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**Before The**
**State Of Wisconsin**
**Board of Nursing**

In the Matter of the Disciplinary Proceedings
Against **JESSICA A. MCCARTHY, R.N.**,
Respondent

**FINAL DECISION AND ORDER**
Order No. 0000828

Division of Enforcement Case Nos. 08 NUR 306, 09 NUR 353, 10 NUR 138 and 10 NUR 145

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 5 day of May, 2011.

Julia Nelson, RN
Member
Board of Nursing

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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **JESSICA A. MCCARTHY, R.N.**,
Respondent

PROPOSED DECISION AND ORDER

DHA Case No. DRL-10-0061

Division of Enforcement Case Nos. 08 NUR 306, 09 NUR 353, 10 NUR 138, 10 NUR 145

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

Jessica A. McCarthy
1320 Terrace Avenue
Racine, WI 53403

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

Department of Regulation and Licensing, Division of Enforcement, by

Attorney Sandra Nowack
Department of Regulation
Division of Enforcement
P. O. Box 8935
Madison, WI 53708-8935

## PROCEDURAL HISTORY

The Complaint in this matter was served on or about September 10, 2010, by both certified and first class mail, consistent with Wis. Admin. Code § RL 2.08.[1] Respondent McCarthy filed an Answer to this Complaint on or about September 24, 2010, consistent with

[1] Per the January 7, 2011, Affidavit of Lori Hoechst, the Complaint was initially sent to Respondent McCarthy at 1725 Cleveland Avenue, Racine WI 53405, her last known address. Upon being returned to the Division as undeliverable, it was resent to Respondent on September 14, 2010, at 2409 W. High Street, Racine, WI 53404. As of October 4, 2010, Respondent McCarthy's address on record with the Division changed again, and is now 1320 Terrace Ave., Racine, WI 53404.

Wis. Admin. Code § RL 2.09(4).[2] The undersigned ALJ (ALJ) thereafter scheduled a prehearing conference for October 13, 2010. Notice of this prehearing conference was sent to both parties, with instructions that Respondent McCarthy provide the telephone number at which she could be reached for the October 13, 2010, telephone conference to the undersigned ALJ no later than October 8, 2010.

She did not do so.

Nevertheless, the October 13, 2010, prehearing conference was rescheduled for November 2, 2010, and then again for November 22, 2010, upon telephone messages from Respondent McCarthy that she was in the hospital on the dates of the scheduled prehearing conferences.[3]

Respondent McCarthy failed to appear at the prehearing conference that was rescheduled for November 22, 2010. She did not provide a telephone number for which she could be reached at for this telephone conference, and she did notify either the undersigned ALJ (ALJ) or the Department of Regulation and Licensing, Division of Enforcement (Division) that she would be unavailable for it. The Division thus made a verbal motion for default. Because Respondent McCarthy had filed an Answer, and had some initial involvement in the proceedings against her, the undersigned ALJ ordered the Division to provide a written motion for default, to which Respondent McCarthy would have the opportunity to respond.

On or about November 23, 2010, before the Division could file its written motion for default, the undersigned ALJ received information from the Respondent McCarthy's mother that Respondent McCarthy had again been in the hospital at the time of her November 22, 2010, prehearing conference, and that she was set to be released on December 13, 2010. Respondent's mother confirmed that the address on record for Respondent McCarthy was still correct, and provided two phone numbers at which her daughter could be reached.

Upon the above information, the undersigned ALJ, (along with Attorney Sandra Nowack of the Division), attempted to initiate an impromptu prehearing conference with Respondent McCarthy on December 13, 2010. Respondent McCarthy could not be reached at either of the two telephone numbers her mother had provided. The undersigned ALJ thus rescheduled the prehearing conference, once again, for January 3, 2011. Notice of this prehearing conference was sent to Respondent McCarthy at the address on record for her, along with a list of the two phone numbers the undersigned ALJ had on record for her, which she was asked to verify.

