

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF THE DISCIPLINARY :
PROCEEDINGS AGAINST :
 : FINAL DECISION AND ORDER
MICHAEL DUANE POLIVKA, R.N., : LS 0702021 NUR
RESPONDENT. :

[Division of Enforcement Case # 06 NUR 091]

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

Michael Duane Polivka, R.N.
6310 Ashbury Drive
Wisconsin Rapids, WI 54494

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

Wisconsin Board of Nursing
Department of Regulation and Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

A Notice of Hearing and Complaint were filed and served in this matter on February 2, 2007. Prior to the hearing on the formal complaint, the parties in this matter agree to the terms and conditions of the attached Stipulation as the final decision of this matter, subject to the approval of the Board of Nursing. The Board has reviewed this Stipulation and considers it acceptable.

Accordingly, the Board adopts the attached Stipulation and makes the following:

FINDINGS OF FACT

1. Michael Duane Polivka, R.N., Respondent, date of birth July 15, 1964, is licensed by the Wisconsin Board of Nursing as a registered nurse in the state of Wisconsin pursuant to license number 98712, which was first granted February 19, 1988.
2. Respondent is licensed by the Wisconsin Board of Nursing as an advanced practice nurse prescriber in the state of Wisconsin pursuant to license number 17, which was first granted March 27, 1995.
3. Respondent's last address reported to the Department of Regulation and Licensing is 6310 Ashbury Drive, Wisconsin Rapids, WI 54494.

COUNT I

4. In March 2006, Respondent was employed as a nurse anesthetist by Anesthesia Associates and practiced at Riverview Hospital in Wisconsin Rapids, Wisconsin.
5. On March 11, 2006, Respondent was involved in a one-vehicle traffic accident in which his car hit a power pole.

- a. When officers from the Grand Rapids Police Department arrived at the scene, Respondent had a vacant stare, was not talking well and his words did not make sense.
- b. Officers noticed there was a 12cc syringe at one end of IV tubing. The other end of the tubing was connected to Respondent's arm by an IV catheter.
- c. Respondent admitted to the officers that he was self-medicating himself with Diprivan® for pain control and that he did not have an order from a practitioner for this medication.
- d. Diprivan® is a brand of propofol, an intravenous sedative-hypnotic used to induce anesthesia. An order of a practitioner is required to legally obtain or possess propofol.
- e. Respondent was arrested and received a citation for Operating a Motor Vehicle While Under the Influence.
- f. Respondent was then flown to a hospital in Marshfield for medical care.

6. The law enforcement authorities obtained a search warrant and conducted a search of Respondent's residence. Upon entering, the officers found vials, syringes and needles throughout the residence. Among other things, the following were seized:

20 ml vials of Diprivan® - 1% with a concentration of 10 mg per ml;
IV bags of Lactated Ringer's;
Diprivan® - 1%, 100 ml infusion vial with a concentration of 10 mg per ml;
12cc syringes;
Miscellaneous uncapped and used needles;
Camouflage knapsack containing numerous medical supplies including ET tubes, IV bags, Lactated Ringer's, IV start kits, IV tubing, Laryngoscope Handle and 3 Mac Blade, IV angiocatheters, Succinylcholine 200 mg, 2% Lidocaine 20 mg, Epinephrine 1:1000.

7. As a result of the police investigation, on April 3, 2006, Respondent was charged in Wood County Wisconsin Circuit Court case number 06CM308 with one count of Possess/Illegally Obtained Prescription, a Class U misdemeanor, in violation of Wis. Stat. § 450.11(7)(h). That case is pending with a trial date of March 27, 2007.

8. Wis. Stat. § 450.11(7)(h) prohibits possession of a prescription drug without a valid order of a practitioner. Respondent's possession of the propofol was in violation of this law substantially related to the practice of nursing and was the obtaining of a drug other than as allowed by law.

9. On March 13, 2006, Riverview hospital suspended Respondent's privileges pending completion of an investigation of the allegations related to the March 11 accident and subsequent police investigation.

