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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **Shane H. Nelson, R.N.**,

Respondent

**FINAL DECISION AND ORDER WITH
EXPLANATION OF VARIANCE**

DHA Case No. SPS-12-0007

ORDER 0002254

Division of Enforcement Case No. 10 NUR 515

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

Shane H. Nelson
1255 Brewers Ln., Unit 3
Stillwater, MN 55085

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

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

Attorney Aaron A. Konkol
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 Shane H. Nelson, alleging that Respondent Nelson's license was subject to disciplinary action pursuant to Wis. Stat. § 441.07(1)(c) and Wis. Admin. Code § N 7.03(3). 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 February 9, 2012. That same day, the Administrative Law Judge (ALJ) issued a

Prehearing Conference Report and Briefing Order. Consistent with that Order, on February 28, 2012 the Division filed a motion for default and recommendations regarding discipline and costs to be imposed on Respondent. Respondent has failed to file a brief in response to the motion for default.

FINDINGS OF FACT

Facts Related to the Alleged Violation

Findings of Fact 1-4 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Shane H. Nelson, R.N. is licensed as a professional nurse in the State of Wisconsin (License No. 154321-30). This license was first granted on May 11, 2006.

2. Respondent's most recent address on file with the Wisconsin Board of Nursing (the Board) is 1255 Brewers Lane Unit 3, Stillwater, MN 55085.

3. On January 27, 2010, the Minnesota Board of Nursing (Minnesota Board) issued an Order of Automatic Suspension (Order), in which Respondent's license to practice nursing in the State of Minnesota was immediately suspended for an indefinite period of time.

4. The Order was based on a Findings and Order Revoking Stayed Order of Commitment entered in Ramsey County District Court, in which Respondent was determined to be mentally ill and committed to Regions Hospital in St. Paul, Minnesota.

Facts Related to Default

5. The Complaint and Notice of Hearing in this matter were served on Respondent on January 11, 2011, 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, failing which "[he would] be found to be in default, and a default judgment may be entered against [him] on the basis of the Complaint and other evidence and the Wisconsin Board of Nursing may 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."

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

7. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for February 9, 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 February 6, 2012. The Notice was not returned to DHA as undeliverable.

8. Respondent failed to provide a telephone number for the prehearing conference. The Division provided a telephone number for Respondent to the ALJ but there was no answer at the telephone number provided by the Division. The Division indicated it would be moving for default against Respondent.

9. On February 9, 2012, the ALJ issued a Prehearing Conference Report and Briefing Order under which the parties were ordered to file their motions and briefs as follows: the Division's motion for default was due no later than March 12, 2012; Respondent's response was due no later than April 12, 2012; and the Division's reply brief, if any, was due no later than April 19, 2012.

10. Based on Respondent's failure to file an Answer to the Complaint and failure to make himself available for the prehearing in this matter, the Division moved for default pursuant to Wis. Admin. Code §§ SPS 2.09 (4) and 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

11. Respondent failed to file a response brief. As a result, the Division indicated it would file no reply brief.

DISCUSSION AND CONCLUSIONS OF LAW

Default and Violation of Wis. Stat. § 441.07(1)(c)

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 videoconference 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 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 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)(b) and SPS 2.14, Respondent has admitted to the allegations of the Complaint. As such, it is undisputed that Respondent was determined to be mentally ill and committed to Regions Hospital in St. Paul, Minnesota, pursuant to an order entered in Ramsey County District Court. On January 27, 2010, the Minnesota Board issued an Order in which Respondent's license to practice nursing in the State of Minnesota was immediately suspended for an indefinite period of time.

Wisconsin Stat. § 441.07(1)(c) 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 . . . [a]cts which show the registered nurse . . . to be unfit or incompetent by reason of . . . mental incompetency."

Wisconsin Admin. Code § N 7.03 states: "'Mental incompetency' is evidenced by conduct which reflects an impaired ability of the licensee to safely or reliably perform duties. 'Mental incompetency' also includes, but is not limited to, adjudication of incompetence by a court of law."

Based on the foregoing, Respondent has violated Wis. Stat. § 441.07(1)(c) because he is unfit by reason of mental incompetency. He is therefore subject to discipline pursuant to Wis. Stat. § 441.07(1)(d).

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 revocation of Respondent's license. In the alternative, the Division requests an indefinite suspension until Respondent undergoes a psychological evaluation, at his own expense, with the following terms:

1. The evaluating psychologist must not have treated Respondent at any time and shall have been approved by the Board, with an opportunity for the Division to make its recommendation, prior to the evaluation being performed.

2. The Division shall provide the evaluating psychologist and Respondent with those portions of the investigative file which the Division believes may be of assistance in performing the evaluation. Respondent may provide the evaluating psychologist with any information Respondent believes will be of assistance in performing the evaluation and shall immediately provide copies of that information to the Division.

3. Respondent shall authorize the evaluating psychologist to provide the Board, or its designee, and the Division with the evaluation report and all materials used in performing the evaluation and shall provide the Board, or its designee, and the Division with the opportunity to discuss the evaluation and findings with the evaluating psychologist.

4. If the evaluating psychologist shows, to the Board's satisfaction, that Respondent is safe to practice nursing, the Board shall lift the suspension. However, the Board may limit Respondent's license in any manner it sees fit to address the facts above and any recommendations resulting from the assessment, including direct supervision and quarterly employer work reports.

