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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **LOU ANN NEWBY**, Respondent

FINAL DECISION AND ORDER
Case No. LS0808181NUR

Division of Enforcement Case Nos. 05 NUR 389 and 07 NUR 442

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

Lou Ann Newby
W. 10020 Olson Road
Poynette, WI 53955

Ms. Newby appeared by

Attorney Michael J. Herbert
Hal Harlowe and Associates, S.C.
519 North Pinckney Street
Madison, WI 53703-1473

Board of Nursing
P. O. Box 8935
Madison, WI 53708-8935

Department of Regulation and Licensing (Department), by

Attorney Jeanette Lytle
Department of Regulation and Licensing
Division of Enforcement
P. O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

The complaint was filed on August 18, 2008. On September, 8, 2008, respondent filed her answer.

Hearing in the matter was held as scheduled on May 22, 2009, at the Department of Regulation and Licensing, Madison, Wisconsin. The Department appeared by Attorney Jeanette Lytle. Respondent appeared by Attorney Michael J. Herbert. Prior to the hearing, the parties submitted a partial stipulation of facts and exhibits.

Objections to the Proposed Decision and Order were submitted by the parties and reviewed by the Board of Nursing on October 3, 2009. Based upon the review and consideration of the entire record, the recommendations by the Administrative Law Judge and the Objections to the Proposed Decision, the Board now issues this Final Decision and Order.

FINDINGS OF FACT

1. Lou Ann Newby, R.N., (DOB 11/30/1952) is duly licensed as a registered nurse in the State of Wisconsin (license #30-126237). This license was first granted on June 2, 1997. (Stip. ¶ 1)

2. Respondent's most recent address on file with the Wisconsin Board of Nursing is W. 10020 Olson Road, Poynette, Wisconsin, 53955. (Stip. ¶ 2)

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3. On May 27, 2004, Ms. Newby presented for nursing duty at Stoughton Hospital at 7:00 p.m. and worked until approximately 11:00 p.m. She wrote no progress notes or nursing assessments for six out of seven patients assigned to her. (Stip. ¶ 3) As noted below, Ms. Newby was asked to leave work before completing her shift. The fact that she was prevented from completing her shift was recognized by nurse witnesses as an explanation for her failure to complete the progress notes for six of the seven patients assigned to her that evening. (Reals testimony; Jundt testimony)

4. For the seventh patient, Ms. Newby wrote a note with the wrong date, indicating that she had received a verbal order from a physician. However, she did not document the verbal order on the order sheet. (Stip. ¶ 3) Proper professional practice required that the physician's verbal order be documented at the time of the order. The quality of her notes was also not professional. (Dean testimony; Jundt testimony; Ex. 6)

5. At some point during the May 27, 2004, evening shift, staff noticed the smell of alcohol on Ms. Newby's breath. Around 11:00 p.m., she was tested, and it was determined that her blood alcohol level was .029. Ms. Newby initially denied drinking prior to work but after her positive test for alcohol stated, "If I get treatment can I keep my license?" She was then asked to leave the hospital before the end of her shift. Subsequently, her employment was terminated for this incident. (Stip. ¶ 4; Newby testimony; Dean testimony; Exs. 6 and 7)

6. At the hearing, Ms. Newby testified to having as many as three drinks containing alcohol during the morning of May 27, 2004, after getting off work around 7:00 a.m. However, she did not provide a credible explanation for her having a positive blood alcohol level by 11:00 p.m. that day or for her smelling of alcohol earlier in her shift. At the hearing, Ms. Newby denied that she was impaired by the time she reported to work on the evening of May 27, 2004. Notwithstanding her denial, this decision finds by the preponderance of the credible evidence that Ms. Newby exhibited some level of impairment while working that evening as a result of her having consumed alcohol earlier in the day. This conclusion is based principally on her blood alcohol level four hours after she started her shift, her statement after her test came back positive, her failure to record a verbal order from a physician, and the poor quality of the progress notes that she wrote that evening. When testifying, Ms. Newby also came across as not being completely forthright regarding the incident. Nor was she forthright on the night in question when she initially denied alcohol use.

