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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF THE
APPLICATION FOR REGISTERED
NURSE LICENSE OF

TODD M. VARNES,

Applicant.

**ORDER GRANTING
LIMITED LICENSE**

ORDER 0001325

Todd M. Varnes
411 Luke Lane
Dane, WI 53529

Richard A. Westley,
Westley Law Offices, S.C.
7633 Ganser Way, Suite 100
Madison, WI 53719-2092

Pursuant to the *Order on Respondent's Motion for Pre-Hearing Determination of Legal Standards to be Applied in Application for Licensure and Admissibility of Evidence* issued by Administrative Law Judge Amanda Tollefson on May 11, 2010 (attached as Exhibit A) and upon review of the terms and conditions for grant of licensure as set forth in the *Stipulation and Order Granting Limited License*, the Board of Nursing now finds and adopts the following:

FINDINGS OF FACT

1. The applicant, Todd M. Varnes was licensed in the State of Wisconsin as a veterinarian pursuant to license (#3752-50). This license was first granted on October 31, 1991 and expired on December 31, 1999.
2. Applicant graduated from the University of Wisconsin School of Veterinary Medicine in 1991 with a doctor of veterinary medicine degree.
3. Since his graduation, the applicant has held a veterinary license in the states of Minnesota, Indiana and Illinois.
4. Applicant does not currently hold an active veterinary license in any jurisdiction and has not practice veterinary medicine since 2004.

Prior Disciplinary History

5. Applicant's initial disciplinary action occurred on March 2, 2000, when the Indiana Board of Veterinary Medicine indefinitely suspended his certification of registration to practice as a veterinarian, having found him to be in default in a proceeding involving allegations of unprofessional conduct. The alleged acts of misconduct involved failure to directly supervise an employee as well as failure to follow standard veterinary surgical procedures.
6. Applicant attempted unsuccessfully to set aside the default and to reinstate his veterinary license in the state of Indiana on the grounds that the hearing notice, notice of proposed default and final order were not properly served on him.

7. Prior to initiation of the disciplinary proceeding in Indiana, the applicant relocated to the state of Illinois and later relocated to the state of Minnesota where he purchased a small animal veterinary clinic.
8. In January of 2004, as part of an investigation into applicant's fitness to practice veterinary medicine, the Minnesota Board of Veterinary Medicine required that the applicant undergo a comprehensive mental health examination to determine whether the applicant had successfully addressed his underlying misconduct and whether he could practice veterinary medicine with reasonable skill and safety in accordance with the minimum standards of acceptable and prevailing veterinary practice standards and standards of humane treatment and care. The applicant was evaluated at Rush Presbyterian-St. Luke's Medical Center in Downers Grove, Illinois, and the Rush examiners opined that if Mr. Varnes adhered to recommendations they outlined, it would be appropriate for him to continue to practice veterinary medicine with the requisite competency, safety and skill. Although the Rush examiners recommended six months of psychotherapy treatment, the Minnesota Board required the applicant to undergo psychotherapy treatment for a minimum of three years.
9. On March 31, 2004, the Minnesota Board of Veterinary Medicine issued a disciplinary order against applicant's veterinary license, and applicant was ordered to comply with the minimum standards of acceptable veterinary practice in the state of Minnesota.
10. On September 14, 2004, applicant and the Minnesota Board of Veterinary Medicine entered into a Stipulation and Order for Revocation of License, which prohibited the applicant from reapplying for a license to practice veterinary medicine for a minimum of 3 years and required that he complete instruction in professional boundaries, anger management, and complete continuing education in anesthesia, pain management, sterile surgical practices, animal behavior and record keeping. Applicant has satisfied all these requirements and a Petition for Reinstatement of his Minnesota Veterinary License is now pending before the Minnesota Board of Veterinary Medicine.
11. As a result of the disciplinary action taken by the Minnesota Board of Veterinary Medicine, the applicant's registration as a veterinarian in the state of Illinois was revoked on November 1, 2006.

