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STATE OF WISCONSIN
BEFORE THE NURSING BOARD

IN THE MATTER OF THE DISCIPLINARY : ORDER RESCINDING DELEGATION
PROCEEDINGS AGAINST : OF AUTHORITY TO RULE ON
: SHOW CAUSE HEARING AND
MICHAEL L. RAYMOND, R.N., : GRANTING CONTINUATION
RESPONDENT. : OF SUMMARY SUSPENSION
: ORDER0000521

Division of Enforcement Case No. 10 NUR 371

TO: Michael L. Raymond, R.N.
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PROCEDURAL HISTORY

On November 4, 2010, the Board of Nursing granted the Petition for Summary Suspension thereby immediately suspending the Respondent's license to practice nursing in the state of Wisconsin, having found probable cause to believe that Respondent had engaged in or is likely to engage in conduct such that the public health, safety or welfare imperatively required emergency suspension of his license to practice nursing. In addition to the order of summary suspension, the Board delegated its authority pursuant to RL 6.11(1)(a) to an employee of the department to preside over and rule in a hearing to show cause provided for in s. RL 6.09 Wis. Admin. Code.

On November 30, 2010, a show cause hearing was held before Yolanda McGowan, an employee of the department. On August 8, 2011, the Respondent, by his attorneys, Harlowe Law, S.C. and Michael J. Herbert, filed a Motion for Termination of Summary Suspension. The basis for the motion was that there had been an unreasonable delay in the administrative proceedings. Oral arguments on the motion were made before the Wisconsin Board of Nursing (Board) on September 1, 2011. Attorney Michael Herbert appeared for the Respondent. Attorney Jeanette Lytle appeared for the Complainant, Department of Safety

and Professional Services (formerly the Department of Regulation and Licensing, Division of Enforcement.)

The Board having heard the arguments of counsel and having reviewed the parties' briefs and the Transcript of the Proceedings in the Disciplinary Proceedings Against Michael L. Raymond, RN, 10 NUR 371 (Show Cause hearing), now finds and orders as follows:

FINDINGS OF FACT

1. Michael L. Raymond, R.N., Respondent, date of birth June 14, 1966, is currently licensed by the Wisconsin Board of Nursing as a registered nurse pursuant to license number 150051-30, which was first granted February 24, 2005.
2. Respondent's last address reported to the Department of Safety and Professional Services is 2398 Wisconsin Street, Oshkosh, Wisconsin, 54901-7812.
3. Respondent has been employed as a pediatric nurse and school nurse. [Tr. p. 188]. Respondent has also worked as a home health nurse and described in his resume experience working with disabled children at home and students with diverse medical needs. Respondent's resume stated that his career objective is working with ventilator-dependent adults and children at home. [Ex. S.1].
4. Division of Enforcement case number 10 NUR 371 was opened based on information received from the Oshkosh Police Department alleging that Respondent was in possession of child pornography.
5. On January 29, 2010, the Oshkosh Police Department executed a search warrant at the residence of Respondent and seized Respondent's laptop computer which contained over 3,500 photographs of naked children, including photographs showing children engaging in explicit sexual acts. In addition, the police found photographs of a severely disabled girl, naked with buttocks, breasts and vaginal area fully exposed and visible, who was later identified by Respondent's wife as a 13-year-old, former patient of Respondent.
6. Dean Artus, a detective with the Oshkosh Police Department, who has over eighteen years experience as an officer; fifteen years of which has been as a detective, and who has investigated over 20 child pornography cases, interviewed Respondent and his wife and retrieved Respondent's laptop computer, boxes of photos, framed photos, books and videotapes. [Tr. pp.41-45]
7. Detective Artus forwarded the Respondent's laptop computer to the Department of Justice, Division of Criminal Investigations (DCI), for forensic examination of the computer's hard drive. [Tr. p.46]
8. Based upon the contents of the computer, a criminal case was referred to the district attorney for criminal charges involving possession of child pornography. Respondent is awaiting trial on those charges which is scheduled for December 2011.

