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Before The
State Of Wisconsin

BOARD OF NURSING

In the Matter of the Disciplinary Proceedings
Against JANET C. AST, R.N., Respondent

FINAL DECISION AND ORDER
WITH VARIANCE
DHA Case No. SPS-11-0071

ORDER 0001329

Division of Enforcement Case No. 11 NUR 250

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

Janet C. Ast
1403 West Vogel Avenue, #4
Milwaukee, WI 53221

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

Department of Safety and Professional Services, Division of Enforcement, by

Attorney Arthur Thexton
Department of Safety and Professional Services
Division of Enforcement
P. O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Safety and Professional Services, Division of Enforcement (the Division), filed a formal Complaint against Respondent Janet C. Ast, alleging that Respondent Ast's license was subject to disciplinary action pursuant to Wis. Stat. § 441.07(1)(d), and Wis. Admin. Code § N 7.04(1).¹ The Division filed the Complaint with the Division of Hearings and Appeals on August 17, 2011, and, on that same date, sent a

¹ Wisconsin Stat. § 441.07(1) (d), states, in relevant part:

Revocation.

copy of the Complaint and a Notice of Hearing via both regular and certified mail to Respondent. Respondent submitted an email regarding the complaint to the Division's attorney, which was forwarded to the Administrative Law Judge (ALJ) who was then assigned the case. The ALJ and Division attorney appear to have treated the email as an Answer to the Complaint. In that email, Respondent generally admitted her criminal history, expressed disappointment in herself, noted that her last offense was committed in 2008, and stated that she has taken steps to modify her behavior.

On September 20, 2011, a prehearing conference was held in this matter. According to the notes of the Administrative Law Judge who handled the prehearing conference, Respondent again admitted the allegations made by the Division and challenged the discipline only. A hearing was scheduled for November 15, 2011.

Respondent did not appear at the scheduled hearing. Rather than moving for default judgment, the Division presented evidence previously submitted to the ALJ and Respondent and offered arguments as to why the Division believed revocation of Respondent's license was appropriate under the circumstances. In addition, the Division provided copies of written statements from Respondent's friends and relatives, which Respondent had provided the Division (Exh. A). With permission of the ALJ, and in order to complete the record, following the hearing, the Division forwarded the ALJ and Respondent other emails Respondent had sent to the Division (Exhs. 4 and 5).

FINDINGS OF FACT

1. Respondent, Janet C. Ast, is duly licensed in the state of Wisconsin as a professional nurse (License No. 107480). This license was first granted on September 5, 1991.

2. In November 2008, and while working as a professional nurse in a Sam's Club in the City of West Allis administering flu shots, Respondent obtained a patient's credit card number and expiration date, and used the information for two personal purchases. During the two separate

(1) The board may, after disciplinary proceedings conducted in accordance with rules promulgated under s. 440.03 (1), revoke, limit, suspend or deny renewal of a license of a registered nurse, a nurse-midwife or a licensed practical nurse, may revoke, limit, suspend or deny renewal of a certificate to prescribe drugs or devices granted under s. 441.16, or may reprimand a registered nurse, nurse-midwife or licensed practical nurse, if the board finds that the person committed any of the following:

...
(d) Misconduct or unprofessional conduct.

As used in Wis. Stat. § 441.07(1)(d), "misconduct or unprofessional conduct" is defined 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." Wis. Admin. Rule § N 7.04. "Misconduct or unprofessional conduct" includes, *inter alia*: "Violating . . . any law substantially related to the practice of professional or practical nursing," Wis. Admin. Code § N 7.04 (1).

transactions, Respondent signed the patient's name in order to effectuate the purchases, all without the knowledge or consent of the patient.

