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Before The  
State Of Wisconsin  
BOARD OF NURSING

In the Matter of the Disciplinary Proceedings  
Against **BEVERLY A. SERVAIS, L.P.N.**,  
Respondent

FINAL DECISION AND ORDER  
Order No. \_\_\_\_\_  
**ORDER 0002402**

**Division of Legal Services and Compliance Case No. 11 NUR 439**


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 19<sup>th</sup> day of April, 2013.

J. Dan Nelson   
Member  
Board of Nursing



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

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In the Matter of the Disciplinary Proceedings  
Against **BEVERLY A. SERVAIS, L.P.N.**,  
Respondent

PROPOSED DECISION AND ORDER  
DHA Case No. SPS-12-0047  
**ORDER 0002402**

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**Division of Legal Services and Compliance<sup>1</sup> Case No. 11 NUR 439**

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

Beverly A. Servais, by

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**PROCEDURAL SUMMARY**

These proceedings were initiated on June 27, 2012, when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), served a formal Complaint upon Respondent Beverly Servais, alleging that Ms. Servais' nursing

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<sup>1</sup> The Division of Legal Services and Compliance was formerly known as the Division of Enforcement.

license was subject to disciplinary action due to her alleged mental incompetency as defined by Wis. Admin. Code § N 7.03(3). Ms. Servais, through counsel, filed an Answer to the Complaint on July 17, 2012. After several telephone prehearing conferences, the matter was scheduled for hearing on November 26, 2012. Neither Ms. Servais nor her attorney appeared for the hearing, and, over the objection of the Division's attorney, a new hearing date was scheduled for January 11, 2013, and a hearing was held at that time. The hearing transcript was received by the administrative law judge (ALJ) on January 18, 2013.

### **FINDINGS OF FACT**

1. Ms. Servais is licensed in the State of Wisconsin as a practical nurse, license number 31-7270. The license was first granted to Ms. Servais on April 28, 1967 and is current through April 30, 2013. (Division's Complaint, p. 1; Respondent's Answer)

2. At all times relevant to this proceeding, Ms. Servais worked as a practical nurse at Seven Oaks Rehabilitation Health Center (Seven Oaks), located in Milwaukee, Wisconsin. (Division's Complaint, p. 1; Answer)

3. Seven Oaks is a short-term rehabilitation facility for elderly patients and also takes care of long-term dementia patients. (Tr., pp. 12, 51)

4. Sarah Mummery was a nursing assistant at Seven Oaks for four years and worked there on July 31, 2011. (Tr., p. 12) Ms. Mummery and Ms. Servais did not work together very often because Ms. Mummery worked the second shift (3:00 p.m. – 11:00 p.m.) and Ms. Servais generally worked the third shift (11:00 p.m. to 7:00 a.m.). (Tr., p. 13) Ms. Mummery saw Ms. Servais during shift changes and they also sometimes worked together when Ms. Servais worked the second shift. (*Id.*) Ms. Mummery worked second shift with Ms. Servais approximately 10-

15 times in the four years she worked at Seven Oaks. (Tr., p. 25) On July 31, 2011, Ms. Servais worked the second shift; therefore, the two of them worked together. (Tr., p. 13)

5. On July 31, 2011, Ms. Mummery observed Ms. Servais sitting at the nurse's station with her pants pulled down to her knees, exposing her naked buttocks. (Tr., pp. 13-15, 49) Ms. Mummery observed that Ms. Servais' pants were maroon and that Ms. Servais was sitting on a towel on the chair. (Tr., p. 14) Ms. Servais was not on break at that time (Tr., pp. 13-14) Ms. Mummery was "sure" it was Ms. Servais because she knows Ms. Servais through working with her and Ms. Servais was the only nurse on that floor. (Tr., p. 14) Another nursing assistant also observed Ms. Servais with her pants down. (*Id.*) Ms. Mummery was "sure" Ms. Servais' pants were to her knees. (Tr., pp. 13-14) At the time she observed Ms. Servais, Ms. Mummery was approximately ten feet from Ms. Servais. (Tr., pp. 14, 126) Ms. Mummery believed that Ms. Servais knew that Ms. Mummery could see her sitting there with her pants down but Ms. Servais did not indicate any sudden surprise. (Tr., p. 15) Ms. Servais did not try to pull her pants up, did not seem embarrassed and just continued to sit there. (*Id.*)