10. Respondent received the following treatment:

- a. St. Joseph's Hospital in Marshfield from March 11 to March 13 for medical stabilization and opioid detoxification.
- b. Norwood Health Center in Marshfield from March 13 to March 21. Emergency detention because of suicide attempts and drug dependence including diversion of fentanyl beginning in December 2005.
- c. Herrington Recovery Center at Rogers Memorial Hospital in Oconomowoc for residential treatment from March 26, 2006 until discharged to the aftercare program on May 26, 2006. His discharge diagnoses included opiate dependence, sedative dependence and major depression.

COUNT II

11. Following treatment, Respondent requested that Riverview reinstate his privileges. After determining that Respondent's aftercare program included treatment and weekly random urine drug screens which included screening for fentanyl and propofol, and after instituting its own supervision policy for Respondent, Riverview agreed to reinstate Respondent's privileges. Respondent was to return to work at the hospital on Monday, July 3:

- a. Sunday evening, July 2, Respondent went to the hospital to check out the anesthesia equipment. While there, he obtained propofol and injected it. He passed out, struck his head and slept the night in the anesthesiologists' office.

b. Monday morning, Respondent was providing services as an anesthetist during a surgery. During a break in surgery, Respondent injected himself with propofol. He then returned to surgery and during the procedure, slumped over the anesthesia machine and became unconscious. Respondent took ten 20 ml vials of propofol without the order of a practitioner.

12. Respondent's conduct on July 2 and 3, 2006 was the use of a drug to the extent that it impaired Respondent's ability to safely and reliably practice.

ALL COUNTS

13. On July 21, 2005, prior to the events set out above, Respondent's physician began prescribing to Respondent Requip, .25 mg, for restless leg syndrome. Respondent continued taking the Requip throughout the events, but ceased taking it in late July 2006. Requip is a brand of ropinirole hcl, a non-ergoline dopamine agonist. Impulse control symptoms, including

compulsive behaviors, have been reported in patients treated with this medication. On February 13, 2007, Respondent was evaluated by a Madison psychiatrist who believes that the Requip was a significant contributing factor to Respondent's use of drugs set out above.

14. Respondent has voluntarily not worked as a nurse or used his advanced practice nurse prescriber license during the more than nine months that have passed since July 3, 2006, while this investigation was completed.

CONCLUSIONS OF LAW

1. The Wisconsin Board of Nursing has jurisdiction over this matter pursuant to Wis. Stat. § 441.07 and has authority to enter into this stipulated resolution of this matter pursuant to Wis. Stat. § 227.44(5).

2. Respondent, by engaging in the conduct set out in Counts I and II above, has violated laws substantially related to practice under his license and obtained a drug as prohibited by law, and has committed misconduct and unprofessional conduct as defined by Wis. Adm. Code § N 7.04(1) & (2), which subjects Respondent to discipline pursuant to Wis. Stat. § 441.07(1)(d).

3. Respondent, by engaging in the conduct set out in Count II above, has abused drugs as defined by Wis. Adm. Code § N 7.03(2), which subjects Respondent to discipline pursuant to Wis. Stat. § 441.07(1)(c).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the attached Stipulation is accepted.

IT IS FURTHER ORDERED, effective the date of this Order:

SUSPENSION

- A.1.a. The license of Michael Duane Polivka, R.N., to practice as a registered nurse in the State of Wisconsin is **SUSPENDED** for an indefinite period.
- A.1.b. The license of Michael Duane Polivka, R.N., to practice as an advanced practice nurse prescriber in the State of Wisconsin is **SUSPENDED** for an indefinite period.
- A.2. Respondent shall mail or physically deliver all indicia of nursing licensure and advanced practice nurse prescriber licensure to the Department Monitor within 14 days of the effective date of this Order.
- A.3. The privilege of Respondent to practice as a nurse in the State of Wisconsin under the authority of another state license pursuant to the Nurse Licensure Compact is also **SUSPENDED** for an indefinite period.
- A.4. During the pendency of this Order and any subsequent related orders, Respondent may not practice in another state pursuant to the Nurse Licensure Compact Regulation under the authority of the Wisconsin license, unless Respondent receives prior written authorization to do so from both the Wisconsin Board of Nursing and the regulatory board in the other state.
- A.5. Upon a showing by Respondent of continuous, successful compliance for a period of at least five (5) years with the terms of this Order, including at least 600 hours of active nursing for every year the suspension is stayed, the Board may grant a petition by the Respondent under paragraph D.4. for return of full licensures.
- A.6. The Board may, on its own motion or at the request of the Department Monitor, grant full licensures at any time.