9. Detective Artus testified that at least six different photographic images on Respondent's laptop computer depicted sexually explicit activity involving children. Those images included: (1) an image of a young nude female on her knees and elbows with a naked male behind her, engaging in a sex act [0072.jpg]; (2) a nude juvenile male with an erection [1888.jpg]; (3) a young nude female bending over showing her buttocks and vaginal area [2463.jpg]; (4) a young nude female facing the camera with a male behind her, engaged in sexual intercourse [2501.jpg]; (5) a young female in knee-high striped socks, showing her genitalia, with a penis inside her vagina [2522.jpg]; and (6) a young nude female, with her hand on a male's erect penis. [2550.jpg] [Tr. pp 56-58].
10. According to Detective Artus the photographs depicted what appeared to be children under the age of 18. [Tr. p.59]
11. Dr. Szabo, a pediatrician who has testified in other child pornography cases, also confirmed in her testimony that to a reasonable degree of medical certainty the children in the photographs found on Respondent's laptop computer were under 18 years of age. [Tr. pp. 114-115].
12. Fifteen of the photographs found on Respondent's computer depicted children who the National Center for Missing and Exploited Children identified as former victims of child assault from Paraguay. [Tr. p. 61]
13. Detective Artus noted several other photographs on Respondent's computer that were of concern, including: (1) a young female's genitalia, with fingers pulling underwear aside to show her vagina [2474.jpg]; (2) a nude young female with her underwear pulled down to show her vagina [2517.jpg]; and (3) a young female's nude genitalia. [2549.jpg]. (4) a nude young female lying on the floor with her legs spread in the air [2521.jpg] and (5) a nude young individual, gender undetermined, with what appears to be a sex toy in the buttocks or vagina. [2520.jpg] [Tr. pp. 59-60].
14. During the course of his investigation, Detective Artus interviewed Respondent's wife who told him that she found Polaroid photographs of Respondent's Little Brother (from the Big Brothers/Big Sisters program) taken while he was naked [Tr. pp. 42-43.]. The Little Brother was not aware that he had been photographed naked by the Respondent. [Tr. p. 87].
15. Respondent admitted to Detective Artus that when his Little Brother was 8 or 9 years old he had taken him to a public swimming pool and had accidentally videotaped him changing in a locker room. The video depicted the child nude. [Tr. p.44]
16. Respondent's wife also told Detective Artus that she saw naked photographs of one of Respondent's former patients who had been cared for in Respondent's home. [Tr. p 62]
17. Among the photos found on Respondent's laptop computer, were photographs of the breasts and genitalia of a naked, severely disabled 13-year-old patient ("Kassie") who Respondent cared for in his own home. [Tr. pp. 62-63, 66-67, 154]

18. It is unusual for a nurse to care for a patient in their own home. [Tr. pp. 116, 152]. Home health patients are typically cared for in the patient's own home or in a respite center. [Tr. p. 116]
19. Dr. Susan Szabo testified that there was no medical reason for some of the photographs of Kassie. [Tr. pp. 119-124]. According to Dr. Szabo, a nurse may need to take photographs to document skin integrity issues, but they should first get written consent from the parents, particularly when the patient is photographed in the nude, and the photographs should be forwarded to the patient's physician. [Tr. p. 117]. When taking any such photographs, the patient should be draped to ensure against unnecessary exposure of their genitals and/or face. [Tr. p. 117].
20. Dr. Szabo was bothered by the photographs of Kassie's genitals as they did not demonstrate any medical condition. [Tr. p. 120]
21. Dr. Szabo was also concerned about one of the photographs which appear to show that the patient's anus was dilated and possibly indicates that someone might have had anal intercourse with her. [Tr. p. 121]
22. Steve Rohland, an investigator with the Department of Safety and Professional Services who investigated the complaint from the Oshkosh Police Department spoke to the Department of Justice computer analyst who performed forensic testing on the computer.
23. Rohland testified that he was informed by the computer analyst that the naked photographs of the disabled patient Kassie and numerous other photographs of naked children, including the pornographic photographs, were found on Respondent's laptop computer in a computer file labeled "to be archived." The photographs were not in another file labeled "medical file." [Tr. pp. 129-130].