6. When Ms. Mummery first saw Ms. Servais with her pants down, she walked away to the kitchen and when she returned, Ms. Servais was still sitting there with her pants down so Ms. Mummery took a video of Ms. Servais with her cell phone (a Smartphone). (*Id.*) She took the video because there had been many incidents with Ms. Servais that had been discussed at work and Ms. Mummery wanted to show her administrator and the director of nursing the incident so that they would have proof. (*Id.*) The prior incidents were incontinence of bowel and bladder with the nurse's station chair being soiled after Ms. Servais got up from the chair and Ms. Servais having feces on her shoe and wiping it off. (Tr., pp. 15-16) Ms. Mummery felt bad taking the video but she knew that what Ms. Servais was doing was not appropriate. (Tr., p. 22)

7. The video was played at hearing and was admitted into evidence as Exhibit 1. (Tr., p. 20) Ms. Mummery opined that the quality of the video might have been poor because her phone shines a bright light when taking a picture or video and she was holding the phone against her pants because she did not want Ms. Servais to see that she was taking the video. (Tr., p. 22) When asked why she did not want Ms. Servais to know that she was taking the video, Ms. Mummery stated, "Because I never had a problem with Bev [Servais]. I enjoyed working with her, but I knew that I had seen her with her pants down, that that wasn't sanitary for both co-workers and more important, the patients there in the nursing home." (Tr., p. 46)

8. During the p.m. shift, the lights in the nurse's station are dimmed with the dimmer. (Tr. p. 42) The nurse's station is at a right-angle intersection of two hallways of the facility in sort of an alcove or a cutout in one of the walls of the hall. (Tr., p. 40)

9. At the end of the video, there is a conversation between a male and female, who Ms. Mummery identified as Ms. Servais and one of the residents. (Tr., p. 48) The male, who is not seen in the video, asks about traffic violations. (Ex. 1, Tr. p. 48) Ms. Mummery opined that the reason that the male did not see that Ms. Servais' pants were down was because he was sitting across the desk, lower than where Ms. Servais was sitting. (Tr., pp. 49-50)

10. Exhibit 2 is a photo taken from the video which shows Ms. Servais from the side, sitting on what appears to be a white towel or cloth, with her pants down to her knees. (Ex. 2; Tr. pp. 16-19). The right buttock and thigh are tan or beige in color, and the pants are dark. (Ex. 2)

11. Ms. Servais had supervisory authority over Ms. Mummery when they worked shifts together. (Tr. p. 26) Ms. Mummery recalled no incidents where Ms. Servais had been critical of

her work performance. (Tr., pp. 26-27, 43-45) When working at Seven Oaks, Ms. Mummery was never disciplined. (Tr., pp. 45, 64)

12. Ms. Mummery reported the July 31, 2011 incident within a few days of it occurring but she did not recall the exact date. (Tr. pp. 28-30) She reported it separately to the director of nursing, Anilisa McDonald, and then to the administrator, Suzanne Navin. (Tr., pp. 31-32) She did not recall anyone asking her to do a “written report” on the incident; however, she believed that she documented the incident, but not on the day of the incident, at the request of either Ms. McDonald or Ms. Navin. (Tr., pp. 33-34, 38-39) She showed Ms. Navin the video while it was still on her phone and observed Ms. Navin download the video onto Ms. Navin’s computer. (Tr., pp. 36-38) Ms. Mummery also emailed a copy of the photo taken from the video to Ms. Navin. (Tr., p. 37) Ms. Navin told her not to speak to others about what had occurred. (*Id.*)

13. Ms. Navin testified at the hearing. She has been a nursing home administrator for 30 years, the last 13 years of which were at Seven Oaks. (Tr., p. 51) Ms. Navin was Ms. Servais’ supervisor’s supervisor and knew Ms. Servais. (Tr., p. 52) Since approximately 2007, staff began to notice a change in Ms. Servais’ behavior. (*Id.*) Ms. Servais had been disciplined prior to the July 31, 2011 incident. (Tr., p. 52)

14. A document entitled, “Seven Oaks Employee Disciplinary Notice,” dated September 11, 2007, which Ms. Navin pulled from Ms. Servais’ personnel file, documents a discussion that the director of nursing at that time, Sheila Zimmer, had with Ms. Servais regarding issues that “had been brewing for a while.” (Ex. 3, p. 1; Tr., pp. 53, 55) It notes that a complaint was made on September 11, 2007, and, under the section captioned “Violation,” states: “Bev. [h]as been having an offensive body odor that peers, families and residents have made comments on. Good personal hygiene is a top prior[i]ty due to close proximity to residents[.] Your personal hygiene

reflects on your professional demeanor and how others perceive you as a leader and a nurse.” (Ex. 3, p. 1) Under the caption “Corrective Action,” it states, “Wash up during work, bring change of clothes[,] wear incontinence products if need [sic], you can shower at work if need. [sic] Use hygiene products such as deodorizers, not just perfume[e] to cover up.” (*Id.*) At the bottom of the document, after signature lines signed by Ms. Servais and Ms. Zimmer, it is stated, “This is hard to do, Bev is a great nurse and a nice person and her peers are concerned for her, but it has been difficult to get report due to odor.” (Ex. 3, p. 1; Tr., p. 68)

