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FILE COPY

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
KELLY A. OCONNOR, L.P.N.,	:	LS9105011NUR
RESPONDENT	:	

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 6 day of September, 1991.

Jacqueline Johnson RN

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF	:	
DISCIPLINARY PROCEEDINGS AGAINST	:	PROPOSED DECISION
	:	Case No. LS-9105011-NUR
KELLY A. O'CONNOR, L.P.N.,	:	
RESPONDENT	:	

PARTIES

The parties in this matter under sec. 227.44, Wis. Stats. and sec. RL 2.036, Wis. Adm. Code, and for purposes of review under sec. 227.53, Wis. Stats. are:

Kelly A. O'Connor, L.P.N.
6945 North 76th Street, Apt. #207
Milwaukee, WI 53223

Board of Nursing
1400 East Washington Ave.
P.O. Box 8935
Madison, WI 53708

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

POSTURE OF CASE

A. This case was initiated by the filing of a complaint with the Board of Nursing on May 1, 1991. A disciplinary proceeding ("hearing") was scheduled for July 15, 1991. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on May 1, 1991 to Ms. O'Connor, who received it on May 8, 1991.

B. Ms. O'Connor did not file an answer as required by sec. RL 2.09, Wis. Admin. Code.

C. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on July 15, 1991. Ms. O'Connor did not appear. The Board of Nursing was represented by Attorney Steven Gloe of the Department of Regulation and Licensing's Division of Enforcement. That proceeding forms the basis for this proposed decision.

FINDINGS OF FACT

1. The Respondent, Kelly A. O'Connor, holds license #27714 to practice as a practical nurse in Wisconsin, originally granted on December 6, 1984.
2. Ms. O'Connor's most recent address on file with the Board of Nursing is 6945 North 76th Street, Apt. 207, Milwaukee, WI 53233.
3. On September 1, 1989, while working as a licensed practical nurse for the North Shore Health Care Center, 601 Glencoe Place, Milwaukee, Wisconsin, a skilled care nursing facility, Ms. O'Connor was assigned nursing duties for approximately twenty patients, left for a scheduled dinner break, and failed to return for the completion of her shift, without informing her supervisor or other nursing home personnel.

CONCLUSIONS OF LAW

- I. The Board of Nursing has personal jurisdiction over Ms. O'Connor based on fact #1 above and paragraph A above under "Posture of Case."
- II. The Board of Nursing has jurisdiction over the subject-matter of this complaint, under sec. 15.08(5)(c), Wis. Stats, sec. 441.07, Wis. Stats, and ch. N 7, Wis. Admin. Code, based on fact #3 above.
- III. Ms. O'Connor is in default under sec. RL 2.14, Wis. Admin. Code, based on paragraphs B and C above under "Posture of Case."
- IV. By her action in fact #3 above, Ms. O'Connor was negligent in her professional duties, in violation of sec. N 7.03(1), Wis. Admin. Code, and sec. 441.07(1)(c), Wis. Stats., and was guilty of unprofessional conduct, in violation of sec. N 7.04, Wis. Admin. Code, and sec. 441.07(1)(d), Wis. Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the respondent, Kelly A. O'Connor, be reprimanded for her negligent and unprofessional conduct in this matter.

IT IS FURTHER ORDERED that the license to practice as a practical nurse issued to respondent, Kelly A. O'Connor, be limited, effective the date this order is signed, as follows:

- i. Ms. O'Connor shall practice only in a setting where another practical or registered nurse is immediately available at all times to provide direction; availability by telephone is not satisfactory. Ms. O'Connor must not practice in a setting where she is the nurse in charge.

- ii. Ms. O'Connor shall arrange for quarterly reports to the Board of Nursing from her employer evaluating her work performance. The first report will be due ninety (90) days after the date of this order.
- iii. Ms. O'Connor must complete at least eight (8) contact hours of continuing education in the areas of nursing ethics, responsibility, or a related area, and submit documentation of completion to the Board within six (6) months after the date of this order.
- iv. Ms. O'Connor shall report to the Board any change in employment, residence, or phone number within ten (10) days of such change.
- v. Ms. O'Connor shall obtain as a condition for continued practice a satisfactory health evaluation from a health care provider acceptable to the Board assessing her ability to practice as a practical nurse. This evaluation must be based upon an examination performed within the previous thirty (30) days. Ms. O'Connor shall submit the evaluation to the Board no later than forty-five (45) days after the date of this order.
- vi. Violation of any of the above terms, i-v, shall be grounds for the Board to summarily suspend Ms. O'Connor's license or impose additional terms of limitation or discipline.
- vii. Ms. O'Connor may petition the Board at any time after one year from the date of this order to revise or eliminate any of the above limitations.

IT IS FURTHER ORDERED that the respondent, Kelly A. O'Connor, pay the costs of this proceeding, under sec. 440.22(2), Wis. Stats., provided that, if the total costs exceed \$100, she is ordered to pay only the first \$100 of costs, and if she fails to pay the costs within sixty (60) days of the date of this order, her license will be summarily suspended, under sec. 440.22(3), Wis. Stats.

OPINION

Ms. O'Connor did not file an answer to the complaint and did not appear at the scheduled hearing. She is therefore in default, and under sec. RL 2.14, Wis. Admin. Code, "the board may make findings and enter an order on the basis of the complaint and other evidence."

