

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 BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
JODI A. DEBACCO, R.N.,	:	LS0701172NUR
RESPONDENT.	:	

Division of Enforcement Case No. 06NUR403

The State of Wisconsin, Board of Nursing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Board of Nursing.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 24th day of July, 2008.

Marilyn Kaufmann
Member of the Board
Board of Nursing

**STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING**

**IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST**

**PROPOSED DECISION
Case No. LS0701172-NUR**

**JODI A. DEBACCO, R.N.,
RESPONDENT.**

Division of Enforcement Case #06 NUR 403

PARTIES

The parties in this matter under Wis. Stats. § 227.44 and for purposes of review under Wis. Stats. § 227.53 are:

Jodi A. DeBacco
14205 W. Glen Meadow Drive
New Berlin, WI 53151

Jodi A. DeBacco
35 Cranfield Drive
Bella Vista, AR 72714

Board of Nursing
P.O. Box 8935
Madison, WI 53708-8935

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

This matter was commenced by the filing of a Notice of Hearing and Complaint. Atty. Arthur Thexton appeared on behalf of the Division of Enforcement. For part of the proceeding, Atty. Erik I. Colque, Law Offices of Mark S. Knutson, S.C., appeared on behalf of the Respondent. Neither Ms. DeBacco, nor Atty. Colque appeared at the hearing.

Based upon the record herein, the Administrative Law Judge recommends that the Board of Nursing adopt as its final decision in this matter, the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Jodi Ann DeBacco, (dob: 3/20/66) is and was at all times relevant to the facts set forth herein a Registered Nurse licensed in the State of Wisconsin pursuant to license #118466, which was granted on December 9, 1994. Her address of record is 14205 W. Glen Meadow Dr., New Berlin, WI 53151, but she has permanently moved from that address and her most recent actual address known to the Department is 35 Cranfield Drive, Bella Vista, AR 72714.

2. After graduating from nursing school, Ms. DeBacco worked at Fort Atkinson Senior Center, a skilled nursing facility, for approximately 1 year. After her employment at Fort Atkinson, Ms. DeBacco worked at St. Luke's Hospital for approximately 7 years. At St. Luke's, Ms. DeBacco worked on the medical telemetry floor; in the cardiac intensive care unit, and as a cardiac stress testing technician. Ms. DeBacco has not practiced nursing since leaving St. Luke's in 2003.

3. In 1991, Ms. DeBacco was diagnosed with lymphocytic leukemia. In September 2003, Ms. DeBacco was diagnosed with breast cancer which resulted in her having a mastectomy. In conjunction with her treatment for cancer, Ms. DeBacco's health care providers gave her prescription drugs for pain management, including, but not limited to, OxyContin and Percocet.

4. In August 1993, Ms. DeBacco was arrested for operating (a motor vehicle) while intoxicated. On June 1, 2002, Ms. DeBacco was arrested for operating (a motor vehicle) while intoxicated (2nd offense), a misdemeanor. Ms. DeBacco was convicted for the second offense on October 30, 2002. As part of the sentencing for the second offense, the Court ordered Ms. DeBacco to undergo an alcohol assessment. On April 19, 2004 or 2005, Ms. DeBacco was arrested for operating (a motor vehicle) while intoxicated.

5. On February 16, 2004, Ms. DeBacco attempted to fill a prescription in her name at a pharmacy in New Berlin for an extended release oxycodone product, which is a Schedule II controlled substance. The prescription purported to be issued by Dr. K, who had not in fact issued the prescription. Ms. DeBacco had presented nine previous prescriptions at this location, all purportedly signed by Dr. K, but only one was a valid prescription. This conduct resulted in Ms. DeBacco's conviction for violating Wis. Stat. § 450.11(7) (a), in the Circuit Court for Waukesha County, Wisconsin, on October 17, 2005. Ms. DeBacco was sentenced to 60 days in jail consecutive to the sentence imposed in the case described in Findings of Fact 6 herein, but that sentence was stayed and she was placed on probation for 2 years, on condition that she undergo AODA counseling and not use or possess any alcohol or unprescribed drug.

6. On January 24, 2005, Ms. DeBacco presented a prescription for an extended release oxycodone product, a Schedule II controlled substance, to a pharmacy. The prescription had been written for 30 tablets, but it had been altered to appear to read 80 tablets. When questioned, Ms. DeBacco falsely stated to the investigating police officer that the prescription had been written for 80 tablets by the prescriber. This conduct resulted in Ms. DeBacco's conviction for violating Wis. Stat. § 450.11(7) (a), in the Circuit Court for Waukesha County, Wisconsin, on October 17, 2005. Ms. DeBacco was sentenced to 60 days in jail consecutive to the sentence imposed in the case described in Findings of Fact 5 herein, but that sentence was stayed and she was placed on probation for 2 years, on condition that she undergo AODA counseling and not use or possess any alcohol or unprescribed drug.

7. Ms. DeBacco failed to notify the Department of Regulation and Licensing (Department) in writing of the date, place and nature of her convictions or findings, as described in Findings of Fact 5 and 6 herein, within 48 hours after the entry of the judgment of convictions.

8. At a time unknown, but before October 5, 2006, Ms. DeBacco changed her address from the address shown in the records of the Department, as noted in Findings of Fact 1 herein, but failed to notify the Department of her change of address within 30 days.

