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

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In the Matter of the Disciplinary Proceedings  
Against **GARY J. STROMBERG, R.N.**,  
Respondent

FINAL DECISION AND ORDER  
WITH VARIANCE

DHA Case No. SPS-11-0100

**ORDER 0001898**

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**Division of Enforcement Case No. 11 NUR 109**

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

Gary J. Stromberg  
2450 Garden Heights Ct.  
Green Bay, WI 54311

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

The above-captioned matter was held before the tribunal, with Administrative Law Judge (ALJ) Jennifer Nashold presiding, on a motion for summary judgment filed by the Department of Safety and Professional Services, Division of Enforcement (Division). Also pending was the Division's February 26, 2012, motion requesting reinstatement of a default judgment that had been vacated at Respondent's request, or, in the alternative, to strike Respondent's untimely

response to the Division's summary judgment motion. The ALJ issued her Proposed Decision on April 20, 2012,

On June 7, 2012, the Board of Nursing reviewed the ALJ's Proposed Decision which granted the Motion for Default and Summary Judgment Against Respondent. The Board also considered the email request dated May 8, 2012, from Respondent for an extension of time to file a response or objections to the Proposed Decision. Based upon all of the information of record, the Board now finds and adopts the following as the Final Decision and Order in this matter. The Board's Order includes an explanation of variance regarding the disciplinary terms which supplement the ALJ's recommendation.

### **FINDINGS OF FACT**

#### **Undisputed Material Facts Related to the Alleged Violations.**

Findings of Fact 1-13 are taken from the Complaint filed against Respondent. These facts are also contained in the Division's summary judgment pleadings and corresponding affidavits and exhibits.

1. Respondent Gary Stromberg, R.N., is licensed as a professional nurse in the State of Wisconsin (License No. 108326-30). This license was first granted on September 5, 1991.

2. At all times relevant to this matter, Respondent contracted on a per diem basis with BriteStar Healthcare to provide home nursing care. Respondent was also employed by ThedaStar Air Medical Services as the Flight Manager. ThedaStar is a part of ThedaCare, a community health system located in Northeast Wisconsin.

3. During the course of Respondent's contract in early 2008, Respondent was assigned to Patient T.D., who required home care due to his severe, traumatic brain injury.

4. Over the next few months, during his home care visits, Respondent built a strong relationship with T.D.'s parents, who were also T.D.'s legal guardians, and used his contacts in the medical community to obtain free medical services for T.D.

5. On Monday, March 31, 2008, Respondent sent an e-mail to T.D.'s mother requesting a personal loan. Respondent's e-mail acknowledged that "[i]t is potentially unethical for me to ask" for the loan.

6. Respondent's e-mail message was sent with "high priority" and emphasized the immediacy of the need. Respondent subsequently placed telephone calls to follow up and request assistance.

7. Under the belief that the loan would be necessary to ensure the continued care of their son, T.D.'s parents agreed to loan the funds to Respondent, and a promissory note was executed for the loan on April 4, 2008, which required payment in full by July 15, 2008.

8. After the execution of the promissory note, Respondent did not provide any further nursing care to T.D.

9. On September 4, 2008, Respondent made a \$1,000 payment. This payment came over 6 weeks past the deadline that the loan was to be paid in full. Respondent's payment was accompanied by a note stating that the remaining balance would be paid in full within 2 weeks. Respondent failed to follow through with the payment schedule.

10. On Monday, April 20, 2009, Respondent sent an e-mail from his ThedaCare e-mail account stating that he would make a \$1,000 payment on May 7, 2009, and would make additional payments every 2 weeks until the balance was paid in full, including accrued interest. Respondent failed to follow through with the payment schedule.

11. On Monday, August 17, 2009, over a year past the due date for full payment of the loan, Respondent sent an e-mail from his ThedaCare e-mail account acknowledging the debt and

once again promising to satisfy the outstanding amount due. Again, Respondent failed to follow through on his promise.

12. In December 2009, Respondent accepted a position in Alaska and moved while an outstanding balance was still due for the loan.

13. T.D.'s parents retained an attorney and, following a lawsuit, obtained a judgment in a total amount of \$11,797.60 against Respondent.

