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Before The
State Of Wisconsin
BOARD OF NURSING

In the Matter of the Disciplinary Proceedings
Against **NICOLE A. WILBURN, L.P.N.**,
Respondent

FINAL DECISION AND ORDER

Order No. ~~0002183~~
ORDER 0002183

Division of Legal Services and Compliance Case No. 12 NUR 219

The State of Wisconsin, Board of Nursing, 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, Board of Nursing.

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 6th day of December, 2012.

Julia Nelson, RN
Member
Board of Nursing



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

In the Matter of the Disciplinary Proceedings
Against **NICOLE A. WILBURN, L.P.N.**,
Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS-12-0056

Division of Legal Services and Compliance¹ Case No. 12 NUR 219

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

Nicole A. Wilburn
5501 North 76th Street, Apt. 5
Milwaukee, WI 53218

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

Department of Safety and Professional Services, Division of Legal Services and
Compliance, by

Attorney Aaron A. Konkol
Department of Safety and Professional Services
Division of Legal Services and Compliance
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 (Division), filed a formal Complaint against Respondent Nicole A. Wilburn (Respondent), 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(14). The Division

¹ The Division of Legal Services and Compliance was formerly known as the Division of Enforcement. Because the Division was called the Division of Enforcement at the time of the actions described, it is referred to as such in the procedural history of this decision.

of Enforcement served Respondent on or about July 12, 2012 by sending a copy of the Notice of Hearing and Complaint to her last known address. Respondent failed to file an Answer to the Complaint, as required by Wis. Admin. Code § SPS 2.09, and failed to appear at the prehearing telephonic conference held before the Division of Hearings and Appeals on August 13, 2012.

The Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c). In light of Respondent's failure to file an Answer to the Complaint and failure to make herself available for the prehearing conference, the undersigned administrative law judge (ALJ) found Respondent to be in default. On August 13, 2012, the ALJ issued a Notice of Default against Respondent. Consistent with the Notice of Default, the Division filed a written recommendation for discipline and costs to be imposed on Respondent.

FINDINGS OF FACT

Facts Related to the Alleged Violation

Findings of Fact 1-5 are taken from the Division's Complaint against Respondent filed in this matter.

1. Nicole A. Wilburn, L.P.N., (DOB 01/22/1974) is licensed as a practical nurse in the State of Wisconsin (license no. 302048-31). This license was first granted on April 30, 1999.
2. Respondent's most recent address on file with the Department of Safety and Professional Services is 5501 N. 76th Street, Apt. 5, Milwaukee, WI 53218.
3. On December 1, 2011, the Wisconsin Board of Nursing (Board) issued a Final Decision and Order (Order) against Respondent in which Respondent's license to practice as a practical nurse was suspended for 60 days and limited for a period of at least two years.
4. On April 24, 2012, Respondent e-mailed a Division of Enforcement attorney and self-reported that she continued to work 24-32 hours per week while her license was suspended.

5. According to Respondent, she was unable to find temporary employment so she continued to work.

Facts Related to Default

6. The Complaint and Notice of Hearing in this matter were served on Respondent on July 11, 2012, by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing stated that Respondent was required to file an Answer to the Complaint within 20 days and informed Respondent: “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 Wisconsin Board of Nursing 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.”

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

8. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for August 13, 2012. Notice of this prehearing conference was sent to both parties, with instructions that Respondent provide the telephone number at which she could be reached for the conference to the ALJ no later than August 8, 2012.

9. Respondent provided a telephone number where she could be reached for the prehearing conference. On August 13, 2012, the ALJ attempted to reach Respondent at the telephone number she provided; however, she received a voice mail recording. The ALJ left a voice mail for Respondent informing her that the ALJ would give Respondent 15 minutes to contact her at the phone number provided by the ALJ. Respondent failed to contact the ALJ during that time period and when the ALJ telephoned Respondent again after the 15-minute period, the ALJ again received a voice mail recording.

10. The Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

11. On August 13, 2012, the ALJ issued a Notice of Default and Ordered the Division to serve no later than August 23, 2012: (1) its written recommendation for discipline in this matter and the reasons supporting that recommendation; and (2) its recommendation as to whether all or part of the costs of this proceeding should be assessed against Respondent and the reasons supporting that recommendation.

12. The Division filed its proposed decision and order including its written recommendation regarding discipline and costs on August 23, 2012. Respondent filed no response.

DISCUSSION AND CONCLUSIONS OF LAW

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

Wisconsin Admin. Code § HA 1.07(3) provides, in relevant part:

(3) FAILURE TO APPEAR.

...

(b) If a Respondent fails to appear, the administrative law judge may . . . take the allegations in an appeal as true as may be appropriate. . .

(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: (1) The failure to provide a telephone number to the division after it had been requested; (2) the failure to answer the telephone or video conference line . . . (4) the failure to be ready to proceed with the hearing or prehearing conference as scheduled.

Pursuant to Wis. Admin. Code § HA 1.07(3)(c), Respondent is in default for failing to answer the telephone and failing to be ready to proceed with the prehearing conference as scheduled.

Moreover, Wis. Admin. Code § SPS 2.09(4) states, “An answer to a complaint shall be filed within 20 days from the date of the service of the complaint.” When a Respondent fails to file an Answer or fails to appear as required, 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. Thus, Respondent has also defaulted in this proceeding pursuant to Wis. Admin. Code § SPS 2.14 by failing to appear at the prehearing conference and failing to file and serve an Answer to the Complaint as required by Wis. Admin. Code § SPS 2.09(4).