STAY OF SUSPENSIONS

- B.1. The suspension of Respondent's registered nurse license shall be stayed upon Respondent providing proof, which is determined by the Board or its designee to be sufficient, that Respondent has been in compliance with the provisions of Sections C and D of this Order for the most recent three (3) consecutive months.
- B.2. The suspension of Respondent's advanced practice nurse prescriber license shall be stayed upon Respondent providing proof, which is determined by the Board or its designee to be sufficient, that he may practice under that license with reasonable skill and safety to patients and the public.
- B.3. The Board or its designee may, without hearing, remove the stay or stays upon receipt of information that Respondent is in substantial or repeated violation of any provision of Sections C or D of this Order. Repeated violation is defined

as the multiple violation of the same provision or violation of more than one provision. The Board may, in conjunction with any removal of any stay, prohibit the Respondent for a specified period of time from seeking a reinstatement of the stay under paragraph B.4.

- B.4. This suspension becomes reinstated immediately upon notice of the removal of the stay being provided to Respondent either by:
- (a) Mailing to Respondent's last-known address provided to the Department of Regulation and Licensing pursuant to Wis. Stat. § 440.11; or
 - (b) Actual notice to Respondent or Respondent's attorney.
- B.5. The Board or its designee may reinstate the stay, if provided with sufficient information that Respondent is in compliance with the Order and that it is appropriate for the stay to be reinstated. Whether to reinstate the stay shall be wholly in the discretion of the Board or its designee.
- B.6. If Respondent requests a hearing on the removal of the stay, a hearing shall be held using the procedures set forth in Wis. Admin. Code § RL 2. The hearing shall be held in a timely manner with the evidentiary portion of the hearing being completed within 60 days of receipt of Respondent's request, unless waived by Respondent. Requesting a hearing does not stay the suspension during the pendency of the hearing process.

CONDITIONS AND LIMITATIONS

Treatment Required

- C.1. Respondent shall enter into, and shall continue, in a drug and alcohol treatment program at a treatment facility (Treater) acceptable to the Board or its designee. Respondent shall participate in, cooperate with, and follow all treatment recommended by Treater.
- C.2. Respondent shall immediately provide Treater with a copy of this Final Decision and Order and all other subsequent orders.
- C.3. Treater shall be responsible for coordinating Respondent's rehabilitation, drug monitoring and treatment program as required under the terms of this Order, and shall immediately report any relapse, violation of any of the terms and conditions of this Order, and any suspected unprofessional conduct, to the Department Monitor (See D.1., below). If Treater is unable or unwilling to serve as Treater, Respondent shall immediately seek approval of a successor Treater by the Board or its designee.
- C.4. The rehabilitation program shall include individual and/or group therapy sessions at a frequency to be determined by Treater, but not less than twice per month for the first year. Therapy may end only upon a determination by the Board or its designee after receiving a petition for modification as required by D.4., below.
- C.5. Treater shall submit formal written reports to the Department Monitor on a quarterly basis, as directed by the Department Monitor. These reports shall assess Respondent's progress in the drug and alcohol treatment program. Treater shall report immediately to the Department Monitor any violation or suspected violation of this Order.

Releases

- C.6. Respondent shall provide and keep on file with Treater, all treatment facilities and personnel, laboratories and collections sites current releases complying with state and federal laws. The releases shall allow the Board, its designee, and any employee of the Department of Regulation and Licensing, Division of Enforcement to: (a) obtain all urine, blood and hair specimen screen results and patient health care and treatment records and reports, and (b) discuss the progress of Respondent's treatment and rehabilitation. Copies of these releases shall immediately be filed with the Department Monitor.