Despite the undersigned ALJ's attempts to reach Respondent McCarthy at both of the telephone numbers her mother had provided for her, Respondent McCarthy once again did not appear at the prehearing conference rescheduled for January 3, 2011.[4] She further failed to

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[2] RL 2.09(4) provides that an answer to a complaint shall be filed within 20 days from the date of service of the complaint.

[3] Respondent McCarthy did not provide her telephone number in these messages.

[4] A voice mail message for one of the two numbers indicated that the number belonged to Respondent McCarthy and Ronnel Nelson, whom Division paralegal Lori Hoechst identified, via affidavit, as "the person Respondent [previously] identified as her abusive boyfriend," and whom she claimed impacted her difficulties at work. *See* January 7, 2011 Affidavit of Lori Hoechst, ¶¶ 4, 12.

confirm her telephone number, as requested, and did not notify either the undersigned ALJ or the Division that she would be unavailable for this prehearing conference. The undersigned ALJ left voicemail messages at both telephone numbers, asking Respondent McCarthy to contact her at her office by the end of the day. She did not. Indeed, neither the undersigned ALJ nor the Division has heard anything from the Respondent McCarthy since January 3, 2011.

The Division thus renewed its verbal motion for default at the prehearing conference that proceeded without Respondent's participation on January 3, 2011. At the undersigned ALJ's request, it further filed a written Motion for Default on January 24, 2011.[5] In this motion, the Division alleged that: (1) Respondent McCarthy committed serious quality of care violations that have placed patients in danger; (2) she was aware that her licensure was at issue; and (3) she had not availed herself of the opportunity to participate in these proceedings.

Respondent McCarthy failed to respond to this motion.

The undersigned ALJ thus granted the Division's Motion for Default on February 1, 2011.

This default decision follows.

## FINDINGS OF FACT

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

1. Jessica A. McCarthy, R.N., Respondent (DOB January 2, 1978), is licensed by the Wisconsin Board of Nursing as a practical nurse in the state of Wisconsin pursuant to license No. 141489-30, which was first granted on August 6, 2002.

2. Respondent McCarthy's address on record with the Department of Regulation and Licensing is 1320 Terrace Avenue, Racine, WI, 53403.

3. In August 2008, Respondent McCarthy was employed as a registered nurse at Maple Ridge Health and Rehabilitation Center and as a unit manager at Jewish Home and Care Center in Milwaukee, Wisconsin. Between May 2009 and October 2009, Respondent was employed as a registered nurse at Select Specialty Hospital in West Allis, Wisconsin. Between December 2009 and February 2010, Respondent was employed as a supervising registered nurse at Cameo Care Center in Milwaukee, Wisconsin.

[5] The Division previously sent a Notice of Motion for Default, Motion for Discipline and Costs, and Affidavit in Support of Motion for Default on or about January 7, 2010.

## MAPLE RIDGE HEALTH & REHABILITATION

4. On August 26, 2008, during Respondent McCarthy's evening shift at Maple Ridge Health and Rehabilitation Center, Respondent fell asleep while taking care of a resident's IV. This resident's family reported the incident to the facility administrator.

5. When confronted by the DON, Respondent McCarthy denied falling asleep, but admitted to being tired. The DON noticed Respondent's speech was slurred.

6. Respondent McCarthy told the DON that she had taken oxycodone and alprazolam before her night shift. She told the DON the oxycodone was for pain from a car accident and the alprazolam was for the stress. Respondent claimed to have prescriptions for these medications.

7. On August 26, 2008, Respondent McCarthy did not have a prescription for oxycodone or for alprazolam. Between March 10, 2007 and November 3, 2008, Respondent had only the following prescriptions for controlled substances:

a) On March 10, 2007 – 10, 1mg lorazempam tablets
b) On October 25, 2008 – 30, 50mg tramadol tablets; 20 5mg/500mg hydrocodone tablets;
c) On November 3, 2008 – 120 50mg tramadol tablets

8. Respondent McCarthy later said she needed the oxycodone for pain associated with domestic violence inflicted by her fiancé, and not because of a car accident.

