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Before The
State Of Wisconsin
Wisconsin Optometry Examining Board

In the Matter of the Disciplinary Proceedings
Against **MARTHA REILLY, O.D.**, Respondent

FINAL DECISION AND ORDER
Order No. Order 0000 779

Division of Enforcement Case No. 10 OPT 007

The State of Wisconsin, Optometry Examining Board, 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, Optometry Examining Board.

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 31 day of MARCH, 2011.

Member
Optometry Examining Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **MARTHA REILLY, O.D.**, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. DRL-10-0092

Division of Enforcement Case No. 10 OPT 007

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

Martha Reilly
3120 Maple Valley Drive, Apt. 201
Madison, WI 53719

Wisconsin Optometry Examining Board
P. O. Box 8935
Madison, WI 53708-8935

Department of Regulation and Licensing, Division of Enforcement, 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, Martha Reilly. The Division filed said Complaint with the Division of Hearings and Appeals on or about December 2, 2010. On the same date, the Division sent a copy of the Complaint and a Notice of Hearing to Respondent Reilly at her most recent address on file with the Department of Regulation and Licensing; 3120 Maple Valley Drive, Apt. 201, Madison, WI 53719. The Notice of Hearing stated that Respondent Reilly 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 Optometry Examining Board [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.”

To date, no Answer has been filed.

On October December 20, 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 Reilly and Attorney James Polewski of the Division of Enforcement for January 12, 2011. This Notice instructed Respondent Reilly to contact the undersigned ALJ to provide the telephone number for which she could be reached for the January 12, 2011, telephone conference, and was sent to the address on file for Respondent Reilly, as provided above.

Respondent Reilly did not contact the undersigned ALJ with a telephone number that she could be reached at for the January 12, 2011, telephone conference, and the telephone conference that was conducted on that date was without her participation.

At the January 12, 2011, conference, Attorney Polewski made a motion for default pursuant to Wis. Admin. Code § RL 2.14. The undersigned ALJ summarily accepted Attorney Polewski’s default motion and issued a Notice of Default instructing Respondent Reilly 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 Polewski to provide the undersigned ALJ with the Division’s written recommendations for discipline and the assessment of costs in this matter by January 19, 2011. It was mailed to Respondent Reilly at the last address on record for her, 3120 Maple Valley Drive, Apt. 201, Madison, WI 53719. Attorney Polewski provided the undersigned ALJ with the Division’s written recommendations as to discipline and costs on or about January 13, 2011.

Respondent Reilly has failed to respond to either the Notice of Default issued against her, or the written recommendations provided by Attorney Polewski on November 29, 2010.

FINDINGS OF FACT

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

1. Martha Reilly, O.D., respondent, was born on July 30, 1955, and is licensed to practice optometry in the state of Wisconsin, license number 2638-35, originally granted on July 22, 1995.

2. Respondent Reilly’s most recent address on file with the Wisconsin Board of Optometry is 3120 Maple Valley Drive, Apartment 201, Madison, WI 53719.

3. On December 14, 2009, Respondent Reilly's license to practice optometry expired.
4. From December 14, 2009, through September 30, 2010, Respondent Reilly continued to practice optometry without a valid optometry license while she was employed as a doctor of optometry at Sears East Towne Optical Center in Madison, Wisconsin.
5. Respondent Reilly is aware that her license is currently expired because renewal notices have been sent to her address of record on November 11, 2009, August 30, 2010, and September 1, 2010. Respondent Reilly has not renewed her license or made any effort to contact DRL concerning her expired license or the allegations of her continuing to practice optometry with an expired license despite the many attempts that DRL staff have made to contact her.
6. On August 27, 2010, a DRL investigator contacted Sears East Towne Optical Center and left a detailed message that Respondent Reilly contact him. No response of any kind was received from Respondent Reilly.
7. On August 31, 2001, a DRL investigator sent a letter to Respondent Reilly at her address of record requesting a response to the allegations. No response of any kind was received from Respondent Reilly.
8. On September 29, 2010, two (2) DRL investigators went to Sears East Towne Optical Center to speak to the Respondent Reilly in person about her failure to renew her license and her failure to respond to DRL's inquiries. Respondent Reilly was not working at the time of the visit. The optical center's manager said that he would talk to Respondent Reilly the next time she was scheduled to work.
9. On September 30, 2010, the optical center's manager contacted a DRL investigator and informed the DRL investigator that he had spoken to Respondent Reilly and that she had decided to quit working at Sears East Towne Optical Center, but it was not clear whether or not she was employed elsewhere at another optometry clinic or if she was going to seek employment elsewhere at another optometry clinic.
10. On October 27, 2010, a DRL investigator tried contacting Respondent Reilly at her residential phone number, and left a detailed voice mail message requesting that Respondent Reilly contact him. No response of any kind was received from Respondent Reilly.
11. On October 29, 2010, a DRL investigator went to Respondent Reilly's residence in order to meet with her in person. The DRL investigator rang the buzzer to Respondent Reilly's apartment twice, but received no answer, so the DRL investigator left his DRL business card next to Respondent Reilly's apartment number on the buzzer console with "Attention: Dr. Martha Reilly" written on his DRL business card. No response of any kind was received from Respondent Reilly.