CONCLUSIONS OF LAW

1. The Board of Nursing has jurisdiction in this matter and may summarily suspend a license to practice nursing pursuant to Wis. Stat. § 227.53(3), and Wis. Admin. Code § RL 6.
2. Pursuant to Wis. Admin. Code § RL 6.09(5), the Board of Nursing may order that the summary suspension be continued until after the effective date of the final decision and order in the disciplinary matter if the preponderance of the evidence presented at a show cause hearing establishes that a respondent has engaged in or is likely to engage in conduct such that the public health, safety or welfare requires continuation of the suspension of a license to practice nursing.
3. The preponderance of credible uncontroverted evidence establishes that Respondent Michael L. Raymond, by his conduct as described in the Findings of Fact involving his

possession of child pornography and possession of inappropriate naked photographs of a patient without the consent from the child's parent, has engaged in or is likely to engage in conduct such that the public health, safety or welfare requires continuation of the suspension of a license to practice nursing.

ORDER

IT IS HEREBY ORDERED that based upon the evidence of record and arguments presented, the Respondent's motion for termination of the summary suspension is DENIED and the summary suspension shall continue in full force and effect until the issuance of a final decision and order in the pending disciplinary proceeding against Respondent.

IT IS FURTHER ORDERED that the Board shall, and has rescinded the delegation pursuant to Wis. Admin. RL 6.11(a), and designation under s. 227.46(1), Stats., to an employee of the Department to preside over and rule in the matters raised at the Hearing to Show Cause in the Matter of Disciplinary Proceedings Against Michael L. Raymond.

DISCUSSION

At the onset of this proceeding, the Board properly delegated its authority to a designated department employee to preside over and rule in a show cause hearing, pursuant to Wis. Admin. Code RL 6.11(2). For reasons not entirely clear to the Board, the department employee has not rendered a decision on the Show Cause hearing concerning the continuation of the summary suspension. Likewise, for reasons unknown to the Board, the parties failed to apprise the Board of the delay until after eight months passed since the conclusion of the show cause hearing. Nor has this matter proceeded to a Class 2 disciplinary hearing, which would provide the Respondent with an opportunity for final resolution of this disciplinary matter.

However, it was not disputed by the parties at the oral argument, and the Board agrees, that the delay associated with the Show Cause hearing proceeding is inconsistent with their expectations regarding when the decision would be made.¹ Accordingly, in view of the present circumstances, the Board finds it necessary and appropriate that the delegation of authority to the employee of the department to rule on the issues at the hearing to show cause should be rescinded. The Board also finds it to be necessary and appropriate that the Board reassume jurisdiction over this matter and make the determination as to whether the summary suspension should be continued.

The Board has reviewed the transcript of the show cause hearing held on November 30, 2010, and the exhibits admitted in that proceeding. The evidence consisted of the testimony of the three witnesses called by the complainant who testified at the hearing: Detective Dean Artus, Dr. Susan Szabo and Investigator Steve Rohland. The Board also reviewed the testimony of

¹ Wis. Admin. Code, RL 6.09(5), the administrative code provisions for a hearing to show cause states "At the conclusion of the hearing to show cause the licensing authority shall make findings and an order. If it is determined that the summary suspension order should not be continued, the suspended license shall be immediately restored. The code does not specify a time frame for when such findings and order must be made.

Respondent's witness, Caley Powell, R.N., and three exhibits consisting of a news article, a journal article and Respondent's professional resume. The Board also reviewed the post-hearing briefs submitted by the parties regarding the application of the substantial evidence/legal residuum rule to the show cause hearing. Legal counsel for Respondent argued that the hearsay evidence submitted at the hearing to show cause does not constitute substantial evidence to support the administrative finding that Respondent possessed child pornography and inappropriate photographs of a patient. Complainant argued in rebuttal that the hearsay testimony regarding the location of the child pornography on Respondent's computer was acceptable to support the finding because the hearsay was corroborated by other evidence and not controverted by in-person testimony. .