14. The Division submitted with its summary judgment pleadings an Affidavit from Kathleen Sullivan, R.N., who has been a practicing nurse for 31 years, served on the Wisconsin Board of Nursing for eight years and was the Board's Chairperson for two years. Nurse Sullivan stated that she reviewed relevant documents that detail Respondent's actions, including the e-mails, the promissory note, the court documents related to the lawsuit filed by T.D.'s parents, and the formal Complaint filed by the Department. (Sullivan Affidavit, ¶ 3). In her affidavit, Nurse Sullivan expresses her opinion that Respondent's "conduct in using his nursing position to take advantage of and profit from the legal guardians and parents of a disabled patient by coercing them into giving him a personal loan, is below the minimal standards of the practice of nursing." (Sullivan Affidavit, ¶ 4). She further stated her opinion "to a reasonable degree of probability in the field of nursing," that Respondent "engaged in conduct that violated the minimal standards of the practice of nursing necessary for the protection of the health, safety, or welfare of a patient or the public in violation of Wis. Admin. Code § N 7.04." (*Id.* at ¶ 6).

**Facts Related to the Division's Motion for Default and Alternative Motion to Strike Responsive Brief.**

15. The Division filed a Complaint with the Division of Hearings and Appeals (DHA) on October 18, 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 (13). The Division sent a copy of the Complaint and a Notice of Hearing via both regular and certified mail to Respondent on October 19, 2011, at his address of record with the Board of Nursing at the time, 612 E. Circle St. Appleton, WI 54911.

16. The Notice of Hearing stated that Respondent was required to file a written Answer to the Complaint within 20 days, failing which “[he would] be found to be in default and a default judgment [could] be entered against [him] on the basis of the Complaint and other evidence and the Wisconsin Board of Nursing [could] take disciplinary action against [him] and impose the costs of the investigation, prosecution and decision of this matter upon [him] without further notice or hearing.”

17. On October 20, 2011, the Division served Respondent with discovery, including a Request for Admissions pursuant to Wis. Stat. § 804.11.

18. On or about November 4, 2011, the Division again sent Respondent its First Request for Admissions, Interrogatories and First Request for Production of Documents. These documents were sent to him at 1012 Meadow Lane, Neenah, WI 54955. The Division informed Respondent that it had previously sent these documents to him both by e-mail and by U.S. mail to the Circle Street address, his address of record with the Board of Nursing. The Division also enclosed a courtesy copy of the Notice of Hearing and Complaint that were previously sent to him at his address of record, which the Division stated were not returned to the Division. The Division reminded Respondent that he was required to maintain a current address with the Board of Nursing and that the Answer to the Complaint was due November 8, 2011. The Division further informed Respondent that his response to the discovery request was due December 5, 2011.

19. To date, Respondent has failed to file an Answer or a response to discovery, including the Request for Admissions.

20. On November 10, 2011, the undersigned Administrative Law Judge (ALJ) issued a Notice of Telephone Prehearing Conference that set a telephone conference with Respondent and Attorney Chad Koplien of the Division for November 29, 2011. This Notice instructed Respondent to contact the ALJ to provide the telephone number for which he could be reached for the November 29, 2011 telephone conference. The Notice was sent to Respondent at the Circle Street address, which was the last address on file with DHA. The Notice was returned to DHA on November 18, 2011 as undeliverable, with notations by the U.S. Postal Service that Respondent had moved and left no forwarding address.

21. By e-mails dated November 23, 2011 and November 29, 2011, and prior to the November 29, 2011 prehearing conference, Attorney Koplien informed the undersigned ALJ that it was his understanding that all mail sent by the Division to Respondent had been returned as undeliverable without a forwarding address.

22. Respondent did not contact DHA with a telephone number at which he could be reached for the November 29, 2011 telephone conference, nor did he provide DHA with a current address. As a result, the telephone prehearing conference was conducted on November 29, 2011 without Respondent's participation. Attorney Koplien moved for default and stated that he would provide recommended findings of fact and disciplinary recommendations by December 6, 2011.

23. On November 30, 2011, the ALJ issued a Notice of Default instructing Respondent that he was in default for failing to appear at the prehearing conference and for failing to provide an Answer as required by law. The Notice further informed Respondent that findings would be made and an Order entered on the basis of the Complaint and other evidence. The Notice further

ordered Attorney Koplien to provide the ALJ with the Division's written recommendations for discipline and the assessment of costs in this matter. The Notice was mailed to Respondent at the Circle Street address.

