

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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Before The  
State Of Wisconsin  
Board of Nursing

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In the Matter of the Disciplinary Proceedings  
Against **AUDREY C. MCBRIAR, R.N.**,  
Respondent

**FINAL DECISION AND ORDER**

Order No. 0000520

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Division of Enforcement Case No. 09 NUR 356

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, 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, 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 at Madison, Wisconsin on the 4<sup>th</sup> day of NOVEMBER, 2010.

A handwritten signature in cursive script, appearing to read "Katarina Luni".

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Member  
Board of Nursing



Before The  
State Of Wisconsin  
**DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the Disciplinary Proceedings  
Against **AUDREY C. MCBRIAR, R.N.**,  
Respondent

PROPOSED DECISION AND ORDER  
DHA Case No. DRL-10-0053

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Division of Enforcement Case No. 09 NUR 356

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

Audrey C. McBriar, R.N.  
202 Union Street  
Rio, WI 53960

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

Department of Regulation and Licensing by

Attorney Jeanette Lytle  
Department of Regulation  
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, Audrey McBriar. The Division filed said Complaint with the Division of Hearings and Appeals on July 23, 2010. On the same date, the Division sent a copy of the Complaint and a Notice of Hearing via both certified and regular mail to Respondent McBriar at her most recent address on file with the Department of Regulation and Licensing; 202 Union Street, Rio, Wisconsin, 53960. The Notice of Hearing stated that Respondent McBriar was required to file a written Answer to the Complaint within 20 days, failing which "[she would] be found to be in default and a default judgment [could] be entered against [her] on the basis of the Complaint and other evidence and the Wisconsin Board of Nursing [could] take disciplinary action against [her] and impose the

costs of the investigation, prosecution and decision of this matter upon [her] without further notice or hearing.”

The above documents were returned to the Division as “return to sender, McBriar, Audrey C. moved left no address, unable to forward.” The Division could not forward these documents to Respondent McBriar, as it was not, (and is not), aware of any other address for Respondent McBriar other than the one provided above. To date, no Answer has been filed.

On August 16, 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 McBriar and Attorney Jeanette Lytle of the Division of Enforcement for August 30, 2010. This Notice instructed Respondent McBriar to contact the undersigned ALJ to provide the telephone number for which she could be reached for the August 30, 2010, telephone conference, and was sent to the address on file for Respondent McBriar, as provided above.

The Notice was again returned as “return to sender, McBriar, Audrey C. moved left no address, unable to forward.” As such, Respondent McBriar did not contact the undersigned ALJ with a telephone number that she could be reached at for the August 30, 2010, telephone conference, and the telephone conference that was conducted on that date was without the respondent’s participation.

At the August 30, 2010, 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 McBriar that she 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 September 7, 2010. It was mailed to Respondent McBriar at the last address on record for her, 202 Union Street, Rio, Wisconsin, 53960, and was returned to the Division of Hearings and Appeals as undeliverable on August 31, 2010. Attorney Lytle provided the undersigned ALJ with the Division’s written recommendations as to discipline and costs on or about August 31, 2010.

### **FINDINGS OF FACT**

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

1. Audrey C. McBriar, R.N., Respondent, date of birth December 5, 1959, is licensed by the Wisconsin Board of Nursing as a registered nurse in the State of Wisconsin pursuant to license number 138422, which was first granted July 20, 2001.

2. Respondent McBriar's most recent address on file with the Wisconsin Board of Nursing is 202 Union Street, Rio, Wisconsin, 53960.

3. At all relevant times, Respondent McBriar was working as a registered nurse at Columbus Community Hospital in Columbus, Wisconsin.

4. On or about September 14, 2009, Respondent McBriar approached another nurse and told her that the morphine was low in the PCA pump for one of the patients assigned to that nurse. Respondent McBriar told the other nurse that she had removed a new morphine syringe from the Pyxis machine and put it in the patient's medication cupboard. The other nurse had just checked the PCA for that patient, and knew that it was not low, and questioned why Respondent McBriar had checked the PCA when she was not assigned to the patient. The syringe in the medication cupboard later was determined to have been tampered with.