15. Prior to Ms. Zimmer’s conversation with Ms. Servais, Ms. Zimmer and Ms. Navin had discussed the issue and decided that Ms. Zimmer should start talking to Ms. Servais about it to see if they could try to change the situation and find out what was going on. (Tr., p. 56) The reason for the conversation was that on numerous occasions, employees approached Ms. Zimmer or Ms. Navin to discuss Ms. Servais’ body odor. (Tr., p. 55). Ms. Servais would sit throughout the building as the night nurse on various chairs and would have to sit on a towel because she would have an incontinent episode. (Tr., pp. 55-56) Ms. Navin believed that in 2007, Ms. Servais did not yet have an incontinence issue with stools, only with urine. (Tr., p. 56)

16. A document dated June 24, 2011, which Ms. Navin also retrieved from Ms. Servais’ personnel file, documents another discussion between the new director of nursing, Anilisa McDonald, and Ms. Servais regarding Ms. Servais’ body odor and incontinence issues involving stools. (Ex. 3, p. 2; Tr., pp. 53-54, 57) The document is signed by Ms. McDonald and states: “Anilisa met with Beverly on the afternoon of June 24<sup>th</sup> to discuss concerns regarding her hygiene and continence. Anilisa told Beverly that it has been reported that there are times when Bev has a strong offensive body odor. It was also shared that Beverly has been observed to have continence issues. Beverly was informed that there are showers available in the employee locker



room and that she should consider bringing a change of clothing to work and utilize the showers if needed. Anilisa also mentioned that Beverly might want to consider using an incontinence brief so as to prevent soiling herself and the chairs she uses when working. I told Beverly that I have personally noticed her to have a strong odor at times and that her appearance at times is disheveled. . . Beverly thanked me for sharing this with her and although she has apparently been informed of this information before, gave the impression that she was unaware of the issue.” (Ex. 3, p. 2)

17. Ms. Navin described Ms. Servais’ incontinence issues as “horrific.” (Tr., p. 57) Ms. Servais would use the public bathroom and soil it so terribly that housekeeping had to be called in to clean. (*Id.*) Housekeeping would shut down bathrooms to prevent Ms. Servais from using them. (*Id.*) Ms. Navin did not see Ms. Servais use or come out of the bathroom herself; rather, she received reports from housekeeping staff. (Tr., pp. 57-58, 81) Housekeeping reported that they had to clean the carpeting because Ms. Servais “would walk down the hall and stool would fall out of her pants, down the hall and down the stairs.” (Tr., p. 60). Nursing assistants reported to Ms. Navin when housekeeping was not there to clean it up and the nursing assistants had to clean it up instead. (*Id.*) A nurse reported to Ms. Navin that she observed an incident sometime in 2011 where Ms. Servais was conversing with someone and a stool fell out of Ms. Servais’ pants and Ms. Servais took her foot out of her clog, scooped up the stool with her toes, and put her foot back in her clog. (Tr., pp. 63, 93, 101)

18. Ms. Navin was aware of the towels on the chairs and the soiled chairs that the facility had to clean after Ms. Servais had worked that shift on that unit. (Tr., p. 82) She had to replace chairs because they were no longer able to be cleaned after Ms. Servais had sat on them and had

incontinent episodes on them. (*Id.*) Generally, only nursing staff had access to nursing staff chairs and equipment. (Tr., p. 91)

19. Ms. Navin had first-hand knowledge of Ms. Servais' body odor. She had sat in offices with Ms. Servais at various times, including while setting up Ms. Servais' 401K or helping her with her health insurance, where she could not sit leaning over like she normally would while talking to an employee. She had to lean back. She also could not stand at the nurse's station standing by Ms. Servais because the odor was too offensive. (Tr., pp. 80-81)

20. As the administrator, Ms. Navin was responsible to maintain a clean and sanitary environment; therefore, if something was not maintained as clean and sanitary, she was notified about it. (Tr., p. 60) Because there was a pattern involving Ms. Servais and the situation was becoming worse, Ms. Navin was notified. (Tr., p. 61) She stated, "This whole situation was extremely difficult for us to discuss with Beverly. She had been with us for years, she was a great nurse, we cared for her, but sitting down and telling someone you smell was difficult. I had other nurses in the building, friends of hers who would go out to lunch and have conversations with her regarding the situation. We decided we had to start doing something." (Tr., p. 61)