Post-Disciplinary Activity

12. The applicant was accepted at the University of Wisconsin School of Nursing-Madison in September 2008 and graduated with a Bachelor of Science in Nursing on May 16, 2010 with a 4.0 GPA in all of his undergraduate nursing courses, having made the Dean's Honor List each semester. He also worked as a student nurse at the University of Wisconsin Hospital and Clinics from January of 2009 to May of 2010. During his schooling applicant was active in many student organizations such as Men In Nursing, Student Geriatric Nursing, and the Student Nurses Association. Applicant developed a pain management booklet for his Senior Project that is still being used by UW Home Care Services.
13. During the time he was enrolled in the nursing program, the applicant was informed that the School of Nursing had been made aware of his disciplinary history and that although he could continue in the program and earn a degree, upon graduation the nursing program would report his disciplinary history to the Department of Regulation and Licensing.
14. On April 7, 2010, the applicant applied for a registered nurse license as an examination candidate.

15. A letter of reference from Paula Jarzemsky, RN, MS, Clinical Professor, dated February 9, 2009 describes Mr. Varnes' participation in her Clinical Nursing I class as evincing a professional and courteous demeanor when working with the public, and characterizes his patient interactions as demonstrative of sensitivity and caring.
16. A letter of reference from Cassie A. Voge, RN, MS, AOCN, Clinical Assistant Professor, dated November 5, 2009 describes her experience with Mr. Varnes in a medical-surgical acute care unit as demonstrating an ability to quickly establish therapeutic relationships with his patients and their families and a willingness to hone his interpersonal skills which include being an articulate speaker and an active listener and possessing a friendly, positive and caring demeanor.
17. A letter of reference from Renee Lannoye-Amble, RN, CRRN, Care Team Leader with the University of Wisconsin Hospital and Clinics dated February 23, 2010, who worked closely with Mr. Varnes as a nurse preceptor, characterized him as having bonded well with patients while demonstrating good professional and communication skills, stating he would make an excellent addition to a nursing staff with his skills, confidence and personality to fit in any setting.
18. A letter of reference from Clayton Roberts, RN, a Primary Nurse at the University of Wisconsin Hospital and Clinics dated May 20, 2010 emphasizes an exceptionally high level of productivity on the part of Mr. Varnes while acting as a Student Nursing Assistant over a period of eighteen months, and concludes that his upbeat personality and engaging personal style allows Mr. Varnes to interact effectively with patients and staff.
19. A letter of reference from Connie Horak, RN, BSN, a Primary Nurse at the University Home Health Agency describes her mentoring relationship with Mr. Varnes as reflecting excellent communication skills, sensitivity to patient and caregiver psychosocial needs, and consistently demonstrating a caring demeanor.
20. In his application for licensure the applicant checked the "Yes" boxes for the question regarding whether any licensing agency had ever taken disciplinary action against him.
21. Applicant submitted an attached statement of explanation with his application disclosing that he had been disciplined by the Minnesota Board of Veterinary Medicine, but he did not disclose the disciplinary actions taken against his veterinary licenses in the state of Indiana or Illinois because he believed they were all part of the same disciplinary process.
22. Applicant did not check the "Yes" box on the license application asking whether he had a medical condition, defined as a physiological, mental or psychological condition or disorder, which impairs or limits his ability to practice nursing with reasonable skill and safety, based on his belief that the Rush diagnosis either was inaccurate or had been addressed in therapy and would not impair or limit his ability to practice nursing with reasonable skill and safety.
23. On July 22, 2010, the applicant appeared before the Board in regard to his application and was asked to address his history of unprofessional conduct and what the Board felt were lack of disclosure of all prior disciplinary actions, and failure to disclose his alleged medical impairment.
24. On August 9, 2010, the Board of Nursing issued a Notice of Denial of Licensure based upon the applicant's history of disciplinary actions in the course of his practice as a licensed

veterinarian, failure to disclose his prior discipline in other states, lack of candor regarding his unprofessional conduct, lack of discernable emotion concerning his alleged mistreatment of animals, his alleged failure to disclose a medical impairment, and lack of sufficient evidence of treatment.

Administrative Hearing

25. Applicant filed a timely request for a Class 1 administrative hearing on the denial of his application for licensure and filed a prehearing motion addressing the legal standards to be applied in application for licensure and admissibility of certain evidence relied on by the Board in denying licensure to the applicant.
26. On May 11, 2011, Administrative Law Judge (ALJ) Amanda Tollefsen issued an order on the pre-hearing motion and directed that the matter be remanded to the Board for findings consistent with her ruling that the Board made a mistake of law in denying the application for initial licensure.
27. The ALJ found that the applicable statute did not permit the Board to deny an initial application for licensure based upon prior disciplinary history or misconduct. The ALJ also found that it was a mistake of law for the Board to consider any facts stipulated to in the Stipulation and Order for Revocation of the Minnesota Board of Veterinary Medicine Order because the agreement was for purposes of the Board of Veterinary Medicine proceedings only and could not be used in any other forum.
28. The ALJ noted that although the Department provided reasons as to why it would not be in the public's interest to ignore the applicant's history of misconduct in the veterinary profession, the statutory language did not contemplate consideration of prior disciplinary history for initial licensure decisions.