9. On or about October 5, 2006, Ms. DeBacco applied for licensure as a professional nurse in Arkansas, by endorsement, using her Wisconsin licensure status as establishing her eligibility for licensure by endorsement. On that application, Ms. DeBacco was asked the following question:

"In the last two years, have you been the subject of a chemical or alcohol dependency intervention or participated in chemical or alcohol dependency treatment/rehabilitation?"

Ms. DeBacco answered "No" to this question. In fact, Ms. DeBacco had been ordered to undergo AODA counseling as a condition of probation, at the time of her sentencing on October 17, 2005, as described in Findings of Fact 5 and 6 herein. She participated in AODA counseling at Cedar Creek Family Counseling in Hales Corners, WI, between July 4, 2006 and August 29, 2006.

10. In conjunction with her application for licensure in Arkansas, Ms. DeBacco submitted a document to the Arkansas State Board of Nursing which purported to be a letter to her, from her former defense attorney, Christopher L. Strohbahn, stating in part, the following:

"This letter is in request for obtaining your Arkansas Nursing License. Judgment of Conviction probation was imposed and served. Ms. DeBacco was released from the Waukesha County Probation Program before the Honorable Judge Thomas Pieper on August 9, 2006."

In fact, Attorney Strohbahn did not author this letter, and the statement that the probation was "served" and that Ms.

DeBacco had been "released" from probation was false.

11. Ms. DeBacco did not appear at the hearing held in this matter.

CONCLUSIONS OF LAW

1. The Board of Nursing has jurisdiction in this matter pursuant to Wis. Stats., § 441.07, and Wis. Adm. Code ch. N 7.

2. Respondent's conduct, as described in Findings of Fact 5-6 herein, constitutes a violation of Wis. Stat. §§ 450.11(7) (a), 943.38 (2), 946.41 (1), and 961.43 (1) (a), and Wis. Adm. Code § N 7.04 (1), (2) and (15).

3. Respondent's conduct, as described in Findings of Fact 7 herein, constitutes a violation of Wis. Admin. Code § RL 4.09, and constitutes unprofessional conduct pursuant to Wis. Admin. Code § N 7.04 (1).

4. Respondent's conduct, as described in Findings of Fact 9-10 herein, constitutes a violation of Wis. Stats., § 441.07 (1) (a) and (d), and Wis. Admin. Code § N 7.04 (1) and (15).

5. By failing to appear at the hearing held in this matter, Ms. DeBacco is in default under Wis. Admin. Code § RL 2.14.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Jodi A. DeBacco to practice as a Registered Nurse (#118466) be, and hereby is, **REVOKED**.

IT IS FURTHER ORDERED that pursuant to s. 440.22 Wis. Stats., the cost of this proceeding shall be assessed against Respondent.

This order is effective on the date on which it is signed by a designee of the Board of Nursing.

OPINION

I. Procedural History

This matter was commenced by the filing of a Notice of Hearing and Complaint. Atty. Arthur Thexton appeared in this matter on behalf of the Division of Enforcement. For part of the proceeding, Atty. Erik I. Colque, Law Offices of Mark S. Knutson, S.C., appeared on behalf of the Respondent. Neither Ms. DeBacco, nor Atty. Colque appeared at the hearing.

II. Applicable Laws

A. Board of Nursing

441.07 Revocation. (1) The board may, after disciplinary proceedings conducted in accordance with rules promulgated under s. 440.03 (1), revoke, limit, suspend or deny renewal of a license of a registered nurse, a nurse-midwife or a licensed practical nurse, may revoke, limit, suspend or deny renewal of a certificate to prescribe drugs or devices granted under s. 441.16, or may reprimand a registered nurse, nurse-midwife or licensed practical nurse, if the board finds that the person committed any of the following:

(a) Fraud in the procuring or renewal of the certificate or license.

(c) Acts which show the registered nurse, nurse-midwife or licensed practical nurse to be unfit or incompetent by reason of negligence, abuse of alcohol or other drugs or mental incompetency.

(d) Misconduct or unprofessional conduct.

N 7.04 Misconduct or unprofessional conduct. As used in s. 441.07 (1) (d), Stats., "misconduct or unprofessional conduct" means any practice or behavior which violates the minimum standards of the profession necessary for the protection of the health, safety, or welfare of a patient or the public. "Misconduct or unprofessional conduct" includes, but is not limited to, the following:

(1) Violating, or aiding and abetting a violation of any law substantially related to the practice of professional or practical nursing. A certified copy of a judgment of conviction is prima facie evidence of a violation;

(2) Administering, supplying or obtaining any drug other than in the course of legitimate practice or as otherwise prohibited by law;

(15) Violating any rule of the board.

B. Other Laws and Regulations

440.11 Change of name or address. (1) An applicant for or recipient of a credential who changes his or her name or moves from the last address provided to the department shall notify the department of his or her new name or address within 30 days of the change in writing or in accordance with other notification procedures approved by the department.

450.11 Prescription drugs and prescription devices.

(7) Prohibited Acts. (a) No person may obtain or attempt to obtain a prescription drug, or procure or attempt to procure the administration of a prescription drug, by fraud, deceit or willful misrepresentation or by forgery or alteration of a prescription order; or by willful concealment of a material fact; or by use of a false name or address.

943.38 Forgery.

(2) Whoever utters as genuine or possesses with intent to utter as false or as genuine any forged writing or object mentioned in sub. (1), knowing it to have been thus falsely made or altered, is guilty of a Class H felony.