7. In lieu of state disciplinary action, Ms. Newby agreed to enter into the Impaired Professionals Procedure (IPP) on September 1, 2004. (Stip. ¶ 5) As part of her agreement, Ms. Newby stipulated that on May 27, 2004, she had presented for nursing duty at Stoughton Hospital, where staff noticed the smell of alcohol on her breath, and that a blood alcohol level was obtained, which indicated a blood alcohol level of .029. As part of the IPP agreement and at the hearing in this case, Ms. Newby stipulated that she suffers from alcoholism. (Stip. ¶¶ 4 and 5; Exs. 1 and 2)

8. Ms. Newby's agreement to participate in the IPP included an Agreement on State of Facts. In paragraph 4 of this agreement, Ms. Newby acknowledged:

> By signing this document, Ms. Newby agrees that the facts set forth above are true. Ms. Newby agrees that the Impaired Professional Procedure represents a reasonable accommodation on the part of the Board of Nursing to afford her an opportunity to practice nursing in Wisconsin. Ms. Newby affirms her understanding that in the event she is terminated from the Wisconsin Impaired Professionals Procedure for any reason, this Statement of Facts may be admissible in a disciplinary action against her license. Ms. Newby further agrees that the facts contained in this Statement shall be deemed a sufficient basis for subsequent disciplinary action under the requirements of sec. 441.07, Wis. Stats. and Wis. Adm. Code §§ N7.03 and N7.04 and the Americans with Disabilities Act of 1990.

(Ex. 2)

9. Under the section entitled "Sobriety" of the Agreement for Participation in the Impaired Professionals Procedure, Ms. Newby agreed to abstain from all personal use of alcohol and controlled substances. The agreement further provided:

> I shall in addition refrain from the consumption of over-the-counter medications or other substances which may mask the consumption of controlled substances or of alcohol, or which create false positive screening results or which may interfere with respondent's rehabilitation. I shall report all medications and drugs, over the counter or prescription taken by me within 24 hours of ingestion or administration and shall identify the person or person who prescribed, dispensed, administered or ordered said medications and drugs. Within 24 hours of taking these medications and drugs, I will provide the Board of Nursing designee, the IPP Coordinator, a copy of the prescription/order for said medications and drugs.

(Ex. 1, p. 2)

10. On the night of July 13, 2005, Ms. Newby was discharged from Lodi Good Samaritan nursing home for sleeping on duty. Ms. Newby testified that she had broken her toe and had taken prescribed pain medication which caused her to experience unexpected and intense drowsiness. (Newby testimony) Post-hearing, the hearing examiner asked Ms. Newby to provide medical records corroborating this claim. The records that were ultimately provided were from a July 18, 2005, doctor's visit and reveal that her testimony regarding the incident at best consisted of half truths. The reason for her doctor's visit on July 18, 2005, is given as "follow up hypertension." Her toe injury is explained as follows: "The patient has complained of right toe pain status post trauma and has a history of a bunion on the same side, which seems to be recurring along with the persistent toe pain now. She states that she works as a nurse. She is on her feet quite a bit and this is causing a bit of discomfort." The assessment of this condition is listed as "right toe deformity," with the following plan: "Recommended ibuprofen 600 mg with food 2-3 times per day for the toe arthritis. A metatarsal pad was also suggested." (Ex. 19)

11. In his letter accompanying this submission, Ms. Newby's counsel advised that:

> Ms. Newby has informed me that she did not obtain a prescription for pain medication for her toe. She took a vicodin tablet which had been given to her by her son, Christopher, who had a prescription. Ms. Newby had an adverse reaction after taking the vicodin tablet. She did not report taking the vicodin tablet to the IPP coordinator, and as she indicated was unaware of the requirement that she report it.

