

WISCONSIN DEPARTMENT OF REGULATION & LICENSING



Wisconsin Department of Regulation & Licensing Access to the Public Records of the Reports of Decisions

This Reports of Decisions document was retrieved from the Wisconsin Department of Regulation & Licensing website. These records are open to public view under Wisconsin's Open Records law, sections 19.31-19.39 Wisconsin Statutes.

Please read this agreement prior to viewing the Decision:

- The Reports of Decisions is designed to contain copies of all orders issued by credentialing authorities within the Department of Regulation and Licensing from November, 1998 to the present. In addition, many but not all orders for the time period between 1977 and November, 1998 are posted. Not all orders issued by a credentialing authority constitute a formal disciplinary action.
- Reports of Decisions contains information as it exists at a specific point in time in the Department of Regulation and Licensing data base. Because this data base changes constantly, the Department is not responsible for subsequent entries that update, correct or delete data. The Department is not responsible for notifying prior requesters of updates, modifications, corrections or deletions. All users have the responsibility to determine whether information obtained from this site is still accurate, current and complete.
- There may be discrepancies between the online copies and the original document. Original documents should be consulted as the definitive representation of the order's content. Copies of original orders may be obtained by mailing requests to the Department of Regulation and Licensing, PO Box 8935, Madison, WI 53708-8935. The Department charges copying fees. *All requests must cite the case number, the date of the order, and respondent's name as it appears on the order.*
- Reported decisions may have an appeal pending, and discipline may be stayed during the appeal. Information about the current status of a credential issued by the Department of Regulation and Licensing is shown on the Department's Web Site under "License Lookup." The status of an appeal may be found on court access websites at: <http://ccap.courts.state.wi.us/InternetCourtAccess> and <http://www.courts.state.wi.us/wscqa>.
- Records not open to public inspection by statute are not contained on this website.

By viewing this document, you have read the above and agree to the use of the Reports of Decisions subject to the above terms, and that you understand the limitations of this on-line database.

Correcting information on the DRL website: An individual who believes that information on the website is inaccurate may contact the webmaster at web@drl.state.wi.gov

STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
DEMETRIUS D. WHITEHEAD, L.P.N.,	:	LS0802211NUR
RESPONDENT.	:	

Division of Enforcement Case No. 07NUR273

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 4th day of September, 2008.

Marilyn Kaufmann
Member of the Board
Board of Nursing

IN THE MATTER OF THE DISCIPLINARY	:	PROPOSED FINAL DECISION
PROCEEDINGS AGAINST	:	AND ORDER
	:	
DEMETRIUS D. WHITEHEAD, L.P.N.,	:	LS-0802211- NUR
RESPONDENT.	:	

[Division of Enforcement Case # 07 NUR 273]

PARTIES

The parties in this matter for purposes of Wis. Stat. s. 227.53 are:

Complainant:

Division of Enforcement
Department of Regulation and Licensing
1400 East Washington Ave.
Madison, WI 53703

Respondent:

Demetrius D. Whitehead, L.P.N.
4635 South 20th Street, Apt. 217
Milwaukee, WI 53221

Disciplinary Authority:

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

PROCEDURAL HISTORY

This is a disciplinary action against Demetrius D. Whitehead, L.P.N. On February 21, 2008, complainant mailed a copy of the Notice of Hearing and complaint to the respondent by certified and first class mail. The respondent has failed to file an answer or other responsive pleading. The complainant filed a Motion for Default on April 17, 2008. A hearing was held on April 22, 2008. Complainant was present but respondent was neither present nor was he represented. No witnesses were called. The decision is made on the record.

FINDINGS OF FACT

1. Demetrius D. Whitehead, L.P.N., respondent, date of birth July 15, 1974, is licensed by the Wisconsin Board of Nursing as a licensed practical nurse in the State of Wisconsin pursuant to license number 305445, which was first granted April 14, 2005.

2. Respondent's address of record with the Department of Regulation and Licensing is 4635 S. 20th Street, Apt. 217, Milwaukee, WI 53221.

3. At the time of the events set out below, respondent was employed as a licensed practical nurse at Beverly Living Center-South Shore, a nursing home in St. Francis, Wisconsin.

4. On July 19, 2007, an unidentified woman entered Beverly Living Center-South Shore and left an envelope containing medications she later said respondent had stolen from residents at the facility.