Post-Hearing Activity

29. After the ALJ's decision on the applicant's pre-hearing motion, the applicant requested permission to take the national nurse licensure examination (NCLEX), to fulfill the requirements for licensure. On September 28, 2011, the applicant notified the Department that he successfully passed the NCLEX.
30. The applicant on his own initiative agreed to obtain a comprehensive evaluation from a Board-approved mental health provider in an effort to satisfy the Board's concerns regarding his fitness to practice.
31. Dr. Michael J. Spierer conducted a full psychological evaluation of the applicant relative to his application for licensure as a registered nurse to assist the Board by providing a Fitness for Duty or Fitness to Practice assessment.
32. Dr. Spierer stated that he understood that the purpose of the evaluation was to determine whether the applicant has a psychological disorder or condition that makes him unable to practice the licensed profession of nursing with reasonable skill and safety to the public.
33. Dr. Spierer prepared a thorough written report and found that the applicant's behavior over the past three years, including his completion of a nursing program and clinical training, indicates that he has been able to modulate the behaviors that created professional and

interpersonal problems for him in the past. Dr. Spierer noted that the stability of the applicant's behavior has been supported and augmented by his participation in psychotherapy for the past three years.

34. Dr. Spierer stated that the best measure of the applicant's ability to function effectively in a professional role as a nurse comes from people who have worked with him in training and in clinical settings. Based upon his examination, including his review of the reports of the faculty and supervisors who have observed the applicant, Dr. Spierer found that the applicant demonstrated the requisite requirements of judgment, analytical skills and critical thinking as well as decision-making capacity required of a nurse.
35. Dr. Spierer recommended that Nursing Board consider the applicant's application for licensure favorably and recommended that the Board require reports from the applicant's supervisor during, at least the first year of his licensure, so that his professionalism and behavior can be monitored appropriately. Dr. Spierer further recommended that the applicant continue in therapy for at least one year following licensure and that the Board receive regular updates regarding his participation and progress in therapy.
36. Mr. Varnes has completed three years of individual therapy with Dr. Letitia Ley Johnson, Ph.D., a Licensed Psychologist with Mental Health Solutions, S.C. in Madison, Wisconsin. She reports that Mr. Varnes attended regularly scheduled sessions with her, was generally engaged in the sessions, and completed assignments. She states that he has gained increased insight into his actions and poor choices that led to his loss of veterinary licensure and has become very sensitive to and aware of ethical issues, patient care and overall standards of care. She notes that over the course of his psychotherapy Mr. Varnes has consistently exhibited internalization of anger management principles, uses anger management techniques before anger can negatively affect his behavior and choices, and has demonstrated effective use of adaptive stress coping skills, resulting in a decrease in both the intensity and frequency of his anger behavior.
37. Dr. Ley Johnson has ruled out the Rush diagnosis based on her observations of and work with Mr. Varnes and in particular her repeated observations of ways in which Mr. Varnes has made positive changes including flexibility in his patterns of thinking, coping with frustration and stress, and adaptive changes in his stated beliefs and values.
38. Dr. Ley Johnson concludes that Mr. Varnes has demonstrated a good understanding of and respect for the role of health service provider in the lives of clients and their families and states with a reasonable degree of professional certainty that Mr. Varnes has exhibited both understanding and application of the topics that were covered in his successfully completed course of psychotherapy.

CONCLUSIONS OF LAW

- A. The Wisconsin Board of Nursing has jurisdiction to act in this matter pursuant to §441.06, Wis. Stats. and is authorized to accept the attached Stipulation pursuant to §227.44(5), Wis. Stats.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that the attached Stipulation is accepted and the *Order Granting Limited License* is approved.

