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STATE OF WISCONSIN
BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST ROSIE A. GARD, L.P.N., RESPONDENT.	: : : : :	FINAL DECISION AND ORDER LS9410142NUR

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 Division of Enforcement and Administrative Law Judge are hereby directed to file their affidavits of costs, and mail a copy thereof to respondent or his or her representative, within 15 days of this decision.

Respondent or his or her representative shall mail any objections to the affidavit of costs filed pursuant to the foregoing paragraph within 30 days of this decision, and mail a copy thereof to the Division of Enforcement and Administrative Law Judge.

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 5th day of May, 1995.

Pamela A. Moser RN Chair

V.C.
private duty nurse / Medicaid fraud revoked

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	PROPOSED DECISION Case No. LS-9410142-NUR
ROSIE A. GARD, L.P.N., RESPONDENT.	

PARTIES

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

Rosie A. Gard, L.P.N.
Box 208
Highway 18
Edmund, Wisconsin 53535

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 on October 14, 1994. A hearing was held in the above-captioned matter on December 7, 1994. Atty. James W. Harris appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. The respondent, Rosie A. Gard, appeared in person without legal counsel. On December 14, 1994, Ms. Gard filed a supplemental document, consisting of 10 pages, relating to the allegations contained in Counts 1 and 2 of the Criminal Complaint filed in Iowa County in October, 1993, (Exhibit #1). A transcript of the hearing proceedings was filed on or about January 19, 1995.

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. Rosie A. Gard, d.o.b. 9/21/26, is licensed as a licensed practical nurse in the State of Wisconsin, license #0310007199. Respondent's most recent address on file with the Department of Regulation and Licensing is Box 208, Highway 18, Edmund, Wisconsin 53535.

2. At all times material to the Complaint filed in this matter, respondent participated in the medical assistance program ("Medicaid") as a provider of private duty nursing care to medical assistance recipients. At least two of the recipients for whom respondent provided care were ventilator dependent patients.

3. On October 8, 1993, the Attorney General of Wisconsin filed a Criminal Complaint against respondent in Iowa County Circuit Court alleging that respondent violated s. 49.49 (1) (a) 1, Wis. Stats. (Count 1), and s. 943.20 (1) (b), Wis. Stats., (Count 2). Count 1 was subsequently dismissed. Count 2 reads as follows:

> Count Two (Theft): On or about October 28, 1991, the defendant by virtue of her business having possession of a check, negotiated the check and retained $27,450 without the consent of the State of Wisconsin, the owner, and contrary to her authority with intent to convert the money to her own use. This violates section 943.20 (1) (b), Wis. Stats., and is a class C felony under section 943.20 (3) (c).

4. On June 30, 1994, respondent was convicted in Iowa County Circuit Court, of one felony count of theft in a business setting, in violation of s. 943.20 (1) (b), Wis. Stats. Respondent was sentenced on September 22, 1994 and ordered to pay a $1,200.00 fine/assessment.

CONCLUSIONS OF LAW

1. The Board of Nursing has jurisdiction in this matter pursuant to s. 441.07 (1) (b) and (d), Stats., and s. N 7.04 (1) and (15), Wis. Adm. Code.
2. Respondent was convicted on June 30, 1994, of one felony count of theft in a business setting in violation of s. 943.20 (1) (b), Wis. Stats.
3. Respondent by having been convicted of a crime, (theft in a business setting) the circumstances of which substantially relate to the practice of practical nursing, violated s. 441.07 (1) (b) and (d) Wis. Stats., and s. N 7.04 (1) and (15) Wis. Adm. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Rosie A. Gard to practice as a licensed practical nurse 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, and shall be payable to the Department of Regulation and Licensing.

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

OPINION

This matter was commenced by the filing of a Notice of Hearing and Complaint on October 14, 1994. A hearing was held on December 7, 1994. Atty. James Harris appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. The respondent, Rosie Gard appeared in person without legal counsel.