12. On November 12, 2010, a DRL investigator sent a second letter to Respondent Reilly at her address of record via Certified Mail. The letter was returned by the Post Office, unclaimed.

13. As set out in the Procedural History above, a Complaint and Notice of Hearing were sent to Respondent Reilly at her most recent address on file with the Department of Regulation and Licensing/Wisconsin Board of Optometry on or about December 2, 2010. The verified Complaint made the allegations recited here as Findings of Fact 1 through 12. The Division made proper service of the Complaint and the notice of hearing upon Respondent Reilly.

14. On or about December 20, 2010, the undersigned ALJ sent a Notice of Telephone Prehearing Conference for January 12, 2011, to Respondent Reilly at the above-referenced address.

15. Respondent Reilly did not appear at this hearing, and the Division made a motion for default which was summarily accepted by the undersigned ALJ.

16. On or about January 12, 2011, the undersigned ALJ sent a Notice of Default to Respondent Reilly at her last known address.

17. Respondent Reilly has not responded to this Notice, or otherwise to the Complaint against her.

CONCLUSIONS OF LAW

1. The Wisconsin Board of Optometry has jurisdiction over this matter pursuant to Wis. Stat. § 449.07.

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

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

7. Pursuant to Wis. Stat. § 449.02(1), "No person shall practice optometry ... without a license to do so and a valid certificate of registration issued by the examining board, except that a dispensing optician need not be so licensed for the practice of optical dispensing."

8. Pursuant to Wis. Stat. § 449.07(1), "The examining board, by order, may reprimand and may deny, limit, suspend or revoke any license or certificate of registration if the licensee or registrant... (f) Is guilty of immoral or unprofessional conduct."

9. Respondent Reilly's conduct, as described in Findings of Fact ¶¶ 3-12, constitutes a violation of Wis. Stat. §§ 449.02 and 449.07(1)(f), and subjects the respondent to discipline pursuant to Wis. Stat. § 449.07(1).

DISCUSSION

Violations of Wisconsin Statute and Administrative Code

By failing to provide an Answer to the Complaint filed against her, Respondent Reilly has admitted that all allegations contained within the Complaint are true. Wis. Admin. Code § RL 2.09. As such, it is undisputed that Respondent Reilly: (1) practiced optometry without a valid license from December 14, 2009, when her license expired, until at least September 30, 2010¹; (2) ignored numerous "renewal notices" DRL sent to her beginning in November of 2009; and (3) "refused to respond to repeated inquiry from the Division," on this subject, beginning in August of 2009. Such conduct clearly violates Wis. Stat. § 449.02.

Though "immoral or unprofessional conduct," as used in Wis. Stat. § 449.07(1)(f), is not specifically defined, (and Wis. Stat. § 449.07(1) does not make practicing without a license punishable *per se*), it also seems quite clear that Respondent Reilly's conduct in practicing without a license for close to one year, when she had been alerted that her license was expired on

¹ Because the Division never conclusively determined whether Sears East Town Mall Optical Center was Respondent Reilly's only place of employment when she quit that job in September of 2009, it is possible that Respondent continues to practice optometry without a license to the present day.

many occasions, is both immoral and unprofessional. She is thus subject to discipline pursuant to Wis. Stat. § 449.07(1)(f).

The only question that remains, then, is what sort of discipline is appropriate.