IT IS FURTHER ORDERED that the applicant, **TODD M. VARNES**, shall be granted a **LIMITED** license to practice as a registered nurse in the state of Wisconsin, subject to the following terms, conditions and limitations:

TREATMENT AND MONITORING

Psychotherapy

1. Applicant shall participate in individual psychotherapy for not less than a minimum of one (1) year from the date of his initial employment as a nurse. Psychotherapy shall be provided by a Wisconsin licensed psychiatrist or psychologist pre-approved by the Board or its designee. The applicant's psychotherapy sessions shall be at a frequency of not less than once per month.
2. Applicant shall furnish a copy of the *Psychological Assessment and Fitness for Duty Evaluation* by Dr. Michael Spierer, dated October 16, 2011, and a copy of this *Order Granting Limited License* to the Board-approved psychiatrist or psychologist. In addition, applicant shall furnish a copy of all future Board orders to the approved psychotherapy providers relative to the applicant's compliance with this Order or his licensure status.
3. Termination of psychotherapy will require a determination by the Board or its designee after receiving a petition for modification accompanied by a satisfactory report from his psychotherapist. A denial of such petition for modification shall not be deemed a denial of the license under §§ 227.01(3) or 227.42, Wis. Stats., or ch. SPS 1, Wis. Adm. Code, and shall not be subject to any right to further hearing or appeal.

Required Reporting by Board-Approved Psychiatrist or Psychologist

4. The psychiatrist or psychologist shall submit formal written reports on quarterly basis to the Department Monitor in the Department of Safety and Professional Services, Division of Enforcement P.O. Box 8935, Madison, Wisconsin 53708-8935. These reports shall assess applicant's participation and progress in psychotherapy, ability to control symptoms with medication or therapy, ability to handle stress and adjustments to the practice of nursing, as well as overall safety to practice. The applicant's psychiatrist or psychologist physician should immediately notify the Department Monitor of any change in applicant's mental health status which would render him unable to practice with reasonable skill and safety to the public.

Removal of Psychiatrist or Psychologist

5. If the pre-approved psychiatrist or psychologist is unable to provide psychotherapy or has been determined to have failed to satisfy the requirements of this Order, the Board may, at its sole discretion, direct that applicant continue his treatment under the direction of another pre-approved health care provider who is able to fulfill the requirements.

PRACTICE SETTING

Supervision

6. Applicant shall only practice under the direct supervision of a licensed professional nurse or other licensed health care professional approved by the Board or its designee. Direct supervision means immediate availability to continually coordinate, direct, inspect at first hand the practice of another.

7. Applicant shall practice only in a work setting pre-approved by the Board or its designee. Applicant must also notify the Board or its designee and obtain approval prior to changing jobs.
8. Applicant may not work in a home health care, pool nursing, hospice, or agency setting.
9. Applicant may work as a nurse in a setting in which he has access to controlled substances for administration to patients, unless the Board or its designee imposes restrictions.
10. Applicant shall provide a copy of the *Order Granting Limited License* and all other subsequent orders of the Board to his direct supervisor at all settings where applicant is employed as a nurse or to any prospective employer at the time applicant receives an offer of employment as a registered nurse.

Required Reporting

11. Applicant shall arrange for his professional nurse supervisor to provide formal written reports on a quarterly basis to the Department Monitor in the Department of Safety and Professional Services, Division of Enforcement, P.O. Box 8935, Madison, Wisconsin 53708-8935. These reports shall assess applicant's work performance and shall include the number of hours of active nursing practice worked during the quarter.
12. The requirements of paragraphs 6, 7, 8, 10 and 11 shall continue until such time as the limitations herein are modified or terminated by further order of the Board.

Change in Address or Work Status

13. Applicant shall report to the Board any change of employment status, residence, address or telephone number within five (5) days of the date of a change.

Department Monitor

14. The Department Monitor is the individual designated by the Board as its agent to coordinate compliance with the terms of this Order, including receiving and coordinating all reports and petitions, and requesting additional monitoring and surveillance. The Department Monitor may be reached as follows:

Department Monitor
Department of Safety and Professional Services
Division of Enforcement
P.O. Box 8935, Madison, WI 53708-8935
FAX (608) 266-2264
TEL. (608) 267-3817
DSPSMonitoring@wisconsin.gov

PETITIONS FOR MODIFICATION OR TERMINATION

15. Applicant may petition the Board for modification or termination of any of the terms, conditions or limitations under this Order after not less than one (1) year of continuous active professional practice (minimum of 600 hours per year) in compliance with this Order. Any such petition shall be accompanied by a written recommendation from applicant's psychiatrist or psychologist expressly supporting the specific modifications sought.