The evidence presented at the hearing establishes that Ms. Gard was convicted of a crime, theft in a business setting, the circumstances of which substantially relate to the practice of practical nursing in violation of s. 441.07 (1) (b) and (d), Stats., and s. N 7.04 (1) and (15), Wis. Adm. Code.

At all times material to the Complaint filed in this matter, Ms. Gard participated in the medical assistance program ("Medicaid") as a provider of private duty nursing care to medical assistance recipients. The Medicaid program is administered by the State of Wisconsin, Department of Health and Social Services (DHSS). EDS Federal ("EDS"), a private firm which contracts with DHSS to process claims for reimbursement under the program, pays claims with funds provided by DHSS. On or about September 26, 1991, Ms. Gard filed a claim with EDS for payment of $480.00 for services provided to a patient on September 22 and 24, 1991. Instead of receiving a $480 payment, she received a payment of $27,930. This was an overpayment of $27, 450. She cashed the check on or about October 28, 1991, and kept the overpayment. She admitted to a Department of Justice representative that she "received the overpayment, had thought the payment was an error and had thought about contacting EDS Federal to report it but had not done so and had kept the money". (Exhibit #1, pages 3-4).

Ms. Gard's positions is that her conviction stems from an error by EDS in making the overpayment to her in the first instance and from her attorney's failure to present evidence at the criminal trial relating to EDS's billing procedures. However, it is not possible to investigate EDS's decision to issue the overpayment or to retry the criminal case in this proceeding. The judgment of conviction reflects that Ms. Gard was convicted of a crime. Absent a contrary ruling by an appellate court the conviction stands. The only remaining issue is whether the crime for which she was convicted substantially relate to the practice of a licensed practical nurse.

Section 111.321 and 111.322, Stats., prohibit a licensing agency from discriminating against an individual on the basis of a conviction record. Section 111.335 (1) (c), Stats., provides that notwithstanding s. 111.322, it is not discrimination because of conviction record to terminate from licensing any individual who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the licensed activity.

The purpose of the exception structured by the Legislature in s. 111.335 (1) (c), Stats., was discussed by the Wisconsin Supreme Court in *County of Milwaukee v. Labor and Industry Review Commission*, 139 Wis. 2d 805, 407 N.W. 2d 908 (1987). Although the Court's discussion focused on the employment area, the societal interests discussed are relevant to the licensing area. The Court stated, Id. at 821, that:

> It is evident that the legislature sought to balance at least two interests. On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

In reference to assessing the risk of recidivism, the Supreme Court stated, Id. at 823-824, that:

> In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related. ...
>
> Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test. ...
>
> It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.

In this case, as a licensed practical nurse Ms. Gard would have amply opportunity to commit crimes similar to the one for which she was convicted. In addition to seeking payment for services under the Medicaid program, she would also be in a position to seek payment directly from patients and private insurance carriers. As a private duty nurse she would also have easy entry into the homes of patients and therefore, access to their personal assets. In reference to character traits, her conduct as evidenced by her conviction for theft reflects that she is dishonest and untrustworthy.

Having found that Ms. Gard engaged in unprofessional conduct, a determination must be made regarding whether discipline should be imposed, and if so, what discipline is appropriate.

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. MacIntyre*, 41 Wis. 2d 481 (1969).

The Administrative Law Judge recommends that Ms. Gard's license to practice as a licensed practical nurse be revoked. This measure is designed to assure protection of the public and to deter other licensees from engaging in similar misconduct.

Public trust is essential to the practice of a licensed practical nurse. Ms. Gard has shown by her conduct that she cannot be trusted, and that she is incapable of practicing in a manner which safeguards the interest of the public. Revocation of her license is the only viable measure available to assure protection of the public.

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 31st day of March, 1995

Respectfully submitted,

Ruby Jefferson-Moore

Ruby Jefferson-Moore
Administrative Law Judge

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.

Serve Petition for Rehearing or Judicial Review on:

THE STATE OF WISCONSIN BOARD OF NURSING.

1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708.

