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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY

PROCEEDINGS AGAINST:

LYNN SCHOBER,

FINAL DECISION AND ORDER

RESPONDENT

LS0110291NUR

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 with the Department General Counsel within 15 days of this decision. The Department General Counsel shall mail a copy thereof to respondent or his or her representative.

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 1st day of March, 2002.

Linda Sanner

A Member of the Board

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

IN THE MATTER OF THE DISCIPLINARY

PROCEEDINGS AGAINST

LYNN SCHOBER, L.P.N.,

PROPOSED DECISION

RESPONDENT

LS0110291NUR

-
PARTIES

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

Lynn Schober

310 McKinley Street, Apt. B

Iola, Wisconsin 54945

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

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

This proceeding was commenced by the filing of a Notice of Hearing and Complaint on October 29, 2001. A hearing was held on November 21, 2001. Atty. James E. Polewski appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. Mr. Schober appeared in person without legal counsel.

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. The respondent, Lynn R. Schober (d.o.b. 12/31/59) is duly licensed in the state of Wisconsin to practice as a licensed practical nurse (license #27768). Respondent's license was first granted on December 6, 1984.
2. Respondent was employed as a licensed practical nurse at Wisconsin Veterans Home in King, Wisconsin from March 1998, through May 1998.
3. In March 1998, respondent entered outpatient AODA treatment at United Health Appleton, Wisconsin, but left without completing the program.
4. Between April 22, 1998 and May 23, 1998, respondent made over 25 medication dispensing errors including: not administering Sinemet, Digoxin, Captopril, and Insulin to patients, and not applying eye drops and an eye dressing to a patient that had recently had eye surgery.
5. On May 28, 1998, respondent was terminated from his position as a licensed practical nurse at Wisconsin Veterans Home because of the medication dispensing errors that he made.
6. From 11-17-98 to 12-15-98, respondent had an AODA assessment and underwent inpatient treatment for chemical dependency at Nova Treatment Center in Oshkosh, Wisconsin. Respondent was diagnosed with chemical dependency in denial. Respondent's drug of choice was alcohol.
7. Respondent's counselor at Nova recommended that respondent go into a transitional living environment for a 3-month period to continue working on his recovery. On December 15, 1998, respondent was admitted to Terra House where he underwent 3 months of inpatient treatment for chemical dependency. Respondent was discharged from Terra House, with staff approval, on March 16, 1999.
8. Respondent did not practice as a licensed practical nurse from May 28, 1998 through January 2000.
9. Respondent has been employed as a licensed practical nurse in the cardiac intensive care unit at Appleton Medical Center since February 2000.
10. Respondent is not currently in an AODA treatment program.

CONCLUSIONS OF LAW

1. The Board of Nursing has jurisdiction in this matter pursuant to s. 441.07 (1), Stats., and ch. N 7, Wis. Adm. Code.
2. By engaging in conduct as described in Findings of Fact 3-6 herein, respondent violated s. 441.07 (1) (c), Stats.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license of Lynn Schober be, and hereby is, **SUSPENDED for an INDEFINITE PERIOD of time.**

IT IS FURTHER ORDERED that:

(1) Petition for Stay. Mr. Schober may petition the Board at any time for a stay of the suspension of his license. In conjunction with such petition, Mr. Schober shall submit documentation of an evaluation performed by a health care provider acceptable to the Board of respondent's alcohol dependency as well as his abstinence from the use of alcohol. The assessor shall submit a written report of his or her findings directly to the Board, including: 1) a diagnosis of Mr. Schober's condition; 2) recommendations (if any) for treatment; 3) an evaluation of Mr. Schober's level of cooperation in the assessment process; 4) work restriction recommendations, and 5) the prognosis. The report shall include a certification stating that Mr. Schober is fit to safely and competently return to the active practice of nursing. The assessment shall occur within (30) days prior to the date of its submission and reflect the fact that the person(s) performing the assessment received a copy of this Order.

(2) Board Action. Upon its determination that Mr. Schober can safely and competently return to the active practice of nursing, the Board may stay the suspension for a period of three (3) months, conditioned upon compliance with the conditions and limitations set forth in paragraph (3).

(a) Respondent may apply for consecutive three (3) months extensions of the stay of suspension, which shall be granted upon acceptable demonstration of compliance with the conditions and limitations imposed upon respondent's practice during the prior three (3) month period.

