

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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

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**IN THE MATTER OF  
DISCIPLINARY PROCEEDINGS  
AGAINST**

**KIM M. NIKLASCH, LPN,  
RESPONDENT**

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**FINAL DECISION AND ORDER  
ON COSTS AND  
MOTION TO VACATE**

**Case No. LS-0502011-NUR**

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(Division of Enforcement Case # 03 NUR 128)

**PARTIES**

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

Kim M. Niklasch, LPN  
714 S. Kuester Lane  
West Bend, WI 53090

Arthur Thexton (Attorney for Complainant)  
Division of Enforcement  
Department of Regulation and Licensing  
1400 East Washington Ave.  
Madison, WI 53708-8935

Board of Nursing  
1400 East Washington Ave.  
Madison, WI 53703-8935

**PROCEDURAL HISTORY**

The parties stipulated to Findings of Fact, Conclusions of Law and an Order, subject to Board approval. The Board of Nursing approved the stipulation on November 10, 2005. The only remaining issue in the proceedings concerned the imposition of costs. The parties agreed, pursuant to the Final Decision and Order that the Administrative Law Judge would submit a proposed decision on costs. Accordingly, a hearing on the issue of costs was held on October 26, 2005. The Administrative Law Judge submitted a Proposed Decision to the Board for its consideration and adoption. The Administrative Law Judge recommended that the Respondent pay 75% of the costs of the proceedings.

Both parties submitted objections to the recommended costs. In addition, the Respondent filed a Motion for Vacation of Stipulation and Assessment of Costs. Upon careful review of the entire record, the Board of Nursing now makes the following.

**CONCLUSIONS OF LAW**

1. The Board of Nursing has jurisdiction in this matter pursuant to Wis. Stat. § 441.07 and Wis. Admin. Code ch. N7.
2. Costs of the proceeding may be assessed against a holder of a credential in any disciplinary proceeding pursuant to Wis. Stat. § 440.22 and Wis. Admin Code § RL 2.18.

**ORDER**

THEREFORE, IT IS ORDERED that:

1. The Respondent, Kim Niklasch, LPN, shall pay the full costs of this proceeding.
2. The Division of Enforcement and the Administrative Law Judge are directed to file supporting affidavits showing costs within 15 days of the date of this order with the Office of Legal Counsel.
3. The Respondent shall file any objection to the affidavits within 30 days of the date of the Final Decision and Order on

Costs, and

4. The Board of Nursing shall review the affidavits and any objections and affirm or modify its order without further hearing on the matter.

### **APPLICABLE LAW**

Wis. Stat. § 440.22(2), provides in pertinent 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.

Wis. Admin. Code § RL 2.18(3), provides in pertinent part:

The disciplinary authority's final decision and order imposing discipline in a disciplinary proceeding shall include a determination whether all or part of the costs of proceeding shall be assessed against the respondent.

### **EXPLANATION OF VARIANCE**

The Administrative Law Judge recommended that 75% of the costs of the proceeding be assessed against the Respondent. The Judge apparently based the reduction of costs based upon 1) his view that full costs may be excessively punitive in light of the violation, and 2) the possibility that costs

were increased by the animosity between the attorneys representing the parties. The Board disagrees with this apportionment.

Respondent has argued that the Board should vacate the stipulation upon which the ALJ based his recommendation and assess costs against her in the amount of \$450.00. The Board does not agree with the Respondent's argument to vacate the stipulation and assess a significantly lesser amount of costs.

That the violative conduct was less than life threatening is not necessarily determinative of an apportionment of costs. It was appropriately noted by the ALJ that a single violation will support a finding of misconduct and the imposition of a penalty.

See [\*Vivian v. Examining Board of Architects, Professional Engineers, \[\\*5\] Designers and Land Surveyors\*, 61 Wis.2d 627, 635, 213 N.W.2d 359, 363 \(1974\)](#). A licensee is not entitled to expect merely a nominal penalty when a single violation is alleged. Had the Respondent cooperated with the Division of Enforcement in the early stages of this proceeding, before considerable costs were incurred, it is possible that she could have resolved this matter with a significantly lower assessment of costs. By her own inaction, the Respondent forfeited this opportunity.

Nor is animus between the attorneys a basis for reduction of costs. Allegations of misbehavior of counsel do not fall within the purview of this Board to review. Furthermore, the proposed 25% reduction is not based upon a documented amount of time specifically attributed to any investigative or prosecutorial misbehavior.

The fundamental issue here is who should pay the price or costs associated with this disciplinary matter – the profession as a whole or the individual respondent. Licensing fees are calculated based upon costs attributable to the regulation of each profession, as the Department of Regulation and Licensing is a program revenue agency. In other words, costs will be borne by one of two sources: the Respondent whose actions made the investigation and prosecution necessary, or the many other licensees of the Board who were not involved in the conduct. It is fundamentally unfair to impose the costs of prosecuting a few members of the profession on the other licensees who were not involved.

The Respondent is solely responsible for her behavior and she can and should be held accountable for her actions. Not only was Respondent's behavior the root cause of the commencement of this proceeding, but her lack of cooperation in ignoring the proceeding significantly contributed to the increase of costs. Accordingly, it is appropriate that the Respondent be responsible for full costs of this proceeding and these not be passed along to the members of her profession.

The parties have entered into a stipulation which included factual and legal findings as to the Respondent's conduct. The parties further agreed that the Board could impose costs of the proceedings based upon these findings. Respondent was represented by legal counsel when she entered into the stipulation. Respondent was apprised of the allegations against her by virtue of the formal complaint and was apprised of the factual basis for the findings in the stipulation.

## **MOTION TO VACATE DENIED**

In this case, because the parties reached a binding stipulation on the factual and legal findings, the Board rendered a decision in this matter without a hearing, thereby reducing the expense to the

parties of further proceedings. The Board of Nursing has issued its Final Decision and Order on the merits of this case in reliance upon the parties' stipulation. Respondent's counsel now moves to vacate the stipulation on the basis that the prosecutor failed to disclose the non-existence of a medical order.

The Board of Nursing is not persuaded by Respondent's argument. The vacating of an order or reversal of a binding act requires at a minimum the showing of a legal or factual error in the proceeding. None has been shown here. The Respondent has not shown that there was any deficiency in the stipulation itself or in the process of negotiation which led to the parties entering a stipulation. All indications are that the Respondent signed the stipulation knowingly and voluntarily.

Respondent's Motion to Vacate Stipulation is denied.

WISCONSIN BOARD OF NURSING

Marilyn A. Kaufmann, PhD, RN  
Chair

2/27/06  
Date