16. The modification or termination of the limitations shall be in the sole discretion of the Board, and denial of the petition for modification or termination of the order in whole or in part shall not be considered a denial of a license within the meaning of Sec. 227.01(3)(a), Stats., and applicant shall not have a right to any further hearings or proceedings on any denial in whole or in part of the petition.

EXPENSES OF COMPLIANCE

17. Applicant shall be responsible for all costs and expenses incurred in conjunction with the treatment, monitoring or supervision associated with his compliance with the terms of this Order.

VIOLATION OF ORDER

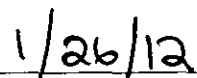
Violation of any of the terms, conditions or limitations set forth in this Order may be construed as conduct imperiling public health, safety and welfare and may result in a Summary Suspension of applicant's license pursuant to Wis. Admin. Code SPS 6. The Board in its discretion may in the alternative impose additional terms, conditions and limitations or other discipline upon the licensee.

This Order shall become effective upon the date of its signing.

STATE OF WISCONSIN
BOARD OF NURSING



Lou Ann Weix, CRNA, APNP
Chair



Date

EXHIBIT A



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application for a License of
TODD VARNES, Applicant

DHA Case No. DRL-10-0088
DOE Case No. 10 NUR 433

ORDER ON RESPONDENT'S MOTION FOR PRE-HEARING DETERMINATION OF
LEGAL STANDARDS TO BE APPLIED IN APPLICATION FOR LICENSURE, AND
ADMISSIBILITY OF EVIDENCE

TO: Attorney Richard Westley
Westley Law Offices
7633 Ganser Way, Suite 100
Madison, WI 53719

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

BACKGROUND

Proceedings in the above-captioned matter were initiated when the Board of Nursing (Board) denied Todd Varnes' application for licensure as a registered nurse (August 9, 2010). As grounds for its denial, the Board cited Mr. Varnes': (1) history of unprofessional conduct in the course of his practice as a licensed veterinarian; (2) lack of disclosure of prior disciplinary actions in other states [per question # 5 on the Registered Nurse Licensure by Examination]; (3) lack of candor regarding his unprofessional conduct during his personal appearance in front of the Board on July 22, 2010; (4) lack of remorse for his unprofessional conduct; (5) lack of any discernable emotion concerning his severe mistreatment of animals; (6) failure to disclose a medical impairment [per question # 15 on the Registered Nurse Licensure by Examination]; and (7) lack of sufficient evidence of treatment. (See August 9, 2010 Notice of Denial of Licensure).

The Board cited Wis. Stat. § 441.07, and Wis. Admin. Code §§ N 2.04, N 7.03 and N 7.04 as the legal bases for its denial of Mr. Varnes' application on these grounds.

Mr. Varnes filed a timely request for an administrative hearing on the denial of his application for licensure on or about September 20, 2010, and on or about November 16, 2010, the Department of Regulation and Licensing (Department), by Attorney Jeanette Lytle, granted and provided appropriate notice of Mr. Varnes' request for a hearing, consistent with Wis. Admin Code § RL 1.08. Said notice indicated that the legal authority and jurisdiction under which the hearing was to be heard was set forth in Wis. Stat. §§ 441.07(2), 227.44, and in Wis. Admin. Code ch. RL 1). It described the issue for this hearing as follows:

“Was the [Nursing] Board’s denial of licensure to the Applicant based on a mistake of fact or law, or was it arbitrary or capricious, under the facts of this case.”

On or about February 25, 2011, Mr. Varnes filed a “Motion for Pre-Hearing Determination of Legal Standards to be Applied in Application for Licensure, and Admissibility of Evidence,” and brief in support thereof, requesting orders from this ALJ that: (1) the standards for granting a license as a Registered Nurse are those found in Sections §§ 441.04 and 441.06 of the Wisconsin Statutes, and not § 441.07(2), which pertains exclusively to reinstatement of an existing license, and (2) as such, the following documents, relied upon by the Board, were irrelevant to Mr. Varnes’ ability to practice nursing, and should not be accepted into evidence at hearing: (a) Stipulation and Order For Revocation of License Before the Minnesota Board of Veterinary Medicine, dated September 15, 2004, (b) Stipulation and Order Before the Minnesota Board of Veterinary Medicine dated March 31, 2004, (c) Illinois reciprocal discipline, (d) Findings of Fact and Order of the Indiana Board of Veterinary Examiners dated March 2, 2002, and (e) Order Denying Respondent’s Petition to Reinstatement by the Indiana Board of Veterinary Medical Examiners dated March 26, 2004.^{1, 2, 3}

The Department filed a brief in response to Mr. Varnes’ prehearing motions on or about March 18, 2011, and Mr. Varnes filed a rebuttal brief on or about April 8, 2011.