9. On October 3, 2008, Respondent McCarthy wrote a statement in which she said she never took oxycodone and she received four doses of alprazolam from her mother to calm her nerves, and to help with nausea, diarrhea, and insomnia. She explained that before her shift at Maple Ridge Health and Rehab Center on August 26, 2008, she worked an 8:30 – 3:30 p.m. shift at Jewish Home and Care Center. Respondent took one .5mg tablet of alprazolam in the morning and another in the afternoon. Respondent's mother is not licensed to dispense prescription medications.

10. On October 17, 2008, Respondent McCarthy underwent an AODA assessment in which she stated:

a) She was falsely accused of attendance issues at Jewish Home and Care Center so she quit due to the stress. She then obtained employment at Maple Ridge Health and Rehab Center.
b) Her boyfriend physically assaulted her after she confronted him about the other woman [sic]; she sought help from her mother who gave her the alprazolam.

c) She took two doses of the alprazolam the night before the incident and two the day of the incident.
d) Respondent's urine drug screen from earlier that day was positive for benzodiazepine.

11. The AODA assessor recommended that Respondent McCarthy could benefit from psychotherapy to reduce stress, improve problem solving, gain insight into her dysfunctional relationship, and develop a balanced lifestyle. Respondent did not commence counseling.

## SECLECT SPECIALTY HOSPTIAL

12. On May 11, 2009, Respondent McCarthy started working as a registered nurse at Select Specialty Hospital. On July 29, 2009, a disciplinary report was issued to Respondent for calling in an absence for her scheduled shift on July 27, 2009. Respondent was still in her 90-day introductory period, during which employees received a written warning for one absence, and termination for two absences. On August 11, 2009, Respondent's 90-day performance appraisal recorded Respondent having one absence and one tardy, and she was reminded of the absence policy.

13. Colleagues repeatedly described Respondent McCarthy as groggy, tired, out of it, etc.

14. On October 23, 2009, Respondent McCarthy's employment at Select Specialty Hospital was terminated for the following reasons:

a) On several occasions between September 21, 2009, and October 17, 2009, Respondent retrieved narcotic medications from the electronic dispensing machine and did not properly document them.
b) Respondent administered pain medications to residents without properly assessing and/or documenting patient's pain levels.
c) Respondent signed out narcotic medications for patients who had already been discharged.
d) On several occasions between September 21, 2009, and October 17, 2009, Respondent's documentation was illegible.
e) Respondent withdrew medications for [sic] more often than one patient at a time, which is a violation of the facility's policy.

## CAMEO CARE CENTER

15. Beginning December 23, 2009, Respondent McCarthy was employed as a registered nurse supervisor at Cameo Care Center in Milwaukee, Wisconsin.

16. On January 22-23 [2010], Respondent McCarthy was working from 11:00 p.m. until 7:00 a.m. as the supervising RN for the facility, which served approximately 100 residents. Respondent was training a recently-hired RN who was not authorized to work alone. Respondent was responsible for supervising the trainee's work. Instead, Respondent had the trainee work alone on one floor, while Respondent worked on another floor without actually supervising the trainee's work.

17. At approximately 11:15 p.m., Certified Nursing Assistant K.G. reported to Respondent McCarthy and the LPN that Patient D.D. had a change of condition: Patient D.D. looked pale and clammy, and the patient said she felt "blah."

18. Respondent McCarthy failed to conduct an assessment of Patient D.D., and admits that she did not assess patient D.D., did not otherwise check on patient D.D. at any point during her eight-hour shift, and did not confirm that any other nurse had assessed Patient D.D. during the shift. Respondent claimed that she had never been told of the change in Patient D.D.'s condition.

