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Before The
State Of Wisconsin
DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES

In the Matter of the Disciplinary Proceedings
Against **MELISSA NAPIORKOWSKI**,
Respondent

FINAL DECISION AND ORDER
Order No.
ORDER 0002094

Division of Enforcement Case No. 11 RSA 033

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 17th day of October, 2012.

Michael J. Berndt, Chief Legal Counsel
Department of Safety and Professional Services



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **MELISSA NAPIORKOWSKI**,
Respondent

PROPOSED DECISION AND ORDER
DHA Case Nos. SPS-12-0018
ORDER 0002094

Division of Enforcement Case No. 11 RSA 033

The parties to this action for the purposes of Wis. Stat. § 227.53 are:

Melissa Napiorkowski
201 North 67th Street, #201
Wauwatosa, WI 53213

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

Attorney James Polewski
Department of Safety and Professional Services
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708-8935

Michael J. Berndt
Chief Legal Counsel
Department of Safety and Professional Services
1400 East Washington Avenue
Madison, WI 53708-8935

PROCEDURAL HISTORY

These proceedings were initiated on February 27, 2012 when the Department of Safety and Professional Services (Department), Division of Enforcement (Division), filed a formal Notice of Hearing and Complaint against Respondent Melissa Napiorkowski (Respondent), alleging that Respondent engaged in unprofessional conduct under Wis. Admin. Code § SPS

164.01(2)(n) and (w) and that her license was therefore subject to disciplinary action.¹ Respondent failed to file an Answer to the Complaint, but did participate in a prehearing conference on March 28, 2012, in this matter and in a companion case, DHA Case No. SPS-12-0017. At the March 28, 2012 conference, Respondent indicated that she would re-sign a settlement stipulation which she believed she has already signed and returned to the Division. A second prehearing conference was set for May 30, 2012, at which Respondent failed to appear. As a result, on June 1, 2012, the Division filed a Motion for Default and supporting documentation in this proceeding and in the companion case. The administrative law judge (ALJ) issued a Briefing Order on June 1, 2012, ordering Respondent to file a response to the motion for default by July 6, 2012. Respondent failed to file a response.

FINDINGS OF FACT

Facts Related to the Alleged Violation

Findings of Fact 1-8 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent was born on February 3, 1979, and is licensed as a substance abuse counselor in training in the state of Wisconsin pursuant to license number 13280-130, first granted on January 13, 2004, and as a substance abuse counselor pursuant to license number 13820-131, first granted on May 6, 2005.

2. Respondent's most recent address on file with the Department is 201 N. 67th Street, #201, Wauwatosa, Wisconsin 53213.

3. At all times relevant to this proceeding, Respondent was working as a substance abuse counselor at the Racine Youthful Offender Correctional Facility in Racine, Wisconsin.

4. In January 2011, Respondent began a close personal relationship with one of the inmates assigned to her caseload and her AODA treatment group. In the course of her relationship with this inmate, her client, Respondent exchanged letters with the inmate by delivering the letters to other inmates for transmittal to him, and he responded using the same method.

¹ In its letter brief in support of its motion for default, the Division argues only that unprofessional conduct was committed under Wis. Admin. Code § 164.01(2)(n), not under Wis. Admin. Code § 164.01(2)(w). However, in the "Conclusions of Law" section of its recommended proposed decision, the Division recommends the following conclusion of law: "The conduct described. . . constitutes unprofessional conduct as defined by Wisconsin Administrative Code § RL [SPS] 164.01(2)(n), (v), (w), and (x)." Subsections (v), (w) and (x) are not discussed or analyzed further anywhere in the Division's submissions, including in the recommended proposed decision. Therefore, I construe the Division's brief as abandoning the allegation contained in the original Complaint that Respondent committed unprofessional conduct under § SPS 164.01(2)(w) and this decision does not address that subsection nor any of the subsections not cited in the original Complaint or the Division's brief.

