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Before The
State Of Wisconsin
DEPARTMENT OF REGULATION AND LICENSING

In the Matter of the Disciplinary Proceedings
Against Timothy J. Moder, Respondent

FINAL DECISION AND ORDER
No. ORDER 0000216

Division of Enforcement Case No. 09 RSA 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, make 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 at Madison, Wisconsin on the 20th day of May, 2010.

Celia M. Jackson, Secretary
Department of Regulation and Licensing



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **TIMOTHY J. MODER**, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. DRL-10-0005

Division of Enforcement Case No. 09 RSA 012

The parties to this proceeding for purposes of Wis. Stat §§ 227.47(1) and 227.53 are:

Timothy J. Moder
1609 South Lake Avenue
Duluth, MN 55802

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

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Regulation and Licensing, Division of Enforcement (the "Division") filed a formal Complaint against the Respondent, Timothy J. Moder. The Division filed said Complaint with the Division of Hearings and Appeals on January 11, 2010. On the same date, the Division sent a copy the Complaint and a Notice of Hearing via certified and regular mail to Respondent Moder at his most recent address on file with the Department of Regulation and Licensing, 1115 Lincoln Street, Superior, WI 54880. The Notice of Hearing stated that the respondent was required to file a written Answer to the Complaint within 20 days, failing which "[he would] be found to be in default and a default judgment [could] be entered against [him] on the basis of the Complaint and other evidence and the Wisconsin Department of Regulation and Licensing [could] take disciplinary action against [him] and impose the costs of the investigation, prosecution and decision of this matter upon [him] without further notice or hearing."

The above documents were returned to the Division with a new forwarding address for Respondent Moder: 1609 S. Lake Drive, Duluth, MN, 55802. The Division appears to have forwarded the documents to Respondent Moder at his new address on or about January 22, 2010.

On January 12, 2010, the undersigned Administrative Law Judge (ALJ) of the Division of Hearings and Appeals issued a Notice of Telephone Prehearing Conference that set a telephone conference with Respondent Moder and Attorney Jeanette Lytle of the Division of Enforcement for March 8, 2010. This Notice instructed Respondent Moder to contact the undersigned ALJ to provide the telephone number for which he could be reached for the March 8, 2010 telephone conference, and was sent to the address on file with the Department of Regulation and Licensing for the respondent, 1115 Lincoln Street, Superior, WI 54880.

The above Notice was returned to the Division of Hearings and Appeals on or about January 13, 2010, with instructions to resend it to Respondent Moder at the following address: 1609 South Lake Avenue, Duluth MN, 55802. The Division of Hearings and Appeals followed these instructions and resent said Notice to Respondent Moder at the above-listed address on or about January 15, 2010. Regardless, Respondent Moder did not contact the undersigned ALJ with a telephone number that he could be reached at for the March 8, 2010 telephone conference, and the telephone conference that was conducted on that date was without the respondent's participation.

At the telephone conference, Attorney Lytle made a motion for default pursuant to Wis. Admin. Code § RL 2.14. The undersigned ALJ summarily accepted Attorney Lytle's default motion and issued a Notice of Default instructing Respondent Moder that he was in default and that findings would be made and an Order entered on the basis of the Complaint and other evidence. The Notice of Default further ordered Attorney Lytle to provide the undersigned ALJ with the Division's written recommendations for discipline and the assessment of costs in this matter by March 19, 2010. It was mailed to Respondent Moder at 1609 South Lake Avenue, Duluth MN, 55802 on this same date. Attorney Lytle provided the undersigned ALJ with the Division's written recommendations as to discipline and costs on or about March 11, 2010. At the ALJ's request, she provided additional reasons for her recommendations on or about April 12, 2010.

The respondent has failed to respond to either the Notice of Default issued against her, or the written recommendations provided by Attorney Lytle.

FINDINGS OF FACT

On the evidence presented, the undersigned ALJ makes the following findings of fact:

1. Timothy J. Moder, Respondent, date of birth August 28, 1969, has two expired Wisconsin substance abuse counselor-in-training certificates (#14242-130 and #12842-130). The first certificate (#14242-130) was granted on October 15, 2005 by the Wisconsin Certification Board, and expired on February 28, 2009. The second certificate (#12842-130) was granted on December 17, 2003 by the Wisconsin Certification Board, and expired on December 17, 2004. Pursuant to Wis. Stat. § 440.08, Respondent Moder can renew certificate # 14242-130

upon payment of a fee by February 28, 2014. Pursuant to Wis. Admin. Code § RL 165.01(2), Respondent Moder can renew certificate # 12842-130 by complying with the requirements for obtaining initial certification, including educational and examination requirements which apply at the time the application is made.

2. Respondent Moder's most recent address on file with the department of Regulation and Licensing is 1115 Lincoln Street, Superior, Wisconsin, 54880.