The Date of Mailing this Decision is:

MAY 9, 1995.

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST

AFFIDAVIT OF COSTS
LS9410142NUR

ROSIE A. GARD, L.P.N.
RESPONDENT.

STATE OF WISCONSIN
COUNTY OF DANE

Ruby Jefferson-Moore, being first duly sworn on oath deposes and states:

1. That affiant is an attorney licensed to practice law in the State of Wisconsin, and is employed by the Wisconsin Department of Regulation and Licensing, Office of Board Legal Services.

2. That in the course of affiant's employment she was appointed administrative law judge in the above-captioned matter. That to the best of affiant's knowledge and belief, the costs for services provided by affiant are as follows:

ACTIVITY	DATE	TIME
Preparation and Hearing	12/07/94	2 hrs.
Review record/law/draft decision	03/23/95	1 hr. 30 min.
Review record/draft decision	03/31/95	30 min.

Total costs for Administrative Law Judge $108.00

3. That upon information and belief, the total cost for court reporting services provided by Magne-Script is as follows: $229.60

Total costs for Office of Board Legal Services: $337.60

Ruby Jefferson-Moore
Ruby Jefferson-Moore
Administrative Law Judge

Sworn to and subscribed to before me
this 19th day of May, 1995

Donald R Pettit
Notary Public
My Commission: is Permanent

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	:	
ROSIE A. GARD, L.P.N., RESPONDENT.	:	AFFIDAVIT OF COSTS LS9410142NUR

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

James W. Harris, being duly sworn, deposes and states as follows:

1. That I am an attorney licensed in the state of Wisconsin, employed by the Wisconsin Department of Regulation and Licensing, Division of Enforcement:

2. That in the course of those duties I was assigned as a prosecutor in the above-captioned matter; and

3. That set out below are the costs of the proceeding accrued to the Division of Enforcement in this matter, based upon Division of Enforcement records compiled in the regular course of agency business in the above-captioned matter.

PROSECUTING ATTORNEY EXPENSE

Date	Activity	Time Spent
7/06/94	telconf. Div. Community Services	0.3
7/11/94	initial file review-screen	0.3
7/11/94	research re: Substantially related offense	2.0
7/20/94	file review - PIC	0.5
8/17/94	telconf. Juan Colas, DOJ	0.3
9/29/94	draft complaint, memo supervisor	2.0
9/30/94	ltr. DOJ	0.3

10/11/94	conf. investigator, execute complaint schedule hearing, prepare Notice, transfer to clerk for process	2.0
11/11/94	prepare affidavit of default & motion	1.0
11/14/94	telconf. Respondent	0.3
11/16/94	prehearing conference	0.3
11/23/94	prepare & serve witness list	1.0
11/23/94	fact preparation & interview L. Goodman	1.0
11/23/94	fact preparation & interview N. Brokish	1.0
11/23/94	prepare subpoenas	---
11/29/94	review Respondent's answer; fact research	2.0
12/06/94	prepareation for hearing	3.0
12/07/94	hearing	4.0
12/14/94	review Respondent's supplement to testimony	1.0
1/20/95	review transcript of hearing	1.0
4/03/95	review proposed ALJ Decision	0.5
4/18/95	review Respondent's objections research, prepare response	3.0
4/24/95	ltr. Atty. Kelley	0.3
5/09/95	review Board order	0.3
TOTAL HOURS		27.4 hours min.

Total attorney expense for
27.4 hours and minutes at $41.00 per hour
(based upon average salary and benefits
for Division of Enforcement attorneys) equals: $ 1 1 3 40

EXPERT WITNESS FEES

1.	L. Goodman, R.N.	$ 360.63
2.	N. Brokish, R.N..	$ 269.23
TOTAL EXPERT WITNESS FEES		$ 629.86
TOTAL ASSESSABLE COSTS:		$ 1,753.26

James W. Harris, Attorney
Division of Enforcement

Subscribed and sworn to before me
this 10th day of May, 1995.

Notary Public
my commission permanent