

## WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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Before The  
State Of Wisconsin  
BOARD OF NURSING

In the Matter of the Disciplinary Proceedings  
Against **DIANE C. WALTERS, R.N.**,  
Respondent

FINAL DECISION AND ORDER

Order No. \_\_\_\_\_

**ORDER 0002516**

**Division of Legal Services and Compliance Case No. 12 NUR 001**

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 11 day of July, 2013.

Julia Nelson, RN  
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 **DIANE C. WALTERS, R.N.**,  
Respondent

PROPOSED DECISION AND ORDER  
DHA Case No. SPS-12-0004  
ORDER 0002516

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**Division of Legal Services and Compliance<sup>1</sup> Case No. 12 NUR 001**

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

Diane C. Walters, R.N., by

Attorney Michael J. Ganzer  
Terschan, Steinle, Hodan & Ganzer, Ltd.  
309 N. Water St., Suite 215  
Milwaukee, WI 53202

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 Lydia Thompson  
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 on February 1, 2012, when the Department of Safety  
and Professional Services (the Department), Division of Legal Services and Compliance (the

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<sup>1</sup> At the time the Complaint was filed in this matter, the Division of Legal Services and Compliance was known as the Division of Enforcement.

Division), served a formal Complaint against Respondent Diane Walters, alleging that Ms. Walters engaged in misconduct or unprofessional conduct, thereby subjecting her to disciplinary action pursuant to Wis. Admin. Code § N 7.04(14) and Wis. Stat. § 441.07(1)(d). The Complaint was based on allegations that Ms. Walters worked as a nurse in Sheboygan, Wisconsin during the month of December 2011, in violation of a December 1, 2011 Final Decision and Order of the Wisconsin Board of Nursing (Board), which indefinitely suspended her license to practice nursing in Wisconsin.

On January 4, 2013,<sup>2</sup> the undersigned Administrative Law Judge (ALJ) issued an Order Granting Partial Summary Judgment, which granted the Division's motion for summary judgment with respect to whether Ms. Walters violated Wis. Stat. § 441.07(1) (d) and Wis. Admin. Code § N 7.04(14), but denied the Division's motion with respect to what discipline and costs, if any, were appropriate. That Order is attached to this decision and incorporated by reference herein.

On January 15, 2013, a telephone status conference was held to establish whether the issues of discipline and costs could be determined on the parties' written submissions or whether a hearing on these issues was required. As a result of this discussion, a hearing date of March 5, 2013 was established. On February 25, 2013, however, the ALJ received a letter from Ms. Walters' attorney at the time, stating that effective that day, his license to practice law in Wisconsin would be suspended for five months. In a follow-up email to the ALJ and the Division's attorney, Ms. Walters' former counsel informed the ALJ that he would be unable to assist Ms. Walters with the March 5, 2013 hearing and that Ms. Walters intended to obtain new counsel. Former counsel confirmed that Ms. Walters was aware of the March 5, 2013 hearing date.

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<sup>2</sup> The date on the Order Granting Partial Summary Judgment contains a typographical error, stating that the order was issued in 2012 rather than 2013.



In view of the March 5, 2013 hearing date, on February 27, 2013, a Wednesday, the ALJ left a voicemail for Ms. Walters requesting that she participate in a telephone conference with the ALJ and Division counsel. Ms. Walters did not return the ALJ's call until the following Saturday, March 2, 2013, during which she left a voicemail for the ALJ asking for postponement of the hearing scheduled for Tuesday, March 5, 2013. On March 4, 2013, a telephone conference was held, at which Ms. Walters indicated that she had just been informed during the week of February 25, 2013 that her former attorney's license had been suspended, that she had received her files from him regarding this matter at the end of that same week and that she wished to retain a new attorney to represent her at the hearing. Over the Division's objection, the ALJ issued a Notice on March 4, 2013, rescheduling the hearing to April 11, 2013. The March 4, 2013 Notice informed Ms. Walters that she should provide her new attorney with a copy of the Notice and that the new attorney would be bound by the new hearing date as well as the previous deadlines for filing witness and exhibit lists and the exhibits themselves.

