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Before The  
State Of Wisconsin  
**BOARD OF NURSING**

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In the Matter of the Disciplinary Proceedings  
Against **NICOLE E. KUTNER, R.N.**,

Respondent

**FINAL DECISION AND ORDER  
WITH VARIANCE**

Case No. SPS-11-0061

**ORDER 0001588**

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Division of Enforcement Case No. 10 NUR 637

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

Nicole E. Kutner, by

Attorney Dennis Coffey  
Mawicke & Goisman, S.C.  
1509 North Prospect Avenue  
Milwaukee, WI 53202

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

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

Attorney Chad W. Koplien  
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 Nicole E. Kutner on June 30, 2011, alleging that Respondent's license was subject to disciplinary action pursuant to Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(1) and (12). Respondent filed an Answer to the Complaint on July 18, 2011. Following a telephonic prehearing conference held on November 1, 2011, the Division filed a motion for summary

judgment, with attached exhibits, on December 1, 2011. Briefing on the motion was completed on December 30, 2011.

On February 3, 2012, the undersigned administrative law judge (ALJ) issued an Order Granting Partial Summary Judgment in favor of the Division. That Order concluded that the Division had demonstrated that the undisputed material facts established misconduct or unprofessional conduct under Wis. Admin. Code § N 7.04(12) but not under Wis. Admin. Code § N 7.04(1). The Order provided the Division with the option of either proceeding to hearing on § N 7.04(1) or dismissing its allegation that Ms. Kutner's conduct constituted misconduct or unprofessional conduct under § N 7.04(1) and having the ALJ issue a proposed decision based solely on the ALJ's conclusion that Ms. Kutner engaged in misconduct or unprofessional conduct, contrary to § N 7.04(12). The Division informed the ALJ and Ms. Kutner's counsel via email dated February 6, 2012 that it wished to dismiss the claim under § N 7.04(1) and have the ALJ issue a proposed decision based on its conclusion that Ms. Kutner violated § N 7.04(12).

On April 12, 2012, the Board of Nursing reviewed the ALJ's Proposed Decision and Order. The board also reviewed the Objections to Proposed Decision submitted by Respondent's attorney and the State's Reply to Respondent's Objections. Based upon its review of the proposed decision and consideration of the parties arguments, the board voted to adopt only the findings of fact and conclusions of law in the proposed decision and to issue a variance to the disciplinary terms and conditions in the order. An explanation of the variance is included in this final decision and order.

### **FINDINGS OF FACTS**

The undisputed material facts in this matter are as follows.

1. Respondent Nicole E. Kutner, R.N., is licensed as a professional nurse in the State of Wisconsin (License No. 141810-30). This license was first granted on July 31, 2002.
2. At all times relevant, Ms. Kutner was employed as a registered nurse day shift supervisor at Golden Living Colonial Manor ("Golden Living") in Glendale, Wisconsin.
3. On December 1, 2010, Lindsey Murphy, a social worker at Golden Living, reported two debit gift cards were missing from her desk, one in the amount of \$500 and the other in the amount of \$250. She had previously purchased the gift cards on behalf of two residents. Ms. Murphy had left the \$500 Chase Visa debit gift card in a locked drawer in her desk and the \$250 debit gift card in an unlocked drawer.
4. Ms. Murphy shared an office with Ms. Kutner.
5. The \$500 debit gift card had the patient's name written on it with a black Sharpie.
6. Upon review of the gift cards' transactions, it was discovered that Ms. Kutner used the \$500 debit gift card to pay her cell phone bill and for other personal purchases,

depleting the balance of the card. The \$250 debit card retained its full balance of \$250. Ms. Kutner was arrested and admitted to using the \$500 debit card but told the police officer that she believed the card was hers.

7. In her affidavit, Ms. Kutner admits that she made expenditures using the gift card during the month of November 2010 and that she agreed to repay \$512 (\$500 in expenditures and \$12 in card replacement costs). She further states that at the time she used the gift card for the purchases, she believed she was using her own gift card.

8. The \$250 gift card was discovered in a tablet of paper in a box filled with documents to be shredded located in Ms. Kutner's office.

9. In December 2010, Ms. Kutner was terminated from employment at Golden Living and she received a municipal citation for use of the patient's debit card. The citation was for violating City of Glendale Ordinance No. 11-1-1(a)29, which makes it a municipal offense to violate the statutory theft provision, Wis. Stat. § 943.20.

10. Ms. Kutner pled no contest to the municipal theft charge and the plea was entered as a condition of a Deferred Prosecution Agreement.

11. The municipal charge against Ms. Kutner was dismissed in August of 2011, upon Ms. Kutner's successful completion of the terms of the Agreement.