(Atty. Herbert letter, July 9, 2009)

12. An additional concern raised by the record of Ms. Newby's July 18, 2005, doctor's visit is that her doctor states that she refrained from " question[ing] her on alcohol intake as this has been a sensitive subject in the past." (Ex. 19)

13. Ms. Newby was also reprimanded by her employer for chronic tardiness in March 2005, as alleged in paragraph 6 of the complaint. While chronic tardiness is consistent with alcohol use, the cause of her tardiness is in fact speculative. Ms. Newby omitted to address this allegation during the hearing. (Newby testimony; Ex. 101)

14. On December 4, 2007, Ms. Newby was terminated from the Impaired Professionals Procedure for having six positive screens for alcohol. (Stip. ¶ 6; Exs. 3 and 4)

15. The level of alcohol disclosed by Ms. Newby's alcohol screens were greater than the level that would have resulted from casual exposure to ambient alcohol, such as from breathing alcohol or washing one's hands with soap containing alcohol. (Henes testimony; Ex. 5) Evidence was not presented to contradict Ms. Newby's claim that the positive screens were due to her taking cold medicine containing alcohol. (Newby testimony)

16. With respect to Ms. Newby's positive screens, a February 22, 2005, treatment record indicates that early in her IPP participation, Ms. Newby claimed to have inadvertently used cold medicine containing alcohol. The treatment note

reads:

> On 2/1/05 client shared in group that she inadvertently ingested some cold medicine (Ny-quill) because she failed to read ingredien[t]s on label and failed her random U.A. Client has destroyed the cough medicine and has not used any since results of U.A. Client has talked about fear and shame about inadvertent use of cough med.

(Ex. 13)

17. In contrast to her February 2005 claim of having inadvertently taken cold medicine with alcohol, at the hearing Ms. Newby testified that her use of cold medicine containing alcohol was deliberate. According to Ms. Newby, while she understood that using the medicine violated the IPP, she continued to do so because no other medication was effective in treating her cold symptoms. (Newby testimony)

18. Ms. Newby acknowledged that on at least one occasion, the IPP Coordinator advised her that she had tested positive for alcohol. This appears to have been the instance noted in the February 2005 treatment note. (Ex. 13) She testified that on that occasion, she wrote the IPP Coordinator to explain that she had been taking cold medicine, but that she did not hear back from the Coordinator. She admitted that the IPP Coordinator never approved her use of cold medicine containing alcohol. Ms. Newby also admitted that she failed to take the initiative to resolve the question of whether she could continue to use the cold medicine in the future. (Newby testimony)

19. According to Ms. Newby, she did not realize that the IPP required her to report her use of over-the-counter cold medicine, particularly medicine containing alcohol, within 24 hours to the IPP Coordinator. She acknowledged that she did not comply with this requirement. (Newby testimony)

20. While Ms. Newby admitted to alcoholism in her stipulation, during the hearing, she was not forthright regarding her alcohol use or dependency prior to the May 27, 2004, incident at Stoughton Hospital. (Newby testimony)

21. Ms. Newby testified that she has not consumed any alcohol (except for that contained in cold medicine) since May 27, 2004. She appeared sincere in this claim. In addition, the records from her participation in alcohol treatment as part of the IPP are generally positive. Her final, November 28, 2007, therapy report is very positive and indicates an excellent prognosis, provided she continued her aftercare recovery plan. The November 28, 2007, report concludes:

> 3 1/2 yrs. sobriety, has followed all treatment/licensing requirements, has shown enthusiasm toward her recovery and at this time it is deemed that client no longer requires AODA counseling due to her excellent recovery skills and reliance upon her own recover networks (A.A., H.P.)

(Ex. 13; Newby testimony)

22. There is no evidence of Ms. Newby's performing nursing duties after May 27, 2004, after consuming alcohol (except possibly after taking cold medicine containing alcohol).

23. Questions remain regarding Ms. Newby's alcohol and drug use. These include her claimed use of cold medicine as the explanation for her positive alcohol screens, the inconsistency in her explanations as to whether the cold medicine was taken on purpose or inadvertently, her lack of forthrightness regarding the nature and extent of her alcohol dependency prior to May 27, 2004, and her lack of forthrightness regarding the May 27, 2004, incident, both at the time and at hearing. In addition, as noted above, she used a non-prescribed narcotic on July 13, 2005, which interfered with her ability to work and which got her fired. She was also not truthful regarding this drug use at hearing. These matters make it difficult to accept her claim of complete abstinence without reservation.