19. On January 23, 2010, Patient D.D. passed away between 6:50 a.m. and 8:30 a.m.

20. Standards of the nursing profession require that when non-nursing staff report a change in the condition of an elderly patient, the patient's nurse must assess the patient and report changes in condition to the patient's physician in less than eight hours.

21. Standards of the nursing profession require that nursing home patients in the condition of Patient D.D. must be seen at least once in an eight-hour shift.

22. On February 5, 2010, Respondent McCarthy was ordered to submit to a urine drug screen because she had signed out a number of narcotics for residents, but failed to document the medications in the residents' medical records.

23. On February 5, 2010, Cameo Care's human resource manager, G.C., gave Respondent McCarthy a form to present for the urinalysis. G.C. completed the form, "Employer's Authorization for Examination or Treatment" and wrote in her own hand [sic] that the specimen was to be "witnessed." Cameo Care then called a taxi for Respondent and sent her to the lab destination. When Respondent arrived for the urinalysis, she presented an altered form that said "non-witnessed" specimen.

24. Although Cameo Care never requests non-witnessed specimen, the lab permitted Respondent McCarthy to submit a sample without a witness. The result of the urinalysis indicated that the specimen had been diluted.

25. They only reasonable inference from the facts set forth above is that on February 5, 2010, Respondent McCarthy altered the employer's authorization form to facilitate a tampered

specimen. It is further reasonable to infer that Respondent altered the specimen because she had used on of the controlled substances for which the screen was intended. She therefore knew that the urinalysis would be positive for a controlled substance for which she did not have a lawful prescription.

26. On February 25, 2010, Cameo Care terminated Respondent McCarthy's employment for performance issues.

27. Alprazolam is a schedule IV controlled substance pursuant to Wis. Stat. § 961.20(2)(a).

28. Oxycodone is a schedule II controlled substance pursuant to Wis. Stat. § 961.16(2)(a)11.

29. Lorazepam is a schedule IV controlled substance pursuant to Wis. Stat. § 961.20(2)(cr).

30. Hydrocodone is a schedule II controlled substance pursuant to Wis. Stat. § 961.16(2)(a)7.

31. Tramadol is not a controlled substance, but does have addictive potential.

32. Pursuant to Wis. Stat. § 961.38(3) it is unlawful for a non-physician to dispense alprazolam to another person without a prescription from a physician.

33. As set out in the Procedural History above, a Complaint and Notice of Hearing were sent to Respondent McCarthy on or about September 10, 2011. (*See* footnote 1)

34. Respondent McCarthy filed an Answer to this Complaint on or about September 24, 2011.

35. The undersigned ALJ thereafter scheduled a prehearing conference for October 13, 2010. Notice of this prehearing conference was sent to both parties, with instructions that Respondent McCarthy provide the telephone number at which she could be reached for the above stated telephone conference.

36. She did not do so.

37. Nevertheless, the prehearing conference was rescheduled for November 2, 2010, and then again for November 22, 2010, upon telephone messages from Respondent that she was in the hospital on the dates of the scheduled prehearing conferences.

38. On November 22, 2010, Respondent McCarthy failed to appear for her twice rescheduled prehearing conference. She had further failed to provide a telephone number at which she could be reached for the conference.

39. Respondent McCarthy's mother subsequently called the undersigned ALJ and reported that Respondent was unable to provide a telephone number and appear for the November 22, 2010, prehearing conference because she was hospitalized until December 13, 2010.

40 After trying, unsuccessfully, to contact Respondent McCarthy on December 13, 2010, the undersigned ALJ rescheduled the prehearing conference for January 3, 2011.

41. On January 3, 2011, despite the ALJ's attempts to reach Respondent McCarthy at two telephone numbers Respondent's mother had provided, Respondent did not appear as ordered for a rescheduled prehearing conference.

42. The undersigned ALJ thus left voicemail messages at both telephone numbers, asking Respondent McCarthy to contact her.