3. In or about April of 2009, Respondent Moder was working in a residential treatment program as a substance abuse counselor-in-training. He approached his supervisor about his desire to socialize with a female client who had been discharged from the program in March of 2009. He was informed that this would be unethical.

4. A few days later, Respondent Moder informed his supervisor that he had not renewed his substance abuse counselor-in-training certificate, and that he was quitting his job and leaving the field due to personal issues.

5. A few days after that, Respondent Moder admitted to other employees of the facility that he was dating the former client.

6. As set out in the Procedural History above, a Complaint and Notice of Hearing were sent to Respondent Moder at his most recent address on file with the Department of Regulation and Licensing, (1115 Lincoln Street, Superior, WI 54880), on January 11, 2010. Upon being returned to the Division, said documents were resent to Respondent Moder 2010 at the following forwarding address, 1609 South Lake Avenue, Duluth MN, 55802, on or about January 22, 2010

7. On or about January 12, 2010, the undersigned ALJ sent a Notice of Telephone Prehearing Conference for March 8, 2010 to Respondent Moder at the above-listed address. Upon being returned to the Division of Hearings and Appeals, said document was resent to Respondent Moder at the following forwarding address, 1609 South Lake Avenue, Duluth MN, 55802, on or about January 15, 2010.

8. Respondent Moder did not appear at the March 8, 2010 hearing, and the Division made a motion for default judgment which was summarily accepted by the undersigned ALJ.

9. On or about this same date (March 8, 2010), the undersigned ALJ sent a Notice of Default to the respondent at his 1609 South Lake Avenue, Duluth MN, 55802 address.

10. Respondent Moder has not responded to this Notice, or otherwise to the Complaint against him.

CONCLUSIONS OF LAW

1. The Department of Regulation and Licensing has jurisdiction over this matter pursuant to Wis. Stat. § 440.88(6).
2. Wis. Stat. § 440.03(1) provides that Department of Regulation and Licensing may “promulgate rules defining uniform procedures to be used by the Department... for... conducting disciplinary hearings.” These rules are codified in Wis. Admin. Code ch. RL.
3. Wisconsin Administrative Code § RL 2.08(1) provides in relevant part that “[t]he 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” and that “[s]ervice by mail is complete upon mailing.” Because the Complaint and Notice of Hearing, Notice of Telephone Prehearing Conference, and Notice of Default were mailed to Respondent Moder at his last known address, he was duly served with these papers pursuant to Wis. Admin. Code § RL 2.08.
4. As the licensee, it was Respondent Moder’s responsibility to keep his address on record with the Department of Regulation and Licensing current. Wis. Stat. § 440.11(1).
5. The respondent has defaulted in this proceeding pursuant Wis. Admin. Code § RL 2.14 by failing to file and serve an Answer to the Complaint as required by Wis. Admin. Code § RL 2.09.
6. Allegations in a complaint are deemed admitted when not denied in an answer. Wis. Admin. Code § RL 2.09. The respondent has admitted to the allegations of the Complaint by default by not filing an Answer.
7. Pursuant to Wis. Stat. § 440.88(6), the Department of Regulation and Licensing “may... revoke, deny, suspend, or limit under this subchapter the certification of any substance abuse counselor... for... any unprofessional conduct, incompetence, or professional negligence.”
8. Pursuant to RL 164.01(2), “[u]nprofessional conduct comprises any practice or behavior that violates the minimum standards of the professional necessary for the protection of the health, safety, or welfare of a patient of the public.”
9. Wis. Admin. Code § RL 164.01(2)(m) further defines “unprofessional conduct” to include “[e]ngaging in inappropriate sexual contact, exposure, gratification, or other sexual behavior with or in the presence of a patient. For the purpose of this subsection, an adult shall continue to be a patient for 2 years after the termination of professional services....”

10. Respondent Moder's conduct as described in Findings of Fact paragraphs 3 through 5 constitutes unprofessional conduct contrary to Wis. Admin. Code §§ RL 164.01(2) and (2)(m), subjecting him to discipline pursuant to Wis. Stat. § 440.88(6).

DISCUSSION

Violations of Wisconsin Statute and Administrative Code

By failing to provide an Answer to the Complaint filed against him, Respondent Moder has admitted that all allegations contained within the Complaint are true. Wis. Admin. Code § 2.09.

These allegations provide that Respondent Moder: (1) expressed interest in socializing with a former substance abuse client only one month after she was discharged from the residential drug treatment program at which he was a counselor, and (2) after his supervisor informed him that this would be unethical, let his substance abuse counselor-in-training certificate expire and left his job, so that he could, presumed, begin a relationship with said patient.¹

The Division alleges such conduct constitutes unprofessional conduct in violation of Wis. Admin. Code § RL 164.01(2)(m), subjecting the respondent to discipline pursuant to Wis. Stat. § 440.88(6). Though the Division fails to provide any argument establishing that the mere dating a patient² constitutes "inappropriate sexual contact, exposure, gratification, or other sexual behavior with ... a patient (*see* RL 164.01(2)(m))," the undersigned ALJ is convinced that Respondent Moder's conduct is punishable under Wis. Stat. § 440.88(6). In the first place, the respondent has not provided any argument to counter the Division's allegation that his behavior was in violation of Wis. Admin. Code § RL 164.01(2)(m). Secondly, regardless of whether Respondent Moder had inappropriate sexual contact with his female client, his conduct was clearly unprofessional pursuant to Wis. Stat. § 440.88(6) and Wis. Admin. Code § RL 164.01(2).