946.41 Resisting or obstructing officer. (1) Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor.

961.43 Prohibited acts C - penalties. (1) It is unlawful for any person:

(a) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge;

RL 2.14 Default. If the respondent fails to answer as required by s. RL 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence. The disciplinary authority may, for good cause, relieve the respondent from the effect of such findings and permit the respondent to answer and defend at any time before the disciplinary authority enters an order or within a reasonable time thereafter.

RL 4.07 Investigation. The department shall investigate whether an applicant for any of the following credentials has been charged with or convicted of a crime:

(42) Nurse, registered.

RL 4.09 Credential holder charges or convictions.

(2) A holder of any of the credentials set forth in s. RL 4.07 who is convicted of a felony or misdemeanor in this state or elsewhere shall notify the department in writing of the date, place and nature of the conviction or finding within 48 hours after the entry of the judgment of conviction. Notice shall be made by mail and shall be proven by showing proof of the date of mailing the notice. Notice shall include a copy of the judgment of conviction and a copy of the complaint or other information which describes the nature of the crime and the judgment of conviction in order that the department may determine whether the circumstances of the crime of which the credential holder was convicted are substantially related to the practice of the credential holder.

III. Summary of Evidence Presented

(A) Jodi A. DeBacco – Deposition Testimony

Although Ms. DeBacco did not appear at the hearing, she did testify at a telephone deposition that was held on March 23, 2007. Exhibit #6.

Ms. DeBacco has been a Registered Nurse since December 1994. After graduating from nursing school, Ms. DeBacco worked at Fort Atkinson Senior Center, a skilled nursing facility, for approximately 1 year. She worked at St. Luke's Hospital for approximately 7 years. At St. Luke's, Ms. DeBacco worked on the medical telemetry floor; in the cardiac intensive care unit, and as a cardiac stress testing technician. Ms. DeBacco has not practiced nursing since leaving St. Luke's in 2003. Exhibit 6, page 7.

In 1991, Ms. DeBacco was diagnosed with lymphocytic leukemia. In September 2003, Ms. DeBacco was diagnosed with cancer which resulted in her having a mastectomy. In conjunction with her treatment for cancer, Ms. DeBacco was given prescription drugs for pain management, including, but not limited to, OxyContin and Percocet.

(B) Default

Ms. DeBacco, by failing to appear at the hearing held in this matter is in default under Wis. Admin. Code § RL 2.14.

Wis. Admin. Code § RL 2.14, states, in part, that if the respondent fails to answer as required by s. RL 2.09 or fails to appear at the hearing at the time fixed, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence.

(C) Obtaining Prescription Drugs By Fraud

The Division of Enforcement alleges in Paragraphs 2 and 3 of its Complaint that Ms. DeBacco, by engaging in the conduct described therein, violated Wis. Stat. §§ 450.11(7)(a), 943.38 (2), 946.41 (1), and 961.43 (1) (a), and Wis. Adm. Code § N 7.04 (1), (2) and (15). The evidence presented establishes by a preponderance of the evidence that the violation occurred.

The Division of Enforcement alleges the following:

That on February 16, 2004, Ms. DeBacco attempted to fill a prescription in her name at a pharmacy in New Berlin for an extended release oxycodone product, which is a Schedule II controlled substance. The prescription purported to be issued by Dr. Kinney, who had not in fact issued the prescription. Ms. DeBacco had presented nine previous prescriptions at this location, all purportedly signed by Dr. Kenny, but only one was a valid prescription. This conduct resulted in Ms. DeBacco's conviction for violating Wis. Stat. § 450.11(7) (a), in the Circuit Court for Waukesha County, Wisconsin, on October 17, 2005. Ms. DeBacco was sentenced to 60 days in jail consecutive to the sentence imposed in the case described in the paragraph below, but that sentence was stayed and she was placed on probation for 2 years, on condition that she undergo AODA counseling and not use or possess any alcohol or unprescribed drug. Exhibit 3.

That on January 24, 2005, Ms. DeBacco presented a prescription for an extended release oxycodone product, a

Schedule II controlled substance, to a pharmacy. The prescription had been written for 30 tablets, but it had been altered to appear to read 80 tablets. When questioned, Ms. DeBacco falsely stated to the investigating police officer that the prescription had been written for 80 tablets by the prescriber. This conduct resulted in Ms. DeBacco's conviction for violating Wis. Stat. § 450.11(7) (a), in the Circuit Court for Waukesha County, Wisconsin, on October 17, 2005. Ms. DeBacco was sentenced to 60 days in jail consecutive to the sentence imposed in the case described in the paragraph above, but that sentence was stayed and she was placed on probation for 2 years, on condition that she undergo AODA counseling and not use or possess any alcohol or unprescribed drug. Exhibit 4.

Ms. DeBacco admitted to presenting invalid prescriptions to a pharmacy and to altering a prescription for 30 tablets to read 80 tablets.

First, in reference to filling invalid prescriptions purportedly issued by Dr. Kinney, Ms. DeBacco testified as follows [Exhibit 6, p. 10-15]:

Q . All right. Apparently on March 7th of 2003, Dr. Kinney prescribed one of the oxycodone products for you?

A. Correct.

Q . Can you tell me what led up to his prescribing that product for you?

A. Okay. You can kind of see my time line of my medical history. It's been a very tough year for me. He was trying to -- I had many abdominal -- I had 23 abdominal surgeries on my abdominal wall. Due to my mastectomy, that surgery that I had, the doctor removed too much abdominal muscle, which caused me to have ventral hernias, ventral wall hernias, repetitively.

So we were trying to fix this abdominal wall. The pain was intense. I had, like I said, abdominal surgeries trying to fix it. Pretty extensive surgeries using fascia from my thighs. So it was intense. He prescribed me that.

