responsibility to determine whether information obtained from this site is still accurate, current and complete.
- There may be discrepancies between the online copies and the original document. Original documents should be consulted as the definitive representation of the order's content. Copies of original orders may be obtained by mailing requests to the Department of Regulation and Licensing, PO Box 8935, Madison, WI 53708-8935. The Department charges copying fees. *All requests must cite the case number, the date of the order, and respondent's name as it appears on the order.*
- Reported decisions may have an appeal pending, and discipline may be stayed during the appeal. Information about the current status of a credential issued by the Department of Regulation and Licensing is shown on the Department's Web Site under "License Lookup." The status of an appeal may be found on court access websites at: <http://ccap.courts.state.wi.us/InternetCourtAccess> and <http://www.courts.state.wi.us/wscqa>.
- Records not open to public inspection by statute are not contained on this website.

By viewing this document, you have read the above and agree to the use of the Reports of Decisions subject to the above terms, and that you understand the limitations of this on-line database.

Correcting information on the DRL website: An individual who believes that information on the website is inaccurate may contact the webmaster at web@drl.state.wi.gov

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF A PETITION FOR AN
ADMINISTRATIVE INJUNCTION INVOLVING

FINAL DECISION

BARBARA C. LEMKE,
RESPONDENT

LS0207261UNL

The parties to this proceeding for the purposes of Wisconsin Statutes, sec. 227.53 are:

Barbara C. Lemke
N7410 HWY E
Watertown, Wisconsin 53094

Department of Regulation and Licensing
P.O. Box 8935
Madison, Wisconsin 53708

Division of Enforcement
Department of Regulation & Licensing
P.O. Box 8935
Madison, Wisconsin 53708

This proceeding was commenced by the filing of a Notice of Hearing and Petition for Administrative Injunction on July 26, 2002. A hearing was held on October 29, 2002. Closing arguments were filed by December 5, 2002. Attorney James E. Polewski appeared on behalf of the Division of Enforcement, Department of Regulation and Licensing. Attorney Robert M. Hesslink, Jr., Hesslink Law Offices SC, 200 Enterprise Dr, PO Box 930005, Verona, WI 53593- 0005 appeared at the hearing on behalf of the respondent, Barbara C. Lemke. The Administrative Law Judge filed a proposed decision on March 3, 2003. On March 14, 2003, respondent Lemke notified the Administrative Law Judge that she had discharged her attorneys.

Based on the complete record and in consideration of the matter, the Department of Regulation and Licensing adopts as its final decision in this matter the following Findings of Fact, Conclusions of Law, Order, and Explanation of Variance.

FINDINGS OF FACT

1. The respondent, Barbara C. Lemke, (d.o.b., 11/21/48), is a resident of the State of Wisconsin. Ms. Lemke's last known address on file with the Department of Regulation and Licensing is N7410 Highway E, Watertown, WI 53094.

2. Ms. Lemke has been licensed as a registered nurse in the State of Wisconsin since 1974. She currently practices nursing in the home health care setting. She has practiced nursing with Oconomowoc Memorial Hospital since 1976 and has worked in the home care setting since 1985.

3. Ms. Lemke is the owner of a business known as Health Options, which is located in Watertown, WI. Health Options opened for business in February 2001.

4. At Health Options, Ms. Lemke engages in the practice of Nambudripad's Allergy Elimination Technique (NAET).

5. NAET is defined in the American Holistic Nurses' Association Resource Directory as "the use of kinesiology and stimulation of acupressure points to reprogram the body's response to foods, environmental and other allergens so that these systemic irritants become accepted by the body".

6. In informational materials that Ms. Lemke distributes to patients, NAET is described as follows:

NAET is a synthesis of various medical disciplines such as allopathy, acupuncture, chiropractic, kinesiology and nutrition. Nambudripad's Testing Techniques utilizes Muscle Response Testing (MRT) which indicates the kinetic imbalance in the body caused by allergens. The NAET treatment stimulates pressure points along the spine from the neck to the sacrum while the patient is holding an allergen. After the treatment, a strong MRT indicates that the allergy has been removed. Specific acupressure points are then massaged or acupuncture needles may be inserted for 20 minutes to stabilize the treatment. The substance must then be completely avoided for 25 hours following the treatment for best results. Allergens are treated and cleared one at a time in a specific sequence. Normally only one item is treated on a given day. In most cases one session is all that is required to eliminate an allergy if NAET is applied properly. Individuals who are highly sensitive may sometimes require additional treatments.

