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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY

PROCEEDINGS AGAINST:

MARK LEROUX, R.N.,

FINAL DECISION AND ORDER

RESPONDENT

LS0110042NUR

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 6th day of June, 2002.

Linda Sanner, Chairperson
Board of Nursing

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

IN THE MATTER OF THE DISCIPLINARY

PROCEEDINGS AGAINST:

MARK J. LEROUX, R.N.,

PROPOSED DECISION

RESPONDENT

LS0110042NUR

PARTIES

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

Mark J. LeRoux
809 Park Avenue

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 15, 2001. A hearing was held on January 30, 2002. Atty. James W. Harris appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. Atty. Douglas W. Rose appeared on behalf of the respondent, Mark J. LeRoux. The hearing transcript was filed on February 27, 2002.

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, Mark J. LeRoux (d.o.b. 12/23/48) is duly licensed in the State of Wisconsin to practice as a registered nurse (license #128015). Mr. LeRoux's license was first granted on October 24, 1997.
2. On March 21, 2001, and while employed as a registered nurse at Milwaukee County Mental Health Division, Mr. LeRoux reported to work around 2:45 p.m., with a small level of alcohol in his bloodstream.
3. Shortly after reporting to work on March 21, 2001, Mr. LeRoux's nursing supervisor, Robert Schaumann, told him that he could smell the odor of an intoxicant on his breath. Mr. LeRoux admitted to Mr. Schaumann that he had consumed a couple of drinks around 8:00 a.m. that morning to help him get back to sleep. Mr. Schaumann asked Mr. LeRoux to take a Breathalyzer test, which was administered shortly thereafter. The results of the Breathalyzer test revealed an alcohol level of 0.056.
4. Based upon the results of the Breathalyzer test; the fact that Mr. LeRoux had the odor of an intoxicant on his breath; the fact that he was struggling with trying to speak clearly and on that particular day he was stuttering and reaching for words, and the need to provide safety for the patients on the Unit, Mr. Schaumann dismissed Mr. LeRoux from work for the remainder of the day.
5. At least on March 21, 2001, the Milwaukee County Mental Health Division had a work rule in effect relating to the use of alcoholic beverages by employees while on the job. The work rule reads, in part, as follows:
 - B. The possession or use of any alcoholic beverage or abuse of drugs by employees while on the job is prohibited. (The odor of alcohol on an employee's breath while at work is prohibited) and may result in discipline. Any employee found possessing or using/abusing such alcoholic beverages or drugs shall be referred immediately to the Supervisor for disciplinary action.
 - F. We believe that each employee's immediate supervisor is best qualified to make a determination of the employee's condition and fitness for work. Other things being equal, the supervisor's determination shall be considered conclusive.
6. On April 3, 2001, Mr. LeRoux saw Frank Coogan, a licensed independent clinical social worker at American Behavioral Clinic, for an assessment relating to his alcohol use. Based upon the results of the initial assessment, Mr. LeRoux was diagnosed with alcohol dependency. Since April 3, 2001, Mr. LeRoux has attended at least 19 group therapy sessions at American Behavioral Clinic for his condition. Mr. LeRoux also attends AA meetings on a regular basis.
7. Mr. LeRoux is not currently participating in an approved AODA treatment program.

8. On May 1, 2001, Mark LeRoux was suspended for one day, which took effect on May 8, 2001, for violating various Milwaukee County work rules relating to his consumption of alcohol on March 21, 2001.

9. Mr. LeRoux is currently the subject of a limited license by Order of the Board of Nursing, dated September 25, 1997, based upon his conviction of two counts of first degree murder on January 19, 1968, and of prison escape on July 7, 1976. Among other things, the Order required Mr. LeRoux to: "for the term of the limited license participate in a program of therapy with a therapist satisfactory to the Board in the area of stress management and such other areas as deemed appropriate by the therapist".

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 2-4 herein, respondent violated s. 441.07 (1) (c), Stats., and s. N 7.04 (15), Code.