43. Respondent McCarthy did not notify either the Division or the undersigned ALJ that she would be unable to appear on January 3, 2011, and did not contact the undersigned ALJ on January 3, 2010, as directed.

44. Since January 3, 2011, neither the Division nor the undersigned ALJ has heard anything from Respondent McCarthy.

45. Respondent McCarthy has admitted to having twice stolen checks from a coworker while working as a nurse. (*See* January 7, 2011 Affidavit of Hoechst, ¶ 4).

46. Respondent McCarthy has further admitted to having a boyfriend by the name of "Ronnel Jay," who was physically abusive to her, impacting her difficulties at work. Though the Division told Respondent that if she moved away from her boyfriend and obtained a domestic violence injunction, it would consider that as mitigating the risk she presented to patients, there is no reliable evidence to suggest that Respondent has followed through in seeking restraining order against her abusive boyfriend and ending the relationship.

47. When the undersigned ALJ attempted to call Respondent on January 3, 2010, a voicemail message indicated that the number belonged to Respondent McCarthy and "Ronnel Nelson," who the Division has reason to know is Respondent's abusive boyfriend. (*See* January 7, 2011 Affidavit of Hoechst, ¶¶ 4 and 12).

## 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 Chapter RL. Where Ch. RL does not apply to the issues before an ALJ, the Division of Hearings and Appeals may apply rules contained in Wis. Admin. Code Chapter HA 1.[6]

3. Pursuant Wis. Admin. Code § HA 1.07(3), "the ALJ may find a failure to appear [for a prehearing conference] grounds for default if any of the following conditions exist for more than ten minutes after the scheduled time for hearing or prehearing conference: (1) [t]he failure to provide a telephone number to the division [of hearings and appeals] after it had been requested; (2) the failure to answer the telephone...; (3) the failure to free the [telephone] line for the proceeding; (4) the failure to be ready to proceed with the hearing or prehearing conference as scheduled."

4. Respondent McCarthy has defaulted in this proceeding pursuant Wis. Admin. Code § HA 1.07(3) by failing to do all these things. (*See* Findings of Fact. ¶¶ 41 - 46).

5. Wis. Admin. Code § RL 2.14, **Default**, provides that when a respondent is in default, "the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence." HA 1.07(3) further provides that (b) "If a respondent fails to appear [at a hearing], the ALJ may take testimony and issue, modify or rescind an order or take the allegations in an appeal as true as may be appropriate..." (emphasis added).

6. By virtue of Respondent McCarthy's default, it is appropriate to deem the allegations of the Complaint admitted, and issue a decision based on the complaint and other evidence provided by the Division.

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."

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[6] *See* Memorandum of Agreement between DRL and DHA.

9. Respondent McCarthy, by possessing a controlled substance, alprazolam, without a valid prescription[7], has obtained drugs other than in the course of legitimate practice and as otherwise prohibited by law, contrary to Wis. Admin. Code § N 704(2). She is thus subject to discipline pursuant to Wis. Stat. § 441.07(1)(d).

10. Wis. Admin. Code § N 6.05 further provides that "A violation of the standards of practice constitutes unprofessional conduct or misconduct and may result in the board limiting, suspending, revoking or denying renewal of the license or in the board reprimanding an R.N. or L.P.N."

11. Wis. Admin. Code § N 6.03, **Standards of practice for registered nurses**, provides that "(3) ...In the supervision and direction of delegated nursing acts an R.N. shall: ...(b) Provide direction and assistance to those supervised."

12. Respondent McCarthy, by permitting an inadequately trained and/or experienced nurse to practice without required supervision[8], has failed to meet the standards of practice for nurses set forth at Wis. Admin. Code. § N 6.03(3)(b), contrary to Wis. Admin. Code. § N 6.03(5). She is thus subject to discipline pursuant to Wis. Stat. § 441.07(1)(d).

13. 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."