(b) Upon a showing by respondent of complete, successful and continuous compliance for a period of five (5) years with the terms of paragraph (3), below, the Board may grant a petition by respondent for return of full licensure if it determines that respondent may safely and competently engage in practice as a licensed practical nurse.

(3) Conditions of Stay

(a) If the assessment report referred to in paragraph (1) above recommends continued treatment for alcohol dependency, respondent shall maintain successful participation in a program of treatment at a health care facility acceptable to the Board. As part of treatment, respondent must attend therapy on a schedule as recommended by his therapist; the Board may, however, in its discretion establish a minimum number of therapy sessions per month.

(b) If the assessment report referred to in paragraph (1) above recommends continued treatment for alcohol dependency, respondent shall: 1) abstain from all personal use of alcohol; 2) attend Narcotics Anonymous and/or Alcoholic Anonymous meetings upon a frequency as recommended by his therapist, but not less than one meeting per week, and 3) enroll in and participate in an alcohol monitoring program as outlined in paragraph (4) below.

(c) If continued therapy is required under the stay Order, respondent shall arrange for submission of quarterly reports to the Board from his therapist evaluating his attendance and progress in therapy. If the assessor recommends work restrictions, respondent shall comply with all restrictions, as recommended.

(d) Respondent shall provide the Board with current releases complying with state and federal laws, authorizing release and access to the records of the health care provider(s) performing his assessment.

(e) Respondent shall be responsible for all costs associated with the assessment referred to in paragraph (1) above, and for all treatment, education and reporting required under the terms of the stay Order.

(f) Within six (6) months of the date of the initial Board Order granting stay of suspension, respondent shall certify to the Board the successful completion of an approved course of education relating to medication administration. Respondent shall submit course outlines for approval by a Board designee within 45 days of the date of the stay Order. The course outlines shall include the name of the institution providing the instruction, the name of the instructor, and the course content.

(g) Respondent shall provide all current and prospective nursing employers with a copy of this Final Decision and Order and any subsequent stay Orders; arrange for submission of quarterly reports to the Board of Nursing from his nursing employer (s) reporting the terms and conditions of his employment and evaluating his work performance, and report to the Board any change in his employment status within five (5) days of such change.

(4) Alcohol Monitoring Program

Within thirty (30) days from the date of the initial Board Order granting stay of suspension, Respondent shall enroll and begin participation in a drug and alcohol monitoring program which is approved by the Department of Regulation and Licensing pursuant to Wis. Admin. Code § RL 7.11, ("Approved Program").

(a) The Department Monitor, Board or Board designee shall provide to the Respondent a list of Approved Programs; however, the Respondent is solely responsible for timely enrollment in any such Approved Program.

(b) Unless otherwise ordered by the Board, the Approved Program shall require the testing of urine specimens at a frequency of not less than 52 times each year.

(c) The Department Monitor, Board or Board designee shall determine the tests to be performed upon the urine specimens.

(d) The Respondent shall comply with all requirements for participation in drug and alcohol monitoring established by the Approved Program, including but not limited to; (1) contact with the Approved Program as directed on a daily basis, including weekends and holidays, and; (2) production of a urine specimen at a collection site designated by the Approved Program within five (5) hours of notification of a test.

(e) The Board in its discretion without a hearing and without further notice to the Respondent may modify this Order to require the submission of hair or breath specimens or that any urine or hair specimen be furnished in a directly witnessed manner.

(f) All expenses of enrollment and participation in the Approved Program shall be borne by the Respondent. The Respondent shall keep any account for such payments current in all respects.

(g) For purposes of further Board action under this Order it is rebuttably presumed that all confirmed positive test results are valid. Respondent has the burden of proof to establish by a preponderance of the evidence an error in collection, testing or other fault in the chain of custody which causes an invalid confirmed positive test result.

(5) Petition for Modification of Terms: Respondent may petition the Board in conjunction with any application for an additional stay to revise or eliminate any of the above conditions. Denial in whole or in part of a petition under this paragraph shall not constitute denial of a license and shall not give rise to a contested case within the meaning of Wis. Stats., s. 227.01 (3) and 227.42.