21. There was never a situation where an employee had informed Ms. Navin about an incontinence issue attributed to Ms. Servais where further investigation revealed that Ms. Servais could not possibly have done it because, for example, Ms. Servais was not working that day. (Tr., p. 102)

22. Ms. Navin became aware of the July 31, 2011 incident involving Ms. Servais because Ms. Mummery called her to tell her about it and stated that she had a video of the incident. (Tr., p. 61). Ms. Navin watched the video on Ms. Mummery's cell phone. (*Id.*) On the video, she observed Ms. Servais sitting at the nurse's station on a towel with her bare bottom

exposed, talking to one of the residents. (Tr., p. 62) She was sure that it was Ms. Servais in the video because she confirmed that at that time, Ms. Servais was on the schedule and had passed medications that she documented, and Ms. Navin also recognized her voice and her features from the video. (*Id.*). After confirming it was Ms. Servais on the video, she terminated Ms. Servais' employment with Seven Oaks on August 9, 2011. (Tr., pp. 62, 83)

23. Ms. Navin then reported the incident to the Board of Nursing because a few weeks after Ms. Servais' termination, an anonymous complaint was filed against Seven Oaks for Ms. Servais' behavior. (Tr., p. 62) Seven Oaks had state surveyors come to Seven Oaks to investigate the situation and the surveyor asked Ms. Navin why she did not report the incident. (Tr., pp. 62-63) Ms. Navin stated she did not initially report the incident because she was concerned for Ms. Servais and believed Ms. Servais had early dementia and wanted to spare her from the embarrassment. (Tr., p. 63) Ms. Navin had 30 years of experience working with dementia patients and her own father had dementia for 17 years during which Ms. Navin was one of his caregivers, and Ms. Servais' behavior was similar to what her father and other dementia patients in the nursing home exhibit. (Tr., p. 64)

24. Ms. Navin believed that Ms. Servais' ability to practice nursing was impaired and that she was unable to practice nursing safely and reliably. (Tr., p. 63). She believed Ms. Servais' conduct posed a risk to patients and co-workers. (Tr., p. 64)

25. If employees at Seven Oaks had conflicts with each other, Ms. Navin would know about them and she was not aware of any conflicts between Ms. Navin and Ms. Servais. (Tr., p. 64) Ms. Navin did not recall Ms. Servais reporting any inappropriate behavior to her Ms. Mummery and Ms. Navin did not recall Ms. Mummery ever being disciplined while working at Seven Oaks. (*Id.*)

26. A document dated August 9, 2011 and signed by Ms. McDonald reports the July 31, 2011 incident and its consequences. (Ex. 3, p. 3; Tr., p. 83) The document states, in part: “After incident with Beverly was reported to Suzanne [Navin], this writer spoke with staff to confirm the information was received. It was confirmed that this incident had occurred. I discussed incident with HR and Adm and it was determined that the incident violated at least two category 1 items and that as a result Beverly was to be terminated from employment. Met with HR (Angel) and Beverly early morning of August 9, 2011 to discuss the incident that was reported to Suzanne on August 8<sup>th</sup>. Anilisa told Beverly that it had been reported that she was observed sitting on Tudor unit at Nurse’s Station with her pants down to her knees. Bev’s initial response was to deny the allegation. Bev then asked what was going to happen. Anilisa informed Bev that she was to be terminated from service for two category 1 offenses. . . . Beverly then asked, ‘[C]an you give me another chance, if I promise it won’t happen again, I need my job.’ Anilisa responded that this was not a situation that allowed for another chance.” (Ex. 3, p. 3)

27. Counsel for Ms. Servais stipulated at hearing that it is unsafe to practice nursing without one’s pants on. (Tr., pp. 22-23)

28. Ms. Servais presented no exhibits or witness testimony on her own behalf, with the exception of her own testimony. In her testimony, Ms. Servais denied ever having her pants pulled down while at work, denied ever having incontinence episodes at work, denied ever being spoken to about such issues by her supervisors, and suggested that she had never seen the September 11, 2007 Disciplinary Notice and that it was not her signature on the document. (Tr., pp. 103-134) She stated that the conversation between herself and Ms. McDonald reflected in Exhibit 3 as occurring on June 24, 2011 “never happened.” (Tr., p. 112)

29. Ms. Servais' hair color and skin tone are similar to the hair color and skin tone of the individual appearing in the video and the photo taken from the video.

