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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST GINA M. D'ACQUISTO, L.P.N., RESPONDENT.	: : : : :	FINAL DECISION AND ORDER

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 Board for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 8 day of March, 1991.

Jacqueline Johnson

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST	:	
GINA M. D'ACQUISTO, L.P.N., RESPONDENT.	:	PROPOSED DECISION LS 9007101 NUR

The parties to this proceeding for purposes of Wis. Stats. s. 227.53 are:

Gina M. D'Acquisto
1251 S.W. 66th Terrace
Plantation, FL 33317

Board of Nursing
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

Division of Enforcement
Department of Regulation and Licensing
P.O. Box 8935
Madison, WI 53708

A hearing was held in the above captioned matter on November 28, 1990, at the State Office Building in Milwaukee, Wisconsin. Respondent D'Acquisto appeared by telephone, at her request, without counsel. Attorney Steven M. Gloe appeared representing the Division of Enforcement, the complainant in this matter. Based upon the entire record in this matter, the hearing examiner 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. Respondent Gina M. D'Acquisto was at all times material to this proceeding a licensed practical nurse in Wisconsin.

2. On or about August 25, 1988, respondent was working as a practical nurse for Barry Healthcare Services, a home care nursing service, providing in-home nursing care to patient TM. Patient TM was 5 years old at the time, and was, and still is, ventilator dependent.

3. Respondent left her nursing duties approximately fifteen minutes before the end of her assigned shift, before TM's mother arrived home to relieve her, leaving TM in the care of TM's sister. TM's sister was 10 years old at the time.

4. Respondent falsely charted that she remained at the home of the patient to the end of the respondent's shift.

CONCLUSIONS OF LAW

1. The Board of Nursing has jurisdiction in this matter pursuant to s. 441.07, Stats.

2. By leaving the patient TM in the care of a 10 year old child, respondent engaged in a substantial departure from the standard of care ordinarily exercised by a competent licensee, contrary to s. 447.07(1)(c), Stats., and s. N 7.03(1), Wis. Admin. Code.

3. By falsely charting that she had remained at her nursing duties to the end of her assigned shift, respondent has engaged in unprofessional conduct contrary to s. 441.07(1)(d), Stats., and s. N 7.04(1), Wis. Admin. Code.

ORDER

IT IS ORDERED that the license issued to Gina M. D'Acquisto to practice licensed practical nursing in the state of Wisconsin be, and hereby is, REVOKED.

IT IS FURTHER ORDERED that the costs of the proceeding be imposed upon Respondent.

OPINION

The evidence in this matter establishes a clear and convincing case of negligence on the part of respondent Gina M. D'Acquisto in the care of patient TM. No harm came to the patient as a result, but it is clear that a 10 year old child is not an appropriate guardian of the patient's health, and the departure from ordinary standards of care is so great that revocation of respondent's license is the only reasonable method of safeguarding the health and safety of the public, respondent's potential patients.

Respondent consistently denied leaving her duties until the patient's mother had arrived home. Respondent stated that she left the house by one door as the mother entered the house by another; the mother and the patient's sister deny this. The mother bases her denial on circumstantial evidence, and the patient's sister denies it on direct knowledge. There is no dispute that within 5 minutes of the scheduled end of respondent's shift the patient's mother called the home nursing service to report respondent's absence from the home when the mother arrived. There is no dispute that respondent was terminated from her employment with the service on that basis, and that

respondent did not apply for unemployment compensation or otherwise dispute the termination at the time.

The complainant submitted respondent's time card for the day, which shows that the respondent claimed to have been present through the end of her assigned shift, and that respondent herself, rather than the patient's mother, signed the time card in the space designated for the client's signature. The nurse's notes for the day, signed by respondent, contain a final entry at 3:45 p.m., the time respondent's shift was to end. The notes could not have been done at 3:45 because respondent was not present in the home at that time when the mother arrived.

Respondent suggested the possibility that the the patient's mother was mistaken, and simply did not know that respondent had been going out one door while the mother came in the other. I do not accept that as the explanation because respondent and the mother disagree on which door the mother used. There is no apparent basis for a hostile motive for the mother's testimony, but respondent argues that the testimony is false because of the 5 minute delay between the mother's arrival home and her phone call to the director of nursing at the nursing agency. Respondent implies that the mother would have called immediately upon entering the house had respondent not been present at the time. I conclude that 5 minutes is "immediately" for a parent who arrives home, expecting to find a nurse, not finding one, checking on the child, and calling the nursing agency even if the parent had the number committed to memory.

Respondent submitted evidence that shows her instructors at her nursing school gave her good evaluations during her training. What the evaluations do not and cannot show is the quality of respondent's judgment and discretion on the day in question. On the basis of the testimony and the exhibits, I conclude that respondent was in a hurry to be someplace else for an appointment, that she made the judgment that the patient would be fine for the short period of time between respondent leaving the house and the mother's usual punctual arrival, and she left early without a suitable substitute present. That judgment was below the minimal standard of competence required of licensed practical nurses for the protection of their patients. I do not believe that a reprimand is appropriate, because it depreciates the seriousness of the risk to the patient of respondent's action. I have no basis on which to found a belief that a limitation of license will be adequate protection from similar lapses in judgment. A period of suspension would surely be adequate discipline for the charting violations, meeting the goals of rehabilitation, deterrence, and protection of the public, but the lapse of judgment is more difficult because of the length of time which was available to respondent to refrain from the action. Respondent had to plan to leave early in order to write the nursing notes and label them the 3:45 p.m. note, and to sign her name in the space designated for the client's signature on the time card. This tells me that this was a deliberate act, not a momentary

failing. Placing a patient at risk for personal convenience is very serious, and revocation of license is probably more appropriate than a suspension for serving the protection of the public, the rehabilitation of the respondent, and the deterrence of similar acts by others.