Having reviewed all of the above briefs, the undersigned administrative law judge now makes the following:

FINDINGS

1. The Board of Nursing made a mistake of law in denying Mr. Varnes’ application pursuant to Wis. Stat. § 441.07 (Revocation), and Wis. Admin. Code §§ N 7.03 (...mental incompetency) and N 7.04 (Misconduct...). Wis. Stat. § 441.07 applies only to revocations and discipline of licenses already granted, and not to initial denials of licensure. The standards for initial licensure are found in Wis. Stat. §§ 441.04 and 441.06. Likewise, Wis. Admin Code §§ N 7.03 and N 7.04 merely define terms used in Wis. Stat. § 441.07. While it is possible that Mr. Varnes’ license was properly denied under RL 2.04(1) (requiring complete applications), because Wis. Stat. §§ 441.04 and 441.06 were not considered, the undersigned ALJ finds it necessary to remand this case

¹ Mr. Varnes further “objects” to these five documents, and a sixth (the Multidisciplinary Assessment Program Summary dated January 29, 2004, prepared by Rush Behavioral Center, Downers Grove, Illinois), because they are [and were] not sponsored by a testifying witness, in violation of his due process right to cross examination, and this ALJ’s obligation not to base any findings of fact on unsubstantiated hearsay evidence. With respect to the first two stipulations, Mr. Varnes also argues that these documents cannot be admitted [and thus, should not have been considered] because both were mutually agreed upon stipulations that contained the following language: For purposes of the Board of Veterinary Medicine proceedings only, and without prejudice to Licensee in a proceeding in any other forum, the Board may consider the following as true:...” (Varnes’ February 25, 2011, Brief in Chief, p. 17, Exhibit 1, p. 2, Exhibit 2, p. 2).

² Mr. Varnes notes that his brief “is not intended to address each and every error of fact or law found in the Board’s decision,” as “the hearing will clearly constitute a *de novo* procedure rather than an appellate-type review of the Board’s Decision.” (Varnes’ Brief in Chief, p. 3). This is inaccurate. The Board’s decision to grant or deny a license is discretionary. (Wis. Stat. § 227.01(3)(a)). The standard of review in such cases is, therefore, “abuse of discretion.” (See Wis. Stat. § 227.57(8)). (See below).

³ Mr. Varnes’ rebuttal brief further asks this ALJ that if Wis. Stat. § 441.07 is found to be the applicable standard for granting a Registered Nurse license, she find that burden of proof should rest with the Department, and not Mr. Varnes.

back to the Board of Nursing, to consider Mr. Varnes' application pursuant to these appropriate legal standard(s).

2. The Board of Nursing further made a mistake of law to the extent that it relied upon any facts stipulated to in the (a) Stipulation and Order For Revocation of License Before the Minnesota Board of Veterinary Medicine, dated September 15, 2004, and (b) Stipulation and Order Before the Minnesota Board of Veterinary Medicine dated March 31, 2004, Its consideration of those facts violated the terms of those Stipulations and Orders, and the Board shall refrain from any consideration of these stipulated facts upon remand.

STANDARD OF REVIEW

The Board's decision to grant or deny a license is discretionary. (Wis. Stat. § 227.01(3)(a)). An ALJ's review of a discretionary decision is limited to determining whether the Board's decision involved a mistake of fact or law. Wis. Admin. Code § RL 107.

DISCUSSION

Appropriate Legal Standards:

This is an awkward case in which the intent of the Board of Nursing does not appear to match the language of the statute(s) that govern its decisions, or the statute(s) cited as its basis for denying the license of Mr. Varnes, namely Wis. Stat § 441.07, and Wis. Admin. Code §§ N 2.04, N 7.03, and N 7.04.