I was also going to the pain clinic getting abdominal injections trying to deaden the nerve endings to try to stop this pain in my abdomen. And just the pain was just out of control. It's terrible. I was homebound, unable to drive, you know, my quality of life was diminishing.

We tried many different regimens trying to control the pain. There are times when I was going to the pain clinic, I was actually at one time on liquid morphine because I couldn't sleep, I couldn't function. The pain was just so intense.

And I did see a psychologist at the pain clinic. When you're a patient at the pain clinic, you have weekly psychology evaluations. I don't remember that psychologist's name, but

that would be on the record.

.....

Q . All right. So following the receipt of the first prescription from Dr. Kinney, or the March 7th prescription, and since that case is now completely closed and over, I want you to now tell me what happened with those subsequent prescriptions that led to the arrest on about -- about a year later.

A. Correct. I was on my medication. It's a highly -- it's the first time I was on it. It's a highly addictive medication, and it was the only thing that was helping my pain. And they were weaning me off of it to see how I would tolerate, and I wasn't tolerating it. I wasn't sleeping. And I was angry. You know, it was not fair, kind of walk in my shoes to be in the pain that I'm in and try to control.

But obviously I knew what they were doing, because I've seen patients weaned off medication before and it's necessary so you don't become addicted to it. And that was the only time that I was pain-free. I mean, the pain -- except when I was on the OxyContin is to control the pain, and it was -- I started to feel better, I started to eat again, I was sleeping, and I was feeling better. And when they started weaning it I got angry, and that led up to me falsifying medications.

Q . How did you do that?

A. I had a -- when I was at the doctor's office, I had a prescription, and I just used it.

Q . And what?

A. I had a blank prescription from Dr. Kinney's office.

Q . How did you get that?

A. It was on his table.

Q . How many did you take?

A. Two.

Q . And then what did you do?

A. And then I started seeing Dr. Delp, and --

Q. No. Excuse me. I can see that my question was not clear. Please forgive me.

A. I'm sorry.

Q. How did you -- want to know physically how you did this series of prescriptions, because there were eight or nine.

A. Right. I got those prescriptions, and I did it. I photocopied the prescriptions.

Q. Okay. And then what; you had these copies?

A. Right. And then I wrote myself the prescriptions for the OxyContin.

Q. And then you signed Dr. Kinney's name and gave it to the pharmacist?

A. Yep. Yes, that is correct.

Q. Did you continue to see Dr. Kinney?

A. Yes, I did for a time.

Q. And --

A. And then he no longer could provide my care with my abdominal wall. It got so bad. He then referred me to Dr. Youisef at Froedtert, and I saw -- I started seeing him. And he -- and then he did my surgery. You know, then I also went to Froedtert. So I haven't seen Dr. Kinney for a few years.

Ms. DeBacco further testified regarding her treatment for pain as follows [Exhibit 6, page 15-17]:

Q. So during this time, were you receiving pain medications from other doctors as well?

A. No, I was not.

Q. How did they think your pain was being controlled?

A. I had the Percocet. I was taking Percocet, because I was -- you know, Dr. Kinney and then I also saw -- like I said, I was at the pain clinic also, and I got Percocet from the pain clinic.

Q. So you were taking the Percocet from the pain clinic plus the OxyContin that you were getting from the --

A. Correct, because the Percocet was like for the pain. OxyContin is long acting.

Q. All right. Then in -- what did you do after you got caught the first time for pain?

A. I was still receiving medication from the pain clinic. I would just call the pain clinic, and he would mail me my -- he'd mail me my script, because they knew me.

Q. And is that the Aurora Pain Clinic, or the Froedtert?

A. The Aurora Pain Clinic. They're located on -- it's Dr. Mortenson, M-o-r-t-e-n-s-o-n, and he's at the pain clinic on Rawson Avenue, R-a-w-s-o-n.

Q. And during that time were you receiving any medication from other doctors?

A. I was also -- when I would go -- I also saw when I was at Froedtert and when they did my surgeries at Froedtert, my last surgery, when I had the hole in my abdominal wall, Dr. Youisef did a surgery. Due to my immune system, the surgical site got infected, and ended up me having -- was four inches deep, 14 inches wide -- . Four inches wide, 11 inches long, and four inches deep, an abdominal wall hole, that I actually had a machine on my abdominal wall because it wasn't healing, and they actually had to debride it at least four times, and I had a skin graft done. And that was my last surgery that I had with Dr. Quebmann at Froedtert.

And after he did that surgery, when he repaired my abdominal wall, finally after all these years I've been pain-free since that surgery. Dr. Quebmann's a surgeon at Froedtert.

Q. And when was that?

A. That last surgery was 2000 -- gosh. 2004, 2005.

Second, in reference to altering a prescription for 30 tablets to read 80 tablets, Ms. DeBacco testified as follows

[Exhibit 6, p. 17-18]:

Q . All right. So backing up then to January, the January before that of 2005, when the police arrested you for altering the script from Dr. Delp.

A. Yes.

Q . Now, that case is completely over and done with, so I want you to tell me now exactly what happened.

A. I went and saw Dr. Delp, and he -- you know, we were talking, and he's like you know, it's time to wean you, you know, get you off this medication, and I agreed to it. And he wrote me a script for 30, and I panicked thinking oh, my god, what if it's not going to work. And I panicked, and I changed it from 30 to 80.

Q . So when the police came -- I want to understand why you didn't just fess up.