AA/NA Meetings

- C.7. Respondent shall attend Narcotics Anonymous and/or Alcoholic Anonymous meetings or an equivalent program for recovering professionals, at the frequency recommended by Treater, but no less than twice per week. Attendance of Respondent at such meetings shall be verified and reported monthly to Treater and the Department Monitor.

Sobriety

- C.8. Respondent shall abstain from all personal use of alcohol.
- C.9. Respondent shall abstain from all personal use of controlled substances as defined in Wis. Stat. § 961.01(4), except when prescribed, dispensed or administered by a practitioner for a legitimate medical condition. Respondent shall

disclose Respondent's drug and alcohol history and the existence and nature of this Order to the practitioner prior to the practitioner ordering the controlled substance. Respondent shall at the time the controlled substance is ordered immediately sign a release in compliance with state and federal laws authorizing the practitioner to discuss Respondent's treatment with, and provide copies of treatment records to, Treater and the Board or its designee.

- C.10. Respondent shall abstain from all use of over-the-counter medications or other substances which may mask consumption of controlled substances or of alcohol, create false positive screening results, or interfere with Respondent's treatment and rehabilitation.
- C.11. Respondent shall report all medications and drugs, over-the-counter or prescription, taken by Respondent to Treater and the Department Monitor within 24 hours of ingestion or administration, and shall identify the person or persons who prescribed, dispensed, administered or ordered said medications or drugs. If Respondent has not provided a release as required by C.9 above, within 24 hours of a request by Treater or the Board or its designee, Respondent shall provide releases in compliance with state and federal laws. The releases shall authorize the person who prescribed, dispensed, administered or ordered the medication to discuss Respondent's treatment with, and provide copies of treatment records to, the requester.

Drug and Alcohol Screens

- C.12. Respondent shall enroll and begin participation in a drug and alcohol monitoring program which is approved by the Department pursuant to Wis. Admin. Code § RL 7.11 ("Approved Program"). A list of Approved Programs is available from the Department Monitor.
- C.13. At the time Respondent enrolls in the Approved Program, Respondent shall review all of the rules and procedures made available by the Approved Program. Failure to comply with all requirements for participation in drug and alcohol monitoring established by the Approved Program is a substantial violation of this Order. The requirements shall include:
- (a.) Contact with the Approved Program as directed on a daily basis, including vacations, weekends and holidays.
 - (b.) Production of a urine specimen at a collection site designated by the Approved Program within five (5) hours of notification of a test.
- C.14. The Approved Program shall require the testing of urine specimens, **including testing for fentanyl and propofol**, at a frequency of not less than 56 times per year, for the first year of this Order. After the first year, the frequency may be reduced only upon a determination by the Board or its designee after receiving a petition for modification as required by D.4., below.
- C.15. If any urine, blood or hair specimen is positive or suspected positive for any controlled substances or alcohol, Respondent shall promptly submit to additional tests or examinations as the Treater or the Board or its designee shall determine to be appropriate to clarify or confirm the positive or suspected positive test results.
- C.16. In addition to any requirement of the Approved Program, the Board or its designee may require Respondent to do any or all of the following: (a) submit additional urine specimens, (b) submit blood, hair or breath specimens, (c) furnish any specimen in a directly witnessed manner.
- C.17. All confirmed positive test results shall be presumed to be valid. Respondent must prove by a preponderance of the evidence an error in collection, testing or other fault in the chain of custody.
- C.18. The Approved Program shall submit information and reports to the Department Monitor in compliance with the requirements of Wis. Admin. Code § RL 7.11.