24. Attorney Koplien filed his recommendations to the ALJ on January 4, 2012, which were also sent to Respondent at the Circle Street address.

25. On December 5, 2011, the Notice of Default was returned by the U.S. Postal Service to DHA as undeliverable, with no forwarding address.

26. On December 6, the ALJ received an e-mail from Attorney Koplien stating that on December 5, Respondent had e-mailed the Division with an updated address, 6700 Sapphire Village, Apt. 140, St. Thomas, USVI 00803 and that Respondent indicated he would be out of Wisconsin until February. The e-mail was copied to Respondent.

27. On December 6, 2011, Respondent e-mailed the ALJ and Attorney Koplien stating that he had not had the opportunity to address this case and had been denied due process. He stated that the matter was a civil case and that he had already satisfied his debt and that he had a 20-year history of exceptional nursing service. He requested a stay of the judgment.

28. That same date, the ALJ e-mailed the parties asking if Respondent would be available by telephone prior to February of 2012. Respondent responded by e-mail on December 7, 2011, stating that he would be available at the ALJ's convenience all of the following week.

29. Attorney Koplien e-mailed the ALJ and Respondent on December 7, 2011, stating that he would agree to re-opening the case, although he had proof that Respondent received the notice of the Complaint, discovery request and telephone scheduling conference via e-mail. He stated his belief that the case was appropriate for summary judgment disposition and that he did not believe a telephone conference was necessary. By e-mail exchange that same date, Respondent agreed to setting a briefing schedule, with the Division's brief due January 10, 2012,



Respondent's response due 30 days later, and the Division's reply brief due 10 days after the due date for Respondent's response brief.

30. On or about December 8, 2011, the ALJ sent an Order Vacating Notice of Default and Scheduling Briefing, which ordered the Division's brief to be filed no later than January 10, 2012 and Respondent's response brief to be filed no later than February 10, 2012. The Order was sent to Respondent at the Virgin Islands address.

31. On January 10, 2012, the Division e-mailed the ALJ and Respondent its Notice of Motion and Motion for Summary Judgment along with supporting affidavits and exhibits. Hard copies of the same documents were also received by the ALJ on January 10, 2012 and were mailed to Respondent at 2450 Garden Heights Ct., Green Bay, WI 54311.<sup>1</sup>

32. On January 10, 2012, Respondent sent an e-mail to the ALJ and Attorney Koplien expressing his unhappiness at certain statements contained in the Division's summary judgment filings, and further stated, "I assume I now have the ability for my voice to be heard and for my attorney to respond on my behalf accordingly." The same date, the ALJ responded by e-mail stating, "Consistent with the briefing schedule dated December 8, 2011, yes, you or your attorney should file a brief no later than February 10, 2012, responding to the claims made by the Division. If you do obtain an attorney, I assume that attorney will file a notice of appearance with me."

33. On February 2, 2012, the ALJ sent an e-mail to Respondent and Attorney Koplien stating that on February 1, 2012, DHA had received returned mail from the U.S. Postal Service, which had been sent on December 8, 2011 to the Virgin Islands address. The e-mail asked what

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<sup>1</sup> On January 4, 2012, Respondent sent an e-mail to the ALJ and Attorney Koplien providing this address. This e-mail automatically went into the ALJ's "Junk E-mail" electronic Outlook file and was not discovered until March 14, 2012.

address DHA should use for future correspondence and also stated, “I note that I made you aware in the e-mail below [the January 10, 2012 e-mail described in Finding of Fact No. 32] that you ha[ve] until February 10, 2011 to file a response to the Division’s motion. **That deadline is still in effect.**” (emphasis added). The ALJ did not receive a response from Respondent to this e-mail. However, on February 2, 2012, Attorney Koplien e-mailed the ALJ with Respondent’s Green Bay address.

34. On February 8, 2012, Respondent sent an e-mail to the ALJ and Attorney Koplien stating that he had just recently relocated back to Wisconsin and was working diligently to meet the February 10, 2012 deadline and attempting to retrieve e-mails, files, employment and recruitment letters, etc. He stated that the process was more cumbersome than he expected and requested an additional 14 days to respond to the Division’s summary judgment motion. He stated, “I will request no further extensions should this be granted.”