A. I was scared.

Q. Well, didn't you think you'd get into even more trouble by lying to them?

A. At that time, sir, the mental -- I didn't -- no, I did not think that. I said that right away and, you know, I know the truth always sets you free, and I didn't tell the truth.

(D) Submitting False Information In Connection with an Application for Licensure

The Division of Enforcement alleges in Paragraphs 8 and 9 of its Complaint that Ms. DeBacco, by engaging in the conduct described therein, violated Wis. Stat., § 441.07 (1) (a) and (d), and Wis. Admin. Code § N 7.04 (1) and (15), by violating Arkansas Code § 17-87-309 (a) (1), (2) and (6), and § 5-37-201 (a). The evidence presented establishes by a preponderance of the evidence that the violation occurred.

The Division of Enforcement alleges and the evidence establishes the following:

That on or about October 5, 2006, Ms. DeBacco applied for licensure as a professional nurse in Arkansas, by endorsement, using her Wisconsin licensure status as establishing her eligibility for licensure by endorsement. On that application, Ms. DeBacco was asked the following question:

"In the last two years, have you been the subject of a chemical or alcohol dependency intervention or participated in chemical or alcohol dependency treatment/rehabilitation?"

Ms. DeBacco answered "No" to this question. In fact, Ms. DeBacco had been ordered to undergo AODA counseling as a condition of probation, at the time of her sentencing on October 17, 2005, and did participate in such counseling at Cedar Creek Family Counseling, Hales Corners, WI, between July 4, 2006 and August 29, 2006.

That Ms. DeBacco also submitted a document to the Arkansas State Board of Nursing which purported to be a letter to her, from her former defense attorney, Christopher L. Strohhahn, stating in part, the following:

"This letter is in request for obtaining your Arkansas Nursing License. Judgment of Conviction probation was imposed and served. Ms. DeBacco was released from the Waukesha County Probation Program before the Honorable Judge Thomas Pieper on August 9, 2006."

In fact, Attorney Strohbahn did not author this letter, and the statement that the probation was "served" and that Ms. DeBacco had been "released" from probation was false.

(1) Jodi DeBacco – Deposition Testimony

When asked about her Arkansas application and why she checked "no" on the box to the question regarding whether she had been the subject of a chemical or alcohol dependency intervention, or participated in chemical or alcohol dependency treatment/rehabilitation, Ms. DeBacco said that on the advice of counsel she would have to plead the 5th Amendment in response to that question. Exhibit 6, p. 27-28.

(2) Testimony of Sue Tedford

Ms. Tedford testified at the request of the Division of Enforcement. She has been the Director of Nursing Education at the Arkansas State Board of Nursing for 5 years. Prior to her appointment at the Board of Nursing, Ms. Tedford was an educator in an RN program for 18 years, and prior to that she worked as a staff nurse/charge nurse in an intensive care unit. One of her responsibilities at the Arkansas State Board is to process and review applications for individuals that have any type of past criminal background history, drug issues, disciplinary issue or anything that "raises any red flags".

As part of her duties at the Arkansas Board of Nursing, Ms. Tedford reviewed an application submitted by Jodi DeBacco in October 2006. Ms. DeBacco indicated on her application that she had past convictions. Ms. Tedford contacted Ms. DeBacco and asked her for court documents, letters of explanation, and anything else pertinent to her past convictions. Included in the materials that Ms. DeBacco sent to Ms. Tedford was a letter that was purportedly from Christopher Strohbahn, an attorney from Milwaukee. According to Ms. Tedford, the purpose of the letter that Ms DeBacco sent to her was to show that Ms. DeBacco was off probation. She said that she had conveyed to Ms. DeBacco that their policy is they "do not like any individual that has not completed all court-ordered stipulations" and who is not off probation. Exhibits 1 and 7.

Ms. Tedford also testified that there is a question on the application form that asks whether an applicant has been ordered to undergo or had undergone drug or alcohol counseling in the previous couple of years. Ms. DeBacco answered "no" on her application to that question. Ms. Tedford testified that the court disposition documents (from Waukesha County) indicated that Ms. DeBacco had to attend drug treatment, so she asked Ms. DeBacco to send documents showing proof of that. Ms. Tedford further stated that Ms. DeBacco submitted a letter to her from Cedar Creek Counseling, dated August 29, 2006, which reflected that Ms. DeBacco had answered the question about substance abuse counseling falsely on her application. Ultimately, Ms. DeBacco's application for licensure was denied. Exhibit 2.

(3) Statement of Atty. Christopher Strohbahn

Atty. Strohbahn submitted a letter stating that the letter that Ms. DeBacco submitted to the Arkansas State Board of Nursing, dated October 23, 2006, was not generated by his office and that he "did not dictate, write or cause to be written a letter of this nature". Exhibits 1 and 7.

(E) Other Alleged Violations

The Division alleges in Paragraphs 5-7 of its Complaint that Ms. DeBacco, by engaging in the conduct described therein, violated Wis. Stat., § 441.07 (1) and (1) (c) and Wis. Admin. Code §§N 7.04 (1) and § RL 4.09. Except for certain allegations, the evidence establishes that the violations occurred. The Division alleges the following:

That Ms. DeBacco failed to notify the department in writing of the date, place and nature

of the conviction or finding within 48 hours after the entry of the judgment of convictions, as set forth in its Complaint.

That Ms. DeBacco is an impaired practitioner, as evidenced by two convictions for operating a motor vehicle while intoxicated, and her obtaining the above narcotics without lawful prescriptions. That she has practiced nursing while concurrently abusing these mood-altering substances. Exhibit 3-5.