On April 10, 2013, the day before the rescheduled hearing, Ms. Walters called the ALJ requesting a continuance of the April 11, 2013 hearing because of her recent hospitalization. During the telephone conversation between the ALJ and Ms. Walters on April 10, 2013, Ms. Walters provided the ALJ with the name and telephone number of her new attorney, Attorney Michael Ganzer, currently the attorney of record on this matter. A telephone status conference was held between the ALJ, Attorney Ganzer and the Division's attorney on April 10, 2013, at which Attorney Ganzer indicated that he had no doubt Ms. Waters had been hospitalized at St. Mary's Hospital in Ozaukee, Wisconsin until April 4 or 5, 2013 and that she had contacted him the morning of April 10, 2013 to inform him that she was unable to meet with him that afternoon as planned and would be unable to appear at the April 11, 2013 hearing due to illness. Attorney

Ganzer stated that he had received information that Ms. Walters had an infection that was getting worse. At the request of Division counsel, Attorney Ganzer indicated that he would provide proof at the next-scheduled hearing of Ms. Walters' hospitalization. In a Notice Rescheduling Hearing, the ALJ rescheduled the hearing to April 30, 2013.

At the hearing on April 30, 2013, Ms. Walters did not appear, although Attorney Ganzer did appear on her behalf. No explanation was provided for her non-appearance. At the end of the hearing on discipline and costs, counsel for the Division asked Attorney Ganzer whether he had brought proof of Ms. Walters' hospitalization with him to the hearing as he had previously agreed to do. When Attorney Ganzer stated he did not have such documentation, Division counsel produced medical records for Ms. Walters from St. Mary's Hospital in Ozaukee, Wisconsin showing that she had been involuntarily hospitalized from April 2-4, 2013 for acute intoxication, with a blood alcohol concentration of .275 and with reports from Ms. Walters' 18 year-old daughter that Ms. Walters appeared to be having auditory hallucinations. These medical reports were admitted and are discussed in more detail in the findings of fact below.<sup>3</sup>

## **FINDINGS OF FACT**

### **Facts Related to the Violation**

1. The undisputed material facts related to the violation in this matter are contained in the January 4, 2013 Order Granting Partial Summary Judgment, incorporated by reference herein. In summary, on December 1, 2011, the Board issued an Order which suspended Ms. Walters' license to practice nursing indefinitely, concluding: (1) Ms. Walters had stolen narcotic

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<sup>3</sup> Attorney Ganzer objected to admission of the reports on grounds that the Department did not lawfully obtain them from the hospital. The objection was overruled based on Wis. Stat. § 146.82(2), which grants the Department access to medical records for disciplinary proceedings such as these, subject to certain exceptions which are not applicable here. However, because Attorney Ganzer indicated he first saw the medical records at the hearing, the ALJ provided him the opportunity to submit a written response to the medical records by May 10, 2013. This opportunity was memorialized in an Order issued April 30, 2013. Attorney Ganzer did not file a submission.

medication from the disabled children she cared for as a nurse, leaving them with diluted and ineffective pain medication; and (2) Ms. Walters' nursing practice was impaired by her use of drugs. Despite her suspension, Ms. Walters practiced nursing on at least nine days in December, 2011, in violation of Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(14).

**Facts Related to Discipline and Costs**

2. Ms. Walters flagrantly disregarded the Board's Order indefinitely suspending her license by practicing nursing on at least nine occasions in December of 2011.

3. The underlying Board order suspending Ms. Walters' license was for serious conduct, taking medication from her disabled child patients, evidently for her own use, and leaving the patients with diluted, and therefore ineffective, medication.

4. Ms. Walters has a serious problem with alcoholism, which she refuses to admit or address, and likely continues to have a serious problem with the use of controlled substances. She is in significant denial regarding her chemical dependency and blames others for her situation. These facts are evidenced by conduct which includes not only the disciplinary proceeding for which Ms. Walters' license was suspended, but also the following recent information:

a. When Ms. Walters contacted the ALJ on April 10, 2013 requesting that the April 11, 2013 hearing be postponed, she sounded extremely intoxicated or under the influence of drugs.

b. Ms. Walters' medical records for her hospitalization on April 2-4, 2013 show that she was brought into the hospital involuntarily, acutely intoxicated, with a blood alcohol concentration of .275. (Medical Records of Diane C. Walters (Records), pp. 21-22)<sup>4</sup>

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<sup>4</sup> Unfortunately, the 182 pages of medical records submitted by the Division at the April 30, 2013 hearing were not Bates stamped or otherwise numbered; therefore, the ALJ numbered them following the hearing.