5. On or about September 23, 2009, another nurse noticed that her patient's PCA pump was beeping. She finished with the patient next door, then went to the first patient's room. The PCA pump was no longer beeping, but the screen indicated that the PCA syringe needed to be changed. The nurse obtained a new syringe of morphine from the Pyxis machine, and as she placed it into the PCA pump, Respondent McBriar arrived in the doorway with a syringe of morphine, although Respondent McBriar was not assigned to the patient. Respondent McBriar said that she would place the syringe in the patient's medication cupboard in case it was needed later in the shift. Later, the nurse noticed that the syringe in the medication cupboard had been tampered with.

6. On or about October 12, 2009, two syringes of clear liquid, labeled Morphine, were found in two different patient medication cabinets. Both patients were assigned to Respondent McBriar. Both syringes had been tampered with. Laboratory testing later indicated that neither syringe contained morphine.

7. Respondent McBriar called in sick the next day.

8. On or about October 13 and October 14, 2009 Respondent attempted suicide by overdose of morphine, alprazolam and alcohol. Friends intervened and she was hospitalized voluntarily.

9. Respondent McBriar later admitted that she had stolen morphine from the hospital on October 12, 2009, and substituted water. She also admitted that she had injected herself with morphine during her shift and worked with morphine in her system.

10. Respondent McBriar has a history of mental health issues.

## CONCLUSIONS OF LAW

1. The Wisconsin Board of Nursing has jurisdiction over this matter pursuant to Wis. Stat. § 441.07.

2. Wis. Stat. § 440.03(1) provides that the department (of Regulation and Licensing) may promulgate rules defining uniform procedures to be used by the department... and all examining boards and affiliated credentialing boards attached to the department or an examining board, 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 McBriar at her last known address, she was duly served with these papers pursuant to Wis. Admin. Code § RL 2.08.

4. As the licensee, it was Respondent McBriar’s responsibility to keep her address on file with the Department of Regulation and Licensing current. Wis. Stat. § 440.11(1).

5. Respondent McBriar 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. Respondent McBriar has admitted to the allegations of the Complaint by default by not filing an Answer.

7. Pursuant to Wis. Stat. § 441.07(1)(d), the Board of Nursing (the “Board”) has authority to “revoke, limit, suspend or deny renewal of a license of a registered nurse” if the Board finds that the registered nurse has engaged in “misconduct or unprofessional conduct.”

8. Wis. Admin. Code § 7.04 defines “misconduct or unprofessional conduct” as “any practice or behavior which violates the minimum standards for the profession necessary for the protection of the health, safety, or welfare of a patient or the public.”

9. Wis. Admin. Code § 7.04(2) further defines “misconduct or unprofessional conduct” to include “[a]dministering, supplying or obtaining any drug other than in the course of legitimate practice or as otherwise prohibited by law.”

10. Respondent McBriar's conduct, as described in paragraphs 3-9 of the Findings of Facts, constitutes a violation of Wis. Admin. Code § N 7.0(2) and subjects Respondent McBriar to discipline pursuant to Wis. Stat. § 441.07(1)(c) and (d).

11. Pursuant to Wis. Stat. § 4412.07(1)(c), the Board may also "revoke, limit, suspend or deny renewal of a license of a registered nurse... if the board finds the person 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."

12. Wis. Admin Code § 7.03(3) provides that "'mental incompetency' is evidence by conduct which reflects an impaired ability of the licensee to safely or reliably perform duties. 'Mental incompetency' also includes, but is not limited to, adjudication of incompetence by a court of law."

13. Respondent McBriar's conduct, as described in paragraph 10 of the Findings of Facts, further constitutes "acts which show the registered nurse... to be unfit or incompetent by reason of... mental incompetency, in violation of Wis. Stat. § 441.07(1)(c) and Wis. Admin. Code § 7.03(3) and subjects Respondent McBriar to discipline pursuant to Wis. Stat. § 441.07(1)(c).