5. Respondent provided this inmate with her cell phone, for his use in his cell, by violating the security rules of the institution and hiding the cell phone on her person to bring it into the institution, knowing that it was contraband.

6. The relationship was discovered by a correctional officer who discovered the inmate in Respondent's office, out of the inmate's assigned area without authorization. Respondent at first denied that there was a relationship, but eventually admitted to part of the relationship. Respondent continued to deny that the relationship was ongoing, despite having continued to exchange letters with the inmate past the date on which Respondent asserted that the relationship had ended.

7. Respondent was terminated from her employment for bringing contraband into a correctional facility and violating the conditions of her employment.

8. Respondent declined to respond to inquiries from the Division of Enforcement about her conduct with the inmate.

Facts Related to Default

9. The Complaint and Notice of Hearing in this matter were served on Respondent on February 27, 2012, by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing notified Respondent as follows: "If you do not provide a proper Answer within 20 days, you will be found to be in default, and a default judgment may be entered against you on the basis of the complaint and other evidence and the Department of Safety and Professional Services may take disciplinary action against you and impose the costs of the investigation, prosecution and decision of this matter upon you without further notice or hearing."

10. Respondent failed to file an Answer as required by Wis. Admin. Code § SPS 2.09(4).

11. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for March 28, 2012. Respondent and counsel for the Division, Attorney Polewski, appeared by telephone at the conference. Attorney Polewski indicated that he had sent a settlement offer to Respondent on October 28, 2011. Respondent indicated that she signed the settlement documents and sent them back to the Division on November 15, 2011; however, Attorney Polewski indicated he never received them. The parties indicated that Attorney Polewski would re-send the settlement documents and that Respondent would re-sign them and send them to Attorney Polewski.

12. A subsequent prehearing conference was set for May 30, 2012. The May 9, 2012 Notice for this prehearing conference stated, "A respondent's failure to appear at a scheduled conference or hearing may result in default judgment being entered against the respondent." Respondent failed to appear at the May 30, 2012 prehearing conference. On June 1, 2012, the Division filed a Motion for Default and supporting documentation. The ALJ issued a Briefing Order on June 1, 2012, ordering Respondent to file a response to the Division's motion by July 6, 2012. Respondent failed to file a response.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter pursuant to Wis. Stat. § 440.88.
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 Notice pursuant to Wis. Admin. Code § SPS 2.08 and was also served with the Notice of Telephone Prehearing Conference scheduling a prehearing conference for May 30, 2012.
4. When a Respondent fails to file an Answer as required by Wis. Admin. Code § SPS 2.09 or fails to appear at the hearing at the time fixed therefor, the Respondent is in default and findings may be made and an Order entered “on the basis of the complaint and other evidence.” Wis. Admin. Code § SPS 2.14.
5. Wisconsin Admin. Code § HA 1.07(3)(b) and (c) further provide: “(b) If a respondent fails to appear, the administrative law judge may . . . take the allegations in an appeal as true as may be appropriate . . .” and “(c) For a telephone or video hearing or prehearing the administrative law judge may find a failure to appear grounds for default if any of the following conditions exist for more than ten minutes after the scheduled time for hearing or prehearing conference . . . (2) the failure to answer the telephone or videoconference line.”
6. 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.
7. Respondent has also defaulted in this proceeding by failing to appear at the scheduled prehearing conference on May 30, 2012 after due notice, pursuant to Wis. Admin. Code § HA 1.07(3) and Wis. Admin. Code § SPS 2.14.
8. Pursuant to Wis. Admin. Code §§ SPS 2.09(3) and 2.14, and Wis. Admin. Code § HA 1.07(3)(b) and (c), Respondent has admitted to the allegations of the Complaint and other evidence by not filing an Answer and by failing to appear at the May 30, 2012 telephone prehearing conference.
9. Respondent engaged in unprofessional conduct in violation of Wis. Stat. § 440.88(6) and Wis. Admin. § SPS 164.01(2)(n) by failing to avoid a relationship that may have impaired her objectivity or created a conflict of interest.