c. While hospitalized, Ms. Walters repeatedly approached staff asking for medication for anxiety, and Ambien for sleep. (Records, p. 33) The records state, "At this time, [Ms. Walters is] very symptomatic of withdrawal and appears to be motivated only to receive more medications. She asks what she can get minutes after a dosage is administered." (*Id.*) The records further note that Ms. Walters was "very annoyed irritable and med seeking" and that "[i]t is not clear if she is forgetting or manipulative. It appears it may [ ] be a combination of both." (Records, p. 34)

d. Ms. Walters' "Chief Complaint" to hospital staff, in her own words, was "My daughter did this to me!" (Records, p. 19)

e. The records note that Ms. Walters was "admitted under Chapter 51.15 emergency detention for the second time in a period of 4 months." (Records, p. 17) They further indicate: "Since the time of admission, [Ms. Walters] has exhibited tremulousness, tachycardia, diaphoresis and flushing. She has received a total of 100 mg of Librium and 1 mg of [L]orazepam. She remains tremulous. . . . She does not believe that alcohol is a problem, yet clearly there is laboratory evidence of substantial alcohol abuse with macrocytosis . . . . The patient denies past problems related to alcohol. She does not consider herself alcoholic . . . . The patient will be treated with Librium for objective evidence of alcohol withdrawal. She will be seen by AODA treatment staff [who] hopefully will have more success than the undersigned in helping the patient relinquish substantial denial." (Records, p. 5-6) The morning after her admission to the hospital, Ms. Walters "was exhibiting substantial symptoms of alcohol withdrawal as indicated by a CIWA score of 9." (Records, p. 17)<sup>5</sup> Further, "On the second

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<sup>5</sup> At the April 30, 2013 hearing, the Division's attorney represented that CIWA stands for Clinical Institute Withdrawal Assessment and that it is a scale used by hospitals to determine alcohol withdrawal, using the ten most common withdrawal symptoms. (Transcript of April 30, 2013 Hearing, pp. 18-19)

hospital day, [Ms. Walters] was somnolent. When she awoke, she was insisting on more Librium and [L]orazepam, which had been held due to her profound somnolence. By the third day in hospital CIWA score was down to 2-3. She was confronted several times about the laboratory evidence for alcoholism with macrocytosis, elevated liver function tests, AST greater than ALT and an admitting blood alcohol level of [.]275, as well as the obvious symptoms of alcohol withdrawal. Despite overwhelming evidence the patient maintains that she has been ‘drinking too much for 2 weeks but otherwise did not have problems with alcohol.’ She was seen by AODA treatment staff who did formally diagnose alcohol dependence.” (Records, p. 7) Ms. Walters was “unwilling/unable to discuss her substance abuse history” and “repeatedly fell asleep during interview.” (Records, p. 31)

f. The Progress Notes indicate, among other things, that Ms. Walters was “trying to manipulate staff” and that she “continues with manipulative behavior.” (Records, pp. 43-44)

5. Ms. Walters’ treating physician, Dr. James Hurth, indicated that Ms. Walters was in his care from April 2-4, 2013 and that she could return to work on April 6, 2013. (Records, p. 170) April 6, 2013 was 5 days before the previously scheduled hearing date of April 11, 2013, which Ms. Walters said she was unable to attend due to her health.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **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).

In the instant case, the Division recommends that Ms. Walters’ license to practice nursing be revoked. Based on the record in this case and the factors set forth in *Aldrich*, revocation is warranted.

The main argument against revocation offered by Ms. Walters' attorney at hearing was that Ms. Walters received bad legal advice from the attorney who was handling her case at the time of the original suspension. (That attorney was not the same attorney whose law license was suspended and who represented Ms. Walters directly prior to her current counsel.) To the extent counsel is suggesting that Ms. Walters worked during the month of December 2011 because she was being advised by her then-attorney that her license was not suspended, I note that there has been no evidence admitted in this record to support that assertion. Rather, the record indicates that Ms. Walters worked as a nurse while her license was suspended because she wished to receive income as a nurse and because she thought she could get away with it. For example, as noted in the findings of fact and in the January 4, 2013 Order Granting Partial Summary Judgment, when confronted by another nurse on how she could be working with a suspended license, Ms. Walters replied that the state did not know she was working.