## **DISCUSSION**

### **Violations of Wisconsin Statute and Administrative Code**

By failing to provide an Answer to the Complaint filed against her, Respondent McBriar has admitted that all allegations contained within the Complaint are true. Wis. Admin. Code § 2.09. As such, it is undisputed that in the early fall of 2009, Respondent McBriar (1) stole several syringes of morphine from the hospital at which she worked, (Columbus Community Hospital), and then attempted to conceal her actions by replacing the diverted morphine with water, (2) injected herself with morphine during her shift and worked with morphine in her system on at least one occasion, and (3) attempted suicide by overdose of morphine, alprazolam and alcohol. Such conduct clearly violates Wis. Admin. Code §§ N. 7.04 and N. 7.04(2), which includes as misconduct the "[o]btaining [of] any drug other than in the course of legitimate practice or as otherwise prohibited by law."<sup>1</sup> It further constitutes "acts which show the registered nurse to be unfit by reason of mental incompetency, pursuant to Wis. Stat. § 441.07(1)(c) and Wis. Admin Code § N. 7.03(3). Respondent McBriar is thus subject to discipline pursuant to Wis. Stat. §§ 441.07(1)(c) and (d). The only question that remains is what kind of discipline is appropriate.

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<sup>1</sup> The Division's Complaint additionally alleged that Respondent McBriar's conduct violated Wis. Admin. Code § N. 7.04(1), which defines "misconduct or unprofessional conduct" to include "[v]iolating or aiding and abetting a violation of any law substantially related to the practice of professional or practical nursing." Because the Division did not provide any evidence or argument to indicate what law Respondent McBriar's conduct violated, this allegation will not be considered.

### Appropriate Discipline

The Division requests that Respondent McBriar's license to practice nursing be suspended pending proof of fitness to practice. The Division proposes that if Respondent McBriar can satisfy the Board that she can practice safely, then the Board shall impose a suspension for an indefinite period of not less than five (5) years, with monitoring, "as is typical in these [addiction] cases." In support its recommendation, the Division cites *In the Matter of Disciplinary Proceedings Against Julie A. Trzebiatowski, R.N., A.P.N.P* (LS0603091NUR, <https://online.drl.wi.gov/decisions/2006/agency-00069310>), in which the respondent, a registered nurse and advance practice nurse prescriber, received nearly the same discipline<sup>2</sup> after she diverted narcotics and other medications and supplies from her employer, and then attempted to commit suicide with said medications and supplies.<sup>3</sup>

In light of the uncontested evidence, the Division's request will be granted.

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 McBriar's admitted diversion and use of morphine while at work evinces that she has a substance abuse problem which requires rehabilitation. Her attempts to conceal her conduct, by replacing the morphine she took with water, and her willingness to work while under the influence of narcotics show that she did not consider the risk her actions posed to her patients. Finally, her history of mental health issues, culminating in a suicide attempt on October 13 and October 14, 2009, show that she is not presently competent to care for herself, much less others. The relief requested by the Division is thus appropriate and even necessary to protect the public from future instances of misconduct by the respondent.

### Costs

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

In *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), the Chiropractic Examining Board found that:

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<sup>2</sup> Although Respondent Trzebiatowski's licenses were indefinitely suspended, the Board did not indicate a specific time period before which they would not be reinstated.

<sup>3</sup> The Division notes that the Board did not "spell out" the limitations which might be imposed if a stay of the suspension were granted, but indicates that "later decisions on the DRL website show that the Board imposed its typical monitoring order on Ms. Wilcox [formerly *Trzebiatowski*] a later date." The undersigned ALJ has reviewed these decisions, (nineteen in number, including the initial decision), and finds that while the Board's initial decision (LS0603091NUR) did not specifically detail the limitations and treatment and monitoring requirements that would be imposed on the respondent's licenses, the Board did provide an appropriate framework that will be followed in this case. The undersigned ALJ further requests that in the future, references to DRL decisions and/or orders be specifically cited and/or provided to the ALJ.