Wis. Stat. §§ 441.07 v. Wis. Stat. §§ 441.06:

Wis. Stat. § 441.07 **Revocation** provides that:

(1) The board [of Nursing] may, after disciplinary hearings conducted in accordance with rules promulgated under s. 440.03 (1), revoke, limit, suspend or deny renewal of a license of a registered nurse..., may revoke, limit, suspend or deny renewal of a certificate to prescribe drugs or services under s. 441.16, or may reprimand a registered nurse..., if the board finds that the person committed any of the following:

- (a) Fraud in the procuring or renewal of the certificate of or license.
- (b) One or more violations of this subchapter or of any rule adopted by the board under the authority of this subchapter.
- (c) Acts which show the registered nurse, ... to be unfit or incompetent by reason of negligence, abuse of alcohol or other drugs or mental incompetency.
- (d) Misconduct or unprofessional conduct.
- (e) A violation of any state or federal law that regulates prescribing drugs or devices, if the person has a certificate to prescribe drugs or devices under s. 441.16
- (f) A violation of the requirements of s. 253.10(3)(c)2.m 3., 4., 5., 6., or 7....

(2) The board may reinstate a revoked license, no earlier than one year following revocation, upon receipt of an application for reinstatement....

(Emphasis added).

Nowhere in this statute does the legislature indicate that the board may deny initial licensure for any of the above-stated reasons.

Rather the standards for granting licensure are found in Wis. Stat. § 441.07(6) **Licensure**, which provides that:

(1) An applicant for licensure as a registered nurse who complies with the requirements of this subchapter⁴ and satisfactorily passes an examination shall receive a license.

Wis. Stat. § 441.07(4) **Requisites for examination as a registered nurse**, further provides:

Any person who has graduated from a high school or its equivalent as determined by the board, does not have an arrest or conviction record, subject to 111.321, 111.322 and 111.335, holds a diploma from a an accredited school of nursing and, if the school is located outside this state, submits evidence of general and professional education qualifications comparable to those required in this state at the time of graduation may apply to the department for licensure by the board as a registered nurse, and upon payment of a fee specified under s. 440.05(1) shall be entitled to examination.⁵

There are no other sections in Wis. Stat. ch. 441 that deal with initial licensing requisites.

Though the Division provides convincing reasons as to why it would not be in the public's interest to ignore Mr. Varnes' history of misconduct in the veterinary profession., namely that; (1) considerations of past behavior are highly relevant to determining fitness to practice nursing, (2) failure to make such considerations could result in the Board licensing dangerous individuals, and (3) a contrary finding by the ALJ will merely result in the Board granting and then immediately revoking Mr. Varnes' license pursuant to Wis. Stat. § 441.07, (which contrary to Mr. Varnes' argument, does apply to acts committed by a licensee prior to obtaining a license), wasting both parties' time and resources; the Division cannot elude the clear language of Wis. Stat. ch. 441, reproduced above.

The Division's further attempt to assert that the Board's "longstanding interpretation of Wis. Stat. § 441.07 to apply to initial denials," should be given great weight deference⁶, is not convincing. For an interpretation to be given great weight deference, the agency must have employed its expertise or specialized knowledge in forming the interpretation." *County of Dane v. LIRC*, 315 Wis. 2d 293, 308, 759 N.W.2d 571. While the Board of Nursing no doubt has specialized knowledge of nursing, and the Division of Enforcement certainly has the "...knowledge... to determine that if the provisions of Wis. Stat. § 441.07 were not made applicable to applicants for licensure, it would be faced with the laborious and ridiculous task of granting a license only to take it away immediately thereafter," (see Division's Brief in Response to Respondent's prehearing motions, pp. 2-3), such knowledge does not place either in a better position to make judgments regarding the (rather clear) interpretation(s) of Wis. Stat. § 441.07 (and §§ 441.04 and 441.06) than the ALJ.

⁴ Subchapter 1 of Wis. Stat. ch. 441 includes §§ 441.01 – 441.49

⁵ The rules governing examinations are found in § 441.05.

⁶ Depending on the circumstances, an agency's interpretation of a statute is entitled to one of the following three levels of deference: great weight deference, due weight deference or no deference at all. (*Id.* at ¶ 14).

