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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

:

:

FINAL DECISION

:

AND ORDER

MELINDA A. SMITH, R.N.,
RESPONDENT.

:

:

LS0801221NUR

Division of Enforcement Case No. 07NUR122

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 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 24th day of July, 2008.

Marilyn Kaufmann
Member of the Board
Board of Nursing

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS

MELINDA A. SMITH, R.N.

RESPONDENT.

PROPOSED FINAL DECISION
AND ORDER

Case No. LS 0801221 NUR

DOE case # 07 NUR 122

PARTIES

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

Melinda A. Smith, R.N.
1353 Clarence St.
St. Paul, MN 55106

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

Wisconsin Board of Nursing
Wisconsin Department of Regulation and Licensing
P.O. Box 8935
Madison, Wisconsin 53708-8935

PROCEDURAL HISTORY

A motion for default in the above-captioned matter was held on April 30, 2008, before Administrative Law Judge William A. Black. The Division of Enforcement appeared by Attorney Arthur Thexton. The respondent, Melinda Smith, 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. Melinda A. Smith is and was at all times relevant to the facts set forth herein a professional nurse licensed in the State of Wisconsin pursuant to license #124727. This license was first granted 10/28/96. Respondent is also licensed in Minnesota. Her address of record is 1353 Clarence St., St. Paul, MN 55106.
2. On 3/26/07, and while employed as a professional nurse at the Hudson Hospital, Hudson, Wisconsin, respondent documented that she withdrew a Schedule II opioid from stock, which was not documented as being administered to any patient, and was in fact retained by her for later use. On 3/22/07 or 3/26/07, respondent opened a container of used sharps, and removed a container of Propofol®, without consent or authority.
3. On 8/2/07, respondent was disciplined by the Minnesota Board of Nursing for the following, among other things: practicing beyond the scope of nursing, failing to monitor a patient’s oxygen saturation level, practicing below the standard of care for nurses, sleeping

while on duty, and practicing while impaired by prescribed opioids for persistent pain. Her license was suspended but the suspension was stayed provided that she complied with treatment and other conditions.

CONCLUSIONS OF LAW

1. The Wisconsin Board of Nursing has jurisdiction over this matter, pursuant to Wis. Stat., § 441.07.
2. By failing to file an Answer as required by Wis. Admin. Code § RL 2.09, and by failing to appear at the default hearing, the respondent is in default under Wis. Admin. Code § RL 2.14, and the Board of Nursing may make findings and enter an order on the basis of the Complaint and the evidence presented at the hearing.
3. The conduct described in Findings of Fact paragraphs 2 and 3, above, violated Wis. Stat., § 441.07(1) and Wis. Admin. Code §§ N 7.03(2) and N 7.04(1), (2), (7), and (15). Such conduct constitutes unprofessional conduct within the meaning of the Code and statutes.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the respondent's license for practice as a registered nurse in Wisconsin, number #124727, is **SUSPENDED**.

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 complaint, nor did she appear at the scheduled default hearing. As a result, the motion for a default judgment was granted at the time of the hearing.

The Division of Enforcement requested that the discipline to be imposed should be revocation. The rationale for revocation was that the respondent has been unwilling to cooperate in the investigation of this matter, evidenced ultimately by the failure to respond to the complaint. This type of rationale applies, in theory, because in cases of this type which involve drug diversion, without other aggravating factors, typically a cooperative respondent will agree to being placed on a monitoring order, showing willingness for rehabilitation. Without such cooperation revocation looms instead.

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). So, it is acknowledged that revocation may oftentimes be the best form of public protection for a defaulted respondent in a case involving drug diversion. However, I do not feel revocation is warranted in this instance.

Placed into evidence, Exhibit 2, was the August 2, 2007, order from the Minnesota Board of Nursing in which the respondent admitted the conduct charged in this complaint, paragraphs 6 and 7, and such conduct was considered by that board in adopting a monitoring order for the respondent which is substantially similar to the form used by the Wisconsin Board of Nursing. So, while it is true that the respondent could have been more forthcoming in this forum, she is addressing the serious

issue of rehabilitation through the Minnesota order. In this day and age where a person may hold more than one credential among several jurisdictions for practicing the same profession, it may be difficult if not impossible to fully comply with a separate monitoring order in every jurisdiction.

By suspending the respondent here, the public will be protected in Wisconsin. Revocation is not necessary in this case because the respondent will have the ability to demonstrate rehabilitation in Minnesota. If and when the respondent returns to Wisconsin, the burden will be on her to work out a suitable practice arrangement in Wisconsin, if possible. There is no additional substantive benefit to the citizens of Wisconsin by placing a revocation on the respondent's record in this state while she is working toward rehabilitation in another state.

Costs

Wis. Stat. § 440.22(2) provides in relevant 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.

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 and the Board of Nursing'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 disciplined attorneys, see Supreme Court Rule 22.24(1m), 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.

The respondent by nature of her being in default has not presented any evidence regarding any of the above factors that would mitigate the imposition of the full costs of this proceeding. To the contrary, the conduct was of serious nature, drug diversion, and more serious administrative sanctions were sought. The factual allegations were all proven and there is no argument to apportion any counts that were unproven, (being none), or that certain factual findings were investigated and litigated that were unnecessary. Given 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, fairness here dictates of imposing the costs of disciplining the respondent upon the respondent and not fellow members of the nursing profession who have not engaged in such conduct.

Date: May 21, 2008

Administrative Law Judge

SmithPropDec5-16-08WAB