14. Respondent McCarthy, by altering a document authorizing toxicology testing under another person's name, without the consent of the signatory[9], has committed misconduct, not otherwise specified, as defined by Wis. Admin. Code § N 704. She is thus subject to discipline pursuant to Wis. Stat. § 441.07(1)(d).

15. Pursuant to Wis. Stat. § 441.07(1)(c), 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 "Acts which show the registered nurse, nurse-midwife or licensed practical nurse to be unfit or incompetent by reason of negligence, abuse of alcohol or other drugs or mental incompetency."

16. Wis. Admin. Code § N 703(2) defines "abuse of alcohol or other drugs" as "the use of alcohol or any drug to an extent that such use impairs the ability of the licensee to safely or reliably practice."

17. The following conduct, detailed in ¶¶ 2-10 and 16-25 of the Findings of Fact, above, establishes that Respondent McCarthy is impaired by use of controlled substances to such an

[7] *See* Findings of Fact, ¶¶ 4-10.
[8] *See* Findings of Fact ¶ 16.
[9] *See* Findings of Fact, ¶¶ 22-25.

extent that she cannot reliably and safely practice nursing: illegal use of a controlled substance without a prescription, frequent absences, frequent job changes, errors pertaining to controlled substances, faulty documentation and lack of documentation concerning controlled substances, diversion of controlled substances[10], inattentiveness, dishonestly in providing a urinalysis to her employer, slurred speech and sleepiness, and failure to provide competent care for patients.

18. Respondent McCarthy, by using drug(s) to an extent that such use impaired her ability to safely or reliably practice nursing, has committed negligence as defined by Wis. Admin. Code § N 703(2). She is thus subject to discipline pursuant to Wis. Stat. § 441.07(1)(c).

19. Wis. Admin. Code § N 703(1)(c) defines "negligence," as "Failing to observe the conditions, signs and symptoms of a patient, record them, or report significant changes to the appropriate person."

20. Respondent McCarthy, by failing to assess Patient D.D. after a reported change in Patient D.D.'s condition[11], or otherwise during her eight-hour shift, has committed negligence as defined by Wis. Admin. Code § N 703(1)(c). She is thus subject to discipline pursuant to Wis. Stat. § 441.07(1)(c).

21. Wis. Admin. Code § N 703(1)(b) further defines "negligence as "An act or omission demonstrating a failure to maintain competency in practice and methods of nursing care."

22. Respondent McCarthy, by failing to document administration of controlled substances in an accurate and legible way[12], has committed misconduct as defined by Wis. Admin. Code § N 703(1)(b). She is thus subject to discipline pursuant to Wis. Stat. § 441.07(1)(c).

## DISCUSSION

### Violations of Wisconsin Statute and Administrative Code

By abandoning her defense, Respondent McCarthy has conceded that all allegations contained within the Complaint are true. Wis. Admin. Code §§ 2.14 and HA 1.07(3). As such, it is undisputed that Respondent: (1) obtained drugs (alprazolam) other than in the course of legitimate practice; (2) was frequently absent from work and changed jobs often; (3) exhibited sleepiness and slurred speech while at work; (4) signed out medications for patients who had already been discharged and/or failed to document their distribution to patients altogether; (5) permitted an inadequately trained and experienced nurse to practice without supervision; (6) failed to assess patient D.D. after a reported change in Patient D.D.'s condition, or otherwise; and, (7) altered a document authorizing toxicology testing under another person's name in an

[10] As evidenced by signing out controlled substances for patients already discharged.
[11] *See* Findings of Fact ¶¶ 17-21.
[12] *See* Findings of Fact ¶¶ 14 and 22.

attempt to facilitate a tampered specimen. Such conduct clearly violates Wis. Admin. Code §§ N 7.03(2)(abuse of alcohol or other drugs), N 703(1)(c)(negligence), N 6.03(3)(b) (standards of practice), and N 6.05, 7.04(2), and 7.04(1)(misconduct). (*See* Conclusions of Law, ¶¶ 10-22). Respondent McCarthy 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.