35. By e-mail dated February 8, 2012, Attorney Koplien objected to the extension request, noting among other things that “[n]ot one honest attempt to cooperate with the Division has been made” and that the Division and ALJ “have bent over backwards to accommodate” Respondent. Following some further e-mail exchanges, the ALJ granted the request, giving Respondent until February 24, 2012 to file a response. The ALJ’s February 8, 2012 e-mail informed the parties: “Barring extremely unusual circumstances, no further extensions will be granted to [Respondent].” Respondent replied to the ALJ and Attorney Koplien by e-mail that same day, thanking the ALJ and stating that “No further extensions will be required.”

36. Respondent failed to provide a response to the Divisions’ summary judgment motion by the February 24, 2012 extended deadline.

37. On Sunday, February 26, 2012, Attorney Koplien e-mailed the ALJ and Respondent stating that the Division had not received an answer to the Complaint, an answer to discovery

requests or the response to the motion for summary judgment, which was due on February 24, 2012. Attorney Koplien requested that the ALJ either reinstate the previous order of default judgment, or in the alternative, strike any late response filed by Respondent and grant the Division's summary judgment motion. The Division further noted that because Respondent had not responded to the Division's Request for Admissions, the requests were deemed admitted pursuant to Wis. Stat § 804.11(1)(b).

38. That same Sunday, February 26, 2012, Respondent responded by e-mail, stating that his formal response left Green Bay by mail on Thursday afternoon (which would have been February 23, 2012) but that he would also have access to send a digital response the following morning as he was currently traveling back to Green Bay from Nashville.

39. On Monday, February 27, 2012, three days after the February 24, 2012 extended deadline, Respondent sent an e-mail responding to the summary judgment motion, representing, "I had to do some cut and pasting from the original program but this is essentially the response minus a few attachment[s] that were sent in the mail."

40. On Tuesday, February 28, 2012, Attorney Koplien e-mailed the ALJ and Respondent, stating that the Division had not received any response in the mail. The e-mail stated, "Had Respondent mailed it last Thursday as he represented below, we would have received it by now." Attorney Koplien e-mailed the ALJ and Respondent again at the close of business the following day, February 29, 2012, stating that he still had not received anything by mail from Respondent.

41. On March 1, 2012, Respondent sent an e-mail to the ALJ and Attorney Koplien apologizing for not responding to the e-mail string sooner as he was out of town addressing a family death. He stated that the response he claimed to have sent by mail on February 23, 2012, was sent to the P.O. Box noted in the Division's brief and stated that the digital copy was nearly

identical. The ALJ responded by e-mail, asking Respondent if he sent a copy to the ALJ at DHA of the “formal response” referenced in Respondent’s February 26, 2012 e-mail which Respondent stated left Green Bay the previous Thursday. The ALJ noted that such response was not received by DHA. In a March 2, 2012 e-mail, Respondent indicated, “It was sent to the office at PO box 8935. I haven’t received anything back at my address either. Having said that, the digital document and the additional [sic] yesterday are essentially identical in material.” Despite the fact that the ALJ had sent her inquiry to both Respondent and Attorney Koplien, Respondent did not copy anyone from the Division in his e-mail response, although he had routinely done so with other e-mail correspondence. The ALJ e-mailed Respondent and Attorney Koplien the same day, forwarding Respondent’s e-mail to Attorney Koplien and notifying Respondent that he had not mailed a hard copy of his summary judgment response to the ALJ prior to the due date.

42. On March 5, 2012, the Division filed its Reply Brief, in which Attorney Koplien stated that he never received a mailed copy of Respondent’s brief which Respondent claimed to have mailed to the Division on February 23, 2012.

### **DISCUSSION**

#### **The Division’s February 26, 2012, Motion Requesting Default Judgment, or in the Alternative, to Strike any Late Response Filed by Respondent, is Granted.**

On February 26, 2012, Attorney Koplien e-mailed the ALJ and Respondent stating that the Division had not received an answer to the Complaint, an answer to discovery requests or a response to the motion for summary judgment, which was due on February 24, 2012. As a result, the Division requested that default judgment be reinstated against Respondent or, in the alternative, to strike any late response filed by Respondent.