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24. On April 9, 2005, Ms. Newby was working at Lodi Good Samaritan nursing home. H.E. was a 77 year-old-man who had been admitted to the facility the previous day for short-term rehabilitation following a fall at home that had

resulted in a fractured vertebra and subsequent development of pneumonia. H.E.'s diagnosis also included chronic obstructive pulmonary disease. At the time of H.E.'s admission, the physician wrote to contact him if the patient's pulse was over 100. Ms. Newby was assigned the care of H.E. that evening. (Stip. ¶ 7)

25. Part of H.E.'s care involved nebulizer treatment. Nebulizer treatment can result in dizziness. Ms. Newby put the nebulizer mask on H.E., but then left his room. After Ms. Newby left, H.E. fell, hitting the back of his head. This happened around 9:00 p.m. Ms. Newby recorded H.E.'s pulse as between 104 and 130 at various times between 9:00 and 10:30 p.m. There is conflicting evidence regarding H.E.'s mental orientation following the fall. Ms. Newby did not attempt to contact H.E.'s physician until 10:30 p.m., when she sent him a fax. April 9, 2005, was a Saturday, and it was unlikely that H.E.'s physician would receive the fax until the following Monday. Ms. Newby did, however, contact H.E.'s daughter. After Ms. Newby's shift ended, H.E. was transferred to the hospital at 12:30 a.m. at his daughter's insistence. H.E. died at the hospital on April 16, 2005. Cause of death was listed as pneumonia and respiratory failure. Two CAT scans at the hospital did not reveal a subdural hematoma. (Ex. 11, esp. pp. 5 and 6; Exs. 12 and 102; Newby testimony; Dorn testimony)

26. Ms. Newby acknowledged at hearing that her care of H.E. fell below professional standards, and that she should have contacted the physician after H.E. fell and hit his head and after his pulse registered above 100. (Newby testimony) It should be noted that the Division does not contend that H.E.'s death was due to his falling and hitting his head or to the level of care provided by Ms. Newby.

27. There is no evidence suggesting that Ms. Newby was under the influence of alcohol at the time of her care of H.E.

Current Employment

28. Ms. Newby has been employed as a charge nurse at Select Specialty Hospital in Madison since August 11, 2006. An employee evaluation for the period January to August 2008 was submitted into evidence, as well as letters and testimony of co-workers, and a letter of recommendation and testimony of her former clinical supervisor. All of this evidence indicates that Ms. Newby is providing nursing care at a professional level at the current time. (Exs. 14-17, Reals testimony; Huemmer testimony; Tomashek testimony) Ms. Newby testified that she had long wished to become a nurse and that she loves nursing. (Newby testimony)

CONCLUSIONS OF LAW

1. The Wisconsin Board of Nursing has jurisdiction to act in this matters pursuant to Wis. Stat. § 441.07.

2. The conduct described in the paragraphs 3 through 23 above constitutes a violation of Wisconsin Administrative Code §N 7.03(2)

3. The conduct described in the paragraphs 24 through 27 above constitutes a violation of Wisconsin Administrative Code §N 7.03(1).

ORDER

For the reasons set forth above, IT IS ORDERED that effective on the date of this Order:

SUSPENSION

A.1. The license of Lou Ann Newby, R.N., to practice as a registered nurse in the State of Wisconsin is **SUSPENDED** for an indefinite period.

A.2. The privilege of Lou Ann Newby, R.N., to practice as a registered nurse in the State of Wisconsin under the authority

of another state's license pursuant to the Nurse Licensure Compact is also **SUSPENDED** for an indefinite period.

A.3. During the pendency of this Order and any subsequent related orders, Respondent may not practice in another state pursuant to the Nurse Licensure Compact 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.4. Respondent shall mail or physically deliver all indicia of Wisconsin nursing licensure to the Department Monitor within 14 days of the effective date of this order. Limited credentials will be reissued.

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 Wisconsin licensure.

A.6. The Board may, on its own motion or at the request of the Department Monitor, grant full Wisconsin licensure at any time.

STAY OF SUSPENSION

B.1. The suspension is stayed effective the date of the Order.