When a nurse blatantly ignores a Board's Order by knowingly working on multiple occasions after having her license suspended for stealing narcotics from disabled children in her care, the chances of rehabilitation are remote. The likelihood of rehabilitation is made even more remote by Ms. Walters' serious alcoholism, and her likely abuse of other substances, which she refuses to acknowledge or address. There is simply nothing in the record to suggest that imposing anything short of revocation would have a rehabilitative effect on Ms. Walters, or even that she has an interest in being rehabilitated at this time.

Regarding the second *Aldrich* factor, protection of the public, I note that because of Ms. Walters' disregard of Board orders and nursing regulations, her chemical dependency and her refusal to take responsibility for her own behavior, she is a grave threat to the patients she serves. Moreover, with respect to deterrence, it is imperative that other licensees get the clear message

that they cannot thumb their noses at Board orders suspending their licenses for egregious conduct which endangers vulnerable patients. Anything less than revocation would not sufficiently protect the public or deter others from engaging in such misconduct. Finally, revocation is consistent with other Board orders revoking the licenses of those who have continued to practice their professions while their licenses were suspended by prior Board orders. *See In the Matter of Disciplinary Proceedings Against Rebecca S. Hice, R.N.*, Case No. LS0510181NUR (March 9, 2006); *In the Matter of Disciplinary Proceedings Against Terri Lee Johnson, R.N.*, Case No. LS0210047NUR (Oct. 4, 2002); *In the Matter of Disciplinary Proceedings Against John Voelz, P.T.*, Case No. 0000091 (March 11, 2010).

### **Costs**

Pursuant to Wis. Stat. § 440.22, the Board has the authority to assess respondents for costs of the disciplinary proceedings. Factors to consider include: (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 cooperation of the respondent; (5) any prior discipline; and (6) the fact that the Department is a program revenue agency, funded by other licensees. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz*, Case No. LS 0802183 CHI (Aug. 14, 2008).

Based on these factors and the record in this case, I agree with the Division's recommendation that full costs be imposed. The counts charged against Ms. Walters were all proven. As stated above, the conduct was egregious, and Ms. Walters has been disciplined before, which apparently had no impact on her as she ignored the Board's order and was unwilling to conform her conduct to the standards required of nurses. In addition, although Ms. Walters participated in these proceedings and hired attorneys to represent her, in the end, she

inexplicably did not show up at her hearing on April 30, 2013, and her attorney represented her in her absence, even though the hearing had been postponed at Ms. Walters' request to give her an opportunity to attend the hearing following her hospitalization. In the end, it was evident that Ms. Walters' request was unfounded: although she had been hospitalized for 3 days, the hospitalization was the result of her acute intoxication, and the doctor who released her from the hospital indicated she could return to work on April 6, 2013, 5 days prior to the previously scheduled hearing on April 11, 2013. When she made her request for the postponement the day before the April 11, 2013 hearing date, she was once again intoxicated. Again, this demonstrates Ms. Walters' failure to take seriously the disciplinary proceedings against her. Finally, it would be unfair to impose the costs of pursuing discipline in this matter on those licensees who have not engaged in misconduct.

#### **ORDER**

For the reasons set forth above, IT IS ORDERED that:

1. Ms. Walters' license to practice as a registered nurse is REVOKED.
2. Ms. Walters 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**

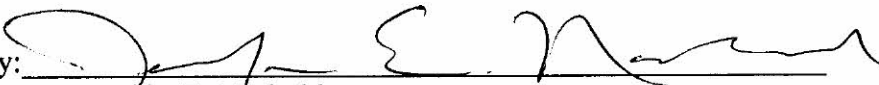
3. The terms of this Order are effective the date the Final Decision and Order is signed by the Board.



IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Diane Walters.

Dated at Madison, Wisconsin on May 22, 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

Attachment: January 4, 2013 Order Granting Partial Summary Judgment.



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

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In the Matter of the Disciplinary Proceedings  
Against **DIANE C. WALTERS, R.N.**,  
Respondent

ORDER GRANTING PARTIAL  
SUMMARY JUDGMENT  
DHA Case No. SPS-12-0004

ORDER **0002516**

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**Division of Legal Services and Compliance<sup>1</sup> Case No. 12 NUR 001**

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

Diane C. Walters, R.N., by

Attorney Benjamin Harris  
Harris Law Offices, S.C.  
705 East Silver Spring Drive  
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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 Jeanette Lytle  
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 on February 1, 2012, when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (the

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

Division), served a formal Complaint against Respondent Diane Walters, alleging that Ms. Walters engaged in misconduct or unprofessional conduct, thereby subjecting her to disciplinary action pursuant to Wis. Admin. Code § N 7.04(14) and Wis. Stat. § 441.07(1)(d). The Complaint was based on allegations that Ms. Walters worked as a nurse in Sheboygan, Wisconsin during the month of December 2011, in violation of a December 1, 2011 Final Decision and Order (Decision) of the Wisconsin Board of Nursing (Board), which indefinitely suspended her license to practice nursing in Wisconsin. The current case is before this tribunal on the Division's motion for summary judgment.

