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STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST

LINDA J. MILLER, R.C. P.,
Respondent

FINAL DECISION AND ORDER
LS0104301MED

The parties to this action for purposes of §227.53, Wis. Stats., are:

Linda J. Miller
603 Johnson Avenue, Apt. D
Clinton, WI 53525

State of Wisconsin
Medical Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation & Licensing
Division of Enforcement
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

A hearing in the above-captioned matter was held on July 18, 2001, before Administrative Law Judge Jacquelynn B. Rothstein. The Division of Enforcement appeared by attorney Arthur Thexton. Ms. Miller did not appear.

The Administrative Law Judge filed her Proposed decision on July 23, 2001, and the board considered the matter on August 22, 2001. Based on the entire record in this case, the Medical Examining Board adopts as its final decision in this matter the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Linda J. Miller (dob 2/25/53) is a respiratory care practitioner certified in the State of Wisconsin pursuant to Certificate #1337, which was granted on August 19, 1992.
2. On or about July 11, 2000, Linda J. Miller, while on duty as a respiratory care therapist at her employing hospital, telephoned a local pharmacy and falsely identified herself as an employee of a local physician. During that same telephone call, she ordered a prescription for hydrocodone, a Schedule III controlled substance and a prescription drug, for herself as a patient, purportedly prescribed by the physician.
3. Following the discovery of that incident, Linda J. Miller admitted to having a chemical dependency on narcotic drugs.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to §448.02, Wis. Stats.
2. By failing to file an Answer as required by § RL 2.09, Wis. Admin. Code, and by failing to appear at the hearing, Ms. Miller is in default under § RL 2.14, Wis. Admin. Code, and the Medical Examining board may make Findings and enter an Order on the basis of the Complaint and evidence presented at the hearing.
3. By having engaged in the conduct identified in Finding of Fact #2, Ms. Miller attempted to procure a controlled substance by fraud in violation of §450.11(7)(a), Wis. Stats.
4. By having committed the conduct identified in Finding of Fact #2, Ms. Miller attempted to possess a controlled substance in violation of §961.41(3g), Wis. Stats.
5. By having engaged in the conduct identified in Finding of Fact #2, Ms. Miller committed unprofessional conduct in violation of §§ MED 10.02(2)(i) and (z), Wis. Admin. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the certification of Linda J. Miller to practice as a respiratory care practitioner in the State of Wisconsin and any existing right to renew it are revoked.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed against Linda J. Miller.

DISCUSSION

The Medical Examining Board has adopted the Findings of Fact, Conclusions of Law and Order set forth in the Proposed decision of the Administrative Law Judge in their entirety. This includes that portion of the proposed Order which assesses the full costs of the proceeding against the respondent. The basis for exercising the board's discretion in regards to costs is as follows.

Section 440.22(2), Stats., 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, and that the board's discretion extends to the decision whether to assess the full costs or only a portion of the costs. The board's decision to assess the full costs of the proceeding is based primarily on fairness to other members of the profession.

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. 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 an evidentiary hearing, that licensee should bear the costs of the proceeding. Moreover, where, as here, the respondent failed to even appear at the hearing, there is no evidence in mitigation which might militate for imposing only a portion of the costs. Accordingly the full costs must be assessed against this respondent.

Dated this 28th day of August, 2001.

STATE OF WISCONSIN

MEDICAL EXAMINING BOARD

Sidney E. Johnson, M.D.

Secretary