That at a time unknown, but before October 5, 2006, Ms. DeBacco changed her address from the address shown in the records of the Board, but failed to notify the Department of her change of address within 30 days.

First, in reference to failing to report her convictions to the Department within 48 hours, Ms. DeBacco admitted that she did not notify the department of the convictions. At her deposition, Ms. DeBacco testified that she did not know that she had to. She said that nobody told her to do that. She said that her attorney never mentioned it. *Answer to Second Amended Complaint and Affirmative Defenses, paragraph 5; Exhibit 6, p. 24-25.*

Second, in reference to being an impaired practitioner and practicing nursing while concurrently abusing mood-altering substances, Ms. DeBacco denied these allegations. *Answer to Second Amended Complaint and Affirmative Defenses, paragraph 6.*

Ms. DeBacco testified at her deposition, in reference to her arrest and conviction for operating a vehicle while under the influence of alcohol, that her arrest for the first offense in 1993 resulted from a celebration with friends of the fact that her leukemia was in remission. She did not provide an explanation regarding her arrest and conviction for the second offense in 2002. Exhibit 5; Exhibit 6, p. 5-6.

Third, in reference to failing to notify the department of her change of address, Ms. DeBacco admitted in her Answer to the Second Amended Complaint that she did not notify the department of the change. *Answer to Second Amended Complaint and Affirmative Defenses, paragraph 7.*

IV Analysis of Evidence

The Division of Enforcement alleges in its Complaint that Ms. DeBacco, by engaging in the conduct described therein, violated numerous laws relating to the practice of professional nursing. Except for certain allegations, which are discussed below, the evidence presented establishes by a preponderance of the evidence that the violations occurred.

Ms. DeBacco stole two blank prescriptions forms from her physician; made copies of the forms; filled out the prescriptions in her name for an extended release oxycodone product; signed the physician's name on the forms and presented the prescriptions to her pharmacy for filling. She presented a total of ten prescriptions to her pharmacy. Only one prescription was valid. She also altered a legitimate prescription from 30 tablets to 80 tablets. Ms. DeBacco said that she obtained the prescriptions to control her pain and that her conduct did not directly involve a patient under her care.

In addition, Ms. DeBacco lied on her application for licensure that she submitted to the Arkansas State Board of Nursing when she stated that she had not undergone drug or alcohol counseling, when in fact she had undergone counseling. She also submitted a letter to the Arkansas State Board which purported to be from her former defense attorney stating that she had been released from probation for her conviction for obtaining prescriptions by fraud. In fact, her attorney stated that

he did not write the letter. Ms. DeBacco did not offer an explanation as to why she submitted false information to the Arkansas State Board. Her only comment was that she was advised to plead the "Fifth Amendment".

In reference to Ms. DeBacco's failure to notify the Department of a change of address, in my opinion, the evidence does not establish that such conduct constitutes a violation of Wis. Adm. Code § N 7.04 (1). That provision reads as follows:

N 7.04 Misconduct or unprofessional conduct. As used in s. 441.07 (1) (d), Stats., "misconduct or unprofessional conduct" means any practice or behavior which violates the minimum standards of the profession necessary for the protection of the health, safety, or welfare of a patient or the public. "Misconduct or unprofessional conduct" includes, but is not limited to, the following:

(1) Violating, or aiding and abetting a violation of any law substantially related to the practice of professional or practical nursing. A certified copy of a judgment of conviction is prima facie evidence of a violation;

The term "professional nursing" is defined in Wis. Stats., § 441.001 (4) as follows:

(4) Professional Nursing. "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, that requires substantial nursing skill, knowledge, or training, or application of nursing principles based on biological, physical, and social sciences. Professional nursing includes any of the following:

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

(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 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.

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

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

In my opinion, failing to report a change of address does not "substantially" relate to the practice of professional nursing as the term "professional nursing" is defined in Wis. Stats., § 441.001 (4). Such conduct also does not constitute "misconduct or unprofessional conduct", which is defined in the introductory language to Wis. Adm. Code § N 7.04, to mean "any practice or behavior which violates the minimum standards of the profession necessary for the protection of the health, safety, or welfare of a patient or the public".

Finally, in reference to the allegation that Ms. DeBacco is an impaired practitioner and that she practiced nursing while concurrently abusing mood-altering substances, the evidence does not establish that the violation occurred.

Wis. Stats., § 441.07 (1) (c) reads as follows:

441.07 Revocation. (1) The board may, after disciplinary proceedings conducted in accordance with rules promulgated under s. 440.03 (1), revoke, limit, suspend or deny renewal of a license of a registered nurse, a nurse-midwife or a licensed practical nurse, may revoke, limit, suspend or deny renewal of a certificate to prescribe drugs or devices granted under s. 441.16, or may reprimand a registered nurse, nurse-midwife or licensed practical nurse, if the board finds that the person committed any of the following:

(c) Acts which show the registered nurse, nurse-midwife or licensed practical nurse to be unfit or incompetent by reason of negligence, abuse of alcohol or other drugs or mental incompetency.

The evidence does not establish that Ms. DeBacco is an impaired practitioner or that she practiced professional nursing while impaired.

