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Before The
State Of Wisconsin
DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES

In the Matter of the Disciplinary Proceedings
Against SUSAN J. MCALEY, LPC, Respondent

FINAL DECISION AND ORDER
Order _____

~~ORDER 0001420~~

Division of Enforcement Case No. 10 RSA 004

The State of Wisconsin, Department of Safety and Professional Services, 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, Department of Safety and Professional Services.

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 2nd day of March, 2012.

Michael J. Berndt, Chief Legal Counsel
Department of Regulation and Licensing



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings Against
SUSAN J. MCALEY, Respondent

ORDER 0001420
DRA Case No. DRL-11-0041
DOE Case No. 10 RSA 004

TO: Susan J. McAley
18620 103rd Street
Bristol, WI 53104

Susan J. McAley
4605 8th Avenue, #2
Kenosha, WI 53104

Attorney James E. Polewski
Department of Regulation and Licensing
Division of Enforcement
PO Box 8935
Madison, WI 53708-8935

Division of Enforcement Case No. 10 RSA 004

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

Susan J. McAley
18620 103rd Street
Bristol, WI 53104

Susan J. McAley
4605 8th Avenue, #2
Kenosha, WI 53104

Secretary Dave Ross
Department of Regulation and Licensing
P. O. Box 8935
Madison, WI 53708-8935

Department of Regulation and Licensing, Division of Enforcement, by

Attorney James Polewski
Department of Regulation and Licensing
Division of Enforcement
P. O. Box 8935
Madison, WI 53708-8935

PROCEDURAL HISTORY

These proceedings were initiated when the Department of Regulation and Licensing, Division of Enforcement (the "Division") filed a formal Complaint against the Respondent, Susan J. McAley. The Division filed said Complaint with the Division of Hearings and Appeals May 10, 2011. On the same date, the Division sent a copy of the Complaint and a Notice of Hearing to Respondent McAley at her most recent address on file with the Department of Regulation and Licensing; 18620 103rd Street, Bristol, Wisconsin, 53104. The Notice of Hearing stated that Respondent McAley was required to file a written Answer to the Complaint within 20 days, failing which "[she would] be found to be in default and a default judgment [could] be entered against [her] on the basis of the Complaint and other evidence and the Department of Regulation and Licensing [could] take disciplinary action against [her] and impose the costs of the investigation, prosecution and decision of this matter upon [her] without further notice or hearing."

To date, no Answer has been filed.

On May 31, 2011, the undersigned Administrative Law Judge (ALJ) of the Division of Hearings and Appeals issued a Notice of Telephone Prehearing Conference that set a telephone conference with Respondent McAley and Attorney James Polewski of the Division of Enforcement for June 21, 2011. This Notice instructed Respondent McAley to contact the undersigned ALJ to provide the telephone number for which she could be reached for the June 21, 2011, telephone conference, and was sent to the address on file for Respondent McAley, as provided above.

Respondent McAley did not contact the undersigned ALJ with a telephone number that she could be reached at for the June 21, 2011, telephone conference, and the telephone conference that was conducted on that date was without the respondent's participation.

At the June 21, 2011, conference, Attorney Polewski made a motion for default pursuant to Wis. Admin. Code § RL 2.14. The undersigned ALJ summarily accepted Attorney Polewski's default motion and issued a Notice of Default instructing Respondent McAley that she was in default and that findings would be made and an Order entered on the basis of the Complaint and other evidence. The Notice of Default further ordered Attorney Polewski to provide the undersigned ALJ with the Division's written recommendations for discipline and the assessment of costs in this matter by June 28, 2011. It was mailed to Respondent McAley at the last address on record for her, 18620 103rd Street, Bristol, Wisconsin, 53104.¹ Attorney Polewski provided the undersigned ALJ with the Division's written recommendations as to discipline and costs on or about June 28, 2011.

