

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
MARILYN GAAR, LPN,	:	
LS0210031NUR	:	
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 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 10th day of January, 2003.

Linda M. Sanner, RN
Chairperson

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF	:		
DISCIPLINARY PROCEEDINGS	:	PROPOSED FINAL DECISION	
	:	AND ORDER	
MARILYN J. GAAR, LPN,	:	LS0210031NUR	
RESPONDENT.	:		

PARTIES

The parties to this action for the purposes of s. 227.53 Stats., are:

Marilyn J. Gaar, LPN
531 North 61st Street
Wauwatosa, WI 53213

Attorney Steven M. Gloe
Division of Enforcement

P. O. Box 8935
Department of Regulation & Licensing

Madison, WI 53708-8935

PROCEDURAL HISTORY

A hearing in the above-captioned matter was held on November 19, 2002, before Administrative Law Judge William A. Black. The Division of Enforcement appeared by Attorney Steven M. Gloe. The respondent, Marilyn J. Gaar, did not appear and did not file an answer to the complaint.

Based on the entire record of this case, the undersigned 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, Marilyn J. Gaar, LPN, is licensed in the state of Wisconsin to practice as a practical nurse.
2. On March 1, 2001, the Wisconsin Board of Nursing imposed discipline against the respondent, case number LS 0103013 NUR, suspending her license to practice as a practical nurse. (Exh. A)
3. The March 1, 2001, suspension was based upon the respondent diverting from her employer the controlled substance, Fentanyl ®, for personal use. (Exh. A)
4. The respondent was diagnosed with opiate dependence. (Exh. A)
5. The respondent was the subject of prior discipline for chemical abuse in case 86 NUR 036. (Exh. A)
6. On exact dates unknown but following March 1, 2001 and continuing through October 15, 2001, the respondent worked as a licensed practical nurse at Woodland Health Center, 18740 West Bluemound Road, Brookfield, Wisconsin, while having a suspended license pursuant to the board's March 1, 2001 order.
7. The respondent was served with the Notice of Hearing and Complaint on October 3, 2002, at her address of record with the Department of Regulation and Licensing.

CONCLUSIONS OF LAW

1. The Wisconsin Board of Nursing has jurisdiction over this matter, pursuant to Wis. Stats, § 441.07.
2. The conduct described in the Findings of Fact constitutes unprofessional conduct within the meaning of Wis. Stats, §§ 441.07(1), 441.10, and Wis. Admin. Code § N 7.04.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the respondent's license for practice as a practical nurse in Wisconsin, number 18756 is REVOKED.

IT IS FURTHER ORDERED that costs of this proceeding shall be assessed against the respondent.

OPINION

Section RL 2.14 of the Wisconsin Administrative Code provides that a respondent who fails to answer a complaint or fails to appear at a hearing is in default. If found to be in default, the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence against the respondent. In this case, the respondent did not file an answer to the above-captioned complaint, nor did she appear at the scheduled hearing. As a result, the respondent is in default. The attorney for the complainant moved for an order granting default at the hearing. That motion was granted.

It has been requested that the discipline to be imposed be that of revocation. After review of the allegations forming the basis for discipline in this case, and given the past history of the respondent's discipline by the board, that request is appropriate.

The respondent suffers from opiate dependence. She has endangered the public by continuing to practice while under suspension by the board without demonstrating that she has met the conditions necessary for a stay of suspension as provided by the board's March 1, 2001 order. To protect the public, caregivers such as the respondent must take orders of the board seriously and meet all requirements necessary to obtain a stay of suspension. The danger of impaired practice by persons such as the respondent is too great not to demand otherwise. It is clear that the respondent did not take the March 1, 2001, suspension seriously, she continued to work creating a potential danger to her patients.

It is well established that the objectives of professional discipline include the following: (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 209 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*. 41 Wis. 2d 481, 485 (1969).

There is nothing in the record to suggest that imposing any discipline short of revocation would protect the public, have a rehabilitative effect on the respondent, or deter other licensees from engaging in similar conduct. The respondent has not come forward to show remorse, an explanation, or cooperation with the board in this matter. To not revoke the respondent's license would instead wrongly signal others to engage in similar conduct of ignoring board ordered suspensions. Revocation remains as the only way in which to safeguard the public.

Costs

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 of Nursing, and that the board's discretion extends to the decision whether to assess the full costs or only a portion of the costs. The ALJ'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.

Date: November 26, 2002

William Anderson Black

Administrative Law Judge