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STATE OF WISCONSIN
BEFORE THE HEARING AND SPEECH EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
ALFRED L. MILLER,	:	LS0712181HAD
RESPONDENT.	:	

Division of Enforcement Case No. 05HAD003

The State of Wisconsin, Hearing and Speech Examining Board, 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, Hearing and Speech Examining Board.

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 14th day of July, 2008.

Okie E. Allen
Member of the Board
Hearing and Speech Examining Board

STATE OF WISCONSIN
BEFORE THE HEARING AND SPEECH EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY :
ACTION AGAINST :

PROPOSED DECISION
AND ORDER
Case No.

LS0712181HAD

ALFRED L. MILLER,
RESPONDENT.

[DOE Case No. 05HAD003]

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

Alfred L. Miller
10731 W. Forest Home Avenue
Hales Corners, WI 53130

Hearing and Speech Examining Board
P.O. Box 8935
Madison, WI 53708-8935

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

PROCEDURAL HISTORY

A hearing in the above-captioned matter was held on March 26, 2008, before Administrative Law Judge Jacquelynn B. Rothstein. The Division of Enforcement appeared by attorney James E. Polewski. Mr. Miller did not appear.

Based on the entire record in this case, the undersigned administrative law judge recommends that the Hearing and Speech Examining Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Alfred L. Miller (dob 5/27/30) was licensed as a hearing instrument specialist in Wisconsin on December 3, 1984 (License No. 60). The license expired on January 31, 2005. Mr. Miller may renew the license by payment of a fee.
2. Mr. Miller was also licensed as an audiologist in Wisconsin on November 9, 1993 (License No. 156). The license expired on January 31, 2007. Mr. Miller may renew the license by payment of a fee.
3. Mr. Miller's most recent address on record with the Hearing and Speech Examining Board is 10731 W. Forest Home Avenue located in Hales Corners, Wisconsin.
4. On March 7, 2005, the Division of Enforcement received an informal complaint regarding Mr. Miller's practice in conducting a hearing examination with Client S.D. as well as the selling and fitting of a hearing instrument for Client S.D.
5. On March 28, 2005, the Division of Enforcement sent a letter to Mr. Miller at his address of record with the Hearing and Speech Examining Board, requesting his records for Client S.D. The letter indicated that the Division of Enforcement was working on behalf of the Hearing and Speech Examining Board and also identified Client S.D. by full first and last name, and by date of birth. The letter further requested that Mr.

Miller provide a copy of the calibration certificates for his equipment for the preceding five years.

6. Mr. Miller did not reply to the request of March 28, 2005.
7. On May 11, 2005, the Division of Enforcement sent another copy of the March 28, 2005, request to Mr. Miller at his address of record.
8. Mr. Miller did not reply to the second request of May 11, 2005.
9. Two additional written requests were sent to Mr. Miller by mail on August 15, 2005, and again on September 16, 2005. Both requests were sent to Mr. Miller's address of record.
10. Mr. Miller did not reply to either the August or September 2005 requests for his records.
11. On January 30, 2006, the Division of Enforcement mailed the same request to Mr. Miller at his address of record.
12. On March 1, 2007, the Division of Enforcement received, by certified mail, a packet containing four certificates of completion of continuing education dated 2005, 2006, and 2007, purporting to show that Mr. Miller had completed some continuing education.
13. On September 21, 2007, the Division of Enforcement sent another letter requesting Client S.D.'s records, identifying her by her full name. The letter also requested certificates of calibration for Mr. Miller's audiometric equipment, and asked for a reply by October 21, 2007. The letter was sent via certified mail.
14. On September 26, 2007, the Division of Enforcement received the signed receipt indicating that the Division of Enforcement letter dated October 21, 2007, had been delivered to Mr. Miller's business address.
15. Mr. Miller did not reply to the request of September 26, 2007, for his records or his certificates of calibration of his audiometric equipment.