7. At least from February 2001 to October 2002, Ms. Lemke used NAET to treat patients for medical conditions and diseases.

8. At least from August 17, 2001 to April 4, 2002, respondent used NAET to treat Patient 1 (also referred to herein as Patient LM) for sinus infections and bronchitis.

9. At least from February 1, 2002 to April 4, 2002, respondent used NAET to treat Patient 2 for allergies.

10. At least from May 17, 2001 to August 2, 2001, respondent used NABT to treat Patient 3 for asthma.

11. In 2001 and 2002, respondent used NABT to treat Patient TB for recurring infections under her fingernails.

12. Sometime in 2001 or 2002, respondent used NAET to treat Patient KB for pain in three toes on his right foot.
13. At least in 2002, respondent used NABT to treat Patient KV for numerous allergies.
14. Sometime in 2001 or 2002, respondent used NAET to treat Patient JV for his allergy to dogs.
15. Ms. Lemke's use of NAET to treat patients for medical conditions and diseases was done without the general or special supervision or direction of a physician and without orders from physicians.
16. Ms. Lemke is not currently, and has never been, licensed to practice medicine and surgery in the State of Wisconsin.

CONCLUSIONS OF LAW

1. The Department of Regulation and Licensing has jurisdiction in this matter pursuant to Wis. Stat. § 440.21.
2. The evidence in the record is insufficient to establish that by engaging in the conduct described in Findings of Fact 7-15 respondent engaged in a practice or used a title without a credential required under chs. 440 to 480.

ORDER

NOW THEREFORE, IT IS ORDERED that the petition for an administrative injunction filed in this matter shall be, and hereby is, denied.

EXPLANATION OF VARIANCE

This Final Decision adopts the findings of fact and the first conclusion of law in the proposed decision of the Administrative Law Judge, and varies from the proposed decision as follows: findings of fact are renumbered; this decision includes a conclusion of law that the evidence in the record is insufficient to establish that by engaging in the conduct described in findings of fact 7-14, respondent engaged in a practice or used a title without a credential required under Wis. Stat. chs. 440 to 480; this decision deletes the conclusion of law that respondent's conduct as described in the findings of fact constitutes the practice of medicine and surgery; the order in this decision denies the petition rather than grants an administrative injunction. The explanation for these modifications follows.

The authority for the Department of Regulation and Licensing to issue an order enjoining unlicensed practice is Wis. Stat. § 440.21 (2):

If after holding a public hearing, the department determines that a person has engaged in a practice or used a title without a credential required under chs. 440 to 480, the department may issue a special order enjoining the person from the continuation of the practice or use of the title.

The petition filed in this case alleges that respondent represents that she can diagnose allergies and treat patients to eliminate the allergies using a procedure referred to as NAET. The petition also alleges that the practice of NAET is the practice of medicine and surgery, a practice restricted to licensed physicians under Wis. Stat. § 448.03 (1), and that respondent is not licensed to practice medicine and surgery. Respondent defended against the petition, in part, on the grounds that her practice was within the scope of the practice of a registered nurse, a profession she is licensed to practice.

The record reflects that respondent's treatment of allergies includes checking the energy balance of a patient, assessing certain energy fields and using vials that include the "vibrational energy" or the "energetic copy" of the substance that causes the allergy. (R. 44 - 52; 206 - 208.) The practice described in the record raises concerns of whether the treatment administered by respondent is effective. However, issues related to whether the practice of NAET as described in the record is an effective treatment or whether the respondent's conduct in treating patients, advertising her business, or offering or performing the practice of NAET constitutes misconduct or unprofessional conduct under Wis. Stat. § 441.07(1)(d) are not material to the matter before the Department. The issues of effectiveness and possible misconduct are not within the authority of the Department of Regulation and Licensing to determine in responding to a petition filed under Wis. Stat. § 440.41. An allegation that respondent's practice of NAET is grounds for disciplinary action must be brought before the Board of Nursing.