Ms. DeBacco practiced nursing at St. Luke's for 7 years (from approximately 1996 to 2003). She testified at her deposition that she has not practiced nursing since leaving St. Luke's in 2003. It is true that she was working as a nurse at St. Luke's at the time of her first arrest in 1993 for operating a vehicle while under the influence of alcohol occurred and at the time of her second arrest and conviction in 2002. As part of sentencing for the second offense, Ms. DeBacco was ordered by the Court to undergo an alcohol assessment. However, there is no evidence in the record indicating that Ms. DeBacco's abuse of alcohol interfered with her practice as a nurse. In addition, there is no evidence in the record, from any qualified health care professional, indicating that Ms. DeBacco was determined to be impaired, by reason of alcohol; that she was diagnosed as being alcohol dependent, or that she required treatment for alcohol dependence.

Also note that, in reference to Ms. DeBacco's arrests and convictions for obtaining prescription drugs by fraud, she was not practicing nursing at that time. As noted previously, Ms. DeBacco has not practiced nursing since she left St. Luke's in 2003. She was arrested in 2004 for the first offense involving fraud and convicted in 2005. She was arrested and convicted in 2005 for the second offense involving fraud. In addition, there is no evidence in the record, from any qualified health care professional, indicating that Ms. DeBacco has been determined to be impaired, by reason of her use of narcotics.

V. Appropriate Discipline

Having found that Ms. DeBacco violated statutes and rules relating to the practice of professional nursing, a determination must be made regarding whether discipline should be imposed, and if so, what discipline is appropriate.

The Board of Nursing is authorized under Wis. Stats. § 441.07 (1), to revoke, limit, suspend or deny renewal of a license of a registered nurse or a licensed practical nurse, or reprimand a registered nurse or licensed practical nurse, if the board finds that the person has engaged in misconduct or unprofessional conduct.

The purposes of discipline by occupational licensing boards are to protect the public, deter other licensees from engaging in similar misconduct and to promote the rehabilitation of the licensee. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Punishment of the licensee is not a proper consideration. *State v. McIntyre*, 41 Wis. 2d 481 (1969).

The Division of Enforcement recommends that Ms. DeBacco's license to practice as a Registered Nurse be revoked.

In her Answer to the Complaint, Ms. DeBacco recommended that this matter be dismissed. In her deposition testimony, Ms. DeBacco expressed interest in resuming practice as a nurse and indicated why she thinks that the Board can

trust her to practice nursing safely.

When asked why she wanted to resume nursing practice, Ms. DeBacco testified as follows [Exhibit 6, p. 28-30]:

Q. So moving on, why is it that you now want to resume nursing and be a nurse?

A. I went to school for four years to fulfill a dream. My dream was always helping people, and I love my job, and -- excuse me. And I loved my work, and I was a great nurse, and I would like the opportunity to even have you talk to some of my colleagues, my boss, my doctors I worked with. I was very successful at nursing. I got awards from the president of the hospital for excellent care on my patients, and I'd get letters, you know, regarding the status of my care that I gave them.

And you know, I got ill, I got sick. And it was a very tough time in my life. I mean, I was diagnosed with breast cancer when I was 27. I had a mastectomy at that age. We have a history of cancer in my family. My mom died when I was 17, and my sister was diagnosed at 28, and I was diagnosed when I was 27 with cancer.

It's been a very long 13 years of my life going through, you know, not knowing if the cancer is going to come back, and with the leukemia. Excuse me, I'm sorry. And you know, with my health problems, I got myself -- I made obviously a very bad judgment in my life, and I feel really I paid for this.

There is not a day that goes by that I don't think about this, about what I did, what I did to my family, and how this is going to ruin my livelihood. You know, I can't get health insurance because I don't have a job. And that's the scariest thing for me.

I finally in my life am healthy again. This is the best I've ever felt since I was first diagnosed. I'm working out. I work out everyday. I'm helping my husband with his company and trying to get through things in our life. Our son moved home with us. He hasn't lived with us for a few years, he's going to college. And I just want to get my family life together and get back in to my normal routine, getting up at 6:00 o'clock and going to work and

coming home fulfilled with putting in my hours
and doing what I love to do.

I just -- you know, I would never want
somebody to walk in my footsteps. And what I did
was a huge mistake in my life, and I paid and
paid for it. I beat myself up. I went through
court, I went through probation, and I just -- I
want normalcy back in my life. I want to be able
to look over my shoulder and smile and not worry.
I want to have that gratitude of going into a
patient's room and make them feel good.
That's what I went to school for. It's
taken away from me now. What do I do? I still
have 30 -- not 30, but maybe 20 years of nursing
I can still do if given the chance again.
And that's all I have to say.

When asked how the Board can trust her to be honest when her record contains several instances of dishonesty, Ms. DeBacco testified as follows [Exhibit 6, p. 31-32]:

MR. THEXTON: The question is, how can
the Board trust her to be honest when her record
is -- contains several instances of dishonesty in
areas relating to the very kinds of things nurses
do; prescriptions, applying for a nursing
license, records, that kind of thing. So I know
that the Board -- this is what's in the Board's
mind. So I want to offer her the opportunity to
explain to the Board why they can trust her with
a nursing license after all this has happened.

MR. COLQUE: I'll object to the form of
the question. Jodi, if you can -- if you want to
take a minute to pull your thoughts together, if
you want to make a statement, I mean --

THE WITNESS: I can answer that, Erik.

MR. COLQUE: Go ahead.

THE WITNESS:

A. None of my dependency has ever involved anybody

but myself. I never did anything illegal while I worked. My patients obviously are your first concern. I would never jeopardize somebody else's life. Those people come to us, their life is in our hands, and there is never one instance that I ever went against anything ethical during my duties as a nurse. And I never would. I would never stop - - even think of doing anything disrespectful, dishonest, distrustful during my work.