Under the facts of this case, it is appropriate to impose an indefinite suspension with the conditions recommended by the Division, set forth above.

As evidenced by the Minnesota district court's adjudication that Respondent was mentally ill and required commitment to a hospital and the Minnesota Board's automatic and indefinite suspension of Respondent's nursing license, Respondent currently poses a danger to the public he serves (his patients). The fact that he did not participate at all in these proceedings strengthens concerns that he has not been rehabilitated. That said, the facts do not conclusively establish that Respondent is unamenable to treatment and rehabilitation. Thus, the Division's alternative recommendation is warranted.

This disciplinary order promotes the rehabilitation of Respondent in that it provides an avenue for him to continue practicing in a safe and responsible manner. It 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 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. The Division points out that Respondent was offered a stipulation, but failed to respond to the Division’s offer. Further, the conduct is of a serious nature, he 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 the nursing profession who have not engaged in such conduct.

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

EXPLANATION OF VARIANCE TO ALJ’S PROPOSED DECISION

As the regulatory authority and final decision maker in this Class 2 proceeding, the Board of Nursing may modify the ALJ’s proposed decision. *See* Wis. Stat. § 227.46(2). The Board must provide reasons for any such modifications. *Id.* Here, the Board adopts as its own the findings of fact and conclusions of law set forth in the proposed decision. However, the Board modifies the ALJ’s recommended discipline in three respects, explaining the basis for each.

First, the Board modifies the proposed Order to require that before the Board will consider a petition by Respondent for any modification of this Order, his license to practice nursing in the State of Minnesota must be reinstated. As the Minnesota Board of Nursing made

the original determination that Respondent was unfit to practice, this Board will not allow Respondent to resume practicing in Wisconsin under any licensure status until the Minnesota Board is satisfied that its reasons for suspending him have been sufficiently addressed for the Minnesota Board to permit him to practice nursing in that state. The Minnesota Board is in the unique position to determine, based on the underlying facts in its adjudication, whether Respondent is able to safely resume practice.

Second, the Board modifies the proposed Order to require that prior to resuming the practice of nursing in the State of Wisconsin, Respondent must prove to the Board's satisfaction that he is able to do so safely, and without endangering his patients or the public. This provision ensures that the Board may review Respondent's current status and abilities at the time of his petition for reinstatement to determine whether he can safely resume practice and has successfully addressed the issues which are the underlying basis of this disciplinary action. Given the seriousness of the underlying facts in this matter, particularly the determination that Respondent was committed for treatment of his mental illness, the Board must have the ability to determine successful treatment and/or resolution of Respondent's condition at the time of any petition for reinstatement.

Third, the Board modifies the proposed Order to require that in the event the Board does grant Respondent the ability to resume the practice of nursing, the Board may limit Respondent's license in any manner it deems necessary for the protection and safety of his patients and the public. This provision further ensures that any remaining concerns regarding Respondent's ability to safely resume practice may be addressed, if necessary, at the time of the petition for reinstatement. Any limitations placed on Respondent's license shall address these continuing concerns and may include the requirements that he practice only under direct supervision, arrange for the submission of quarterly work reports from his employer, or other limitations that the Board may deem appropriate at that time.

ORDER

Accordingly, IT IS ORDERED that the license of Shane H. Nelson to practice nursing in the State of Wisconsin be, and is hereby, **SUSPENDED INDEFINITELY** until such time as the Board finds that his reinstatement is appropriate.

IT IS FURTHER ORDERED that Respondent is subject to the following terms and conditions prior to petitioning the Board for reinstatement of any license to practice nursing in this state:

1. Respondent shall have had his license to practice nursing in the State of Minnesota reinstated to licensure status by the Minnesota Board of Nursing.
2. Respondent shall undergo a psychological evaluation, at his own expense, and must adhere to the following conditions in doing so:
 - a. The evaluating psychologist must not have treated Respondent at any time and shall have been preapproved by the Board, or its designee, with an

opportunity for the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division) to make its recommendation for the evaluator, prior to the evaluation being performed.

- b. The Division shall provide the evaluating psychologist and Respondent with those portions of its investigative file that it believes will assist the evaluator in performing the evaluation. Respondent may provide the evaluating psychologist with any information Respondent believes will assist the evaluator in performing the evaluation, and shall immediately provide copies of such information to the Division.
- c. Respondent shall authorize the evaluating psychologist to provide the Board, or its designee, and the Division with the evaluation report and all materials used in performing the evaluation, and shall provide the Board, or its designee, and the Division the opportunity to discuss the evaluation and findings with the evaluating psychologist.

3. If Respondent demonstrates, to the Board's satisfaction, that his license to practice nursing in the State of Minnesota has been reinstated, that he is able to safely resume the practice of nursing in the State of Wisconsin and that he has complied with the terms of paragraph 2 above, the Board shall lift the suspension of Respondent's license. However, the Board may, upon lifting the suspension, limit Respondent's license in any manner it deems necessary at the time of reinstatement for the protection and safety of his patients and the public. Such limitations may include the requirement that he practice only under direct supervision, arrange for the submission of quarterly work reports from his employer, and/or other limitations that the Board deems appropriate at the time of reinstatement.

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. Following determination of the amount, 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.

Dated at Madison, Wisconsin on this 14th day of January, 2013.

Wisconsin Board of Nursing

By: 
Chair of the Board of Nursing 