CONCLUSIONS OF LAW

1. The Hearing and Speech Examining Board has jurisdiction in this matter pursuant to §§ 459.10 and 459.34, Wis. Stats.
2. By failing to file an Answer as required by § RL 2.09, Wis. Admin. Code, and by failing to appear at the hearing, Mr. Miller is in default under § RL 2.14, Wis. Admin. Code, and the Hearing and Speech Examining Board may make Findings and enter an Order on the basis of the Complaint and evidence presented at the hearing.
3. By engaging in the conduct as set forth in Findings of Fact #5-15, Mr. Miller has committed unprofessional conduct contrary to § HAS 5.02 (2) (a), Wis. Admin. Code.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that effective the date this Order is signed the licenses of Alfred L. Miller to practice as an audiologist and as a hearing instrument specialist in the State of Wisconsin are **REVOKED**.

IT IS FURTHER ORDERED that the assessable costs of this proceeding be imposed upon Alfred L. Miller, pursuant to sec. 440.22, Wis. Stats.

OPINION

Section RL 2.14 of the Wisconsin Administrative Code provides that if a respondent fails to answer a complaint or fails to appear at a hearing, he or she 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.

A Notice of Hearing and Complaint were sent to Mr. Miller by regular U.S. mail and by certified mail at his last known address on file with the Wisconsin Department of Regulation and Licensing on December 17, 2007. However, Mr. Miller did not file an Answer to the above-captioned complaint, nor did he appear at the scheduled hearing on March 26, 2008. As a result, Mr. Miller is in default and has effectively admitted all of the allegations contained in the complaint. More specifically, Mr. Miller has repeatedly refused to cooperate with the investigation conducted by the Division of Enforcement on behalf of the Hearing and Speech Examining Board in response to a complaint received in March of 2005.

On March 7, 2005, the Division of Enforcement (Division) received a complaint regarding Mr. Miller's practice in conducting a hearing examination with Client S.D. The complaint also identified concerns surrounding the selling and fitting of a hearing instrument for Client S.D. by Mr. Miller. Following the receipt of the complaint, the Division of Enforcement sent six separate letters to Mr. Miller seeking further information from him. See Ex. 3-6 and 8. The letters requested that Mr. Miller provide patient records concerning Client S.D. and calibration certificates for the last five years. The letter dated September 21, 2007, sent by certified mail to Mr. Miller, also requested specific information about the hearing aid sold to this client and his reason for choosing that particular model.

To date, Mr. Miller has provided no meaningful or substantive response to these requests. Instead, he has supplied the Division of Enforcement with certificates of completion from professional educational courses. See Ex. 7. Whether Mr. Miller believes those certificates are actually responsive to the request for *calibration certificates* or whether he was being intentionally evasive is unknown. (Emphasis added) Regardless, he has consistently and repeatedly failed to provide basic information that he should have had readily at hand. Not only has Mr. Miller been uncooperative with the multiple requests for information that originated with the Division of Enforcement, he has also been uncooperative with the undersigned in appearing at prehearing conferences and at the evidentiary hearing. A Notice of Prehearing was sent to Mr. Miller on or about January 8, 2008. The Notice of Prehearing set forth January 17, 2008, as the date of the prehearing and also directed Mr. Miller to contact the undersigned at a telephone number at which he could be reached. Mr. Miller did not respond to the Notice of Prehearing nor did he participate in the prehearing conference call held on January 17, 2008.

Thereafter, the undersigned issued a Memorandum and Order dated March 7, 2008, in which Mr. Miller was directed to appear at the evidentiary hearing to be held on March 12, 2008. On March 11, 2008, the prosecuting attorney, Mr. James E. Polewski, provided the undersigned with a copy of an excuse form from Aurora Health Care indicating that Mr. Miller had a left humerus fracture and that he was unable to drive. Implicit in the medical excuse was a request from Mr. Miller to delay the evidentiary hearing. However, Mr. Miller did not request a postponement from the undersigned. Over the written objections of Mr. Polewski, the undersigned granted the postponement and the evidentiary hearing was rescheduled to March 26, 2008.