Respondent McAley has failed to respond to either the Notice of Default issued against her, or the written recommendations provided by Attorney Polewski on June 28, 2011.

¹ Upon being returned to the Division of Hearings and Appeals from the Department of Administration mail room with the following new address for Respondent; 4605 8th Avenue, #2, Kenosha, WI 53104; the Division of Hearings and Appeals resent its Default Notice to Respondent at her new address.

FINDINGS OF FACT

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

1. Susan J. McAley, Respondent, date of birth August 27, 1964, is licensed as a substance abuse counselor-in-training by the Department of Regulation and Licensing pursuant to license number 15707-130, which was first granted on January 27, 2009. Respondent's registration expired on February 28, 2011.

2. Respondent's last address reported to the Department of Regulation and Licensing is 18620 103rd Street, Bristol, WI 53104.

3. From August 2009 through November 20, 2009, Respondent was employed as a substance abuse counselor-in-training at Aalto Enhancement Center in Kenosha, WI. While working at Aalto, Respondent stole a physician's printed prescription pad and forged several prescriptions for Adderall, which contains amphetamine and dextroamphetamine, Dexedrine brand of dextroamphetamine and Ritalin brand of methylphenidate (stimulants that are Schedule II controlled substances) without the authorization or knowledge of the physician or any other practitioner.

4. From September through November 2009, Respondent had some of the forged prescriptions filled and attempted to have the others filled at pharmacies in Kenosha, Wisconsin and Antioch and Gurney, Illinois.

5. On or about October 17, 2009, the Respondent was charged in Lake County Illinois Circuit Court with:

- a) Unlawful acquisition of controlled substance (Class 4) in violation of 720 ILCS 570/406(b)(3).
- b) Forgery (Class 3) in violation of 720 ILCS 5/17-3(a)(2).

6. Pursuant to a plea agreement, on August 16, 2010, Respondent was found guilty of the unlawful acquisition of controlled substance charge. The forgery count was dismissed. Respondent was sentenced to 24 months of probation

7. On January 14, 2010, Respondent was charged in Kenosha County Wisconsin Circuit Court with violating Wis. Stat. § 943.20(1)(a), Theft, for the alleged theft of the prescription pad from Aalto. On October 27, 2010, Respondent entered a plea of guilty to that charge as part of a deferred prosecution agreement. If she successfully completes her probation on the Illinois conviction, this charge will be dismissed. If she fails to complete her probation on the Illinois conviction, she will be sentenced on this charge.

8. As set out in the Procedural History above, a Complaint and Notice of Hearing were sent to Respondent McAley at her most recent address on file with the Department of Regulation and Licensing, (18620 103rd Street, Bristol, Wisconsin, 53104), on or about May 10, 2011.

9. On or about May 31, 2011, the undersigned ALJ sent a Notice of Telephone Prehearing Conference for June 21, 2011, to Respondent McAley at the above-listed address.

10. Respondent McAley did not appear at this prehearing conference, and the Division made a motion for default which was summarily accepted by the undersigned ALJ.

11. On or about June 21, 2011, the undersigned ALJ sent a Notice of Default to Respondent McAley at her last known address.

12. Respondent McAley has not responded to this Notice, or otherwise to the Complaint against her.

CONCLUSIONS OF LAW

1. The Department of Regulation and Licensing has jurisdiction over this matter pursuant to Wis. Stat. § 440.88(6).

2. Wisconsin Stat. § 440.03(1) provides that the department [of Regulation and Licensing] “may promulgate rules defining uniform procedures to be used by the department... and all examining boards and affiliated credentialing boards attached to the department or an examining board, for... conducting [disciplinary] hearings.” These rules are codified in Wis. Admin. Code ch. RL.