## **DISCUSSION**

### **Burden of Proof**

The burden of proof in disciplinary proceedings is on the Division to show by a preponderance of the evidence that the events constituting the alleged violations occurred. Wis. Stat. 440.20(3). To prove by a preponderance of the evidence means that it is "more likely than not" that the examined action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Saulter*, 60 F.3d 270, 280 (7th Cir. 1995).

### **Violation of Wis. Stat. § 441.07 and Wis. Admin. Code § N 7.03(3)**

Wisconsin Stat. § 441.07 states that Wisconsin Board of Nursing (the Board) may revoke, limit, suspend or deny renewal of a license of a licensed practical nurse or may reprimand a licensed practical nurse, if the Board finds that the person committed, inter alia, "(b) One or more violations of this subchapter or any rule adopted by the board under the authority of this subchapter" or "(c) Acts which show the . . . licensed practical nurse to be unfit or incompetent by reason of . . . mental incompetency." Wis. Admin. Code § N 7.03(3) defines "mental incompetency" as "conduct which reflects an impaired ability of the licensee to safely or reliably perform duties."

Counsel for Ms. Servais stipulated at hearing that it is unsafe to practice nursing without one's pants on. (Tr. pp. 22-23) Even without such a stipulation, I would conclude that the conduct alleged to have occurred on July 31, 2011 demonstrates mental incompetency as that phrase is defined by Wis. Admin. Code § 7.03(3) as it is "conduct which reflects an impaired ability of the licensee to safely or reliably perform duties." Thus, if the July 31, 2011 incident is

found to have occurred, Ms. Servais has violated Wis. Stat. § 441.07 and Wis. Admin. Code § N 7.03(3). For the reasons stated below and based on the record in this case, I conclude that it is more likely than not that the incident on July 31, 2011 and the acts of incontinence described above occurred. Therefore, Ms. Servais violated Wis. Stat. § 441.07(b) and (c) and Wis. Admin. Code § N 7.03(3).

I find credible Ms. Mummery's testimony that she observed Ms. Servais in the nurse's station on July 31, 2011 with her pants pulled down to her knees, speaking to a resident. She testified that she was only ten feet away from Ms. Servais at the time she observed her, that she knew Ms. Servais and had worked with her, that Ms. Servais was the only nurse in the unit during that shift and that Ms. Mummery actually walked away and returned to the nurse's station and found Ms. Servais still sitting there with her pants down. Ms. Mummery was sufficiently confident in her observations that she took a video with her Smartphone of what was occurring. Her observations are reinforced by the video and the picture taken from that video. Though at first, it is difficult to discern what the photo depicts, once explained, it pretty clearly shows a person viewed sitting from the side with her dark pants pulled down to just above her knees. The hair color of the individual in the photo is consistent with Ms. Servais' hair color as observed at the hearing, the pattern and colors of the shirt are similar to the one worn by Ms. Servais at the hearing, the skin color on the side of the right buttock and upper leg is similar to Ms. Servais' skin color as observed at the hearing and the individual in the video/photo appears to be sitting on a white towel or some other material. I also find credible Ms. Navin's testimony that she recognized Ms. Servais' voice on the video.

Although neither the video nor photo are of great quality, Ms. Mummery's explanations of why that could be actually reinforced her credibility: she was attempting to hide her phone

while recording Ms. Servais because she had a good relationship with Ms. Servais and did not want Ms. Servais to know that she was videotaping her. In addition, the fact that she took the video is compelling evidence in and of itself. It does not seem likely that Ms. Mummery would have videotaped Ms. Servais unless she was certain that she was observing the very unusual conduct she described.

Ms. Servais' testimony regarding what might appear on the video/photo is not credible and does not undermine Ms. Mummery's testimony or the video/photo. She did not dispute that the video was taken on July 31, 2011 and the only explanation that she gave for what appears on the video/photo is her testimony that she could have been sitting there with a scrub jacket tied around her waist which hung down to her knees. (Tr., p. 123-24) Ms. Servais used a white scrub jacket to demonstrate how it might have been tied around her waist. (*Id.*) However, the video/photo does not show a white color on the upper buttock and upper thigh; it shows a tan or beige flesh color of a Caucasian. The Caucasian flesh color is especially pronounced when juxtaposed against the white cloth on which the person is sitting. Ms. Servais never suggested that tan or beige colored scrub tops were available. Moreover, even the angle and straight line of what appears to be the pants pulled down to the knee area are more consistent with pants being pulled down than with a jacket hanging to the knees.