B.2. The Board or its designee may, without hearing, remove the stay 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.3. 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.4. 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.5. 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 ch. 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.

IT IS FURTHER ORDERED:

CONDITIONS AND LIMITATIONS

Provided respondent fully complies with the following conditions and limitations, said conditions and limitations will be in place for four years, beginning from the date of this Order. The Board or its designee shall have the authority to reduce this period, but such decision shall lie in the sole discretion of the Board or its designee.

Evaluation and Treatment Required

C.1. Within 30 days of the date of this order or within such other period as may be acceptable to the Board or its designee, respondent shall be evaluated for alcohol and other drug abuse and dependency by a person competent to make such evaluation and approved by the Board or its designee (Evaluator).

C.2. If the Evaluator recommends that Respondent participate in a program for the treatment of alcohol or other drug abuse and dependency, then within 30 days of the completion of the evaluation required under paragraph 1 or within such other period as may be acceptable to the Board or its designee, respondent shall enter into a treatment program of the type recommended by the Evaluator and approved by the Board or its designee (Treater). Unless the Board or its designee modifies this requirement, Respondent shall successfully complete such program.

C.3. Respondent shall immediately provide Evaluator and Treater with a copy of this Final Decision and Order and all other subsequent orders.

C.4. 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.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 collection 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 or Evaluator. Attendance of Respondent at such meetings shall be verified and reported quarterly 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. Respondent may propose to the Board or its designee a modification of this requirement to allow respondent to take certain types of over-the-counter medications that could potentially result in false alcohol screens. However, approval of such modification shall lie in the sole discretion of the Board or its designee, and absent such approval, respondent shall be required to comply fully with the requirement as currently stated.

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. The Board or its designee may provide Respondent with a list of over-the-counter medications whose use is not required to be reported. If Respondent has not provided a release as required by A.7. 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 at a minimum frequency of not less than 56 times per year, for the first year of this Order. At least 42 of those tests must include EtG/EtS testing. 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 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 Avenue
P. O. Box 8935
Madison, WI 53708-8935
Fax: (608) 266-2264
Telephone: (608) 267-3817

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 Evaluator, 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 the 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 Evaluator, 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 or be evaluated by another Evaluator.

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. 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 the full costs of the disciplinary proceeding to the Department of Regulation and Licensing, within one hundred eighty (180) days of this Order. In the event Respondent fails to timely submit any payment of costs, the stay of the suspension of Respondent's license shall be lifted, 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.

OPINION

Wisconsin Statutes § 441.07(1)(c) grants the Wisconsin Board of Nursing jurisdiction to impose discipline following disciplinary proceedings against a registered nurse found to have committed "[a]cts which show the registered nurse . . . to be unfit or incompetent by reason of negligence, abuse of alcohol or other drugs or mental incompetency." Wisconsin Administrative Code § N 7.03(1) provides:

> **(1)** As used in s. 441.07 (1) (c), Stats., "negligence" means a substantial departure from the standard of care ordinarily exercised by a competent licensee. "Negligence" includes but is not limited to the following conduct:
> (a) Violating any of the standards of practice set forth in ch. N 6;
> (b) An act or omission demonstrating a failure to maintain competency in practice and methods of nursing care;
> (c) Failing to observe the conditions, signs and symptoms of a patient, record them, or report significant changes to the appropriate person;
> (d) Failing to execute a medical order unless the order is inappropriate and the licensee reports the inappropriate order to a nursing supervisor or other appropriate person;
> (e) Executing an order which the licensee knew or should have known would harm or present the likelihood of harm to a patient;
> (f) Failing to report to a nursing supervisor or appropriate person the existence of a medical or nursing order which the licensee knew or should have known would harm or present the likelihood of harm to a patient; or,
> (g) Offering or performing services as a licensed practical nurse or registered nurse for which the licensee is not qualified by education, training or experience.