5. Among the medications in the envelope were Darvocet and Vicodin, which are controlled substances. Also included was a sealed packet of penicillin, purportedly prescribed to KC. KC had been a resident at Beverly Living Center-South Shore, but died on June 13, 2007.

6. On July 19, 2007, respondent's employer requested and respondent submitted to a urinalysis. The sample respondent provided was determined to be invalid as the sample was cold and lighter in color than urine respondent had left in the toilet bowl.

7. On July 19, 2007, St. Francis police interviewed respondent. Respondent denied that he took medications from his workplace and stated that he kept pills from his own old and unused prescriptions, as well as from his parents' old and unused prescriptions.

8. With regard to the medications presented at his work place, respondent claimed that a former girlfriend was setting him up. However, he acknowledged that some of the medications that had been in his possession "were missing," including a blister-pack of penicillin belonging to KC. Respondent said he found the penicillin in the parking lot at work and had intended to return them, but forgot and kept them at his apartment.

9. Respondent denied that he had any drug addiction issues.

10. On July 19, 2007, respondent consented to a search of his residence. In respondent's bedroom closet, police found a decorative red box containing a number of pills. The pills have been identified to include Ultram (tramadol), Vicodin (hydrocodone) and Percocet (oxycodone).

11. Pursuant to Wis. Stats. s. 961.16(2)(a)7 and 11, hydrocodone and oxycodone are schedule II controlled substances.

12. A valid prescription, in the possessor's name, is required for lawful possession of schedule II controlled substances. See Wis. Stat. §. 961.41(3g).

13. On July 19, 2007, respondent did not have prescriptions in his name for penicillin, Vicodin or Percocet.

14. On February 21, 2008, the complainant filed and served the respondent with a Complaint and Notice of Hearing by certified and first class mail. They were mailed to the respondent's last address on file with the Department of Regulation and Licensing (department). The certified copy was returned on March 18, 2008, marked "return to sender, Whitehead moved, left no address, unable to forward". The copy of the Complaint sent by first class mail was returned on March 20, 2008, with the same message marked on the envelope.

15. The Administrative Law Judge served a Notice of Pre-Hearing and of Hearing on the respondent by first class mail on February 21, 2008, to respondent's last address on file with the department. That mail was returned on March 14, 2008, with the same message stated in #14 above.

16. The department has not received an answer or any other correspondence from the respondent. The respondent did not attend the scheduled pre-hearing conference or the hearing.

CONCLUSIONS OF LAW

1. The Wisconsin Board of Nursing has jurisdiction to act in this matter, pursuant to Wis. Stats. s. 440.03(1) and 441.07.
2. By failing to file an Answer as required by Wis. Admin. Code s. RL 2.09, respondent is in default under Wis. Admin. Code s. RL 2.14, and the facts stated in the Complaint are admitted. Wis. Admin. Code s. RL 2.09. Therefore, the Board of Nursing may make findings and enter an Order based solely on the facts in the Complaint.
3. Findings of Fact 10 through 13 constitute misconduct and unprofessional conduct by the respondent within the meaning of Wis. Adm. Code s. N 7.04(2) and is subject to discipline pursuant to Wis. Stat. s. 441.07(1)(d).
4. The respondent received proper notice of this action from the department when the Division of Enforcement mailed a copy of the Notice of Hearing and Complaint to the respondent's last known address on record with the Department.

ORDER

THEREFORE, IT IS ORDERED that the license of respondent Demetrius D. Whitehead to practice as a Licensed Professional Nurse in the State of Wisconsin is **SUSPENDED INDEFINITELY**. 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 INDEFINITELY**.

IT IS FURTHER ORDERED that the respondent may not petition the Board of Nursing for a stay of the suspension, or reinstatement of his license until one year after the effective date of this Order.

IT IS FURTHER ORDERED that the respondent shall submit with any application for a stay or for reinstatement, a current alcohol and drug assessment, performed by a provider approved by the department monitor.

IT IS FURTHER ORDERED that the respondent Demetrius D. Whitehead pay the costs of this proceeding, as authorized by Wis. Stat. s. 440.22(2), and Wis. Admin. Code s. RL 2.18. Payment shall be made payable to the Wisconsin Department of Regulation Licensing, and mailed to:

Department Monitor
Division of Enforcement
Department of Regulation and Licensing
PO Box 8935
Madison, WI 53708-8935

This Order is effective on the date it is signed by a designee of the Board of Nursing.