3. Wisconsin Administrative Code § RL 2.08(1) provides in relevant part that “[t]he complaint, notice of hearing, all orders and other papers required to be served on a respondent may be served by mailing a copy of the paper to the respondent at the last known address of the respondent” and that “[s]ervice by mail is complete upon mailing.” Because the Complaint and Notice of Hearing, Notice of Telephone Prehearing Conference, and Notice of Default were mailed to Respondent McAley at her last known address, she was duly served with these papers pursuant to Wis. Admin. Code § RL 2.08.

4. As the licensee, it was Respondent McAley’s responsibility to keep her address on record with the Department of Regulation and Licensing current. Wis. Stat. § 440.11(1).

5. Respondent McAley has defaulted in this proceeding pursuant Wis. Admin. Code § RL 2.14 by failing to file and serve an Answer to the Complaint as required by Wis. Admin. Code § RL 2.09.

6. Allegations in a complaint are deemed admitted when not denied in an Answer. Wis. Admin. Code § RL 2.09. Respondent McAley has admitted to the allegations of the Complaint by default by not filing an Answer.

7. Wisconsin Statute § 440.88(6) provides that, “The department may, after a hearing held in conformity with chapter 227, revoke, deny, suspend, or limit under this subchapter the certification of any substance abuse counselor, clinical supervisor, or prevention specialist or reprimand the substance abuse counselor, clinical supervisor, or prevention specialist, for practice of fraud or deceit in obtaining the certification or any unprofessional conduct, incompetence, or professional negligence.”

8. Wisconsin Administrative Code § RL 164.01(2)(b) defines “unprofessional conduct” to include: “Violating, or aiding and abetting a violation of, any law or rule substantially related to practice as a substance abuse professional.”

9. Respondent McAley’s conduct, as described in Findings of Fact ¶¶ 3-7, violated laws substantially related to her practice as a substance abuse professional, which is unprofessional conduct as defined by Wis. Admin. Code § RL 164.02(2)(b). She is thus subject to discipline pursuant to Wis. Stat. § 457.26(2)(f).

DISCUSSION

Violations of Wisconsin Statute and Administrative Code

By failing to provide an Answer to the Complaint filed against her, Respondent McAley has admitted that all allegations contained within the Complaint are true. Wis. Admin. Code § 2.09. As such, it is undisputed that Respondent McAley: (1) stole a physician’s printed prescription pad and forged several prescriptions for stimulants that are Schedule II controlled substances; (2) had some of the forged prescriptions filled and attempted to have the others filled at pharmacies in Kenosha, Wisconsin and Antioch and Gurney, Illinois; (3) pled guilty to “unlawful acquisition of controlled substance²” (Illinois) and “Theft³” (Wisconsin) for doing so, and was sentenced to 24 months of probation (Illinois).⁴ Such conduct clearly violates Wis. Admin. Code § RL 164.01(2)(b), which defines unprofessional conduct to include “Violating, or aiding and abetting a violation of, any law or rule substantially related to practice as a substance abuse professional.” Indeed, the purpose of substance abuse counseling is to treat alcohol or substance dependency or abuse. (Division’s June 28, 2011 Memorandum on Discipline, p. 1). Respondent’s conduct in obtaining controlled substances by unlawful means, presumably for her own personal use, is clearly incompatible with the practice of assisting others to avoid or defeat substance abuse or dependency. (*Id.*). Respondent McAley is thus subject to discipline pursuant to Wis. Stat. § 457.26(2).

² 720 ILCS 570/406(b)(3)

³ Wis. Stat. § 943.20(1)(a)

⁴ Respondent entered into a deferred prosecution agreement in Wisconsin, under which she will only be sentenced if she does successfully complete her probation in Illinois. (See Findings of Fact, ¶ 7).

The only question that remains is what kind of discipline is appropriate.