Ms. Newby's failure to contact H.E.'s physician after H.E. fell and hit his head and after H.E. exhibited an elevated pulse constituted negligence. However, this decision does not conclude from this single act of negligence, occurring more than four years ago, that Ms. Newby was or is unfit or incompetent under Wis. Stat. § 441.07(1)(c). There is no evidence that the inadequacies in Ms. Newby's care of H.E. were the result of her having consumed alcohol. Wisconsin Administrative Code § N 7.03(2) provides:

> **(2)** "Abuse of alcohol or other drugs" is the use of alcohol or any drug to an extent that such use impairs the ability of the licensee to safely or reliably practice.

Ms. Newby's use of painkillers in July 2005 impaired her ability to safely and reliably practice nursing. The violation of N 7.03(2) is aggravated by the fact that it involved the use of an unprescribed narcotic, by the fact that Ms. Newby violated the terms of the IPP, and by the fact that she provided deliberately misleading testimony at hearing regarding the use. This decision finds no merit in Ms. Newby's attorney's argument that her admission to using a prescription painkiller at the hearing

was noteworthy as an act of honesty. Counsel suggests that she "could have easily lied under these circumstances and stated that she had taken an over the counter pain medication, such as ibuprofen, and no one would have known." (Atty. Herbert letter, July 9, 2009) First, the taking of ibuprofen would not explain her falling asleep in the middle of her shift. Second, at the hearing she falsely claimed that the painkiller had been prescribed.

Ms. Newby's reporting to work on May 27, 2004, after drinking is equally serious. The Department established by the preponderance of the credible evidence that her use of alcohol that day impaired her ability to safely and reliably practice and therefore constituted abuse under N 7.03(2). This decision finds no merit in Ms. Newby's attorney's contention that the accuracy of the breathalyzer was not established and that its results may not be relied on as evidence of impairment. When she entered into the IPP, Ms. Newby stipulated that the breathalyzer measured her blood alcohol content at .029 and that the stipulated facts provided a sufficient basis for discipline under N 7.03. In consideration for her agreement, she was given the opportunity to participate in the IPP in lieu of facing disciplinary proceedings. If she wished to contest the accuracy of the test, she should have done so at the time. Moreover, the fact that she smelled of alcohol that evening, engaged in poor charting practices, and asked whether she could keep her license if she got treatment, all tend to corroborate the finding of a positive blood alcohol level.

There is no dispute that Ms. Newby violated the terms of the IPP agreement by having six positive alcohol screens, regardless of whether the reason for the positive screens was her taking cold medicine which contained alcohol, as she claims, or her continuing to consume alcohol. Under the terms of the IPP's Agreed Statement of Facts, Ms. Newby's termination from the Impaired Professional Procedure in December 2007 for violating the IPP agreement entitled the Department to bring disciplinary action based on her impairment on May 27, 2004. The complaint in this case was filed in August 2008, or nine months after Ms. Newby's termination from the IPP. There is no merit to respondent's attorney's argument that the Department unduly delayed in charging Ms. Newby for the May 27, 2004, and July 13, 2005, instances of working while under the influence of drugs or alcohol. The delay in bringing charges was principally due to the Department's giving Ms. Newby an opportunity to avoid discipline by participating in the IPP, an opportunity which she then squandered.

Two facts in particular favor Ms. Newby in the evaluation of the severity of her violations of N 7.03(2). The first is that she may have maintained alcohol sobriety over the last five years, as she claims. The second is that her July 13, 2005, use of vicodin constitutes the only known instance of her working as a nurse while impaired since her discharge from the Stoughton hospital in May 2004. An additional favorable consideration is that she has been employed in the same job for nearly three years and appears to be providing nursing care at a professional level.

In addition to Ms. Newby's violations of N 7.03(2) and her violation of the IPP protocol, Ms. Newby has lacked forthrightness on several important matters. Of specific concern are her lack of forthrightness regarding the level of her alcohol use and dependency prior to the May 27, 2004, incident, her lack of candor regarding her level of impairment while working on May 27, 2004, both at the time and at the hearing in this matter, her failure to testify truthfully concerning her use of a narcotic on July 13, 2005, and the continued questions regarding the six positive screens that resulted in her termination from the IPP. As to this final concern, Ms. Newby initially claimed that her use of cold medicine containing alcohol was inadvertent, but now claims that it was deliberate and due to the medicine’s being the only effective product available. That she had six positive screens makes the original claim of inadvertence difficult to accept and would seem to explain why her story has changed. In addition, Ms. Newby failed to report her use of the cold medicine, as required by the IPP, and took no action to resolve her perceived need for the medicine, other than to continue to use it in violation of her agreement. This lack of forthrightness counsels against the Board's accepting without a further period of monitoring and evaluation, Ms. Newby's claims that she is now abstinent and that she will provide professional nursing care without resort to drugs or alcohol in the future.