The Division's motion for default is granted, as is the Division's alternative motion to strike Respondent's response.

**Motion for Default.**

Respondent was served a copy of the Complaint at his last known address, and never bothered to file an Answer as required by Wis. Admin. Code § SPS 2.09, despite repeated notice and reminders, and despite a prior notice of default issued against him for such failure, which was subsequently vacated pursuant to his request.

"If the respondent fails to answer as required by s. SPS 2.09 . . . the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence." Wis. Admin. Code § SPS 2.14. *See also* Wis. Admin. Code § SPS 2.09(3): ("Allegations in a complaint are admitted when not denied in the answer.").

Findings of Fact 1-13 set forth the allegations contained in the Complaint. Those allegations are deemed admitted. The Complaint alleges that these facts constitute a violation of Wis. Admin. Code § N 7.04(1) and N 7.04(13).<sup>2</sup> These provisions state, in relevant part:

**N 7.04 Misconduct or unprofessional conduct.** As used in s. 441.07 (1) (d), Stats., "misconduct or unprofessional conduct" means 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. "Misconduct or unprofessional conduct" includes, but is not limited to, the following:

(1) Violating, or aiding and abetting a violation of any law substantially related to the practice of professional or practical nursing. A certified copy of a judgment of conviction is prima facie evidence of a violation;

...

(13) Obtaining or attempting to obtain any compensation by fraud, misrepresentation, deceit or undue influence in the course of nursing practice[.]

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<sup>2</sup> Although the Complaint alleges violations of these two specific subsections, the Division's initial brief in support of its summary judgment motion focuses exclusively on the introductory language of Wis. Admin. Code § N 7.04. Because both the Complaint and Reply Brief allege violations of subsections (1) and (13) of § N 7.04 and do not allege a violation of the introductory language of § N 7.04 as a stand-alone violation, this decision addresses the language of subsections (1) and (13) only.

The facts as set forth above establish a violation of Wis. Admin. Code § N 7.04(13) in that Respondent obtained the loan from T.D.'s parents by "undue influence in the course of [his] nursing practice." Thus, the Division has established that Respondent's conduct constituted misconduct or unprofessional conduct.

However, the Division has not met its burden of establishing a violation of the other subsection alleged, Wis. Admin. Code § N 7.04(1), because it has not shown what "law" was violated by Respondent's breach of contract or that a breach of contract constitutes a "violation of [a] law," as contemplated by that subsection.

Nevertheless, because the Division has shown that Respondent's conduct constituted misconduct or unprofessional conduct under subsection (13) of § N 7.04 and the Division need not prove that Respondent's conduct constituted an additional violation of that same provision, the undersigned ALJ will address the appropriate discipline and costs, below, without further proceedings.

**Motion to Strike Respondent's Response Brief.**

After the ALJ, with the Division's consent, agreed to accommodate Respondent and vacated the notice of default against him, this matter was set for briefing on summary judgment with Respondent's brief due no later than February 10, 2012.

In response to an e-mail from Respondent, on January 10, 2012, the ALJ e-mailed Respondent and Attorney Koplien, reminding Respondent that his brief was due February 10, 2012. On February 2, 2012, the ALJ sent an e-mail to Respondent and Attorney Koplien which again reminded Respondent of the February 10, 2012 due date for his brief. On February 8, 2012, Respondent sent an e-mail to the ALJ and Attorney Koplien stating that he had just

recently relocated back to Wisconsin and requesting an additional 14 days to respond to the Division's summary judgment motion. He stated, "I will request no further extensions should this be granted."

Over the Division's objections, the ALJ again accommodated Respondent and granted the request, giving Respondent until February 24, 2012 to file a response. The ALJ's February 8, 2012 notice informing the parties of the extension warned Respondent: "Barring extremely unusual circumstances, no further extensions will be granted to [Respondent]." Respondent replied to the ALJ and Attorney Koplien by e-mail that same day, reiterating that "No further extensions will be required."