The Board accepts that an agency's action must be supported by substantial evidence in the record and that an individual has vital interest in the potential sanction of his or her professional license. The Board finds that the case law in Wisconsin holds that corroborated hearsay can legally constitute substantial evidence to support an agency finding if the hearsay is not controverted or opposed by other reliable evidence, specifically by in-person testimony. *Gehin v. Wisconsin Group Insurance Board*, 278 Wis. 2d 111, 692 N.W.2d 572 (2005), *Williams v. Housing Authority of the City of Milwaukee*, 323 Wis. 2d 179, 190, 779 N.W.2d 185, 191 (Ct. App. 2009.) Corroborating evidence is evidence sufficient to permit a reasonable person to conclude, in light of all the facts and circumstances, that the hearsay statements could be true. See Wis. Stat. § 908.045; *Gehin*, 278 Wis. 2d 11, 154. Corroborating evidence can, in some cases, be other hearsay evidence. See *Gehin*, 289 Wis. 2d at 156. The most recent Wisconsin Court of Appeals decision on the admissibility of hearsay evidence distinguished *Gehin* and stated that *Gehin* stands for the proposition that an administrative agency cannot rely on *uncontroverted* written hearsay *alone* when that hearsay is *otherwise controverted by in-person testimony*. *Questions, Inc., v. City of Milwaukee*, 2011 Wisc. App. LEXIS 557 (Wis. Ct. App. July 19, 2011)

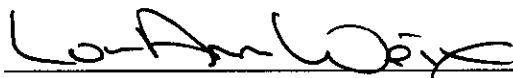
The Board finds that the preponderance of the uncontroverted evidence presented in support of the continuation of the summary suspension, although some of which is hearsay, is of such quantity and quality that a reasonable person could, in light of all the facts and circumstances, conclude that the hearsay statements were true. Detective Artus, Investigator Rohland and Dr. Szabo are experienced trustworthy professionals. Although their testimony contained some hearsay, the information which they testified to was elicited from reliable sources. An example is the testimony of Investigator Rohland who interviewed the government forensic computer expert who was subpoenaed to testify but not allowed to appear due to the pending criminal case.

Nor does the hearsay testimony of these witnesses stand alone, it was corroborated by credible circumstantial evidence. There were several thousand computer images and photographs of naked children and other materials found in Respondent's home. Respondent admitted that he videotaped a young boy in the nude; a boy that Respondent was mentoring in the Big Brothers/Big Sisters program. Respondent's wife told Detective Artus that her husband had also taken nude Polaroid photographs of the boy. In addition, Respondent had in his possession non-medically necessary photographs of a naked 13 year old severely disabled patient. All of the circumstantial evidence corroborates the hearsay testimony and leads to logical conclusion that the allegations are true.

Finally, Respondent did not present in-person testimony to controvert the evidence regarding his possession of child pornography. Respondent's one and only witness, Ms. Powell, testified only about Kassie, the disabled child patient and her health care needs, not about the naked photographs of the patient or other children. Respondent did not testify about the photographs found in his possession. Nor was there any forensic computer evidence to dispute the hearsay testimony regarding the file location of the thousands of images on his laptop computer. Rather, Respondent has relied throughout these proceedings on argument from his legal counsel as opposed to actual evidence controverting the complainant's evidence. Therefore, under the *Williams*, *Gehin* and *Questions, Inc.* line of cases, corroborated hearsay evidence which is not controverted by in-person testimony is acceptable to support the finding of facts in this proceeding, specifically, to support the evidence relating to Respondent's intentional possession of the images on his laptop computer.

Based upon the evidence presented, the Board concludes that the continuation of the summary suspension is highly appropriate. Respondent has engaged or is likely to engage in conduct such that the public health, safety or welfare is at risk. The evidence shows that Respondent has, at the very least, an obsession with naked children. This is demonstrated by his possession of over three thousands photographs of naked children, including some who were known to be victims of sexual assault, and some of which were pornographic. The evidence shows that Respondent has taken advantage of vulnerable persons entrusted to his care to satisfy his obsession. Respondent admitted that he videotaped a young boy in the nude, a boy who he was to mentor. Respondent also had in his possession non-medically necessary naked photographs of a severely disabled female child for whom he provided professional nursing care in his home. Clearly, given Respondent's propensity to view and photograph naked children for his own prurient interests, including those entrusted to his care, and the opportunity in his practice as a nurse to exploit that desire, it is necessary to protect any future vulnerable patients from such exploitation by the continuation of the suspension until the final disposition of this case.

Dated this 9th day of September, 2011.



Lou Ann Weix, Chair
Board of Nursing