In addition, in general, it is contrary to public policy to reward a professional who has agreed to participate in the IPP after admitting to the use of drugs or alcohol while on the job by not imposing some level of discipline for the original violation, where the professional has been terminated from the IPP for non-compliance. Weighing these considerations, as well as the impact of the discipline in this case on other licensees who are given the opportunity to avoid discipline by participating in the IPP, and the ability of the Department to protect the public if Ms. Newby is allowed to continue working while her drug and alcohol use are re-assessed and monitored, this decision recommends that the Board impose and stay discipline consisting of an indefinite suspension, the stay to be contingent upon Ms. Newby’s compliance with the monitoring, evaluation, and treatment requirements set forth below. This decision concludes that the state's interests, including its fundamental interest in

the protection of the public, can be adequately advanced without preventing Ms. Newby from working. If the Board adopts this recommendation, Ms. Newby will need to understand that the state cannot risk patient harm as a result of any future misconduct and that any further infraction is likely to result in the lifting of the stay of suspension and, potentially, the commencement of further disciplinary proceedings.

The deficiency in Ms. Newby's care of H.E. occurred more than four years ago and resulted from her misapprehending her duty to contact her patient's physician after his fall and after his heart rate exceeded the level at which the physician had directed he be contacted. Ms. Newby acknowledges that the level of care was below professional standards. As noted in the findings of fact, there is no evidence suggesting that she was impaired at the time of the incident. The deficiency in care can be avoided in the future by Ms. Newby's receiving instruction regarding the circumstances under which a physician is to be called, which appears to have already happened.

Both instances of Ms. Newby's working while under the influence of drugs or alcohol constitute serious violations of the standards of professional conduct. A medical professional's attempting to work while impaired presents a potentially dangerous situation. Alcohol and narcotics can affect the skills, judgment, and interpersonal interactions essential to the delivery of care at a professional level. The case of *Christel Brell* (LS0711084NUR), cited by the Department, provides an example of the extremely tragic consequences which can flow from a nurse attempting to provide care while under the influence.

In the case of the May 27, 2004, incident, part of the evidence of Ms. Newby's impairment consists of the unprofessional quality of her record-keeping. In and of itself, unprofessional record-keeping can compromise the quality of patient care.

The impairment that occurred in July 2005 resulted in Ms. Newby becoming exceedingly sleepy and failing to attend to her ward duties.

As noted in the conclusions of law, there are two principal factors in mitigation of the violations. The first is that the most recent incident occurred four years ago; the other happened more than five years ago. The second is that despite Ms. Newby's termination from the IPP for positive screens, there is evidence that she benefited significantly from the program.

If the Board could be confident that Ms. Newby had in fact abstained from all alcohol use during the past five years, and that the only time she took a non-prescribed narcotic was on July 13, 2005, it might be in a position to regard the two violations as largely historical, rather than as evidence of an on-going risk. Even then, some sanction would be appropriate. Without any sanction, Ms. Newby would end up being rewarded for being terminated from the IPP for non-compliance. However, there has been a significant lack of forthrightness on the part of Ms. Newby that makes it difficult to accept her claims of sobriety without further opportunity to evaluate and monitor her use or abstinence. Accordingly, this decision recommends that discipline be imposed based on the two known instances of her working as a nurse while impaired.

