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Before The
State Of Wisconsin
BOARD OF NURSING

In the Matter of the Disciplinary Proceedings
Against **DIANE C. WALTERS, R.N.**,
Respondent

FINAL DECISION AND ORDER
Order No. 0001239

Division of Legal Services and Compliance Case No. 09 NUR 290

The State of Wisconsin, Board of Nursing, having considered the above-captioned matter and having reviewed the record and the Supplemental Proposed Decision on Remand of the Administrative Law Judge, make the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Supplemental Proposed Decision on Remand 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 6th day of December, 2012.

Julia Nelson, RN
Member
Board of Nursing



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

In the Matter of the Disciplinary Proceedings Against
DIANE C. WALTERS, R.N., Respondent

SUPPLEMENTAL PROPOSED
DECISION ON REMAND
DHA Case No. SPS-10-0095

Division of Legal Services and Compliance Case No. 09 NUR 290

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

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BACKGROUND

On January 19, 2011, an Amended Complaint was filed against Diane Walters in this matter by the Department of Regulation and Licensing, Division of Enforcement (now called the Department of Safety and Professional Services, Division of Legal Services and Compliance). The Amended Complaint alleged that during the weekend of July 25-26, 2009, Ms. Walters had

tampered with and diluted a bottle of Roxicet while acting as a home health care nurse in a home serving foster children who needed medical care.

The Complaint also alleged that, according to Ms. Walters' medical records, her physician expressed concerns regarding Ms. Walters' use of pain medications, that Ms. Walters asked for additional pain medications, asked for early refills, and took more pills than were prescribed. According to the Amended Complaint, Ms. Walters claimed that her husband had taken her pain medications and that the dog had eaten her medications. She went through withdrawal due to taking more medications than prescribed and ran out of her medications early. Based on these facts, the Amended Complaint alleged that Ms. Walters engaged in "misconduct or unprofessional conduct" under Wis. Admin. Code § N 7.04(2), which prohibits "[a]dministering, supplying or obtaining any drug other than in the course of legitimate practice or as otherwise prohibited by law," and was therefore subject to discipline pursuant to Wis. Stat. § 441.07(1)(d). In addition, the Amended Complaint alleged that Ms. Walters violated Wis. Admin. Code § N 7.03(2), which prohibits the use of "any drug to an extent that such use impairs the ability of the licensee to safely or reliably practice," and was therefore subject to discipline pursuant to Wis. Stat § 441.07(1)(c).

At the hearing held in this matter on May 9, 2011 and in post-hearing briefs, Ms. Walters argued that she did not work on the weekend of July 24-26, 2009 until approximately 7:00 p.m. on Sunday, July 26, 2009, until the following morning, Monday, July 27, 2009, and that the Roxicet had been discovered to be tampered with prior to her shift that weekend. Thus, her position was (and is) that she could not have been the person who tampered with or diluted the Roxicet. The administrative law judge (ALJ) who presided over the hearing and issued the proposed decision in this matter specifically rejected these assertions and concluded that the

Department had met its burden of establishing the violations alleged in the Complaint. The ALJ's proposed decision was adopted by the Wisconsin Board of Nursing (Board) by Final Decision and Order dated December 1, 2011 (collectively referred to as "Decision").

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

By Order dated May 7, 2012, Ozaukee County Circuit Court Judge Paul Malloy remanded the above-captioned matter to the Division of Hearings and Appeals (DHA) for further proceedings as provided by Wis. Stat. § 227.56(1). Specifically, the circuit court's remand order allowed Ms. Walters to submit evidence relating to her billing and work schedule for the weekend of July 24-26, 2009, which Ms. Walters states conclusively establishes that she worked the Sunday evening shift, which she asserts was after the tampering had been discovered.

Consistent with the circuit court's remand order, a status conference was held on July 23, 2012 to address compliance with the circuit court order. At that status conference, the parties agreed that an additional hearing was unnecessary, that counsel for Ms. Walters would submit the evidence related to Ms. Walters' billing and work schedule for the weekend in question, and that the parties would submit briefs on the impact of that additional evidence.

Having reviewed the additional evidence and briefs filed on remand as well as the entire record in this matter, including the transcript of the May 9, 2011 hearing, I conclude, for the reasons set forth below, that the additional evidence does not change the outcome of the Decision in this case.