Where “an agency has some experience in an area, but had not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than the court,” as in the instant case, the agency’s interpretation is entitled only to due weight deference.⁷ (*Id.* at ¶ 17 (citing *Clean Wis.*, 282 Wis.2d 250, ¶ 39, 700 N.W.2d 768 *Id.*, ¶ 42 (quoting *Hutson*, 263 Wis.2d 612, ¶ 33, 665 N.W.2d 212)). Under due weight deference, the reviewing court [or agency] will uphold the agency’s reasonable interpretation of a statute as long as another interpretation is not more reasonable.⁸ *Id.*

In the instant case, it is quite clear that Wis. Stat. § 441.07 does not contemplate initial licensure decisions. In addition to the absence of any language in Wis. Stat. § 441.07 regarding denials of initial licensures (*see above*), statutes related to other boards/the department specify that the board/department may deny a license based on certain conduct. (*See* Wis. Stat. §§ 440.88(6), 440.978(2), 448.06(2), 449.07(1), 459.10, (1)). As such, the more reasonable interpretation of Wis. Stat. § 441.07 is that it does not apply to initial licensures.

Wis. Admin. Code §§ N 7.03 and N 7.04

In light of the above, the Board’s further reliance on Wis. Admin. Code §§ N 7.03 and N 7.04 as bases for denying Mr. Varnes’ application for licensure as a registered nurse was likewise a mistake of law. Wis. Admin. Code §§ N 7.03 (Negligence, abuse of alcohol or other drugs or mental incompetency) and N 7.04 (Misconduct or unprofessional conduct) merely define terms used in Wis. Stat. §§ 441.07, and thus also do not apply to decisions of initial licensure.

Wis. Admin. Code § N 2.04

Wis. Admin Code § N 2.04 (Application procedure for R.N. and L.P.N. applicants) provides, in relevant part, that:

Each applicant shall file with the bureau a completed, notarized application on forms provided by the bureau. The application shall include the signature of the applicant.

While the ALJ believes it is at least arguable that the Board properly denied Mr. Varnes’ application on this basis under Wis. Stat. §§ 441.06 and 441.04, given his alleged lack of disclosure of prior disciplinary actions in other states (and possibly, a medical impairment), [per question ## 5 and 15 on the Registered Nurse Licensure by Examination], and his lack of candor regarding his unprofessional conduct during his personal appearance in front of the Board on July 22, 2010 – because the Board relied on Wis. Stat. § 441.07, and not Wis. Stat. § 441.06 or § 441.04, the ALJ finds that best solution to this problematic case is to remand this decision to the Board for findings consistent with Wis. Stat. §§ 441.06 and 441.04.

⁷ The Court gives no deference to an agency’s interpretation of a statute when “the issue before the agency is clearly one of first impression... or when an agency’s position on an issue has been so inconsistent as to provide no real guidance.” *Id.* at ¶ 19 (quoting *UFE Inc. v. LIRC*, 201 Wis.2d 274, 285, 548 N.W.2d 57 (1996)).

⁸ In *County of Dane*, the Court held that “there is little difference between due weight deference and no deference, since both situations require “[the court] to construe the statute [them]selves. In so doing, [the court] employ[s] judicial expertise in statutory construction, and embrace[s] a major responsibility of the judicial branch of government, deciding what statutes mean.”

Admissibility of Evidence:

To the extent that this case is being remanded, there is little to consider with respect to admissibility of evidence upon appeal.

Nevertheless, the ALJ notes that the Board erroneously relied on facts stipulated to in the Stipulation and Order for Revocation of License before the Minnesota Board of Veterinary Medicine, dated September 15, 2004, and the Stipulation and Order before the Minnesota Board of Medicine dated March 31, 2004, even though both contained the following language:

For purposes of Board of Veterinary Medicine proceeding only, and without prejudice to Licensee in a proceeding in any other forum, the Board may consider the following as true....:

(Varnes' Brief in Chief, Exhibit 1, p. 2, Exhibit 2, p. 2).

To the extent the Board relies upon these stipulations in its consideration of Mr. Varnes' application under Wis. Stat. §§ 441.06 and 441.04, it shall refrain from any consideration of the stipulated facts contained therein.

ORDER

For the reasons set forth above, IT IS ORDERED that this matter is remanded to the Board of Nursing for findings consistent with the undersigned ALJ's findings.

It is further ordered that the hearing scheduled to take place in this matter on June 7, 2011, and continuing to June 8, 2011, is cancelled pending the Board's renewed decision.

Dated at Madison, Wisconsin on May 11, 2011.

STATE OF WISCONSIN
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By: _____

Amanda Tollefsen
Administrative Law Judge

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