10. As a result of the violation noted above, Respondent is subject to discipline pursuant to Wis. Stat. § 440.88.

DISCUSSION

Violations of Wisconsin Statute and Administrative Code

Because Respondent failed to provide an Answer to the Complaint filed against her and failed to appear at the May 30, 2012 prehearing conference, findings may be made and an Order entered “on the basis of the complaint and other evidence,” Wis. Admin. Code § SPS 2.14, and the ALJ “may . . . take the allegations in [the] appeal as true as may be appropriate.” Wis. Admin. Code § HA 1.07(3)(b) and (c).

It is undisputed, therefore, that in January 2011, while working as a substance abuse counselor at the Racine Youthful Offender Correctional Facility in Racine, Wisconsin, Respondent began a close personal relationship with an inmate assigned to her caseload and her AODA treatment group. In the course of her relationship with this inmate, her client, Respondent exchanged letters with the inmate by delivering the letters to other inmates for transmittal to him, and he responded using the same method.

Respondent also provided this client/inmate with her cell phone, for his use in his cell, by violating the security rules of the institution and hiding the cell phone on her person to bring it into the institution, knowing that it was contraband.

In addition, Respondent allowed the inmate to be in Respondent’s office, out of the inmate’s assigned area, without authorization. Respondent at first denied that there was a relationship, but eventually admitted to part of the relationship. Respondent continued to deny that the relationship was ongoing, despite having continued to exchange letters with the inmate past the date on which Respondent asserted that the relationship had ended. As a result of her actions, Respondent was terminated from her employment. She declined to respond to inquiries from the Division about her conduct with the inmate.

The Department may discipline a substance abuse counselor under Wis. Stat. § 440.88(6) for engaging in unprofessional conduct. Unprofessional conduct includes “[f]ailing to avoid dual relationships or relationships that may impair the substance abuse professional’s objectivity or create a conflict of interest.” Wis. Admin. Code § SPS 164.01(2)(n).

The undisputed facts establish that Respondent engaged in unprofessional conduct in violation of Wis. Stat. § 440.88(6) and Wis. Admin. Code § SPS 164.01(2)(n) in that she failed to avoid a relationship that may have impaired her objectivity or created a conflict of interest.

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 revocation of Respondent's license to practice as a substance abuse counselor. Under the circumstances of this case, revocation is warranted. Respondent engaged in a close personal relationship with a client who was not only an inmate but an inmate who was being held at a Youthful Offender Correctional Facility, indicating that the client was not an adult. Although there is no proof in the record that the relationship was sexual in nature, it was significant enough that Respondent violated several facility rules in order to facilitate the relationship, for which her employment was terminated. The public needs protection from Respondent, a substance abuse counselor with no respect for boundaries between counselor and client and whose actions could have resulted in a security threat to the correctional facility.

The fact that Respondent declined to participate in these proceedings strengthens concerns that she has not taken responsibility for her actions and has not been rehabilitated. Revocation of Respondent's license best promotes the three goals of discipline set forth above, protection of the public, deterrence and rehabilitation.

Costs

The Division requests that Respondent 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.

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 [Safety and Professional Services] 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 of the same reasons delineated in the *Buenzli-Fritz* decision, Respondent should be assessed the full amount of recoverable costs. As set forth in the disciplinary section above, Respondent's conduct is of a serious nature. Moreover, Respondent 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 her profession who have not engaged in such conduct.

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

ORDER

Accordingly, IT IS ORDERED that the license of Respondent Melissa Napiorkowski to practice substance abuse counseling is hereby REVOKED, effective the date the Department signs the final order in this matter.


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 the above-captioned matter be and hereby is closed as to Respondent Melissa Napiorkowski.

Dated at Madison, Wisconsin on September 20, 2012.

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: 
Jennifer E. Nashold
Administrative Law Judge