### **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. The undisputed material facts establish that Ms. Kutner's conduct constituted misconduct or unprofessional conduct by "[o]btaining or attempting to obtain anything of value from a patient without the patient's consent," in violation of Wis. Admin. Code § N 7.04(12), which subjects Respondent to discipline pursuant to Wis. Stat. § 441.07(1)(d). Therefore, summary judgment with respect to this violation is appropriate.

### **ALJ'S DISCUSSION**

Summary judgment is appropriate when there is no material fact in dispute and the moving party is entitled to judgment as a matter of law. *Casper v. American Intern. South Ins. Co.*, 336 Wis. 2d 267, 800 N.W.2d 880 ¶ 32 (2011); *see also* Wis. Stat. § 802.08(2) and Wis. Admin. Code § HA 1.10(2). On a motion for summary judgment, the facts are construed in favor of the non-moving party. *DeHart v. Wis. Mut. Ins. Co.*, 302 Wis. 2d 564, ¶ 7, 734 N.W.2d 394.

### **Violation of Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(12).**

The Division alleges a violation of Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(12). Wisconsin Stat. § 441.07(1)(d) states:

**Revocation.**

(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.

Wisconsin Admin. Code § N 7.04 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" and delineates conduct which is considered misconduct or unprofessional conduct. Such conduct includes "[o]btaining or attempting to obtain anything of value from a patient without the patient's consent." Wis. Admin. Code § N 7.04(12). This provision does not contain an element of intent. Rather, a violation occurs merely by the act of obtaining or attempting to obtain the thing of value without the patient's consent. Respondent has admitted to using a patient's credit card and it is not in dispute that such use was without the patient's consent. Therefore, a violation of § N 7.04(12) is established as a matter of law and summary judgment is appropriate with respect to this violation.

**ALJ's Recommendation for Appropriate Discipline.**

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, 237 N.W.2d 689 (1976).

The Division recommends that Ms. Kutner's license be revoked for no less than five years. In support of this recommendation, the Division states that in stealing from a patient, Ms. Kutner demonstrates a lack of trustworthiness, respect and concern for patients. The Division also notes the prior two disciplinary actions taken against Ms. Kutner and provides two Board of Nursing cases involving theft or fraud by a nurse in which similar discipline was imposed.

Counsel for Ms. Kutner asserts that the two cases involving other nurses are distinguishable for the following reasons. First, they both involved respondents who surrendered their licenses. Moreover, one of the cases involved a nurse who was convicted of two counts of misdemeanor theft in circuit court, and the underlying facts of the criminal conduct are not part of the Divisions' submission. The other case involved a nursing home administrator who was convicted of converting significant sums of money from a patient in a scheme involving the preparation and execution of a power of attorney. In addition, the conduct occurred over a protracted period of time.

Regardless of the differences between those cases and this case, and taking into account the three purposes of discipline and the circumstances here, the discipline recommended by the

Division is appropriate. With regard to protection of the public, Ms. Kutner's conduct in this case shows an extreme lack of trustworthiness and disregard for the rights and dignity of patients. Ms. Kutner used a gift card belonging to the patient and with the patient's name written on it with a Black Sharpie. Ms. Kutner took a substantial amount of money, \$500, from that patient without the patient's consent. Ms. Kutner's conduct involved not just one, but several, purchases.

Ms. Kutner's history also supports that the public and patients in particular, need to be protected from her. Ms. Kutner has been licensed as a nurse in Wisconsin since July of 2002. Since that time, she has had three separate disciplinary actions taken against her, involving separate and distinct types of violations, all of which were serious. The first instance of misconduct involved diversion of controlled substances. According to the State Board of Nursing's Final Decision and Order dated November 16, 2006 (Division's Exh. 7 of Division's Brief in Support of its Motion for Summary Judgment), Ms. Kutner failed to fully document the use of oxycodone products, a C-II controlled substance, and hydrocodone products, C-III controlled substances, from patient supplies. On multiple occasions, she withdrew two dosage units from the secured supply system, which resulted in the patient being billed for the medication, and then documented administering only one to the patient. In several instances she also withdrew medication for a patient who had, in fact, already been discharged. In a written statement, Ms. Kutner stated that she diverted the medication described above and that she provided it to her husband, who was not authorized to possess it. Ms. Kutner subsequently stated that she was pressured into making the inculpatory statement and that it was entirely false and that she withdrew the medication solely to administer to another patient who was in immediate need of pain medication but had not yet received it from the pharmacy. Ms. Kutner's license was suspended indefinitely, although she could petition the Board for a stay of the suspension and reinstatement, which the Board could grant under certain conditions. Her license was fully reinstated on January 29, 2009.