ORDER

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

IT IS FURTHER ORDERED that:

(1) Petition for Stay. Mr. LeRoux may petition the Board at any time for a stay of the suspension of his license. In conjunction with such petition, Mr. LeRoux 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. LeRoux's condition; 2) recommendations (if any) for treatment; 3) an evaluation of Mr. LeRoux'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. LeRoux 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. LeRoux 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) month 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 registered 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 and reporting required under the terms of the stay Order.

(f) 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 an 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 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. LeRoux's conduct, as described therein, constitutes a violation of s. 441.07 (1) (c), Stats., and s. N 7.03 (2) and N 7.04 (15), 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.

N 7.04 Misconduct or unprofessional conduct. As used in s. 441.07 (1) (d), Stats., "misconduct or unprofessional conduct" means any practice or 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. "Misconduct or unprofessional conduct" includes, but is not limited to, the following:

(15) Violating any rule of the board.

II. Violations

The evidence presented establishes that Mr. LeRoux, by engaging in the conduct described in the proposed Findings of Fact, violated s. 441.07 (1) (c), Wis. Stats., and s. N 7.04 (15), Code.

(A) Testimony of Mark LeRoux

On March 21, 2001, Mr. LeRoux was employed as a registered nurse at the Milwaukee Mental Health Complex. He was assigned to Unit 43A, an acute adult psychiatric unit, which has a population of patients with a range of diagnoses from schizophrenia to personality disorders and affective disorders. His shift runs from 2:45 p.m., to 11:15 p.m.

Mr. LeRoux testified that on March 21, 2001, he consumed a drink seven hours before reporting to work; that there was an odor of alcohol on his breath and that he did have a .056 blood alcohol test result. He said that he did not feel impaired on that day and that no one was without a nurse as a result of his nursing supervisor sending him home that day. He acknowledged that he is an alcoholic and that he definitely needed treatment. He said that when the incident occurred, he was "just dumbfounded, flabbergasted". He could not believe that he "had blown a positive blood alcohol level". He said that he had had been drinking on his days off, binging, and that he had not metabolized it at all. He said that he had a problem and that he had to do something about it because "it had reached the point where it was going to hurt me at my work".

After his nursing supervisor dismissed him from work, on March 21, 2001, Mr. LeRoux asked his supervisor for a referral to employee assistance. He contacted the employee assistance program. They gave him a list of providers, the insurance company approved the treatment and he "got Mr. Coogan". In reference to group sessions, Mr. LeRoux testified that he feels that the sessions have been helpful. He said that "you get into drinking a lot of times in a vacuum ... One of the ways to stay out of drinking is to not stay in a vacuum... So you have to broaden everything out".

(B) Testimony of Robert Schaumann

Robert Schaumann has been Mark LeRoux's nursing supervision at the Milwaukee Mental Health Complex for about two years. Mr. Schaumann testified that on March 21, 2001, shortly after Mark started his shift, he went over to Unit 43A to speak to him and several of the nurses about the schedule they had submitted for the next month. There were a number of days on the schedule where they had inadequate coverage so he went over to meet with the nurses, on an individual basis, to see what he could do to provide them with time off or rearrange schedules. While he was sitting at the outer nurses' station next to Mark reviewing the schedule, he noted an odor of an intoxicant. He completed his business with the schedule and asked Mark to meet him over at his office. He said that when Mark came to his office, he informed Mark that he could smell the odor of an intoxicant on his breath, and asked him if he would submit to having a Breathalyzer test. Mark agreed to take the test and a test was administered. The results of the test revealed an alcohol level of 0.056. *Exhibit 7.*

Mr. Schaumann further testified that during his conversation with Mark, Mark stated that "earlier that day he had woke up, was unable to fall back asleep, and had a drink". Later on during their conversation, Mark admitted that it was more than one drink, possibly a couple of drinks. Mr. Schaumann said that, based on the need to provide safety for the patients on the unit, the fact that Mark had the odor of an intoxicant on his breath, plus he was struggling with being able to speak clearly and on that particular day he was doing some stuttering and reaching

for words, he told Mark that he was going to dismiss him from work. He said he did not feel that the patients would be safe and receive appropriate care.