3. Based on the conduct described in Finding of Fact 2, on July 9, 2009 in Milwaukee County Circuit Court, Respondent was convicted of Unauthorized Use of Personal Identifying Information or Documents, a violation of Wis. Stat. § 943.201(2)(a), a Class H Felony. Respondent was sentenced to a maximum term of imprisonment of 33 months; the initial term of confinement is 21 months; the maximum term of extended supervision is 12 months. The sentence was stayed and Respondent was placed on probation for 30 months. Respondent was further ordered to serve 7 months condition time in the House of Correction with Huber release for medical care and treatment; pay restitution; undergo a mental health assessment, treatment and follow up; and complete a cognitive/criminal thinking program.

4. Respondent, while licensed as a professional nurse in the State of Wisconsin, was previously convicted of the following:

- a. Criminal Damage to Property, a class A misdemeanor, Case No. 2003CM001147;
- b. Escape-Criminal Arrest, a class H felony, Case No. 2003CF003752;
- c. Battery, a class A misdemeanor, Case No. 2002CM002384;
- d. Battery, a class A misdemeanor; Resisting or Obstructing an Officer, a class A misdemeanor; Bail Jumping-Misdemeanor, a class A misdemeanor; Case No. 2002CF002002;
- e. Disorderly Conduct, a class B misdemeanor, Case No. 2001CM000360;
- f. Violate Harassment Injunction/Order, an unclassified misdemeanor, Case No. 1997CM002099;
- g. Violate Harassment Injunction/Order, an unclassified misdemeanor, Case No. 1997CM002098; and
- h. Violate Harassment Injunction/Order, an unclassified misdemeanor, Case No. 1997CF000631.

5. According to the criminal complaint in Case No. 2003CM001147, which resulted in Respondent's conviction for criminal damage to property, Respondent, while in a Best Buy store, opened a cell phone package that was being held for resale and discarded the packaging elsewhere in the store. Parts of the cell phone merchandise were found on her person.

6. According to the criminal complaint in Case No. 2002CM002384, which resulted in Respondent's conviction for misdemeanor battery, Respondent grabbed the victim, KS, by the arm and shoved her into a wall. Respondent then grabbed KS by the neck, choking her and shoving her into a door jam, causing pain and bruising.

7. According to the criminal complaint in Case No. 2002CF002002, which resulted in Respondent's conviction for battery and resisting or obstructing an officer, Respondent straddled KS on her bed and began strangling her, pressing both of her thumbs into KS's neck, stopping for a short period of time, but then repeating the actions. When an officer attempted to arrest her for battery to KS, Respondent bit him on the wrist, tearing the cuff off the officer's shirt sleeve and breaking his skin.

8. According to the criminal complaint in Case No. 2003CF003752, which resulted in Respondent's conviction for felony Escape, after Respondent was convicted and sentenced to 14 months in the Milwaukee House of Correction for the offenses in Case No. 2002CF002002, she was allowed to leave for the purpose of going to work. Although she was to return to the House of Correction that same day, at the time of issuance of the criminal complaint two months later, Respondent had not returned.

9. According to the criminal complaint in Case No. 2001CM360, which resulted in Respondent's conviction for disorderly conduct, Respondent admitted that she became upset with KS and choked her and bit her on the cheek. According to KS, Respondent choked her at least three times and also pushed her down onto the kitchen floor, straddling her and choking her. KS stated that it was lucky there were friends over during the incidents or Respondent would have killed her.

10. According to the criminal complaint in Case No. 1997CF631, which resulted in Respondent's conviction for violating a harassment injunction/order, Respondent sent two letters to TZ, which were received by TZ's mother. TZ had a restraining order against Respondent, and Respondent had been charged in circuit court with two separate violations of the restraining order (1997CM2098 and 1997CM2099, for which Respondent was subsequently convicted. *See* Exh. 1). The first letter stated, among other things, "You are going to die, watch your car, and no one will care." The second letter stated, in part, "Are you counting the minutes now? You will die, Trust me bitch. Fuck." The words on the letter were cut from newspapers and magazines and then glued to a stiffer piece of paper.