### **UNDISPUTED MATERIAL FACTS**

1. On December 1, 2011, after a full hearing on the merits and consideration of arguments of counsel, the Board issued a Decision which concluded: (1) Ms. Walters had stolen narcotic medication from the disabled children she cared for as a nurse, leaving them with diluted and ineffective pain medication; and (2) Ms. Walters' nursing practice was impaired by her use of drugs. (Division's Affidavit of Patricia Horn, ¶ 3, Ex. A) The Board suspended Ms. Walters' nursing license for an indefinite period of time. In her Proposed Decision and Order, the Administrative Law Judge (ALJ) stated:

“It is further ordered, *effective the date of this Order*:

A.1. The license of Diane Walters, R.N., to practice as a nurse in the State of Wisconsin is suspended for an indefinite period.”

(Horn Affidavit, ¶ 3 Ex. A p. 16) (emphasis added) The Board incorporated that order into its Decision when the ALJ's proposed decision was adopted by the Board and the Decision was signed by the Board Chair on December 1, 2011. (Horn Affidavit, Ex. A, p. 1) The terms of the Decision have remained in effect ever since. (Horn Affidavit, ¶ 5)

2. Prior to the Board's Decision, Ms. Walters' attorney at that time, Ted B. Johnson,<sup>2</sup> filed objections to the proposed decision for the Board's consideration. (Division's Affidavit of Sharon Henes, ¶ 3) The fact that the Board was to consider the ALJ's proposed decision at the December 1, 2011 Board meeting was a matter of public record and the agenda was posted on the Department's website. (Henes Affidavit, ¶ 3)

3. On December 5 or 6, 2011, the Decision was mailed to Ms. Walters or Attorney Johnson. (Henes Affidavit, ¶ 2; Respondent's Affidavit of Attorney Ted Johnson, ¶ 2, Ex. A)<sup>3</sup>

4. The Notice of Rights of Appeal form (Notice) attached to the Decision stated, *inter alia*: "Your rights to request a rehearing and/or judicial review are summarized below and set forth fully in the statutes reprinted on the reverse side." (Johnson Affidavit ¶ 6, Ex. E) The Notice itself cites and summarizes the applicable statutes for rehearing and judicial review and names the Board as the Respondent. Attorney Johnson sent a letter to the Department on December 16, 2011 stating that the Notice did not contain the statutes on the reverse side and that the Decision was therefore "incomplete and defective." (Johnson Affidavit ¶ 4, Ex. C)

5. On December 6 or 7, 2011, a letter was sent to Ms. Walters, via Attorney Johnson, from Patera Horn, the Department Monitor who is the Department staff person charged with enforcing the Order. (Horn Affidavit, ¶ 4, Ex. B, Johnson Affidavit, ¶ 2, Ex. A) The letter began, "Effective December 1, 2011, your RN license is suspended. You will receive a copy of the Order via certified mail within ten (10) business days." (Horn Affidavit, ¶ 4, Ex. B) This letter was received by Attorney Johnson on December 9, 2012, and forwarded by Attorney

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<sup>2</sup> Following Attorney Johnson's filing of his brief in response to the Division's summary judgment motion, Ms. Walters retained new counsel, Attorney Benjamin Harris. However, because briefing was completed by Attorney Johnson, I refer to the arguments in support of Ms. Walters' position as those made by Attorney Johnson.

<sup>3</sup> The Division's affidavit from Ms. Henes indicates that the Decision was "mailed" to Ms. Walters on December 5, 2011; whereas the Affidavit from Attorney Johnson, along with his Exhibit A, indicate that the Decision was postmarked December 6, 2011 and sent to Attorney Johnson rather than Ms. Walters.