APPLICABLE LAW

440.11 Change of name or address.

(1) An applicant for or recipient of a credential who changes his or her name or moves from the last address provided to the department shall notify the department of his or her new name or address within 30 days of the change in writing or in accordance with other notification procedures approved by the department.

(2) The department or any examining board, affiliated credentialing board or board in the department may serve any process, notice or demand on the holder of any credential by mailing it to the last-known address of the holder as indicated in the records of the department, examining board, affiliated credentialing board or board.

441.07 Revocation.

(1) The board may, after disciplinary proceedings conducted in accordance with rules promulgated under [s. 440.03 \(1\)](#), revoke, limit, suspend or deny renewal of a license of a registered nurse, a nurse-midwife or a licensed practical nurse, may revoke, limit, suspend or deny renewal of a certificate to prescribe drugs or devices granted under [s. 441.16](#), or may reprimand a registered nurse, nurse-midwife or licensed practical nurse, if the board finds that the person committed any of the following:

(d) Misconduct or unprofessional conduct.

RL 2.08 Service and filing of complaint, notice of hearing and other papers.

(1) The complaint, notice of hearing, all orders and other papers required to be served on a respondent may be served by mailing a copy of the paper to the respondent at the last known address of the respondent or by any procedure described in s. 801.14(2), Stats. Service by mail is complete upon mailing.

RL 2.09 Answer (1) An answer to a complaint shall state in short and plain terms the defenses to each cause asserted and shall admit or deny the allegations upon which the complainant relies. If the respondent is without knowledge or information sufficient to form a belief as to the truth of the allegation, the respondent shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. The respondent shall make denials as specific denials of designated allegations or paragraphs but if the respondent intends in good faith to deny only a part or a qualification of an allegation, the respondent shall specify so much of it as true and material and shall deny only the remainder.

(2) The respondent shall set forth affirmatively in the answer any matter constituting an affirmative defense.

(3) Allegations in a complaint are admitted when not denied in the answer.

4) An answer to a complaint shall be filed within 20 days from the date of service of the complaint.

RL 2.14 Default. If the respondent fails to answer as required by [s. RL 2.09](#) or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence. The disciplinary authority may, for good cause, relieve the respondent from the effect of such findings and permit the respondent to answer and defend at any time before the disciplinary authority enters an order or within a reasonable time thereafter.

N 7.04 Misconduct or unprofessional conduct. As used in s. 441.07(1)(d), Stats., “misconduct or unprofessional conduct” means any practice or behavior which violates the minimum standards of the profession necessary for the protection of the health, safety, or welfare of a patient or the public. “Misconduct or unprofessional conduct” includes, but is not limited to, the following:

(2) Administering, supplying or obtaining any drug other than in the course of legitimate practice or as otherwise prohibited by law;



961.16 Schedule II. Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed in schedule II:

(2)(a).....

7. Hydrocodone, also known as dihydrocodeinone.....

11. Oxycodone.

961.41 Prohibited acts A – penalties

(3g) Possession. No person may possess or attempt to possess a controlled substance or a controlled substance analog unless the person obtains the substance or the analog directly from, or pursuant to a valid prescription or order of, a practitioner who is acting in the course of his or her professional practice, or unless the person is otherwise authorized by this chapter to possess the substance or the analog. Any person who violates this subsection is subject to the following penalties:

OPINION

The complainant's motion for a default judgment was granted at the hearing after finding that the respondent did not answer the complaint, did not respond to the complainant's attempts to contact him and failed to attend the hearing. 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. When a respondent is in default the complaint is deemed to be true and the Board of Nursing may make findings and enter an order based on the findings of fact in the Complaint. The decision in this case is based upon the facts in the Complaint and other evidence regarding notice to the respondent.

The question in this matter is: Are the facts asserted in the Complaint sufficient to find that the respondent's conduct constituted misconduct and unprofessional conduct? The answer is that the Complaint does contain enough evidence to find that the respondent's actions constitute misconduct and unprofessional conduct.