Mr. Miller next sent a "Recommendations to Return to Work" form to Mr. Polewski on or about March 25, 2008. See Ex. 10. Mr. Polewski again supplied a copy of that form to the undersigned. The form reiterated that Mr. Miller was unable to drive, but it did not indicate that Mr. Miller was unable to participate in legal proceedings or to ride in a vehicle as a passenger to the hearing site. In response to the form, the undersigned attempted to contact Mr. Miller by telephone on March 25, 2008. Calls were placed both at Mr. Miller's work number and at what was believed to be his home number. Messages were left at both numbers for Mr. Miller to contact the undersigned immediately. Mr. Miller did not respond. The evidentiary hearing was held as scheduled on March 26, 2008. Mr. Miller contacted the undersigned by telephone on March 27, 2008. During that telephone

conversation in which Mr. Polewski was also present, Mr. Miller was advised by the undersigned that he had missed the evidentiary hearing and that there would be a proposed decision and order issued in spite of his absence.

For the past three years, Mr. Miller has been unresponsive to repeated requests from the Division of Enforcement to supply basic information about a single client. He has also failed to provide the Division with calibration records. It appears as if Mr. Miller was once again engaging in similar dilatory tactics with the tribunal by failing to have direct contact with the undersigned, by failing to supply a telephone number at which he could be reached, by failing to appear at the prehearing conference, and by failing to appear at the evidentiary hearing.

By his failure to both answer the complaint and to appear at the evidentiary hearing, Mr. Miller has effectively admitted all of the allegations contained in the complaint; the question therefore remains as to what the appropriate form of discipline is for him. Revocation of both his licenses has been recommended. 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).

Mr. Miller's unresponsiveness and his lack of cooperation suggest that he is not interested in being rehabilitated at this time. By revoking Mr. Miller's licenses, he will not be able to practice as either an audiologist or a hearing instrument specialist and will not pose a risk or act as a threat to the public, thereby adequately protecting their interests. Revocation will also serve to deter others from engaging in similar conduct. Consequently, revocation is an appropriate imposition of discipline and will act as a sufficient means of safeguarding the public.

The imposition of costs against Mr. Miller has also been recommended. 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 Mr. Miller is a discretionary decision on the part of the Hearing and Speech Examining Board (Board). It further suggests that the Board's discretion extends to whether to assess the full costs or only a portion of the costs.

The administrative law judge's recommendation and the Board's decision as to whether the full costs of the proceeding should be assessed against the credential holder, like the supreme court's decision whether to assess the full costs of disciplinary proceedings against attorneys, is based on the consideration of several factors, including:

- 1) The number of counts charged, contested, and proven;
- 2) The nature and seriousness of the misconduct;
- 3) The level of discipline sought by the parties;
- 4) The respondent's cooperation with the disciplinary process;
- 5) Prior discipline, if any;
- 6) The fact that the Department of Regulation and Licensing is a "program revenue" agency, whose operating costs are funded by the revenue received from licensees, and the fairness of imposing the costs of disciplining a few

members of the profession on the vast majority of the licensees who have not engaged in misconduct; and

- 7) Any other relevant circumstances.

See Supreme Court Rule 22.24 (1m).

Under the circumstances of this case, it is reasonable to assess the full costs of this proceeding to Mr. Miller. Mr. Miller repeatedly flouted the jurisdiction of the Hearing and Speech Examining Board by failing to respond to multiple requests for information over a period of three years. He failed to participate in scheduled proceedings before the tribunal and did not appear for his evidentiary hearing. Because Mr. Miller not only failed to file an answer to the complaint but also failed to appear at the evidentiary hearing, he has effectively admitted all of the allegations contained in the complaint.

Additionally, in a program revenue agency the costs of prosecuting cases for a particular licensed profession are borne by the licensed members of that profession. Most regulatory boards have found that 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, the more prevalent view has been that the licensee should bear the costs of the proceeding. Such is the case with Mr. Miller. His contumacious actions demonstrate his lack of respect not only for the tribunal, but also for the Board and the purposes for which it stands. Mr. Miller has only himself to blame for the majority of the costs associated with this action and he should therefore bear them in full.

Dated at Madison, Wisconsin, this 2nd day of April, 2008.

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Jacquelynn B. Rothstein
Administrative Law Judge