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Before The
State Of Wisconsin
Board of Nursing

In the Matter of the Disciplinary Proceedings
Against ARMSTRONG, CHERYL K., L.P.N.,
Respondent

FINAL DECISION AND ORDER

~~ORDER 0000766~~

Division of Enforcement Case No. 09 NUR 289

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 24th day of March, 2011.

Member
Board of Nursing



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **ARMSTRONG, CHERYL K., L.P.N.**,
Respondent

PROPOSED DECISION AND ORDER
DHA Case No. DRL-09-0112

Division of Enforcement Case No. 09 NUR 289

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

Cheryl K. Armstrong
E13621 Bluff Road
Baraboo, WI 53913-9659

Department of Regulation and Licensing, Division of Enforcement, by

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

Wisconsin Board of Nursing
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, Cheryl K. Armstrong. The Division filed said Complaint with the Division of Hearings and Appeals on November 3, 2009. On the same date, the Division sent a copy of the Complaint and a Notice of Hearing via certified and regular mail to Respondent Armstrong at 1414 Martiny Court, #7, Baraboo, WI, 53913. The Notice of Hearing stated that Respondent Armstrong 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 “not deliverable as addressed, unable to forward, return to sender.” The Division could not forward these documents to Respondent Armstrong, as it was not (and is not) aware of any other address for Respondent Armstrong other than the one provided above. To date, no Answer has been filed.

On December 10, 2010, the undersigned Administrative Law Judge (ALJ) of the Division of Hearings and Appeals issued a Notice of Telephone Hearing on a Motion for Default with Respondent Armstrong and Attorney Jeanette Lytle of the Division of Enforcement for January 20, 2011. This Notice instructed Respondent Armstrong to contact the undersigned ALJ to provide the telephone number for which she could be reached for the January 20, 2011, telephone conference, and was sent to E13621 Bluff Road, Baraboo, WI, 53913-9659 which pursuant to notification from the United States Post Office is Respondent’s current address. The Notice was not returned by the USPS and must be considered delivered mail.

On January, 20, 2010 a Hearing on the Motion for Default was held. The DOE appeared by Attorney Jeanette Lytle. Respondent failed to appear. The Motion for Default is therefore not contested.

FINDINGS OF FACT

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

1. Cheryl K. Armstrong, L.P.N., Respondent, date of birth February 21, 1957, is licensed by the Wisconsin Board of Nursing as a licensed practical nurse in the State of Wisconsin, pursuant to license number 27117, which was first granted June 6, 1984.
2. Respondent Armstrong’s most recent address on file with the Wisconsin Board of Nursing is 1414 Martiny Court #7, Baraboo, Wisconsin and pursuant to the USPS is E13621 Bluff RD. Baraboo, WI, 53913.
3. On or about September 7, 2005 and September 12, 2005, Respondent forged a prescription of Oxycodone in the State of Florida. The Florida Board of Nursing, among other actions, suspended her license until such time as she was deemed safe to practice nursing.
4. On or about October 1, 2007 and February 26, 2008, Respondent was convicted of obtaining controlled substances by fraud and served a term in a State of West Virginia prison.
5. On or about September 2009, Respondent was working at a nursing home in Wisconsin when it was noticed that there were discrepancies between her charting and her

documentation regarding administration of mediations. Thereafter, Respondent Armstrong refused to submit to a drug test, left the facility, and failed to return.

6. The conduct described in paragraphs 3-5 above constitutes a violation of Wisconsin Administrative Code § N 7.04(1) and (2) and subjects Respondent to disciplinary action pursuant to Wis. Stat. § 441.07(1(d)).

7. As set out in the Procedural History above, a Complaint and Notice of Hearing were sent to Respondent Armstrong at her most recent address on file with the Department of Regulation and Licensing/Wisconsin Board of Nursing on November 6, 2009.

8. On or about December 10, 2010, the undersigned ALJ sent a Notice of Default Hearing for January 20, 2011 to Respondent Armstrong at E13621 Bluff Rd, Baraboo, WI 53913.

9. Respondent Armstrong failed to appear at this hearing and the Division having previously made a Motion for Default; said motion was summarily accepted by the undersigned ALJ.

CONCLUSIONS OF LAW

1. The Wisconsin Board of Nursing has jurisdiction over this matter pursuant to Wis. Stat. §§ 441.07 and 441.50(3)(b).

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 "the 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 "service 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 Armstrong 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 Armstrong's responsibility to keep her address on record with the Department of Regulation and Licensing current. Wis. Stat. § 440.11(1).

5. Respondent Armstrong 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, and by failing to appear at the Hearing on the Motion for Default.

6. Allegations in a complaint are deemed admitted when not denied in an answer. Wis. Admin. Code § RL 2.09. Respondent Armstrong 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 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 § N 704 defines “misconduct or unprofessional conduct” as “any practice or behavior which violates the minimum standards of the profession necessary for the protection of the health, safety, or welfare of a patient or the public.”

9. Wis. Admin. Code § N 704(2) further defines “misconduct or unprofessional conduct” to include: “Administering, supplying or obtaining any drug other than in the course of legitimate practice or as otherwise prohibited by law.”

10. The Respondent’s conduct, as described in Findings of Fact paragraphs 3 and 5, constitutes misconduct or unprofessional conduct contrary to Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code §§ N 7.04 and 7.04(2). Thus, she is subject to discipline pursuant to 441.07(1)(d).

DISCUSSION

Violations of Wisconsin Statute and Administrative Code

By failing to provide an Answer to the Complaint filed against her, Respondent Armstrong has admitted that all allegations contained within the Complaint are true. Wis. Admin. Code § 2.09. As such, it is undisputed that Respondent Armstrong forged a prescription for Oxydalone in the State of Florida and subsequently she was suspended by the Florida Board of Nursing. It is undisputed that Respondent Armstrong was convicted of obtaining a controlled substance by fraud in West Virginia and served a prison term. Further it is undisputed that while working at a Wisconsin Nursing Home, discrepancies arose with Respondent’s charting concerning administration of medications, she was asked to submit to drug testing, did not comply, left work, and did not return. Such conduct clearly violates Wis. Admin. Code §§ N. 7.04 and N. 7.04(2), which includes as misconduct the “administering, supplying or obtaining of any drug other than in the course of legitimate practice or as otherwise prohibited by law.” Respondent Armstrong is thus subject to discipline pursuant to Wis. Stat. § 441.07(1)(d). The only question that remains is what kind of discipline is appropriate.

Appropriate Discipline

The Division requests that Respondent Armstrong's license to practice nursing in the State of Wisconsin be revoked. In light of the uncontested evidence, the Division's request will be granted.

Indeed, 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 conduct. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Respondent Armstrong's numerous allegations of drug misappropriation evinces that she has not yet been rehabilitated, and that she is still very much a danger to the public. Her inability to keep the Division apprised of her whereabouts only strengthens this concern. 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 Armstrong 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:

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 Armstrong 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 Armstrong on Respondent Armstrong, 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 could 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

For the reasons set forth above, IT IS ORDERED that the license of the Respondent Cheryl K. Armstrong's, L.P.N. to practice nursing in the State of Wisconsin be and is hereby **REVOKED**.

IT IS FURTHER ORDERED that Respondent Armstrong 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 Cheryl K. Armstrong.

Dated at Madison, Wisconsin on January 26, 2011.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-3720
FAX: (608) 264-9885

By: 

Robert G. Pultz
Administrative Law Judge