Finally, Mr. Schaumann testified that it is a violation of the Mental Health Division's work rules for an employee to have an odor of alcohol on his or her breath while at work. Mr. Schaumann told Mark that because of the odor of the intoxicant he would be requesting a disciplinary hearing, which is standard procedure in the institution. Following a disciplinary hearing, Mr. LeRoux was suspended for one day, May 8, 2001, for violations of the Mental Health Division's work rules. *Exhibits 3 and 6.*

(C) Testimony of Frank Coogan

Frank Coogan is a licensed independent clinical social worker in the State of Wisconsin. He has a Master's degree in Social Work with a specialty in psychiatric social work. After receiving his Master's degree in 1955, Mr. Coogan worked for the Veterans Administration in the mental health and psychiatric unit. Then, he worked 13 years with the State of Wisconsin as Director of the Bureau of Alcohol and Drug Abuse. Thereafter, he worked for 13 years with DePaul Rehabilitation Hospital, which specializes in addiction treatment. At DePaul, Mr. Coogan was in charge of research and program development. For the last ten years, Mr. Coogan has been working in outpatient mental health clinics (operated by American Behavioral Clinic) with a primary emphasis on addiction. About 70 percent of the patients that he sees have a diagnosis of one of the addictions.

Mr. Coogan testified that he conducted an AODA assessment of Mark LeRoux on April 3, 2001. His notes indicate that Mr. LeRoux "self-referred" and that his "use of alcohol increased over the past five years to alcohol dependence". Mr. Coogan's primary diagnosis of Mr. LeRoux's condition is "alcohol dependence". Mr. LeRoux has completed 19 group therapy sessions since his initial assessment. Mr. Coogan's revised treatment plan, dated July 10, 2001, indicates that Mr. LeRoux agreed to attend AA meeting every other week and to continue group therapy every other week through the end of the year. He said that the goal was to achieve sobriety and meet the intent of the Board of Nursing. Mr. Coogan further testified that Mr. LeRoux has been very cooperative and that from the inception of the treatment he has been at "the very high end of the people that I deal with." He said that Mr. LeRoux was "very self-disclosing right from the assessment, and even though his initial goal was to try to work toward a returned to controlled drinking ... he accepted on his own initiative the goal of abstinence and ... the goal of attend AA to further enhance ... the treatment". He said that Mr. LeRoux's prognosis is very good and that he is "doing very well ... at the top level of people in treatment". *Ex. # 2.*

During cross-examination, Mr. Coogan testified that Mr. LeRoux is at risk for relapse at any time. He said that he would rate Mr. LeRoux's prognosis as "very good for not having a relapse ... and at the very high end of the patients that I've dealt with". Finally, in reference to appropriate treatment, Mr. Coogan testified that he believes that it is appropriate for Mr. LeRoux to continue with AA and for him to participate in therapy sessions with his organization or someone else.

III. Discipline

The evidence presented in this case establishes that Mr. LeRoux violated s. 441.07 (1) (c), Stats., and s. N 7.04 (15), Code. Having found that Mr. LeRoux violated laws governing the practice of a registered 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 registered nurse or limit, suspend or revoke the license of a registered 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. LeRoux's license to practice as a registered nurse be suspended for an indefinite period of time. This measure is designed primarily to assure protection of the public and to promote Mr. LeRoux'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 registered nurse, it is recommended that Mr. LeRoux 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 up-to date information regarding Mr. LeRoux's alcohol dependency. As noted previously, Mr. Coogan testified that he believes it is appropriate for Mr. LeRoux to continue with AA and for him to participate in therapy sessions with his organization or someone else. Although Mr. LeRoux continues to see Mr. Coogan on his own, he is not currently enrolled in an approved AODA treatment program.

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 3rd day of April, 2002

Respectfully submitted,

Ruby Jefferson-Moore

Administrative Law Judge