Practice Limitations

- C.19. Respondent shall not work as a nurse or other health care provider in a setting in which Respondent has access to controlled substances and shall not prescribe or order controlled substances.
- C.20a. Respondent shall practice only under the direct supervision of a licensed nurse or other licensed health care professional approved by the Board or its designee and only in a work setting pre-approved by the Board or its designee. Respondent may not work in a home health care, hospice, pool nursing, or agency setting.
- C.20b. If the Board shall modify paragraph C.19. to allow Respondent to work in a setting in which he has access to controlled substances, to prescribe controlled substances or order controlled substances, **Respondent may not practice as a nurse-anesthetist without specific approval of the Board. After one year of continuous successful practice under this Order, and with the support of his therapist and employer, Respondent may petition for such permission. Such petition shall be accompanied by a plan from the prospective employer to prevent and detect any diversion and shall include a requirement that all wasting be witnessed and documented by another professional nurse or a physician, daily reconciling of the controlled substances**

record verified by another professional nurse or a physician, and no access to controlled substances other than those actually needed for Respondent's patients. The Board may require a personal appearance in conjunction with such a petition. If such request is granted, Respondent's urine screens will initially be at the rate of at least 106 per year. Respondent may petition for a reduction in this number after six months of continuous practice as a nurse-anesthetist.

- C.21. Respondent shall provide a copy of this Final Decision and Order and all other subsequent orders immediately to supervisory personnel at all settings where Respondent works as a nurse or care giver or provides health care, currently or in the future.
- C.22. It is Respondent's responsibility to arrange for written reports from supervisors to be provided to the Department Monitor on a quarterly basis, as directed by the Department Monitor. These reports shall assess Respondent's work performance, and shall include the number of hours of active nursing practice worked during that quarter.
- C.23. Respondent shall report to the Board any change of employment status, residence, address or telephone number within five (5) days of the date of a change.

MISCELLANEOUS

Department Monitor

- D.1. Any requests, petitions, reports and other information required by this Order shall be mailed, e-mailed, faxed or delivered to:

Department Monitor
Wisconsin Department of Regulation and Licensing
Division of Enforcement
1400 East Washington Ave.
P.O. Box 8935
Madison, WI 53708-8935
Fax: (608) 266-2264
Telephone: (608) 267-3817
department.monitor@drl.state.wi.us

Required Reporting by Respondent

- D.2. Respondent is responsible for compliance with all of the terms and conditions of this Order, including the timely submission of reports by others. Respondent shall promptly notify the Department Monitor of any failures of the Treater, treatment facility, Approved Program or collection sites to conform to the terms and conditions of this Order. Respondent shall promptly notify the Department Monitor of any violations of any of the terms and conditions of this Order by Respondent. Additionally, every three (3) months, Respondent shall notify the Department Monitor of the Respondent's compliance with the terms and conditions of the Order, and shall provide the Department Monitor with a current address and home telephone number.

Change of Treater or Approved Program by Board

- D.3. If the Board or its designee determines the Treater or Approved Program has performed inadequately or has failed to satisfy the terms and conditions of this Order, the Board or its designee may direct that Respondent continue treatment and rehabilitation under the direction of another Treater or Approved Program.

Petitions for Modification of Limitations or Termination of Order

- D.4. Respondent may petition the Board for modification of the terms of this Order or termination, however no such petition for modification shall occur earlier than one year from the date of this Order and no such petition for termination shall occur other than in compliance with paragraph A.3. Any such petition for modification shall be accompanied by a written recommendation from Respondent's Treater expressly supporting the specific modifications sought. Denial of a petition in whole or in part shall not be considered a denial of a license within the meaning of Wis. Stat. § 227.01(3)(a), and Respondent shall not have a right to any further hearings or proceedings on the denial.

Costs of Compliance

- D.5. Respondent shall be responsible for all costs and expenses incurred in conjunction with the monitoring, screening, supervision and any other expenses associated with compliance with the terms of this Order. Being dropped from a

program for non-payment is a violation of this Order.

Costs of Proceeding

D.6. Respondent shall pay costs of \$1,820.00 to the Department of Regulation and Licensing within 90 days of this Order. In the event Respondent fails to timely submit any payment of costs, Respondent's licenses SHALL BE SUSPENDED without further notice or hearing, until Respondent has complied with the terms of this Order.