The Administrative Law Judge concluded that respondent's use of NAET to treat patients "...constitutes the practice of medicine and surgery in the State of Wisconsin" and enjoined respondent from so practicing without a license to practice medicine and surgery.

The two conclusions of law reached by the Administrative Law Judge are that the Department has jurisdiction in the matter, and

2. Respondent's conduct as described in Findings of Fact 6-14 constitutes the practice of medicine and surgery in the State of Wisconsin.

While the Administrative Law Judge concluded that what the respondent did in treating patients 1 - 3, TE, KE, KV and JV constituted the practice of medicine and surgery, the Administrative Law Judge did not conclude that respondent engaged in this practice "... without a credential required under chs. 440 to 480." The essential elements that require proof to support issuance of an administrative injunction in response to the petition filed in this matter are that: (1) respondent engaged in a regulated practice, and (2) respondent was without a credential required under chs. 440 to 480 of the *Wisconsin Statutes*.

The law recognizes that the disciplines of various health care professionals may overlap. Practicing in the area of overlap presents questions in enforcement of the law but does not, by itself, result in finding that the practitioner engaged in the practice overlapped "... without a credential required under chs. 440 to 480." See OAG 1-01 dated January 30, 2001. In that opinion, the Attorney General quoted from *Kerkman v. Hinz*, 142 Wis. 2d 404, 416 (1988):

... [a]lthough chiropractors are permitted to use some medical tools when

analyzing and treating a patient, this overlap does not transform the practice of chiropractic into the practice of medicine.

See also 68 Op. Att'y Gen. 316 (1979) for additional discussion of an overlap in the practices of medicine and chiropractic.

The petition alleges that respondent's practice violates the statutory requirement in Wis. Stat. § 448.03

(1):

(1) License required to practice. (a) No person may practice medicine and surgery, or attempt to do so or make a representation as authorized to do so, without a license to practice medicine and surgery granted by the board.

(b)...

Exceptions to this general prohibition are in Wis. Stat. § 448.03 (2):

(2) Exceptions. Nothing in this subchapter shall be construed either to prohibit, or to require, a license or certificate under this subchapter for any of the following:

(a) Any person lawfully practicing within the scope of a license, permit, registration, certificate or certification granted to practice professional or practical nursing or nurse-midwifery under ch. 441, to practice chiropractic under ch. 446, to practice dentistry or dental hygiene under ch. 447, to practice optometry under ch. 449, to practice acupuncture under ch. 451 or under any other statutory provision, or as otherwise provided by statute.

Respondent Barbara Lemke is a registered nurse and is permitted to practice as a registered nurse in Wisconsin within the scope of practice described by law in Wis. Stat. ch. 441, including in the areas where the practice overlaps the practice of medicine and surgery as described in Wis. Stat. ch. 448. Respondent linked her NAET practice to nursing by listing her nursing credentials on the pamphlet that she used to describe NAET as "NAET SPECIALIST, Barbara Lemke, R.N., BSN" (Exhibit 2).

The Administrative Law Judge found that respondent's use of NAET to treat patients for medical conditions and diseases was done without the general or special supervision or direction of a physician and without orders from physicians. From this finding, the Administrative Law Judge apparently concluded that the conduct of respondent was not within the scope of practice of a registered nurse.

There is insufficient evidence in the record to determine whether respondent's conduct is within the scope of practice of a registered nurse under Wis. Stat. ch. 441. "Professional nursing" is defined in Wis. Stat. § 441.001(4). Modifications were made to the definition in 2001 Wisconsin Act 107. Prior to the modifications in Act 107 it was unclear to what extent the phrase ". . . under the general or special supervision or direction of a physician," applied to nursing acts described in the definition. The changes made in Section 80 of 2001 Wisconsin Act 107, as shown below, support a conclusion that "professional nursing" in Wisconsin includes areas of practice that are not performed under the supervision of a physician or other health care professional.

2001 Wisconsin Act 107

Section 80. 441.11 (4) of the statutes is renumbered 441.001 (4) (intro.) and amended to read:

441.001 (4) Practice of professional PROFESSIONAL NURSING. (intro.) The practice of professional nursing within the terms of this subchapter "Professional nursing" means the performance for compensation of any act in the observation or care of the ill, injured, or infirm, or for the maintenance of health or prevention of illness of others, which act that requires substantial nursing skill, knowledge, or training, or application of nursing principles based on biological, physical, and social sciences, such as the. Professional nursing includes any of the following:

(a) The observation and recording of symptoms and reactions, the.