Dated this 8th day of January, 1991.

James E. Polewski
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST GINA M. D'ACQUISTO, L.P.N., RESPONDENT.	: : : : :	AFFIDAVIT OF COSTS OF THE OFFICE OF BOARD LEGAL SERVICES LS 9007101 NUR

STATE OF WISCONSIN
COUNTY OF DANE, SS:

James E. Polewski, being first duly sworn on oath, deposes and says:

1. He is an attorney employed by the Department of Regulation and Licensing, Office of Board Legal Services.

2. He was designated to serve as the administrative law judge in the above captioned proceeding, and in the course of his duties in that regard, spent the following amounts of time on the dates indicated, all to the expense of the Department of Regulation and Licensing as noted at the foot of the itemized tally which follows:

DATE	ACTIVITY	TIME
9/7/90	Read complaint	5 minutes
9/25/90	Read answer, draft transmittal letter to Gloe	10 minutes
10/12/90	Draft notice of Prehearing	10 minutes
10/19/90	Hold prehearing conference	15 minutes
	Draft letter on prehearing conference	30 minutes
10/24/90	Hold prehearing conference	15 minutes
10/25/90	Draft notice of hearing	15 minutes
11/9/90	Draft denial of change of venue motion	30 minutes
11/19/90	Read motion for reconsideration of venue	10 minutes
11/20/90	Draft change of venue order	15 minutes
11/28/90	Travel time to and from Milwaukee for hearing	3 hours
	Hearing, including setting up and striking	1 hour, 20 minutes
1/8/91	Draft decision	2 hours, 15 minutes
	TOTAL TIME	9 hours, 10 minutes

Expense for Administrative Law Judge, Time spent multiplied by hourly salary and benefits for James E. Polewski: (9.16 x $24.75)

	$226.85
Expense for Court Reporter:	50.00
TOTAL EXPENSE, OFFICE OF BOARD LEGAL SERVICES:	$276.85

James E. Polewski

Sworn to and subscriped before me this 8th day of January, 1991.

Notary Public
My Commission is permanent

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for each and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing withi 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Board of Nursing.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsi Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Board of Nursing.

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Board of Nursing.

The date of mailing of this decision is March 22, 1991.

WLD:dms
886-490

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the

disposing of the application for rehearing, or within 30 after the final disposition by operation of law of any application for rehearing. The 30-day period for servin filing a petition under this paragraph commences on th after personal service or mailing of the decision by the ag If the petitioner is a resident, the proceedings shall be h the circuit court for the county where the petitioner re except that if the petitioner is an agency, the proceedings be in the circuit court for the county where the respo resides and except as provided in ss. 77.59 (6) (b), 182. and 182.71 (5) (g). The proceedings shall be in the c court for Dane county if the petitioner is a nonresident. parties stipulate and the court to which the parties des transfer the proceedings agrees, the proceedings may be in the county designated by the parties. If 2 or more peti for review of the same decision are filed in different cou the circuit judge for the county in which a petition for r of the decision was first filed shall determine the venu judicial review of the decision, and shall order transf consolidation where appropriate.

(b) The petition shall state the nature of the petitio interest, the facts showing that petitioner is a perso grieved by the decision, and the grounds specified in s. 2 upon which petitioner contends that the decision shou reversed or modified. The petition may be amended, by of court, though the time for serving the same has ex The petition shall be entitled in the name of the person se it as petitioner and the name of the agency whose decis sought to be reviewed as respondent, except that in peti for review of decisions of the following agencies, the agency specified shall be the named respondent:

1. The tax appeals commission, the department of rev

2. The banking review board or the consumer credit re board, the commissioner of banking.

3. The credit union review board, the commission credit unions.

4. The savings and loan review board, the commission savings and loan, except if the petitioner is the commiss of savings and loan, the prevailing parties before the sa and loan review board shall be the named respondents.

(c) Copies of the petition shall be served, personally certified mail, or, when service is timely admitted in wr by first class mail, not later than 30 days after the instit of the proceeding, upon all parties who appeared befor agency in the proceeding in which the order sought t reviewed was made.

(d) The agency (except in the case of the tax ap commission and the banking review board, the cons credit review board, the credit union review board, an savings and loan review board) and all parties to the pro ing before it, shall have the right to participate in proceedings for review. The court may permit other i ested persons to intervene. Any person petitioning the c to intervene shall serve a copy of the petition on each who appeared before the agency and any additional part the judicial review at least 5 days prior to the date se hearing on the petition.

(2) Every person served with the petition for revie provided in this section and who desires to participate i proceedings for review thereby instituted shall serve upo petitioner, within 20 days after service of the petition such person, a notice of appearance clearly stating person's position with reference to each material allegat the petition and to the affirmance, vacation or modific of the order or decision under review. Such notice, other by the named respondent, shall also be served on the n respondent and the attorney general, and shall be together with proof of required service thereof, with the of the reviewing court within 10 days after such se Service of all subsequent papers or notices in such proce need be made only upon the petitioner and such other pe