Ms. Mummery's testimony is further reinforced by the fact that Ms. Servais was working on the day in question, by Ms. Navin's testimony regarding Ms. Mummery's report to her about the incident shortly after it occurred and Ms. Navin's credible testimony with respect to the incidents of incontinence, odor and inappropriate behavior on the part of Ms. Servais. Ms. Mummery's and Ms. Navin's testimony is also reinforced by Exhibit 3, which consists of documentation of the July 31, 2011 incident and a conversation between Ms. McDonald and Ms.

Servais about the incident in which Ms. Servais is reported to have asked for another chance if she promises that it will never happen again; a Disciplinary Notice from September 11, 2007, in which incontinence issues and odor are noted, and which contains Ms. Servais' signature and the signature of the director of nursing at the time and recommends that Ms. Servais shower at work, bring a change of clothes, and use incontinence products; and a document dated June 24, 2011, signed by the new director of nursing, which again mentions issues of Ms. Servais' strong odor and incontinence issues and again recommends that Ms. Servais bring a change of clothes, use the work showers and use an incontinence brief.

I do not find credible Ms. Servais' testimony that she did not have her pants pulled down on July 31, 2011, that she never had incontinence issues, was never talked to about incontinence, either on September 11, 2007 or on June 24, 2011 as documented, or at any other time, that she never saw the September 11, 2007 or June 24, 2011 documents, or that the signature on the 2007 Disciplinary Notice was not her signature. To believe Ms. Servais' testimony would mean that Ms. Mummery either lied under oath or was mistaken about what she saw on July 31, 2011 and that Ms. Navin, an administrator for 30 years, lied under oath about what people had told her regarding Ms. Servais' incontinence issues or that all of the employees who mentioned Ms. Servais' incontinent episodes to Ms. Navin were lying or mistaken about the many incidents attributed to Ms. Servais. It would also suggest that Ms. Navin lied under oath that she pulled the 2007 and June 2011 documents contained in Exhibit 3 from Ms. Servais' personnel file and that the documents reflected discussions with and actions regarding Ms. Servais that Ms. Navin approved. In addition, believing Ms. Servais' testimony would mean that someone, presumably management, forged Ms. Servais' signature on the 2007 Disciplinary Warning.



The record does not contain any credible evidence suggesting a motivation sufficient for Ms. Mummery or Ms. Navin to make up these allegations, or for any of Ms. Servais' colleagues to do so, particularly allegations which are so bizarre in nature, and presumably, uncomfortable to discuss. Ms. Servais testified with regard to some conflicts she had had with Ms. McDonald after Ms. McDonald became director of nursing in May of 2011. She stated that at one point, Ms. McDonald became angry with her over the issue of whether Ms. Servais, as an LPN, could start and regulate an IV without an RN on the premises. (Tr., p. 110) Ms. McDonald allegedly told Ms. Servais that because Ms. Servais had taken the IV course, she would be expected to start and regulate an IV without an RN on the premises but Ms. Servais disagreed and found documentation saying that state regulations state that an LPN cannot run an IV unless there is an RN in the building. (*Id.*) Ms. Servais also testified that she and Ms. McDonald had a discussion regarding problems that Ms. Servais was having with the night shift as far as start times because there was a time that Ms. Servais was the only person in the building from 11:00 p.m. until 11:45 p.m., which Ms. Servais considered unsafe. (Tr., pp. 111-112) She also stated that she submitted written questions to Ms. McDonald inquiring what Ms. McDonald wanted her to do with falls involving patients, with narcotics counts being wrong, and problems with the pharmacy bringing medicines into Seven Oaks and just leaving them and not having them properly signed in. (Tr., p. 110)

Ms. Servais also suggested that false allegations against her and her termination of employment may have been the result of her seeking to take time off work for a surgery she needed. She stated that on August 1, 2011 (which was after the July 31, 2011 incident), her doctor informed her she would have to undergo a medical procedure. (Tr., p. 117) She stated that she had to find her own replacements for time she took off from work because Seven Oaks

does not allow sick leave, her time off would involve weekends, and there was a policy at Seven Oaks that if an employee misses two weekends during an unspecified time period, it would lead to discipline. (*Id.*) She called several co-workers to see if they could work for her but when no one would do it, she contacted the scheduler, Sheena, to get suggestions. (*Id.*) Sheena told her she would have to find her own replacement, that Shenna was not going to replace her, and that Ms. Servais “know[s] how hard it is to get a night nurse.” (Tr., p. 118) Ms. Servais called her doctor on August 2, 2011 and told him that she was having a hard time getting off work and he told her to file for a family leave, bring the paperwork in and tell Seven Oaks she was going to take the leave time. (*Id.*) Ms. Servais further testified that on either August 3 or 4, 2011, she left a note for Angela in Human Resources requesting the paperwork but no one got back to her. She stated that she never heard anything about the accusations regarding the July 31, 2011 incident until she was terminated on August 9, 2011.