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 McBriar should be assessed the full amount of recoverable costs. Her 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 McBriar on Respondent McBriar, and not fellow members of the nursing profession who have not engaged in such conduct. Payment of assessed costs will be necessary before the respondent's license can be reinstated pursuant to Wis. Stat. § 441.07(2). If the Board assesses costs against the respondent, these amount of costs will be determined pursuant Wis. Admin. Code § RL 2.18.

## ORDER

1. For the reasons set forth above, IT IS ORDERED that the license of the Respondent Audrey McBriar to practice nursing in the State of Wisconsin be and is hereby **INDEFINATELY SUSPENDED**, for a period not less than five (5) years.

2. The suspension of Respondent McBriar's license **MAY BE STAYED** upon proof to the satisfaction of the Board of all of the following:

- a. Respondent shall have, at Respondent's own expense, undergone a mental health assessment by an experienced mental health care practitioner.
  - i. The assessor must not have treated Respondent at any time and shall have been approved by the Board, with an opportunity for the Division to make its recommendation, prior to the evaluation being performed.
  - ii. The Division shall provide the assessor and Respondent with those portions of the investigative file which the Division believes may be of assistance in performing the assessment, including Respondent's treatment records or evaluations in the possession of the Division. Respondent may provide the assessor with any information Respondent believes will be of assistance in performing the assessment and shall immediately provide copies of that information to the Division.
  - iii. Respondent shall authorize the assessor to provide the Board, or its designee, and the Division with the opportunity to discuss the assessment and findings with the assessor.
  - iv. The assessor shall have provided an opinion to a reasonable degree of professional certainty that Respondent is able to practice with reasonable skill and safety of patients and public and does not suffer from any condition which prevents her from practicing in that manner. This opinion must be accompanied by the assessor's reasoning, articulated to the Board's satisfaction.
- b. If the assessor has rendered the opinion required above, and supported that opinion to the Board's satisfaction, then the Board may stay the suspension.

3. In the event that the suspension is stayed, the Board may **LIMIT** Respondent's license in a manner to address any concerns the Board has as a result of the conduct set out in the findings of fact or the period of time Respondent has not practiced nursing and to address any recommendations resulting from the assessment, including, but not limited to:

- a. Psychotherapy or other treatment, at Respondent's expense, by a practitioner approved by the Board, to address specific treatment goals, with periodic reports to the Board by the therapist.
- b. Additional professional education in any identified areas of deficiency.
- c. Restrictions on the nature of practice or practice setting or requirements for supervision of practice, by a professional approved by the Board, with periodic reports to the Board by the supervisor.
- d. Requiring Respondent to appear before the Board on an annual basis, if requested by the Board, to review the progress of any treatment.
- e. Imposing a prohibition on the use of alcohol and drugs and instituting random alcohol and drug testing and alcohol and drug treatment.

4. The Board may revoke the stay and reinstate the suspension at any time if it determines that patient health, safety or welfare so warrants.

5. Upon the recommendation of her therapist, Respondent may petition the Board to eliminate the limitations on her license and/or end the suspension. The decision to eliminate any of the limitations or to end the suspension is the sole discretion of the Board. Denial in whole or in part of a petition under this paragraph shall not constitute denial of a license and shall not give rise to a contested case within the meaning of Wis. Stats. §§ 227.01(3) and 227.42.

6. Violation of any of the other terms of this Order may be construed as conduct imperiling public health, safety and welfare and may result in a summary suspension of Respondent's license pursuant to the procedures set forth in Wis. Admin. Code RL Ch. 6. The Board in its discretion may in the alternative impose additional conditions and limitations or other additional discipline for a violation of any of the terms for this Order. In the event that Respondent fails to pay costs as ordered the Respondent's license **SHALL REMAIN SUSPENDED**, without further notice or hearing, until Respondent has complied with the terms of this Order.


7. Respondent McBriar 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**

8. This Order is effective on the date of its signing.

Dated at Madison, Wisconsin on September 28, 2010.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
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By:   
Amanda Tollefsen  
Administrative Law Judge

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