Additional Discipline

D.7. In addition to any other action authorized by this Order or law, violation of any term of this Order may be the basis for a separate disciplinary action pursuant to Wis. Stat. § 441.07.

Wisconsin Board of Nursing

By: Marilyn Kaufmann
A Member of the Board

4/19/07
Date

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF THE DISCIPLINARY :
PROCEEDINGS AGAINST :
 :
MICHAEL DUANE POLIVKA, R.N., : STIPULATION
RESPONDENT. : LS 0702021 NUR

[Division of Enforcement Case # 06 NUR 091]

It is hereby stipulated and agreed, by and between Michael Duane Polivka, R.N., Respondent; Robert J. DeBauche o Hal Harlowe & Associates, S.C., attorneys for Respondent; and John R. Zweg, attorney for the Complainant, Department o Regulation and Licensing, Division of Enforcement, as follows:

1. This Stipulation is entered into as a result of a pending disciplinary proceeding against Respondent's licensure by the Division of Enforcement (DOE file 06 NUR 091). Respondent consents to the resolution of this investigation by stipulation and without the issuance of a formal complaint.

2. Respondent understands that by signing this Stipulation, he voluntarily and knowingly waives his rights, including the right to a hearing on the allegations against him, at which time the state has the burden of proving those allegations by a preponderance of the evidence; the right to confront and cross-examine the witnesses against him; the right to call witnesses on his behalf and to compel their attendance by subpoena; the right to testify himself; the right to file objections to any proposed decision and to present briefs or oral arguments to the officials who are to render the final decision; the right to petition for rehearing; and all other applicable rights afforded to him under the United States Constitution, the Wisconsin Constitution, the Wisconsin Statutes, the Wisconsin Administrative Code, and any other provisions of state or federal law.

3. Respondent has obtained advice of legal counsel prior to signing this Stipulation.

4. Respondent neither admits nor denies the allegations in this matter but agrees to the adoption of the attached Final Decision and Order by the Board. The parties to the Stipulation consent to the entry of the attached Final Decision and Order without further notice, pleading, appearance or consent of the parties. Respondent waives all rights to any appeal of the Board's Order, if adopted in the form as attached.

5. If the terms of this Stipulation are not acceptable to the Board, the parties shall not be bound by the contents of this Stipulation, and the matter shall be returned to the Division of Enforcement for further proceedings. In the event that this Stipulation is not accepted by the Board, the parties agree not to contend that the Board has been prejudiced or biased in any manner by consideration of this attempted resolution.

6. Attached to this Stipulation are Respondent's current wall and wallet registration certificates. If the Board accepts the Stipulation, upon issuance of an Order, Respondent's license may be reissued pursuant to the terms of the Order. If the Board does not accept this Stipulation, Respondent's certificates shall be returned to the Respondent with a notice of the Board's decision not to accept the Stipulation.

7. The parties to this Stipulation agree that the attorney or other agent for the Division of Enforcement and any member of the Board ever assigned as a case advisor in this investigation may appear before the Board in open or closed session, without the presence of Respondent or his attorney, if any, for purposes of speaking in support of this agreement and answering questions that any member of the Board may have in connection with the Board's deliberations on the Stipulation. Additionally, any such case advisor may vote on whether the Board should accept this Stipulation and issue the attached Final Decision and Order.

8. Respondent is informed that should the Board adopt this Stipulation, the Board's Final Decision and Order is a public record and will be published in accordance with standard Department procedure.

9. The Division of Enforcement joins Respondent in recommending the Board adopt this Stipulation and issue the attached Final Decision and Order.

Michael Duane Polivka, R.N.
Respondent
6310 Ashbury Drive
Wisconsin Rapids, WI 54494

Date

Robert J. DeBauche
Hal Harlowe & Associates, S.C.
Attorneys for Respondent
519 N. Pinckney Street
Madison, WI 53703-1473

Date

John R. Zwiig
Attorney for Complainant
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Date