(b) The execution of procedures and techniques in the treatment of the sick under the general or special supervision or direction of a physician, podiatrist licensed under ch. 448, dentist licensed under ch. 447 or optometrist licensed under ch. 449, or under an order of a person who is licensed to practice medicine, podiatry, dentistry or optometry in another state if that the person making the order prepared the order after examining the patient in that other state and directs that the order be carried out in this state, and the.

(c) The execution of general nursing procedures and techniques.

(d) Except as provided in s. 50.04 (2) (b), the practice of professional nursing includes the supervision of a patient and the supervision and direction of licensed practical nurses and less skilled assistants.

A note following Section 80 of the Act states:

NOTE: Moves definition section to the beginning of the subchapter, modifies language, and modifies language for improved readability and conformity with current style. The defined terms are changed to reflect the actual terms used in ch. 441. 1981 Wis. Act 317 added the phrase, "Except as provided in s. 50.04 (2) (b), the practice of professional nursing includes", in sub. (4) to exclude activity under that provision from the definition of professional nursing. The amendment of sub. (4) applies the phrase "professional nursing includes" to all of the examples under the subsection for consistency and to avoid possible confusion.

Respondent contended that her conduct was within the scope of practice of a registered nurse. Evidence was introduced in the record that respondent's conduct could be considered as the practice of nursing in some states. Exhibits 21-25. The Administrative Law Judge noted, in referring to these exhibits: "Note that Wisconsin is listed as one of the states where the Board of Nursing has not taken a formal position."

Respondent's conduct as described in the Findings of Fact, paragraphs 7-14, may fall within the scope of nursing as set forth in the nursing standards of practice at ch. N 6, Code. The definitions of "nursing diagnosis" at § N 6.01(8), Code, and the explanation of registered nurse scope of practice at N 6.03, state as follows:

N 6.02 Definitions. ... (8) "Nursing diagnosis" means a judgment made by an R.N. following a nursing assessment of a patient's actual or potential health needs for the purpose of establishing a nursing care plan.

N 6.03 Standards of practice for registered nurses. (1) GENERAL NURSING PROCEDURES. An R.N. shall utilize the nursing process in the execution of general nursing procedures in the maintenance of health, prevention of illness or care of the ill. The nursing process consists of the steps of assessment, planning, intervention and evaluation. This standard is met through performance of each of the following steps of the nursing process:

(a) Assessment. Assessment is the systematic and continual collection and analysis of data about the health status of a patient culminating in the formulation of a nursing diagnosis.

(b) Planning. Planning is developing a nursing plan of care for a patient which includes goals and priorities derived from the nursing diagnosis.

(c) Intervention. Intervention is the nursing action to implement the plan of care by directly administering care or by directing and supervising nursing acts delegated to L.P.N.'s or less skilled assistants.

(d) Evaluation. Evaluation is the determination of a patient's progress or lack of progress toward goal achievement which may lead to modification of the nursing diagnosis.

No specific findings were made concerning the applicability of the statutory provisions relating to the practice of a registered nurse in Wisconsin to the conduct of the respondent. No witnesses testified specifically about whether the practice standards described in Wis. Admin. Code § N6.03 incorporate the NAET practice of the respondent. Because the record does not include evidence and an analysis of whether respondent's practice falls within the practice of professional nursing as defined in Wis. Stat. § 440.001 (4) and general nursing procedures in Wis. Admin. Code ch. N 6, the record does not support a conclusion that respondent engaged in the practice of medicine and surgery ". . . without a credential required under chs. 440 to 480." Lacking this conclusion, the law does not support the issuance of an administrative injunction. Because the petition is denied, it is unnecessary to determine whether respondent's practice constitutes the practice of medicine and surgery and Conclusion of Law #2 in the proposed decision is, therefore, deleted.

Dated at Madison, Wisconsin this 21st day of July, 2003.

Respectfully submitted,

Donsia Strong Hill, Secretary

Wisconsin Department of Regulation and Licensing