However, just over a year later, on March 22, 2010, the Division issued another Complaint against Ms. Kutner (Exh. 8 of Division's Brief in Support of its Motion for Summary Judgment). According to the State Board of Nursing's June 3, 2010 Final Decision and Order in that case, in 2008 Ms. Kutner was negligent in her care of a patient when, in the course of a blood transfusion, she administered blood intended for another patient. The blood was properly labeled and the blood type was not that of the patient for whom it was administered. Ms. Kutner reacted immediately upon discovering the error, admitted her behavior and discontinued the transfusion within 30 minutes. According to the Nursing Board's decision, administration of an incompatible blood type can be fatal. Ms. Kutner was reprimanded for her conduct and was required to complete 6 hours of continuing education in preventing medical errors, or its equivalent.

Thus, since obtaining her license in 2002, Ms. Kutner has demonstrated negligence and betrayal of trust to the patients she is supposed to serve and has posed a danger to the public in distributing controlled substances to individuals without a prescription. Revocation is warranted to protect the public and deter others from such conduct. In terms of rehabilitation, it is clear that other less severe penalties, including suspension, have not been successful in rehabilitating Ms. Kutner. Hopefully, during the five years that her license is revoked, Ms. Kutner will take

responsibility for her actions and be fully rehabilitated in the event she wishes to reapply for a license after five years.

### Costs

The Division requests that Ms. Kutner 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 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.

Considering the factors set forth in the *Buenzli-Fritz* decision, Ms. Kutner should pay the full costs of this proceeding. As discussed above, the conduct in this case is serious, as was the conduct that resulted in Ms. Kutner's prior discipline. In addition, the level of discipline sought by the Division, a five-year revocation, is substantial, and Ms. Kutner refused to take responsibility for her actions despite overwhelming evidence against her. Finally, as the costs of disciplinary proceedings are borne by the revenue received from licenses, it would be unfair to impose the costs of disciplining Ms. Kutner on her fellow nurses.

If the Board assesses costs against Ms. Kutner, the amount of costs will be determined pursuant to Wis. Admin. Code § SPS 2.18.

### **EXPLANATION OF BOARD'S VARIANCE**

The Board of Nursing declined to adopt the disciplinary recommendations by the ALJ in her Proposed Decision and Order. The ALJ's recommendation for discipline consisted of the revocation of the Respondent's nursing license for a period of five (5) years and the imposition of full costs in this matter. If the ALJ had recommended a revocation of Respondent's license without the minimum of five years, it is possible that the Board could have accepted the recommendation and exercised its discretion in determining the appropriate length of the suspension. The purpose of professional discipline is not punishment; the purposes are rehabilitation, deterrence and public protection. For these reasons the Board finds that a more tailored combination of limiting and rehabilitating terms and conditions achieve the goals of professional discipline. The terms revised by this variance include the following: 1) suspension in lieu of revocation; 2) pre-approval of Respondent's work-setting; 3) direct supervision of her practice; 4) submission of work reports assessing Respondent's performance and adherence to the standards of practice; and 5) the completion of continuing education in ethics. These revisions are designed to fit the goals of professional discipline.

The disciplinary recommendations have also been revised to include a requirement that Respondent make a personal appearance before the Board. This case was resolved via a summary judgment motion, without an opportunity for the ALJ or the Board to assess the Respondent's demeanor and credibility. Accordingly, the Board has reserved the right to impose additional restrictions based upon information received at her appearance.

### **ORDER**

For the reasons set forth above, IT IS ORDERED that Respondent Nicole E. Kutner's license is hereby **SUSPENDED** for a period of nine (9) months, or the completion of the required continuing education whichever is greater, beginning on the effective date of this order.

IT IS FURTHER ORDERED that Respondent's nursing license shall be LIMITED as follows:

1. Respondent shall, at her own expense, complete six (6) hours of board pre-approved continuing education addressing ethics in nursing prior to termination of the suspension.
2. For a period of at least two (2) years from the date of this Order, Respondent shall arrange for quarterly reports from her nursing employer(s) in a Board pre-approved work setting with direct supervision. The quarterly work reports shall address the terms and conditions of Respondent's employment and evaluate her work performance.
3. After two (2) years from the date of this Order, Respondent may petition the Board for termination of this requirement. The Board may grant or deny the petition, it is discretion, or may modify this Order within its discretion.

IT IS FURTHER ORDERED that Respondent shall personally appear before the Board at its July 19, 2012 meeting, or at another date to be approved by the Board.



IT IS FURTHER ORDERED that Ms. Kutner shall pay the full 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**

IT IS FURTHER ORDERED that the Respondent shall make a personal appearance before the Board on July 19, 2012, at which the Board may impose additional requirements if deemed necessary to achieve the purposes of professional discipline.

This Order is effective on the date signed below.

Dated at Madison, Wisconsin on May 22<sup>nd</sup>, 2012.

WISCONSIN BOARD OF NURSING

By: Lou Ann Weix  
Lou Ann Weix, APNP  
Chair