The ALJ heard nothing from Respondent until February 26, 2012, two days after the due date, when he responded to an e-mail from Attorney Koplien which notified the ALJ and Respondent that Attorney Koplien had received no response to the summary judgment motion nor had he received an Answer to the Complaint or response to discovery. Attorney Koplien requested that the ALJ either reinstate the previous order of default judgment, or in the alternative, strike any late response filed by Respondent and grant the Division's summary judgment motion. The Division further noted that because Respondent had not responded to the Division's Request for Admissions, the requests were deemed admitted, pursuant to Wis. Stat § 804.11(1)(b).

In his February 26, 2012 e-mail response, Respondent stated that his formal response left Green Bay by mail on February 23, 2012 but that he would also have access to send a digital response the following morning as he was currently traveling back to Green Bay from Nashville.

On Monday, February 27, 2012, Respondent sent an e-mail containing his response to the Division's summary judgment motion. The ALJ never received the copy of the responsive brief

that Respondent claimed to have mailed on February 23, 2012, and, as of the Division's filing of its Reply Brief on March 5, 2012, the Department had not received it either.

Based on the procedural history, I conclude that Respondent's claim that he mailed a copy of his brief on February 23, 2012 is not credible. It appears from the record that the more likely explanation is that he was only roused to action on filing his response brief when he received Attorney Koplien's e-mail on February 26, 2012, noting that Respondent had failed to meet the filing deadline. However, even if Respondent had mailed the brief to the Division of Safety and Professional Services on February 23, 2012, as he claimed several times to have done, he did not mail it to the ALJ which is required for filing. Wis. Admin. Code § SPS 2.08(2). Further, the filing date is the day the brief is received by the ALJ, not mailed. *Id.* Finally, because the response was *received* by the ALJ by e-mail only, it was not properly filed under Wis. Admin. Code § SPS 2.08(2).

Accordingly, Respondent's untimely response is stricken, particularly in light of Respondent's repeated failure to take this disciplinary proceeding seriously, his disrespect for the ALJ's orders, and his misrepresentations to this tribunal. As a result, the Division's assertions are undisputed and the Division prevails on its alleged violations on that basis as well.

**The Division's Motion for Summary Judgment is Warranted Because Respondent has Admitted Violations of Wis. Admin Code § N 7.04 by Failing to Respond to the Division's Request for Admissions, and Because Respondent has Failed to Rebut the Material Facts as Established by the Division's Pleadings, Affidavits and Other Proof.**

Even if default were not entered and Respondent's brief not stricken, the Division would nonetheless prevail on its motion for summary judgment due to Respondent's failure to respond to the Division's request for admissions and due to his failure to rebut the material facts as established by the Division's pleadings, affidavits and other proof.

**Standards Governing Summary Judgment.**



Summary judgment procedure entails a three-step methodology. The first step requires an examination of the pleadings to determine whether a claim for relief has been stated and a material issue of fact presented. *Voss v. City of Middleton*, 162 Wis. 2d 737, 747, 470 N.W.2d 625 (1991). If a claim for relief has been stated and a material issue presented, the inquiry then shifts to the moving party's affidavits or other proof to determine whether the moving party has made a *prima facie* case for summary judgment under Wis. Stat. § 802.08. *Voss*, 162 Wis. 2d at 747-48. If the moving party has made a *prima facie* case for summary judgment, the court must examine the affidavits and other proof of the opposing party to determine whether there exist disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to a trial. *Id.* at 748.

Summary judgment must be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *Lecus v. American Mut. Ins. Co.*, 81 Wis. 2d 183, 189, 260 N.W.2d 241, 243 (1977). To avoid summary judgment, the non-moving party must set forth specific facts showing that there is a genuine issue of material fact for trial. Wis. Stat. § 802.08(3). “[W]hen the facts are not in dispute and the legal issues are capable of resolution, summary judgment is mandatory.” *Smith v. State Farm Fire and Cas. Co.*, 127 Wis. 2d 298, 301, 380 N.W.2d 372 (Ct. App. 1985).