While a purpose of discipline can be to provide a deterrent to other professionals; that is not the main purpose of the discipline being recommended in this case. The point of the discipline is not to punish Ms. Newby but to give her an opportunity to demonstrate that she can provide a professional level of nursing care without resorting to either drugs or alcohol, but at the same time without placing the public at undue risk. The evaluation, monitoring and treatment set out below should enable the Department to determine whether a risk continues to exist, and if it does, to address it. The suspension that is being recommended should impress on Ms. Newby the seriousness of violations, as well as the fact that any future use of drugs or alcohol or any future failure to comply with the imposed conditions will result in her not being able to work as a nurse. A stay of the suspension is being recommended to prevent undue economic hardship to Ms. Newby and to build on her apparently positive work history of the past few years. This decision does not view it as necessary to require Ms. Newby to lose the source of her livelihood, even for a short period, to get the point across that she may not work as a nurse while under the influence of drugs or alcohol or that the use of cold medicine containing alcohol violates her monitoring obligations. At the same time, Ms. Newby should understand that *any* violation of the Board's order in this case will almost certainly result in the lifting of the stay and may also result in new disciplinary proceedings.

EXPLANATION OF VARIANCE

The Board of Nursing reviewed the Findings of Fact, Conclusions of Law and Order in the *Proposed Decision and Order* and found sufficient cause to vary certain portions of the recommendations contained therein; specifically, the Conclusions of Law with respect to the number of violations proved and the Order with respect to the imposition of costs. In addition, the Board has reorganized and reformatted the document to place the ALJ's analysis of the evidence into a new section designated as the "Opinion." This variance is consistent with the practice and views of the Board of Nursing and is described in more detail as follows:

1. Based upon the evidence in the record, the Conclusions of Law is revised to reflect two separate violations; § N 7.03(1)(c), Wis. Admin. Code and § N 7.03(2),Wis. Admin. Code.

2. Paragraph A.5 of the *Proposed Decision and Order* is revised to increase the period of monitoring from four (4) years to the standard five (5) years, based upon the Board's view of the length of time necessary for treatment and monitoring of nurses who are disciplined for unprofessional conduct involving abuse of alcohol or drugs.

3. Paragraph D.6 of the Proposed Order has been revised to impose full costs of the proceeding to the Respondent based upon the following factors:

number of counts charged,
number of counts contested and proven,
the nature and seriousness of the misconduct,
the level of discipline sought by the parties,
the Respondent's cooperation with the disciplinary process and prior discipline, if any.

The Board is persuaded that the evidence shows that the Respondent committed two separate acts of negligence which constitute unprofessional conduct. The first act of negligence is that she left the patient unattended during a nebulizer treatment, despite the known risk of dizziness from the treatment as well as the patient's heavy doses of narcotics, resulting in his injury due to falling from the bed. The second act of negligence is that she failed to contact or notify the patient's physician in a timely and effective manner after the patient fell and his heart rate exceeded the level at which the physician had directed that he be notified. Either of these actions in and of themselves would be sufficient causes for discipline. Thus, both of the counts as charged by the Division of Enforcement were proven as separate and distinct violations.

The Board is also persuaded that full costs of the proceeding should be imposed against the Respondent based upon the nature and seriousness of the Respondent's misconduct and her history of conduct with the disciplinary process. Initially, the Respondent was allowed to participate in the Impaired Professional Program (IPP), a confidential drug and alcohol monitoring program offered by the Board. During the period that she was in the IPP, the Respondent had six positive screens for alcohol and reported to work as a nurse under the influence of alcohol. As a result of her violations, the Respondent was terminated from the program for non-compliance. Upon termination from IPP, the Respondent could have agreed by stipulation to practice under a standard impairment order which could have mitigated her costs incurred in the proceeding. When this matter went to hearing, the ALJ noted that the Respondent continued to display a lack of the forthrightness regarding the level of her alcohol use and dependency, a lack of candor regarding her level of impairment while working on May 27, 2004, and did not testify truthfully concerning her use of a narcotic on July 13, 2005, and the six positive screens that resulted in her termination from the IPP. Thus, given the Respondent's history of repeated alcohol and narcotic drug abuse, the nature and seriousness of her misconduct, the number of violations charged and proved, and her failure to cooperate with the disciplinary process, the Board's decision to impose full costs of the proceeding against the Respondent is warranted.

STATE OF WISCONSIN
BOARD OF NURSING

Kathleen L. Sullivan, RN, 11/5/09

Vice Chair