Accordingly, pursuant to Wis. Admin. Code §§ HA 1.07(3) and SPS 2.14, Respondent has admitted to the allegations of the Complaint. As such, it is undisputed that on December 1, 2011, the Board issued a Final Decision and Order against Respondent in which Respondent’s license to practice as a practical nurse was suspended for 60 days and limited for a period of two years. It is also undisputed that on April 24, 2012, Respondent e-mailed a Division of Enforcement attorney and self-reported that she continued to work 24-32 hours per week while her license was suspended.

Wisconsin Stat. § 441.07(1)(d) provides that the Board may “revoke, limit, suspend or deny renewal of a license of a registered nurse...or may reprimand a registered nurse . . . if the board finds that the person committed . . . [m]isconduct or unprofessional conduct.”

Wisconsin Admin. Code § N 7.04(14) states: “[M]isconduct 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 . . . [v]iolating any term, provision or condition of any order of the board.”

Based on the foregoing, Respondent has violated Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(14) because her conduct constitutes misconduct or unprofessional conduct. She is therefore subject to discipline pursuant to Wis. Stat. § 441.07(1)(d).

Appropriate Discipline

The Board has the authority to discipline Respondent in this matter pursuant to Wis. Stat. § 441.07 for the violation discussed above. 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 and that her privilege to practice in the State of Wisconsin pursuant to the Nurse Licensure Compact, Wis. Stat. § 441.50(3)(b), be revoked. Under the facts of this case, the criteria of *Aldrich*, and a prior Board decision, the discipline recommended by the Division is warranted.

On December 1, 2011, the Board issued a Final Decision and Order against Respondent in which Respondent's license to practice as a practical nurse was suspended for 60 days and limited for a period of at least two years. Clearly, the actions of Respondent constitute unprofessional misconduct as defined by the Board of Nursing Code. Respondent not only violated the terms of the Board Order, but also admitted to the violation by e-mailing the Division of such conduct. Violating a Board order is a violation of Wis. Admin. Code § N 7.04(14), and in this case, also resulted in Respondent practicing nursing while her license was suspended.

Respondent's intentional acts and failure to take responsibility for her actions, including her failure to appear for the prehearing conference in this matter, demonstrates that she has not been rehabilitated and that there is a need for protecting the public from other instances of misconduct. There is also a need to send a strong message to other licensees to deter them from engaging in similar conduct. When the Board, with full credentialing authority, issues an order

disciplining the license holder, the importance of complying with that order is critical. Respondent's actions were highly unethical and created the risk of harm to the public. The discipline requested will adequately serve the purposes for imposing discipline in this matter. Revocation of Respondent's license, as well as her privilege to practice in Wisconsin pursuant to the Nurse Licensure Compact will serve to protect the health, safety, or welfare of patients and ensure that Respondent understands the rules governing her profession. Wis. Stat. § 441.07(2) provides that after one year, the Board may reinstate the revoked license. Respondent is clearly not ready to resume the practice of nursing as evidenced by her intentional disregard of a Board order. Moreover, similar discipline has been ordered by the Board for similar conduct. *See In the Matter of Disciplinary Proceedings Against Carrie L. West, R.N.*, 12NUR107 (May 3, 2012).

Accordingly, it is appropriate to revoke Respondent's license and to revoke her privilege to practice in the State of Wisconsin pursuant to the Nurse Licensure Compact, set forth above.

Costs

The Board has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Respondent be ordered to pay the full costs of its investigation and of these proceedings. The factors to be considered in assessing costs are: (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 prosecutor; (4) the respondent's cooperation with the disciplinary process; (5) prior discipline, if any; (6) the fact that the Department 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; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008).

Most of these factors have been addressed in the disciplinary section of this decision, above. Additionally, although Respondent does not have any prior disciplinary action against her, her conduct was serious, there is no argument that certain factual findings were investigated and litigated unnecessarily and, given the program revenue nature of the Department, 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. Moreover, the Division states that it offered Respondent a stipulation to resolve the Complaint; however, Respondent did not accept the stipulation which forced the Division to file a formal disciplinary Complaint. According to the Division, once the Complaint was filed, Respondent failed to respond to any further contact from the Division. Respondent also refused to participate in the proceedings before the Division of Hearings and Appeals. Based on all of the above, it is appropriate to require Respondent to pay the full costs incurred in this matter.

ORDER

Accordingly, IT IS ORDERED that:

1. Respondent's license to practice as a professional nurse in the State of Wisconsin is hereby REVOKED.
2. The privilege of Respondent to practice nursing in the State of Wisconsin, pursuant to the Nurse Licensure Compact, is hereby REVOKED.
3. 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 Legal Services and Compliance
P.O. Box 8935**

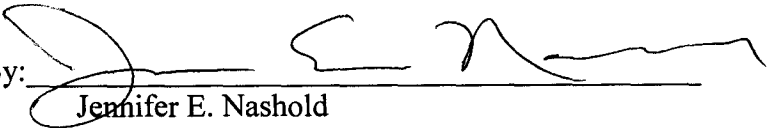
Madison, WI 53708-8935
Telephone: (608) 267-3817
Fax: (608) 266-2264

4. The ordered terms of this decision are effective the date the Board signs the final decision in this matter.

Dated at Madison, Wisconsin on October 15, 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