Ms. Servais’ testimony regarding other possible motivations for the accusations against her and for her termination are outweighed by the evidence presented by the Division supporting its allegations. Ms. Servais acknowledged during cross-examination that she never had any conflict with Ms. Zimmer, whose signature appears on the September 11, 2007 Disciplinary Notice (Tr., pp. 130-31) Moreover, Ms. Servais did not present any evidence, in the form of documentation or testimony, in support of her theories, other than her own testimony. She did not present testimony from Ms. McDonald regarding the alleged conflicts and IV incident, from the HR person, Angela, for whom she allegedly left the note, or from any Seven Oaks nurses regarding Ms. Servais’ testimony that she asked them during the first week of August 2011 if they would work for her. She did not present any testimony from colleagues who regularly worked with her to state that they never observed Ms. Servais to have incontinence issues.

Moreover, even if Ms. Servais' assertions are true that she attempted to exercise her right to medical leave in early August 2011, they do not negate evidence that her employment was terminated for what occurred on July 31, 2011.

In sum, Ms. Servais has failed to present a motive for management and staff at Seven Oaks to make false and highly unusual allegations against her and to go to such great lengths, including perjury and forgery, to subject her to discipline from Seven Oaks and from the Board of Nursing.

Nor did Ms. Servais sufficiently negate the Division's evidence with respect to incontinence and body odor issues. In an effort to explain Ms. Navin's testimony regarding reports of Ms. Servais soiling the bathrooms and the nursing chairs, Ms. Servais testified that one of the public bathrooms routinely overflowed, approximately once per month, and that feces would get on the floor; that signs on the bathroom would be posted on the bathroom advising people not to use it; and that at one point, a nursing aid's husband came in to help clean up because Ms. Servais could not find enough things with which to clean it up. (Tr., p. 113) She stated that on a couple of occasions, a day nurse named Lori Jordon complained about a patient being incontinent on the chair in the nurse's station. (Tr., pp. 120-21) With regard to the allegations regarding her odor, Ms. Servais testified that this may have been an issue at some point in the Spring of 2011 because she has a condition called Barret's esophagus, which causes food to get caught in her throat and phlegm to come out. (Tr., p. 115). She stated that a co-worker, Jill Becker, mentioned the problem to her. (*Id.*) However, neither Ms. Jordon, Ms. Becker, the aid's husband nor any other witnesses were presented, nor were any medical or other records introduced, to corroborate any aspect of Ms. Servais' assertions.

Ms. Servais suggested that she would not have done what was alleged to have occurred on July 31, 2011 because she would be too embarrassed to engage in such conduct due to a band she is required to wear around her waist from a medical condition. (Tr., p. 122) However, this testimony actually hurt more than it helped her defense, as it suggested that exposing one's buttocks while in a public place on duty as a nurse would not be sufficiently embarrassing to prevent her from engaging in such conduct.

Finally, I note that Ms. Servais' credibility was undermined by her equivocation on some important facts. For example, when asked by her attorney if she had ever seen the September 11, 2007 Disciplinary Notice contained in Exhibit 3, she stated, "I don't remember. I don't think so." (Tr. p. 105). When asked about her signature on that document, she stated, "I can't say that's my signature. The reason I'm saying that is I know I never make an S like that, I usually [] make a regular S, I never make a deal like that." (Tr., p. 105) She also definitively stated that she had three conversations with Ms. McDonald but then testified to five conversations with her. (Tr., pp. 105-112)

Based on the foregoing, the Division met its burden of establishing that it is more likely than not that Ms. Servais engaged in the conduct alleged to have occurred on July 31, 2011. As stipulated to by Ms. Servais and as further determined by the undersigned ALJ, this conduct in itself shows impairment of the ability to safely perform nursing duties and therefore constitutes mental incompetence. However, I also conclude that the Division met its burden of establishing that Ms. Servais suffered from incontinence issues which she neglected to address (by, for example, using incontinence products as recommended by her supervisors) and that as a result, she soiled chairs, public bathrooms and carpeting at Seven Oaks. This conduct, particularly in conjunction with Ms. Servais' conduct on July 31, 2011, also reflects an impaired ability to

safely or reliably perform duties and therefore constitutes mental incompetency under Wis. Stat. § 441.07 and Wis. Admin. Code § N 7.03(3).<sup>2</sup> As a result, Ms. Servais is subject to discipline pursuant to Wis. Stat. § 441.07.