First, the evidence introduced on remand does not establish the premise for which it was introduced, namely, that Ms. Walters did not work during the weekend of July 24-26, 2009 prior to the Sunday evening shift. The document submitted by Ms. Walters as Exhibit A does appear to establish that Ms. Walters worked at the Urbina home on July 26, 2009 through July 27, 2009;

however, because dates and patients directly before and after that time period are blacked out, it is impossible to conclude based on Exhibit A that Ms. Walters did not work at the Urbina home at other times during the weekend of July 24-26, 2009. Although Ms. Walters states in her reply brief on remand that the sections have been blacked out because they involve patients other than the Urbina family, the fact remains that the document does not establish that Ms. Walters did not work prior to the Sunday evening shift that weekend. Thus, even if Exhibit A had been introduced at hearing, the fact-finder would have been in the same position with respect to whether Ms. Walters worked prior to Sunday's evening shift that weekend, with Ms. Walters indicating that she only worked the Sunday evening shift and with other evidence referred to in the Decision indicating that she may have also worked that weekend prior to the Sunday evening shift.

Second, even if the new evidence supported Ms. Walters' contention that she worked only Sunday night that weekend, it does not change the outcome because there was evidence introduced at hearing that the tampering was not discovered until Monday, July 27, 2009 and the ALJ could not conclusively find that the tampering was discovered prior to that Monday. As found by the ALJ: "When Gail Urbina returned home at the end of the weekend, she checked the narcotic medication, and found that the levels had gone down and the medication appeared to have been tampered with. (Tr. pp. 65-66) [Footnote omitted]. It is unclear from the record whether Ms. Urbina made this discovery late Sunday evening, or early Monday. (*Compare* Tr. p. 65 to Division's Exhibit 2, p. 007-008). *Id.*" (Decision, p. 7, finding of fact no. 30). The ALJ reiterated this point in footnote 13 of the decision. The ALJ's finding is supported by the record, and Exhibit A does not change that finding. Thus, Ms. Walters is incorrect that the new evidence

establishes that the tampering was discovered prior to her working in the Urbina home that weekend.

Third, even if Ms. Walters is correct that Exhibit A establishes that the tampering occurred prior to her shift that weekend, it does not make a difference to the outcome in this case because the ALJ specifically concluded that “Respondent diverted and diluted Roxicet from the Urbina home, both on, *and before*, this weekend.” (Decision, p. 12) (Emphasis added). A preponderance of the evidence supports the ALJ’s conclusion.

Fourth, the new evidence does nothing to negate the Decision’s conclusion that Ms. Walters committed the other violation alleged, namely, that her abuse of narcotics impaired her ability to safely or reliably work as a nurse, in violation of Wis. Stat § 441.07(1)(c) and Wis. Admin. Code § N 7.03(2). The ALJ noted that Respondent had chronic pain, was almost continuously prescribed the narcotic Tussionex; that she overused and exhibited other concerning behaviors with respect to her pain medication, including obtaining narcotics at urgent care visits, claiming that her husband had taken her medications and that her dog had eaten them, and going through withdrawal symptoms when the medications were not prescribed; and that her medical records reflect a gap in her prescription narcotics during the time that she worked at the Urbina home. (Decision at pp. 12-13). The ALJ found that Ms. Walters’ behavior at work was suspicious and even stated that it appeared that Ms. Walters “appeared wired, as if she were on something” during the hearing. (Decision, p. 10, Finding of Fact 56). The ALJ concluded:

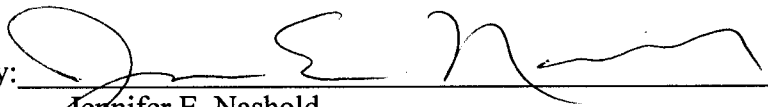
Even more importantly, however, the preponderance of the evidence shows that Respondent abused pain medications to the extent that she diverted Roxicet from severely disabled children, diluting whatever remained so that the bottle would appear full. In the process, she changed the medications’ properties, and assumedly, effectiveness. (Findings of Fact, ¶ 23). The ALJ cannot imagine a clearer example of drug abuse leading to an impaired ability to safely and reliably practice. (*See* Wis. Admin. Code § N 7.03(2)).

(Decision, p. 13). Thus, even assuming the evidence submitted on remand somehow affected the outcome with respect to the tampering and diversion allegation, it does nothing to affect the remaining violation found. Moreover, the discipline imposed -- an indefinite license suspension with an opportunity for a stay of the suspension following an assessment for fitness to practice and after demonstrating six months of compliance with specified drug treatment, testing and counseling -- would remain appropriate even if only one violation involving drug use had been proven rather than two. Ms. Walters does not argue otherwise.

For all of the reasons set forth above, and based on the entire record in this case, I conclude that the new evidence submitted by Ms. Walters on remand does not affect the conclusions of law or the discipline and costs imposed in the Board's December 1, 2011 Final Decision and Order.

Dated at Madison, Wisconsin on October 26, 2012.

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By: 
Jennifer E. Nashold
Administrative Law Judge