11. On November 14, 2011, the day before the scheduled hearing in this matter, the undersigned ALJ contacted the parties by email to inquire regarding an evidentiary question. Respondent informed the ALJ that she did not plan to attend the November 15, 2011 hearing and stated, "I have already given everything that I had to [the Division's attorney]," in particular, written statements from friends and family familiar with Respondent's character. She further stated, "I have nothing more to say on my own behalf" and "I do not plan to attend tomorrow."

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. Wisconsin Stat. § 440.03(1) provides that the Department of Safety and Professional Services "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. Respondent defaulted in this proceeding for her failure to appear at the scheduled hearing after due notice, and the allegations against her may be taken as true, pursuant to Wis. Admin. Code § HA 1.07(3)(b).

4. Respondent's conduct as described in Findings of Fact 2 and 3 constitutes "misconduct or unprofessional conduct" pursuant to Wis. Stat. § 441.07(d) and Wis. Admin. Code § N 7.04(1) as the conduct involves "[v]iolating, or aiding and abetting a violation of any law substantially related to the practice of professional or practical nursing."

5. Based on the Findings of Fact and Conclusion of Law above, Respondent is subject to discipline pursuant to Wis. Stat. § 441.07.

DISCUSSION

Violations of Law and Appropriate Discipline

Respondent does not contest that she engaged in unprofessional conduct. Moreover, Respondent failed to appear at the hearing, did not request to reschedule the November 15, 2011 hearing and did not request of the ALJ that she be allowed to appear by telephone for the hearing. Thus, she is in default and the allegations against her may be taken as true. *See* Wis. Admin. Code § HA 1.7(3)(b).

Not only is misconduct or unprofessional conduct established by virtue of Respondent's admission of the conduct and her failure to appear, but it is also established by the evidence in the record, which shows by a preponderance of evidence that Respondent was in violation of § 441.07(d) and Wis. Admin. Code § N 7.04(1). There is no question that stealing from a patient, by using the patient's credit card for her own personal gain, constitutes "[v]iolating . . . [a] law substantially related to the practice of professional or practical nursing."

With respect to the convictions for intentionally inflicting physical harm and threatening to inflict such harm on others, there is a strong argument that such violations relate to the practice of professional nursing, in that the abusive conduct directly contradicts the goal of nursing, which is to promote and protect the health and well-being of others. However, having determined that the conviction for Unauthorized Use of Personal Identifying Information or Documents constitutes misconduct or unprofessional conduct, I need not determine whether any of the other convictions constitute misconduct or unprofessional conduct. Rather, Respondent's additional criminal history contained in Finding of Fact 4 and 5-10 is considered in determining what discipline is warranted.

The Division of Enforcement requests that Respondent's license be revoked. The Division convincingly argues that stealing from a patient is a very serious ethical breach and further notes that this conviction, just two years ago, is just the latest in a series of criminal

convictions that Respondent has been racking up practically since she was licensed as a nurse in 1991, twenty years ago. In support of its argument that Respondent is untrustworthy and unlikely to change, notwithstanding the letters submitted on her behalf attesting to her character, the Division introduced a copy of an Administrative Warning issued to Respondent on September 8, 2005, for unprofessional conduct involving her nursing practice. The Division argued that despite having received the administrative warning and having completed an ethics course, the Respondent engaged in a serious ethical breach by using her patient's credit card for personal purchases.

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Based on these standards, the evidence in the record, and the arguments made by the Division, the discipline recommended by the Division is appropriate. Respondent's letters of support do not convince me that their writers were aware of the seriousness of Respondent's ethical breach to her patient or her long history of serious mistreatment of others. Indeed, the letter Respondent wrote to her friends and relatives soliciting the character letters do not mention the grounds for the Division's disciplinary action, namely, the 2009 conviction for using a patient's credit card and her history of criminal activity, including physical violence against others. Instead, Respondent suggests that the Division's disciplinary action was premised on Respondent's physical abilities. She states, "[T]hey are questioning MY ability to physically work as a Registered Nurse." (Exh. A).