Appropriate Discipline

The Division requests that Respondent Reilly's license to practice optometry be revoked – so that she may not renew her license within five years from her most recent renewal date² simply by paying the renewal fee and a late fee, as is currently allowed by law.³ (See Wis. Stat. § 440.08(3)(a)).⁴ In support of its recommendation, the Division argues that:

It appears that Dr. Reilly's conduct in practicing without a license was not an oversight, but rather an intentional course of conduct. This course of conduct is particularly targeted at the foundation of the regulatory scheme, and is accordingly worthy of particularly strong response. The law requiring that optometrists be licensed to practice in Wisconsin is not a novel exercise of the State's Police power, but a long-standing measure for the protection of public health, safety and welfare. Allowing Dr. Reilly to flout that law and yet keep the license would contradict the State's seriousness of purpose in granting the license to anyone.

(Division's Written Recommendations for Discipline and the Imposition of Costs, filed January 12, 2011).

The undersigned ALJ agrees with the Division that the undisputed facts show that Respondent Reilly's conduct in practicing without a license was intentional. She further agrees that this kind of conduct must be disciplined if the state's decision to regulate of the practice of optometry is to be given any effect. And, while at first glance, license revocation appears a bit excessive in consideration of the three purposes of discipline (discussed *infra*), under the circumstances of this case, the undersigned ALJ agrees with the Division that Respondent Reilly's right to renew her license upon mere payment of a fee must be revoked.

The purpose of discipline is to: (1) promote the rehabilitation of the licensee; (2) protect the public from other instances of misconduct; and (3) deter other licensees from engaging in

² December, 2009

³ Upon questioning from the undersigned administrative law judge as to the purpose of revoking an expired license, Attorney Polewski advised that though "revocation after expiration does not directly affect [the respondent's] right to practice optometry, given that she has none, but it does terminate her right to renew her license and resume practice legally without first applying for a license and having the board consider her application [anew]."

⁴ Wis. Stat. § 440.08(3)(a) provides, in relevant part: "...[I]f the department does not receive an application to renew a credential before its renewal date, the holder of the credential may restore the credential by payment of the applicable renewal fee determined by the department under s. 440.03 (9) (a) and by payment of a late renewal fee of \$25.

similar conduct. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Respondent Reilly's conduct in practicing without a license for close to one (1) year, when she had been alerted that her license was expired on many occasions, shows that she has little regard for the rules that regulate her practice and protect the general public, and must be rehabilitated. Her inability to participate in the proceedings against her, despite substantial effort from the Division to involve her in this case, only strengthens this concern, and shows that Respondent Reilly has not made any strides towards rehabilitation, and is, thus, still very much a danger to the public. Revoking Respondent Reilly's right to renew her license, per Wis. Stat. § 440.08(3)(a), is thus necessary to promote her rehabilitation, and to protect the public from future instances of misconduct while she rehabilitates. Said discipline will also send a strong message to other optometrists that disregard of the rules that govern optometry will not be tolerated.

Costs

The Division requests that Respondent Reilly 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 of the same reasons as cited in the *Buenzli-Fritz* decision, Respondent Reilly should be assessed the full amount of recoverable costs. Her alleged conduct is of a serious nature, she has failed to cooperate in these proceedings despite repeated efforts by the Division to involve her, and there is no argument that certain factual findings were investigated and litigated unnecessarily. Given the program revenue nature of the Department of Regulation and Licensing, fairness again dictates imposing the costs of disciplining Respondent Reilly on Respondent Reilly, and not fellow members of the optometry 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

For the reasons set forth above, IT IS ORDERED that the license of Martha Reilly, O.D., to practice optometry in the state of Wisconsin, and her right to renew that license, per Wis. Stat. § 440.08(3)(a)⁵, upon the payment of a fee, be and are hereby **REVOKED**.

IT IS FURTHER ORDERED that Respondent Reilly 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:

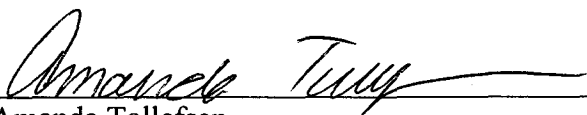
**Department Monitor
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935
Telephone: (608) 267-3817
Fax: (608) 266-2264**

⁵ Wis. Stat. § 440.08(3)(a) provides, in relevant part: “...[I]f the department does not receive an application to renew a credential before its renewal date, the holder of the credential may restore the credential by payment of the applicable renewal fee determined by the department under s. 440.03 (9) (a) and by payment of a late renewal fee of \$25.

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Martha Reilly.

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) 266-7709
FAX: (608) 264-9885

By: 
Amanda Tollefsen
Administrative Law Judge

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