**Failure to Respond to the Request for Admissions.**

On October 20, 2011, the Division served Respondent with a Request for Admissions under Wis. Stat. § 804.11. The Requests for Admissions included the following: **“REQUEST**

**TO ADMIT NO. 18:** Respondent's conduct violated Wisconsin Administrative Code § N 7.04(13)."<sup>3</sup>

To date, Respondent has not responded to the request for admissions or other discovery, despite repeated reminders that a response was required. Respondent never offered any explanation as to why he failed to respond, nor did he ever request additional time to do so. Failure to respond to a request for admissions results in the matters being deemed admitted. Wis. Stat. § 804.11(1). The deemed admissions may relate to statements or opinions of fact "or of the application of law to fact." *Id.* Further, summary judgment may be based upon a party's failure to respond to a request for admission, even if an admission would be dispositive of the entire case. *See Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 334 N.W.2d 230 (1983).

Respondent's failure to respond to the Division's request to admit that his conduct violated Wis. Admin. Code § N 7.04(13) results in that violation being admitted. Further, Respondent has failed to submit any affidavit or other proof that such a violation did not occur. Therefore, the Division is entitled to summary judgment on the issue of whether a violation of Wis. Admin. Code § N 7.04(13) occurred.

**Failure to Rebut Material Facts as Established by the Division's Pleadings, Affidavits and Other Proof.**

The material facts as set forth in the Division's pleadings, affidavits and other proof are set forth in the Findings of Fact above. Respondent's e-mailed response does not contest these facts. Rather, he asserts that he did not "abandon" the patient as alleged by the Division, but instead, BriteStar decided to no longer use his services; he had no malice or intent to defraud or harm; he ultimately paid the debt with interest as a result of the circuit court action; and he did

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<sup>3</sup> The Request for Admissions also included a request that Respondent admit that his conduct violated Wis. Admin. Code § N 7.04(12), which prohibits "Obtaining or attempting to obtain anything of value from a patient without the patient's consent." The Division has abandoned this specific allegation as it was not alleged in the briefing on summary judgment or in the Complaint itself. Therefore, I do not consider whether a violation of this specific subsection occurred.

not “abscond” to Alaska, as alleged by the Division, but was instead recruited by a national company. He also objects to any restriction on his license.

Respondent does not dispute the fact that he obtained a personal loan via undue influence by virtue of his nursing relationship with his patient's parents or that the money was only recovered after his patient's parents sued him. Nor has Respondent provided any opposing expert evidence to rebut the opinion of the Division's expert that Respondent used his nursing position to take advantage of and profit from the legal guardians and parents of a disabled patient by coercing them into giving him a personal loan and that such conduct is below the minimal standards of the practice of nursing necessary for the protection of the health, safety, or welfare of a patient or the public.

The Division's proof, uncontested by Respondent, warrants summary judgment under Wis. Stat. § 802.08, on the issue of whether Respondent engaged in misconduct or unprofessional conduct by violating Wis. Admin. Code § N 7.04(13). However, the undisputed material facts do not show that Respondent also engaged in misconduct or unprofessional conduct by violating Wis. Admin. Code § N 7.04(1) because the Division has not shown that a breach of contract constitutes a violation of the law as contemplated by that subsection of the Code.

#### **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 requests that Respondent's license be revoked for no less than one year and, in support, provides two Board of Nursing cases involving theft or fraud by a nurse in which

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similar discipline was imposed. The Division asserts that Respondent could seek reinstatement after one year if: (1) he undergoes an assessment by a professional, pre-approved by the Board, opining that he is safe to ethically practice nursing; and (2) he enters into an order with the Board which subjects his practice to limitations deemed appropriate by the Board.

The ALJ concluded that such discipline is appropriate under the circumstances of this case; it promotes the rehabilitation of Respondent in that it emphasizes the seriousness of his conduct yet provides an avenue for him to resume practicing in a trustworthy and responsible manner and protects the public in that it ensures that he only practices under conditions in which patients cannot be harmed. Finally, it deters other licensees from engaging in similar misconduct, as it is a discipline reportable to the public.

### Costs

The final issue is what amount of costs, if any, of the investigation and prosecution of this matter should be borne by Respondent under Wis. Admin. Code § SPS 2.08.

In *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), the Chiropractic Examining Board set forth factors that are appropriately considered in determining the imposition of costs in any disciplinary proceeding:

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.

