

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

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IN THE MATTER OF A PETITION FOR :	
AN ADMINISTRATIVE INJUNCTION :	FINAL DECISION
INVOLVING :	AND ORDER
:	LS0708301UNL
RAFAEL M. NUNEZ, M.D., :	:
RESPONDENT. :	

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Division of Enforcement Case No. 07 UNL 012

The State of Wisconsin, Department of Regulation and Licensing, 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, Department of Regulation and Licensing.

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 8<sup>th</sup> day of June, 2009.

Celia M. Jackson, Secretary  
Department of Regulation and Licensing

STATE OF WISCONSIN  
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

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IN THE MATTER OF A PETITION FOR :	PROPOSED
AN ADMINISTRATIVE INJUNCTION :	DECISION AND ORDER
INVOLVING :	ON MOTION
	TO DISMISS
	:
	:
	:
RAFAEL M. NUNEZ, M.D., :	LS-0708301-UNL
RESPONDENT. :	
	:
	:

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Division of Enforcement Case File No. 07 UNL 12

To: Attorney Patrick J. Knight Gimbel, Reilly, Guerin & Brown 330 E. Kilbourn Ave., Ste. 1170 3146 Licensing	Attorney Sandra L. Nowack Division of Enforcement Department of Regulation and 1400 E Washington Ave Madison, WI 53708-8935	Milwaukee, WI 53202-
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PROCEDURAL HISTORY

On August 29, 2007, the Division of Enforcement (Division) of the Department of Regulation and Licensing (Department) filed a petition for an injunction against Rafael Nunez (Respondent). The petition alleged that the Respondent practiced medicine without a license because he saw patients without supervision and pursuant to an improper delegation from a physician.

On December 13, 2007, the Respondent's attorney filed a motion to dismiss this action because the issue in controversy is moot. A hearing on the motion to dismiss was held on January 11, 2008. Attorney Sandra Nowack appeared on behalf of the Division and the Respondent was represented by Attorney Patrick J. Knight.

Based upon the record in this case, the Administrative Law Judge recommends that the Department adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Respondent has never had a license to practice medicine in Wisconsin.
2. The Respondent filed an application for a license but subsequently withdrew it.
3. On February 24, 2006, the Respondent entered into an employment contract with Noemi A. Prieto, M.D., S.C., DBA Southeastern Pediatric & Adolescent medicine. Pursuant to that contract the Respondent provided patient care.
4. The Respondent terminated his employment with Southeastern Pediatric & Adolescent Medicine in December 2007, and has not provided any patient care in Wisconsin since February 2007.
5. The Respondent never had a permanent residence in Wisconsin. His permanent residence was located in Chicago, Illinois.
6. In December 2007 the Respondent moved himself and his family to Hawaii where he is licensed to practice medicine and where he has obtained a permanent residence.

7. The Respondent has stated in an affidavit that he has no intention of returning to Wisconsin and that if he does he is willing to stipulate to the entry of a special order enjoining any medical practice until he is licensed.

8. The petition for an administrative injunction alleged that the Respondent practiced medicine without a license because he practiced medicine independently, without direction, supervision and inspection by a licensed physician authorized to do so. There is no allegation of harm to any patient.

### CONCLUSIONS OF LAW

1. The Department has jurisdiction in this matter pursuant to s. 440.21, Stats.

2. The issues in this case are moot because an injunction cannot have any practical legal effect upon the existing controversy.

### ORDER

THEREFORE IT IS HEREBY ORDERED THAT, the Motion to Dismiss is granted.

### OPINION

A motion to dismiss may be granted if a case is moot. In *Ziemann v. Village of North Hudson*, 102 Wis.2d, 705, 712 (1981) the Wisconsin Supreme Court defined a moot case. In *Ziemann* the Court said:

A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, ... or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy.

This court may retain a review for determination of an issue even though the review has become moot where, *e.g.*, "the issues are of great public importance"..... (internal cites omitted)

In a case relied upon by both parties, the court said that "Generally, if a question becomes moot through a change in circumstances, it will not be determined by the reviewing court....It is a well-recognized exception that a reviewing court will retain jurisdiction and decide the issue if the question is one of great public importance. City of Racine v. J-T Enterprises of America, Inc., 64 Wis. 2d 691, 701 (1974)

The Division is asking this administrative law judge to issue an administrative injunction against the Respondent for allegedly having practiced medicine without a license. Both parties agree that the Respondent is no longer providing patient care in Wisconsin and has not since December 2007.

Using the standard stated above I find this case to be moot because issuing an injunction cannot have any practical effect upon the controversy in this matter. The primary goal in issuing an injunction is to stop the prohibited behavior. The parties agree that the respondent stopped providing any patient care in January 2007. The prohibited behavior has already stopped and the reason for issuing an injunction no longer exists.

The Division argues that this case should be litigated even though it is moot because it is a matter of public health and safety. The Division also argues that an injunction is needed because the Respondent may return to Wisconsin. After careful consideration of the facts in this case I do not find either of the arguments persuasive.

The Respondent has not provided any patient care in Wisconsin since February 2007. He has moved himself and his family to Hawaii where he is a working licensed physician. The Respondent has pulled up his roots in the Midwest and has begun a professional career in Hawaii. Based on these facts and because no harm was alleged to have occurred to any patient in the petition, I do not find that the Respondent is a danger to the public health and safety.

The Respondent has established new roots, both personal and professional, in another state. The record indicates that the Respondent has been willing to stipulate that he would not return to Wisconsin to practice medicine and averred in an affidavit that if he were to return to Wisconsin he would “stipulate to the entry of a special order enjoining such practice until licensure.” Respondent’s affidavit dated is January 7, 2008. The evidence points to a conclusion that the Respondent is unlikely to return to Wisconsin to practice medicine.

The Division also argues that s. 440.21 (2), Stats., requires the Department to issue an injunction regardless of whether the facts underlying the petition continue to exist. I disagree with that interpretation of the statute. The statute says that if the Department finds that a person was practicing a profession without a license, the Department “...may issue a special order enjoining the person from the continuation of the practice...” The statute is permissive and does not require the Department to issue an injunction. Secondly the purpose of an injunction is to stop the continuation of a practice that both parties agree has ceased.

Based on the above, it is my opinion that this case is moot and the Motion to Dismiss should be granted.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Peggy Wichmann  
Administrative Law Judge  
Department of Regulation and Licensing