In the hearing, Mr. Gloe established the basic facts underlying the complaint through the testimony of Investigator Judith Ewald. Ms. Ewald testified, based on information received from Ms. O'Connor's supervisor at the North Shore Health Care Center and other sources, that:

- (i) Ms. O'Connor was scheduled to work a P.M. shift at the North Shore Health Care Center on September 1, 1989, that she left the facility for dinner, and that she did not return after her meal to complete her shift.

- (ii) Ms. O'Connor did not notify her supervisor or her co-worker that she would not be returning, and her absence was discovered only when an aide reported that certain patients were not being cared for.
- (iii) Ms. O'Connor later told her supervisor her reason for not returning as follows: her boyfriend had tried to place a personal call to her at the Health Care Center regarding her newborn child; pursuant to Health Care Center policy, the personal call was not put through; when she met her boyfriend at dinner and learned this, she became upset and did not return to work.
- (iv) Ms. O'Connor told Ms. Ewald that her failure to return was due to the fact that she began to hemorrhage from her recent delivery while on her dinner break.
- (v) Ms. Ewald obtained a release and reviewed Ms. O'Connor's medical records, which showed no entry on September 1 or 2, 1989, and no indication that Ms. O'Connor had suffered or reported a hemorrhage at that time.

It is tempting to speculate further on the precise motive Ms. O'Connor had for not returning to her duties. The most likely possibilities would seem to be that her newborn had a medical emergency, or that she was angered by not receiving a call related to her newborn, or a combination of the two. However, the excuse she later gave was that she had begun to hemorrhage while on break, a fact which was not supported by the medical records examined by Ms. Ewald. Because Ms. O'Connor chose neither to answer the complaint nor to appear at the hearing to present her side of the story, we are unable to take her motivation into consideration, either in mitigation or aggravation.

The evidence, though technically hearsay, is sufficient to establish that Ms. O'Connor was negligent and unprofessional in the performance of her duties as an L.P.N. for North Shore Health Care Center on September 1, 1989, as charged in the complaint. The complaint asserted violations of sections 441.07(1) (c) and (d), Wis. Stats., section N 7.03(1), Wis. Admin. Code, and sections N 7.04(1), (6), and (15), Wis. Admin. Code. The evidence does not support a finding that Ms. O'Connor violated any of the specific subsections of N 7.04, which are merely illustrative examples of unprofessional conduct; instead, I simply find that her action was unprofessional conduct as defined by sec. N 7.04, Wis. Admin. Code.: "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". I also find that her action was negligent, as defined by sec. N 7.03(1), Wis. Admin. Code.: "a substantial departure from the standard of care ordinarily exercised by a competent licensee". Negligence is a violation of sec. 441.07(1)(c), Wis. Stats., and unprofessional behavior is a violation of sec. 441.07(1)(d), Wis. Stats.

Having violated the above standards, Ms. O'Connor has exposed herself to discipline by the Board, which should be imposed in keeping with the well-established purposes of discipline articulated in case law: to rehabilitate the offender, to protect the public by assuring the moral fitness and professional competency of the licensees, and to deter others in the profession from similar conduct. Although her action was an isolated incident, and was probably not intended in any way to cause harm to her patients, it nevertheless created a situation in which the health, welfare, and safety of the patients assigned to her care were placed in danger. Ms. O'Connor and other licensees must realize that such an action is professionally unacceptable, and therefore, at the very least, her action merits a reprimand. Her action also raises questions about her level of competence and dedication to the profession, and especially since she was not available to answer these concerns, the limitations on her license proposed by Mr. Gloe would be appropriate. The condition requiring Ms. O'Connor to obtain a satisfactory health evaluation would probably not be necessary, except for Ms. O'Connor's own assertion that she suffered an internal hemorrhage on the day in question; otherwise, the question of her fitness to practice as an L.P.N. is more a function of the Board than of a health-care professional. Given the concerns raised by her action in this case, the other limitations in the stipulation proposed by Mr. Gloe are also appropriate: (i) that she practice only in a setting where another practical or registered nurse is immediately available at all times to provide direction and that she not practice in a setting where she is the nurse in charge; (ii) that she arrange for quarterly reports to the Board from her employer evaluating her work performance; (iii) that she complete at least eight contact hours of continuing education in the areas of nursing ethics, responsibility, or a related area; and (iv) that she report to the Board any change in employment, residence, or phone number.

In addition, this proposed decision includes a requirement that Ms. O'Connor pay some of the costs involved in this proceeding, which is appropriate due to her lack of cooperation. She did not appear for the scheduled hearing. The costs of that hearing, in attorney, investigator, recorder, and administrative law judge time, as well as the cost of preparing a transcript, could have been avoided if she had signed and returned the stipulation as she told Mr. Gloe she would. However, because Mr. Gloe indicates that Ms. O'Connor is a single parent, she should have to pay only a token amount, no more than \$100, if the costs amount to that much.

Dated July 17, 1991.



John N. Schweitzer
Administrative Law Judge
Department of Regulation and Licensing

BDLS2-494

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 within 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 Wisconsin 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 September 10, 1991.

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) 1. 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. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board or the consumer credit review board, the credit union review board or the savings and loan review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1 to 4.

2. 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 service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

3. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions

for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

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

3. The credit union review board, the commissioner of credit unions.

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

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.