For many of the same reasons delineated in the *Buenzli-Fritz* decision, Respondent should be assessed the full amount of recoverable costs. His alleged conduct is of a serious nature; his participation in these proceedings demonstrates that at best, he does not take the process seriously and at worst, that he was dishonest with this tribunal and with the Division; 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.

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

### **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. SPS.

3. Respondent was duly served with the Complaint and Notice of Hearing pursuant to Wis. Admin. Code § SPS 2.08 and failed to file an Answer to the Complaint as required by Wis. Admin. Code § SPS 2.09.

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

5. Pursuant to Wis. Admin. Code § SPS 2.09, Respondent has admitted to the allegations of the Complaint by not filing an Answer.

6. The allegations of the Complaint establish that Respondent committed misconduct or unprofessional conduct under Wis. Admin. Code § 7.04(13) in that he “[o]btain[ed] . . . compensation by . . . undue influence in the course of [his] nursing practice.”

7. The Division has not met its burden of proof to show that Respondent engaged in misconduct or unprofessional conduct under subsection (1) of Wis. Admin. Code § N 7.04 because it has not shown what “law” was violated by Respondent’s breach of contract or that a breach of contract constitutes a “violation of [a] law,” as contemplated by that subsection.

8. Respondent’s response to the Division’s summary judgment motion was untimely and was not properly filed under Wis. Admin. Code § SPS 2.08(2). As a result, the response is stricken.

9. Respondent’s failure to respond to the Division’s Request for Admissions, including to the request that he admit he violated Wis. Admin. Code § N 7.04(13), results in the allegation being deemed admitted. Wis. Stat. § 804.11(1).

10. Summary judgment is granted in favor of the Division on the issue of whether Respondent violated Wis. Admin. Code § N 7.04(13) because Respondent admitted to this allegation by failing to respond to the Division’s request to admit the violation.

11. Summary judgment is also granted in favor of the Division on the issue of whether Respondent violated Wis. Admin. Code § N 7.04(13) because Respondent failed to rebut the material facts as established in the Division's pleadings, affidavit and other proof.

12. Pursuant to Wis. Stat. § 441.07(1)(c), the Board of Nursing has the authority to "revoke, limit, suspend or deny renewal of a license of a registered nurse" if the Board finds that the registered nurse has engaged in misconduct or unprofessional conduct under Wis. Admin. Code § N 7.04.

13. As a result of Respondent's violation of Wis. Admin. Code § N 7.04, Respondent is subject to discipline pursuant to Wis. Stat. §§ 441.07(1)(c).

14. A revocation of Respondent's license for not less than one year is warranted under the circumstances of this case, with the conditions set forth above.

15. Respondent's payment of all costs of the investigation and prosecution of this matter is warranted under Wis. Admin. Code § SPS 2.18.

#### **EXPLANATION OF VARIANCE**

The Board of Nursing accepts the findings of fact, conclusions of law, costs, order and motion rulings, recommended by the ALJ, with one exception. The Board has determined it appropriate to require that if Respondent chooses to seek reinstatement of his nursing license, he shall also submit a psychological evaluation by a board pre-approved licensed mental health provider. The evaluation shall include appropriate psychometric testing and recommendations, if any, for restrictions on practice based on the facts of this case. It is the view of the Board that this additional disciplinary requirement is consistent with the purposes of discipline and will assist the Board in determining whether Respondent is safe to return to practice and reinstatement of licensure is warranted.

## **ORDER**

For the reasons set forth above, IT IS ORDERED that the license of the Respondent Gary J. Stromberg to practice nursing in the State of Wisconsin be and is hereby REVOKED for a period of not less than one year. After one year, Respondent could seek reinstatement of his license if: (1) he undergoes an assessment by a professional, pre-approved by the Board of Nursing, opining that he is safe to ethically practice nursing; and (2) he enters into an order with the Board which subjects his practice to limitations deemed appropriate by the Board.

IT IS FURTHER ORDERED that if Respondent seeks reinstatement of his nursing license, he shall first, at his own expense, obtain a psychological evaluation from a board pre-approved provider, as described in the explanation of variance.

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**

IT IS FURTHER ORDERED that This Order is effective on the date signed below.

WISCONSIN BOARD OF NURSING

Dated at Madison, Wisconsin on 25<sup>th</sup> day of June, 2012.

By: Gretchen Love  
Member of the Board DL