On July 19, 2007 an unidentified woman gave the respondent's employer an envelope filled with drugs and said that the respondent had stolen them from patients. As a result of that the employer asked the respondent to take a drug test which he did. The test was discounted because it appeared that the urine given the tester was not the respondent's. As presented none of those facts are sufficient to establish either that the respondent had stolen drugs from patients or that he was using drugs. There is therefore no conclusion of law regarding these facts.

However as a result of the above facts the St. Francis police interviewed the respondent on July 19, 2007. The respondent denied that he had stolen the drugs from patients but he did state that he kept pills from his own old and unused prescriptions, as well as from his parents' old and unused prescriptions. The respondent consented to a search of his home on that same day. During the search the police found a decorative red box containing a number of pills in the respondent's closet. The pills included Vicodin (hydrocodone) and Percocet (oxycodone).

Both Vicodin and Percocet are schedule II controlled substances. Wis. Stats., s. 961.16(2)(a) 7. and 11. Wisconsin law makes it a punishable crime to possess schedule II controlled substances without a valid prescription. Wis. Stats., s. 961.41(3g). The respondent did not have a prescription for either of those drugs. The respondent therefore possessed the controlled substances in violation of state law. Section RL 7.04(2) of the Wisconsin Administrative Code says that it is misconduct and unprofessional conduct if a nurse administers, supplies or obtains any drug other than in the course of legitimate practice or as otherwise prohibited by law. The respondent did not obtain the drugs in the course of legitimate practice and did not possess them legally. The respondent is therefore guilty of misconduct and unprofessional conduct.

The next question to be considered is the nature of the discipline that should be imposed on the respondent. 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)

While the record is not clear that he was taking the drugs from his place of business, or that he used the drugs while at work, he did possess controlled substances obtained in violation of state law. A violation of a state drug law by medical personnel is a matter of great concern for patients and the public. As an LPN the respondent is responsible for the health and safety of his patients and has access to controlled substances. The respondent has shown by his actions that he is not trustworthy to ensure the health and safety of his patients and that he cannot be trusted in an environment in which he has access to controlled substances.

The complainant asked to have the respondent's license revoked. A revocation is not warranted in this case because there is no evidence to conclude that the respondent took the controlled substances from his place of employment or that any drugs were missing from his place of employment, except for the penicillin which is not a schedule II controlled substance. There was also no evidence introduced that the respondent was under the influence of controlled substances while at work.

A suspension, rather than a revocation, is the appropriate discipline for the respondent. It addresses all three considerations for the imposition of discipline. Suspension of the respondent's license will send a message to the respondent and to other nurses that behavior like the respondent's is not acceptable and will result in losing the ability to practice. It also sends a message to the respondent that he has been given an opportunity to rehabilitate and reenter his profession. A suspension also protects the public as the respondent will not be able to practice until the Board of Nursing has reviewed and approved his application.

The respondent's license is suspended for an indefinite period of time of not less than one year. The respondent will not be reinstated until he can show the Board that he has been rehabilitated.

COSTS

The imposition of costs against the respondent is 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 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 Administrative Law Judge's recommendation and the Board on 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.

Under the circumstances of this case, it is reasonable to assess the full costs of this proceeding to Demetrius D. Whitehead. Mr. Whitehead's misconduct was serious because he possessed controlled substances in violation of state law,

and because that action is substantially related to the practice of his profession. It is part of a nurse's responsibility to make sure that his or her patients receive their prescribed medications and Mr. Whitehead cannot be trusted in an environment in which he has ready access to controlled substances. Mr. Whitehead cannot be trusted to deliver needed medications to his patients. If Mr. Whitehead continued to work as a nurse it would create a danger to the health and safety of his patients.

In addition, Mr. Whitehead was uncooperative with the disciplinary process. He failed to participate in scheduled proceedings before the Administrative Law Judge and did not appear for his evidentiary hearing. By failing to participate in the process Mr. Whitehead admitted to all of the facts in the Complaint. His actions also demonstrated his lack of respect for the Board and the professionalism that is required of a nurse.

Finally, 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. Accordingly, there are no mitigating circumstances from which to draw in order to not assess the full costs of imposing discipline on the respondent. Fairness dictates the imposition of the full costs of disciplining the respondent on him and not on fellow members of the nursing profession who have not engaged in such conduct.

Dated this _____ day of July, 2008

Respectfully Submitted

Peggy E. Wichmann
Administrative Law Judge