(6) Department Monitor

The Department Monitor is the individual designated by the Board as its agent to coordinate compliance with the terms of this Order, including receiving and coordinating all reports and petitions, and requesting additional monitoring and surveillance. The Department Monitor may be reached as follows:

Department Monitor

Department of Regulation & Licensing, Division of Enforcement

P.O. Box 8935

Madison, WI 53708-8935

FAX (608) 266-2264

TEL. (608) 267-3817

(7) Costs: 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 a representative of the Board of Nursing signs it.

OPINION

The Division of Enforcement alleges in its Complaint, as amended, that Mr. Schober's conduct, as described therein, constitutes a violation of s. 441.07 (1) (c), Stats., and s. N 7.03 (2), Code.

I. Applicable Law

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.

N 7.03 Negligence, abuse of alcohol or other drugs or mental incompetency.

(2) "Abuse of alcohol or other drugs" is the use of alcohol or any drug to an extent that such use impairs the ability of the licensee to safely or reliably practice.

II. Violations

The evidence presented establishes that Mr. Schober violated numerous laws relating to the practice of a licensed practical nurse.

Mr. Schober admitted in his Answer to the Complainant that he made over 25 medication dispensing errors between April 22, 1998 and May 23, 1998. He also admitted that, prior to the time he made the medication dispensing errors, he entered into outpatient AODA treatment at United Health in Appleton but left without completing the program. He has been diagnosed with chemical dependency in denial and he has received treatment for his dependency.

III. Discipline

The evidence presented in this case establishes that Mr. Schober violated s. 441.07 (1) (c), Stats., and s. N 7.03 (2), Code. Having found that Mr. Schober violated laws governing the practice of a licensed practical nurse in Wisconsin, 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 s. 441.07 (1), Stats., to reprimand a licensed practical nurse or limit, suspend or revoke the license of a licensed practical nurse if it finds that the individual has violated ch. 441, Stats., or any rule adopted by the Board under the statutes.

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 Administrative Law Judge recommends that Mr. Schober's license to practice as a licensed practical nurse be suspended for an indefinite period of time. This measure is designed primarily to assure protection of the public and to promote Mr. Schober's rehabilitation.

Upon receipt of a petition for a stay of the order of suspension and documentation of fitness to safely and competently resume practice as a licensed practical nurse, it is recommended that Mr. Schober be permitted to return to active practice subject to compliance with certain conditions as set forth in the proposed Order.

The assessment is being recommended so that the Board will have access to more current information regard Mr. Schober's alcohol dependency. Although Mr. Schober has sought treatment in the past for his alcohol dependency, he is not currently enrolled in an AODA treatment program. He does attend Narcotics Anonymous meetings about twice a month. He also speaks on occasion at Nova to groups of individuals who are undergoing treatment. He said that Nova "like to have people who have successfully completed treatment and continue to be clean and sober, go in and talk to people who are just into treatment, to show them that the treatment does work and that there's life after -- or life continues without drinking or drugs" *Transcript p.16*.

The requirement that Mr. Schober complete appropriate training prior to being allowed to return to full licensure is designed to provide an additional measure of protection to the public. Except for the medical administration errors that were made in 1998, Mr. Schober has performed his duties as a licensed practical nurse in a competent manner. Shannon Handel, the Director of Nursing at Manawa Community Nursing Center in 2000, said that Mr. Schober's work was of high quality standard; that he has a good knowledge base for nursing practice and that he uses his knowledge in working with every patient. William Nolte, a registered nurse at Appleton Medical Center, said that Mr. Schober "always performed his duties competently and efficiently". *Exhibits 2 and 5*.

IV. Costs of the Proceeding

Section 440.22 (2), Stats., provides in relevant part as follows:

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 Administrative Law Judge's recommendation that the full costs of the proceeding be assessed 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. 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.

This approach to the imposition of costs is supported by the practice of the Wisconsin Supreme Court, which is granted similar discretionary authority by SCR 22.24 to impose costs in attorney disciplinary hearings. The Court acknowledges the logic of imposing the cost of discipline on the offender rather than on the profession as a whole, and routinely imposes costs on disciplined respondents unless exceptional circumstances exist. In the Matter of Disciplinary Proceedings against M. Joanne Wolf, 165 Wis. 2d 1, 12, 476 N.W. 2d 878 (1991); In the Matter of Disciplinary Proceedings against Willis B. Swartwout, III, 116 Wis. 2d 380, 385, 342 N.W. 2d 406 (1984).

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 1st day of February, 2002.

Respectfully submitted,

Ruby Jefferson-Moore

Administrative Law Judge