The ALJ did not believe that the lack of criminal convictions since 2009, even in conjunction with the letters opining that Respondent has been helpful to others and is generally a nice person, was sufficient to outweigh the evidence in the record showing Respondent's long-standing untrustworthiness and disregard for the health and bodily integrity of others and, most recently, her disregard of a patient from whom she stole. Based on the foregoing, the ALJ concluded that the interests of rehabilitation, protection of the public and deterrence of others is best served by revocation.

Costs

In *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), the Chiropractic Examining Board stated:

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 respondent's cooperation with the disciplinary process;
5. Prior discipline, if any;
6. The fact that the Department of [Safety and Professional Services] 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.

Based on the factors articulated in the *Buenzli-Fritz* decision, Respondent should be assessed the full amount of recoverable costs. Her alleged conduct is of a serious nature, she did not participate in these proceedings, there is no argument that certain factual findings were investigated and litigated unnecessarily, and, given the program revenue nature of the Department of Safety and Professional Services, fairness dictates imposing the costs of these disciplinary proceedings on Respondent, and not on 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, the amount of costs will be determined pursuant to Wis. Admin. Code § SPS 2.18.

ORDER

For the reasons set forth above, IT IS ORDERED that the license of the Respondent Janet C. Ast to practice nursing in the State of Wisconsin be and is hereby **REVOKED**.

IT IS FURTHER ORDERED that Respondent shall pay all recoverable costs in this matter in an amount to be established pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

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

EXPLANATION OF VARIANCE

The Board of Nursing (hereinafter "Board") has reviewed the Findings of Fact, Conclusions of Law, Discussion, Costs and Order in the proposed decision submitted by the

Administrative Law Judge (ALJ) and has accepted the recommendations contained therein with one exception. The Board finds it necessary to delete the section of the ALJ's discussion which describes in detail the content of the administrative warning issued to Respondent in 2005.

The statutory authority for administrative warnings provides that a warning shall be a public record, however, the content of the warning shall be private and confidential. Wis. Stat. § 440.205. Administrative warnings do not constitute an adjudication of guilt or imposition of discipline and may not be used as evidence that the credential holder is guilty of the alleged misconduct. Therefore, the department or board may only indicate that a warning was issued to a credential holder; the content or terms of the warning cannot be disclosed. If a subsequent allegation of misconduct by a credential holder is received by the department or a board, the matter relating to the issuance of a warning may be reopened and disciplinary proceedings may be commenced on the matter or the warning may be used in any subsequent disciplinary matter as evidence that the credential holder had actual knowledge that the misconduct that was the basis for the warning was contrary to law.

The description of the content of the administrative warning in the discussion section of the ALJ's proposed decision is impermissible because the matter relating to the issuance of administrative warning was not reopened in this disciplinary action. Nor was the matter which led to the administrative warning in 2005 similar to the unprofessional conduct at issue in the current disciplinary action. Likewise, the terms or content of an administrative warning cannot be disclosed in a disciplinary action to prove general character traits such as untrustworthiness, inability to change or to prove different misconduct that occurred after issuance of the warning. Without showing some form of similarity in the misconduct, it cannot be argued that the credential holder would know or have reason to know that the conduct was wrong and it would be contrary to the law to include a discussion of the content of the warning in the proposed decision.

In view of the privacy and confidentiality provisions regarding an administrative warning, the Board has varied the proposed decision by deleting the language that described the actual content of the administrative warning and hereby adopts the revised version as the Final Decision and Order in this matter. This variance fulfills the requirements of Wis. Stat. § 227.46(4), which provides that in any case which is a class 2 disciplinary proceeding, the hearing examiner shall prepare a proposed decision, which includes findings of fact, conclusions of law, order and opinion, in a form that may be adopted as the final decision in the case.

Dated at Madison, Wisconsin on the 30th day of January, 2012.

WISCONSIN BOARD OF NURSING

By: Lou Ann Weix
Lou Ann Weix, CRNA
Board Chair 