### **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 Ms. Servais be indefinitely suspended and that she be ordered to obtain an assessment by a Division-approved mental healthcare provider and that she also obtain a complete medical examination by a Division-approved physician, both of whom would evaluate her for fitness for duty. (Tr., p. 139). The Division further requests that Ms. Servais provide the two evaluators with a copy of the final Board Order resulting from this disciplinary proceeding so that the providers are able to fully evaluate Ms. Servais. (*Id.*) Both Ms. Servais and her attorney stated at the hearing that they did not object to such evaluations. (Tr., pp. 148, 150).

Based on the facts of this case and the factors set forth in *Aldrich*, the discipline recommended by the Division is appropriate. Ms. Servais' actions present a risk to the public she serves and to co-workers, creating unsanitary conditions, including to patients whose health is already compromised. Her bizarre conduct of having her buttocks exposed at work while otherwise behaving normally demonstrates that her judgment cannot be trusted to the extent

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<sup>2</sup> In her closing argument, counsel for the Division indicated that it was not only Ms. Servais' conduct on July 31, 2011 which established mental incompetency but also her other inappropriate behavior resulting from incontinence. (Tr., p. 138) I note that although the allegations related to incontinence were not contained in the Division's Complaint, Ms. Servais' attorney never objected to consideration of this evidence on such grounds. While I do not suggest that such an objection would have been meritorious, I emphasize that even without consideration of the evidence related to incontinence, the result would not have been different in this matter as I have determined that the acts that occurred on July 31, 2011 are sufficient in themselves to support the violation.

required to serve a vulnerable patients that must rely on her to guard their safety, health, and even their lives. Ms. Servais should not be permitted to practice as a nurse unless and until the Board has sufficient proof that she is competent to safely do so. An indefinite suspension with the requested evaluations, satisfies the purposes of discipline: rehabilitation, protection of the public and deterrence.

### **Costs**

The Department has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Ms. Servais 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).

In this case, the Division proved the conduct and violation alleged. The conduct was of a serious nature. In addition, I note that at hearing, counsel for the Division asserted, and counsel for Ms. Servais did not deny, that the Division attempted to work with Ms. Servais and that well before the Division's Complaint was filed in this matter, the Division offered that Ms. Servais be required to undergo assessments for fitness to practice and that it was after she refused to agree that the Division filed the Complaint against her. Moreover, it would be unfair to impose the

costs of pursuing discipline in this matter on those in the nursing profession who have not engaged in misconduct. Accordingly, and in light of the facts set forth above, it is appropriate for Ms. Servais to pay the full costs of these disciplinary proceedings.

### **CONCLUSIONS OF LAW**

1. The Division met its burden of establishing by a preponderance of the evidence that Ms. Servais is mentally incompetent to practice nursing, in violation of Wis. Stat. § 441.07 and Wis. Admin. Code § N 7.03(3).

2. The discipline recommended by the Division is appropriate under *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

3. Imposition of full costs on Ms. Servais for the disciplinary proceedings is warranted under Wis. Stat. § 440.22 and *In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008).

### **ORDER**

Based on the foregoing, it is hereby ORDERED that:

1. Respondent Beverly A. Servais' license to practice nursing is hereby SUSPENDED INDEFINITELY.

2. The Board, in its discretion, may lift the suspension of Ms. Servais' nursing license only if Ms. Servais complies with the following requirements:

(a) Ms. Servais obtains an assessment by a Division-approved mental healthcare provider to evaluate her fitness for duty.

(b) Ms. Servais obtains a complete medical examination by a Division-approved physician to evaluate her for fitness for duty.

(c) Prior to the evaluation, Ms. Servais provides the mental health provider and the physician performing the medical examination copies of the final Board Order resulting from this disciplinary proceeding.

(d) Ms. Servais provides the Board with copies of the reports from the healthcare provider and the physician within 15 days of completion of the assessment.

(e) The assessments referred to in paragraph (d) above must show that Ms. Servais is fit for duty and able to practice with reasonable skill and without posing an unacceptable risk to the safety of clients and the public.

3. Full costs shall be assessed against Ms. Servais in accordance with Wis. Stat. § 440.22 and Wis. Admin. Code § SPS 2.18.

4. Payment of costs shall be made payable to the Wisconsin Department of Safety and Professional Services and sent to the Department Monitor at the address below:


**Department Monitor  
Division of Legal Services and Compliance  
Department of Safety and Professional Services  
P.O. Box 8935  
Madison, WI 53708-8935**

5. The terms of this Order are effective the date the Final Decision and Order is signed by the Board.

Dated at Madison, Wisconsin on February 20, 2013.

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