I guess that's it. I just -- I don't know how I would make people believe in me, but I hope they do. That's all I can say.

The Administrative Law Judge recommends that Ms. DeBacco's license to practice as a Registered Nurse be revoked. This measure is designed primarily to assure protection of the public and to deter other licensees from engaging in similar misconduct. Ms. DeBacco has shown that she is incapable of practicing nursing in a manner that safeguards the interest of the public. Any measure short of revocation of her license would not provide adequate protection to the public, and would not deter other licensees from engaging in similar misconduct.

The evidence establishes that Ms. DeBacco stole two blank prescriptions forms from her physician; made copies of the forms; filled out the prescriptions in her name for an extended release oxycodone product; signed the physician's name on the forms and presented the prescriptions to her pharmacy for filling. She presented a total of ten prescriptions to her pharmacy. Only one prescription was valid. She also altered a legitimate prescription from 30 tablets to 80 tablets. Although Ms. DeBacco obtained the prescriptions to control her pain and her conduct did not directly involve a patient under her care, her conduct is inexcusable.

In addition, Ms. DeBacco lied on her application for licensure that she submitted to the Arkansas State Board of Nursing when she stated that she had not undergone drug or alcohol counseling, when in fact she had undergone counseling. She also submitted a letter to the Arkansas State Board which purported to be from her former defense attorney stating that she had been released from probation for her conviction for obtaining prescriptions by fraud. In fact, her attorney stated that he did not write the letter. Ms. DeBacco did not offer an explanation as to why she submitted false information to the Arkansas State Board. Her only comment was that she was advised to plead the "Fifth Amendment".

Although, Ms. DeBacco's dishonesty in obtaining drugs without valid prescriptions may have been motivated by her attempts to alleviate her pain, that same motivation does not justify why she lied on the application that she submitted to the Arkansas State Board.

In reference to rehabilitation, there is insufficient evidence in the record regarding what type of rehabilitation, if any, is required. Ms. DeBacco testified at her deposition in March 2007, that she had not had an alcoholic beverage for over a year. She also testified that she was "pain free" as a result of her last surgery. That may be some indication that she is no longer dependent on prescription drugs. There is evidence in the record that Ms. DeBacco abused alcohol, which resulted in her arrest in 1993; her conviction in 2002 and her arrest in 2004 or 2005 for operating a vehicle while intoxicated, and that she abused prescription drugs, which resulted in her convictions in 2005 for obtaining prescription drugs with fraud. However, there is no evidence in the record, at least as of the day of the hearing, regarding whether Ms. DeBacco currently abuses alcohol or prescription drugs. Exhibit 6, p. 26-27.

Finally, Ms. DeBacco is free to petition the Board of Nursing in the future for reinstatement of her license by submitting evidence satisfactory to the Board that she is capable of practicing nursing in a manner that safeguards the interest of the public.

VI. Costs of the Proceeding

Wis. Stat. § 440.22 (2) provides in relevant part:

In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department.

The presence of the word “may” in the statute is a clear indication that the decision whether to assess the costs of this disciplinary proceeding against the Respondent is a discretionary decision on the part of the Board of Nursing, and that the Board’s discretion extends to the decision whether to assess the full costs or only a portion of the costs.

The Administrative Law Judge’s recommendation and the Board of Nursing’s decision as to whether the full costs of the proceeding should be assessed against the credential holder, like the supreme court’s decision whether to assess the full costs of disciplinary proceedings against disciplined attorneys, *see* Supreme Court Rule 22.24 (1m), is based on the consideration of several factors, including:

- 1) The number of counts charged, contested, and proven;
- 2) The nature and seriousness of the misconduct;
- 3) The level of discipline sought by the parties;
- 4) The respondent’s cooperation with the disciplinary process;
- 5) Prior discipline, if any;
- 6) The fact that the Department of Regulation and Licensing is a “program revenue” agency, whose operating costs are funded by the revenue received from licensees, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct; and
- 7) Any other relevant circumstances.

Under the circumstances of this case, it is reasonable to assess the full costs of this proceeding to Ms. DeBacco.

First, the Division established by a preponderance of the evidence most of the violations alleged in its Complaint.

Second, although Ms. DeBacco has no record of prior discipline, the violations established were serious with potential to cause great harm. The recommendation for a revocation of her license is reflective of the serious nature of the unprofessional conduct that has been established by the evidence.

Third, Ms. DeBacco failed to cooperate in reference to the disciplinary process. Although she appeared initially by her attorney, she did not appear at the hearing.

Finally, the Department of Regulation and Licensing is a "program revenue" agency, which means that the costs of its operations are funded by the revenue received from its licensees. Moreover, licensing fees are calculated based upon costs attributable to the regulation of each of the licensed professions, and are proportionate to those costs. This budget structure means that the costs of prosecuting cases for a particular licensed profession will be borne by the licensed members of that profession. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the vast majority of the licensees who have not engaged in misconduct. Rather, to the extent that misconduct by a licensee is found to have occurred following a full evidentiary hearing, that licensee should bear the costs of the proceeding.

VII. Recommendations

Based upon the record herein, the Administrative Law Judge recommends that the Board of Nursing adopt as its final decision in this matter, the proposed Findings of Fact, Conclusions of Law and Order as set forth herein.

Dated at Madison, Wisconsin this 10th day of July 2008.

Respectfully submitted,

Ruby Jefferson-Moore
Administrative Law Judge