## Appropriate Discipline

The Division contends that "[r]evocation of Respondent McCarthy's license to practice nursing is necessary due to the broad scope of her practice violations." (Motion for Discipline and Costs, ¶ 10).

Specifically, it argues that Respondent's: (1) demonstrated lack of credibility, as evidenced by her thefts in the workplace and dishonesty in providing a urine sample aimed at determining whether she was fit to practice; (2) decision to conceal her "impaired status," rather than acknowledge it; (3) inability to care for vulnerable patients, as demonstrated by her failure to respond to a patient's reported change of condition in the last hours of her life; (4) refusal to end her relationship with her abusive boyfriend after she admitted that said relationship has impacted her difficulties at work; and, (5) inability and/or unwillingness to meaningfully participate in the proceedings against her, which are critically important to her career, reveal that Respondent McCarthy is not equipped to safely and reliably care for herself, let alone patients, and that the latter's health and safety would be unnecessarily compromised if Respondent faced anything but revocation. (Motion for Discipline and Costs, ¶¶ 10a-f, *see also Gilbert v. Medical Examining Board*, 119 Wis. 2d 168, 188).

In light of Respondent McCarthy's obvious treatment needs, it further requests that any future decision of the Board of Nursing concerning whether to reinstate Respondent's license shall address, among other factors, whether Respondent McCarthy has presented proof that she is physically and psychologically fit to practice nursing, and in what settings. (*Id.* at ¶ 11).

The undersigned ALJ agrees and finds that Respondent McCarthy's conduct warrants the revocation of her license to practice nursing until such time that she can show that she is physically and psychologically fit to practice nursing.

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 contact. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Respondent McCarthy's conduct in (1) taking controlled substances not prescribed to her, (2) falling asleep and exhibiting slurred speech at work, (3) signing out medications for patients who had already been discharged – or failing to document their distribution to patients altogether, (4) shirking her duties with respect to patient care and supervision of inadequately trained and/or experienced nurses, (5) frequently being absent from work, and (6) attempting to falsify the results of a drug test, evinces that she has a serious drug abuse problem that requires rehabilitation, without with she is

very much a danger to the public. Her inability to participate in these proceedings after numerous attempts to involve her by both the Division and the undersigned ALJ only strengthens these concerns. Suspending Respondent's license until she can prove that she is rehabilitated, and no longer a threat to the public, is thus not only logical, but necessary in light of the above purposes of discipline. Such discipline will further work to deter other licensees from engaging in similar conduct.

## Costs

The Division requests that Respondent McCarthy be ordered to pay the full costs of its investigation and of these proceedings. (*See* Motion for Discipline and Costs, ¶ 14). In fairness to the respondent, however, it asks that the costs be due only if and when Respondent McCarthy elects to apply for licensure again in the future,

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 McCarthy 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 McCarthy on Respondent McCarthy, and not fellow members of the nursing profession who have not engaged in such conduct. Payment of assessed costs will be necessary before Respondent's license can be reinstated pursuant to Wis. Stat. § 441.07(2). If the Board assesses costs against Respondent McCarthy, 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 Jessica A. McCarthy, R.N. to practice nursing in the State of Wisconsin be and is hereby **REVOKED**.

IT IS FURTHER ORDERED that Respondent McCarthy's privilege to practice in Wisconsin pursuant to the Multi-state Nurse Licensure Compact be and is hereby **REVOKED.**

Pursuant to Wis. Stat. 441.07(2), the board in its discretion may reinstate a revoked license no earlier than one year following revocation, upon receipt of an application for reinstatement. Any reinstatement by the board must address whether Respondent has presented proof that she is both physically and psychologically sound to practice nursing, and, if so, in what settings.

IT IS FURTHER ORDERED that if and when Respondent McCarthy elects to apply for licensure in the future, she 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 Jessica A. McCarthy.

Dated at Madison, Wisconsin on March 2, 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
Amanda Tollefsen
Administrative Law Judge

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