Appropriate Discipline

The Division requests that Respondent McAley's license to practice substance abuse counseling be revoked. In support of this recommendation, the Division asserts that:

Because [Respondent's] conduct is so clearly and directly incompatible with the central purpose of the practice of a substance abuse counselor, the only reasonable disciplinary response is revocation.... Respondent's failure to participate in the disciplinary hearing has left the Department with no basis on which to say that Respondent's continued licensure might be compatible with public health, safety and welfare. Because the purpose of the licensing scheme is protection of public health, safety and welfare, and the license is issued for the benefit of the public, not the licensee, *Gilbert v. Medical Examining Board*, 119 Wis. 2d 168, 188, 349 N.W.2d 68, 77 (1984), the only appropriate discipline is revocation of [her] license such time as Respondent satisfies the Department that she is a fit subject for licensure."

(Division's Memorandum on Discipline, pp. 1-2).

Absent any argument from Respondent, the undersigned ALJ agrees with the Division's logic, and finds that Respondent McAley's conduct, and inability to participate in these proceedings, warrants the revocation of her license until such time as she can demonstrate to the Department that she is once again fit for licensure.

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 conduct. *State v. Aldrich*, 71 Wis. 2d 206 (1976). Respondent McAley's conduct in obtaining controlled stimulants by unlawful means demonstrates that she has significant substance abuse problems that, without rehabilitation, pose a direct danger to her patients' needs. Her inability to participate in these proceedings only strengthens that concern. The relief requested by the Division is thus appropriate and even necessary to protect the public from future instances of misconduct by the respondent.

Costs

The Division requests that Respondent McAley be ordered to pay the full costs of its investigation and of these proceedings.

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

The ALJ's recommendation and the ... Board's decision as to whether the full costs of the proceeding should be assessed against the credential holder..., is based on the consideration of several factors, including:

- 1) The number of counts charged, contested, and proven;
- 2) The nature and seriousness of the misconduct;
- 3) The level of discipline sought by the parties
- 4) The respondents cooperation with the disciplinary process;
- 5) Prior discipline, if any;
- 6) The fact that the Department of Regulation and Licensing is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct;
- 7) Any other relevant circumstances.

The respondent, by nature of her being in default has not presented any evidence regarding any of the above factors that would mitigate the imposition of the full costs of this proceeding. To the contrary, her conduct is of a serious nature. The factual allegations were deemed admitted and proven and there is no argument to apportion any counts that were unproven (being none), or that certain factual findings were investigated and litigated that were unnecessary. Given the fact that the Department of Regulation and Licensing is a "program revenue," agency, whose operating costs are funded by the revenue received for licensees, fairness here dictates imposing the costs of disciplining the respondent upon the respondent and not fellow members of the chiropractic profession who have not engaged in such conduct."

For many same reasons as cited in the *Buenzli-Fritz* decision, Respondent McAley 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 Regulation and Licensing, fairness again dictates imposing the costs of disciplining Respondent McAley on Respondent McAley, 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 the respondent, these amount of costs will be determined pursuant Wis. Admin. Code § RL 2.18.

ORDER

For the reasons set forth above, IT IS ORDERED that the license of the Respondent Susan J. McAley, to practice as a substance abuse counselor-in-training in the State of Wisconsin be and is hereby **REVOKED**.

IT IS FURTHER ORDERED that if and when Respondent McAley applies for reinstatement, the Department shall consider whether Respondent has presented proof that she is fit to practice substance abuse counseling and in what settings.

IT IS FURTHER ORDERED that Respondent McAley 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:

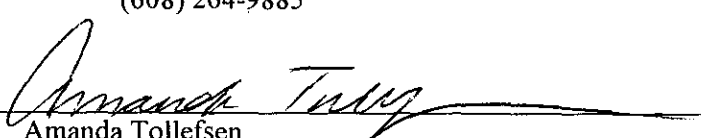
**Department Monitor
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935
Telephone: (608) 267-3817
Fax: (608) 266-2264**

IT IS FURTHER ORDERED that the above-captioned matter be and is hereby closed as to Respondent Susan J. McAley.

Dated at Madison, Wisconsin on July 28, 2011.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____


Amanda Tollefsen
Administrative Law Judge