Appropriate Discipline

The Division advises that in cases involving sexual misconduct that is voluntary on the part of the patient, a suspension of at least one year is warranted. *See, e.g., In the Matter of Disciplinary Proceedings Against Claudia Greco, In the Matter of Disciplinary Proceedings Against Christina Wilke, In the Matter of Disciplinary Proceedings Against Thomas Plach.* However, it notes that this case is different because the respondent has already allowed his substance abuse counselor-in-training certificate to lapse. The Division, thus, requests that Respondent Moder's right to renew his certificate upon the payment of a fee under Wis. Stat. §

¹ It is unclear at what point in time the respondent began dating the former patient. The facts alleged merely assert that Respondent Moder *admitted* to other employees that he was dating said client a few days after he informed his supervisor he was quitting, not that he actually began dating her at this time. It is, thus, possible that the respondent began dating his client before this time.

² There are no allegations of sexual contact.

440.08, commonly referred to as a “license tail,” be revoked. It explains that this means that if the respondent wants a substance abuse counselor license in the future, he will have to apply anew and meet all the initial requirements for licensure, and the credentialing division can take into account his past misconduct in making their licensing decision. In support of its request for discipline, the Division includes *In the Matter of Disciplinary Proceedings Against Jodie Hise*, in which the respondent, also a substance abuse counselor in training, similarly resigned her position to pursue a relationship with a client, who she eventually married. Although the Final Decision and Order in this case were the result of a stipulation, and not a default judgment, the parties agreed that as a result of her unprofessional conduct, the respondent, who had let her substance abuse counselor-in-training certificate expire, would surrender her right to renew this certificate under Wis. Stat. § 440.08.

In light of the above, the undersigned ALJ will accept the recommendation of the Division to revoke Respondent Moder’s right to a license tail under Wis. Stat. § 440.08.

The purpose of discipline is to (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar contact. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Respondent Moder’s failure to participate in these proceedings suggests that he cannot be reasonably relied upon to comply with any Board order which might be considered in an effort to limit or monitor his contact with patients. Thus, the relief requested by the Division is appropriate and even necessary to protect the public from future instances of misconduct by the respondent.

Costs

The Division requests Respondent Moder be ordered to pay the full costs of its investigation and of these proceedings.

In support of this recommendation, the Division references *In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), which asserts, in relevant part:

The ALJ’s recommendation and the ... Board’s decision as to whether the full costs of the proceeding should be assessed against the credential holder..., 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 respondents 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 licenses, 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;
- 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, her conduct is of a serious nature. The factual allegations were deemed admitted and 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 for licensees, fairness here dictates imposing the costs of disciplining the respondent upon the respondent and not fellow members of the chiropractic profession who have not engaged in such conduct."

For many same reasons as cited in the *Buenzli-Fritz* decision, Respondent Moder should be assessed the full amount of recoverable costs. His alleged conduct is of a serious nature, there is no argument that certain factual findings were investigated and litigated unnecessarily, and given the program revenue nature of the Department of Regulation and Licensing, fairness again dictates imposing the costs of disciplining Respondent Moder on Respondent Moder, and not fellow members of the substance abuse counselor profession who have not engaged in such conduct. Payment of assessed costs will be necessary before the respondent's license could be reinstated. If the Board assesses costs against Respondent Moder, these amount of costs will be determined pursuant Wis. Admin. Code § RL 2.18.

ORDER

For the reasons set forth above, IT IS ORDERED that the right of the Respondent Timothy J. Moder to renew his certification as a substance abuse counselor-in-training in the State of Wisconsin be and is hereby **REVOKED**.

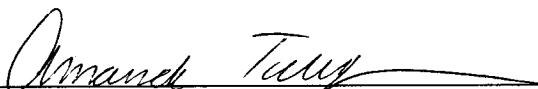
IT IS FURTHER ORDERED that Respondent Moder shall pay all recoverable costs in this matter in an amount to be established pursuant to Wis. Admin. Code § RL 2.18. After the amount is established payment shall be made by certified check or money order payable to the Wisconsin Department of Regulation and Licensing and sent to:

**Department Monitor
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935
Telephone: (608) 267-3817
Fax: (608) 266-2264**

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Timothy J. Moder.

Dated at Madison, Wisconsin on April 27, 2010.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: 
Amanda Tollefsen
Administrative Law Judge