Johnson to Ms. Walters on December 12, 2012. (Johnson Affidavit, ¶ 2, Ex. B; Respondent's Affidavit of Diane Walters, ¶ 2, Ex. A)

6. In her sworn affidavit, Ms. Walters states that she never received any copy of the Decision by certified mail at any time subsequent to December 7, 2011. (Walters Affidavit, ¶ 2)

7. In a letter dated December 16, 2011, Attorney Johnson acknowledged receipt of the Decision and Order on December 9, 2011. (Henes Affidavit, ¶ 4, Ex. A) In that letter, Attorney Johnson argued that the Decision was not valid because the Notice of Appeal Rights form that accompanied the Decision claimed to have statutes on the reverse side, but did not. The Board re-sent the Decision with the requested statutory language on December 19, 2011. (Affidavit of Sharon Henes, ¶ 5) On the first page of the Notice, in the blank provided for date of mailing, the Department filled in "December 19, 2011," so that the sentence read, "For purposes of service the date of mailing of this Final Decision and Order is December 19, 2011."

8. In his Answer to the Division's Complaint, Attorney Johnson argued that Ms. Walters was not aware that she was suspended until after December 21, 2011, when the Board mailed an additional copy of the Decision along with a copy of the statutes relevant to her appeal rights. (Attorney Johnson's Answer to Complaint)

9. On January 3, 2012, the Division received information from another nurse that Ms. Walters was knowingly working under a suspended license as an independent, private duty nurse with Patient K.G. (Division's Affidavit of Steve Rohland, ¶ 2-3; Division's Affidavit of Shawna Gabriel, attached to Division's Reply Brief) When asked how she could do that, Ms. Walters replied that the state did not know she was working. (Rohland Affidavit, ¶ 3, Gabriel Affidavit, ¶ 3)

10. Upon receipt of this information, the Division's investigator contacted Investigator John Knappmiller of the Department of Justice's Medicaid Fraud unit. Mr. Knappmiller

confirmed that Ms. Walters had billed Medicaid for approximately 120 hours of services to Patient K.G. on 12 dates in December of 2011. (Affidavit of Knappmiller, ¶¶ 3-4, Ex. A) Those dates were December 2, 3, 4, 12, 13, 14, 15, 16, 27, 28, 29 and 30. (*Id.*)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **Standards Governing Summary Judgment**

“The summary judgment procedure as provided in s. 802.08, Stats., shall be available to the parties upon approval by the division or the administrative law judge.” Wis. Admin. Code § HA 1.10(2).

Pursuant to Wis. Stat. § 802.08, summary judgment “shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2). The purpose of the summary judgment procedure is to avoid trials when there is nothing to try. *Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton*, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981). “When a motion for summary judgment is made and supported as provided in this section [§ 802.08], an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial.” Wis. Stat. § 802.08(3). “If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.” *Id.*

“A motion for summary judgment may be made on the basis of the pleadings or other portions of the record in the case or it may be supported by affidavits and a variety of outside material.” *Tews v. NHI, LLC*, 2010 WI 137, ¶ 49, 330 Wis. 2d 389, 793 N.W.2d 860 (citation omitted). On a motion for summary judgment, the facts are construed in favor of the non-

moving party. *DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶ 7, 302 Wis. 2d 564, 734 N.W.2d 394.

### **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).

### **The Undisputed Facts Show that the Division is Entitled to Judgment as a Matter of Law on the Issue of Whether Ms. Walters Violated Wis. Stat. § 441.07(1)(d).**

Pursuant to Wis. Stat. § 441.07(1)(d), the Board may discipline a licensee for misconduct or unprofessional conduct. Wisconsin Admin. Code § N 7.04(14) defines misconduct or unprofessional conduct to include “violating any term, provision or condition of any order of the board.”

On December 1, 2011, The Board ordered that Ms. Walters’ nursing license “be and is hereby” indefinitely suspended. The Division argues that service of the Decision was not necessary for it to be effective and that by its express terms, the Board order was effective when signed. The Division further contends that Attorney Johnson knew or should have known the Board would be acting that day as he had filed objections to the proposed decision and the agenda for the Board’s December 1, 2011 meeting was a public record and available on the Department website. However, the Division further asserts that even if service were required to make the Decision effective and neither Ms. Walters nor her attorney knew that the Board had

taken action on December 1, 2011, the Order was served on December 5, 2011,<sup>4</sup> and service is effective upon mailing. *Wis. Stat. § 227.48; In re Proposed Incorporation of City of Pewaukee, Waukesha County*, 72 Wis. 2d 593, 596, 241 N.W.2d 603 (1976).

Attorney Johnson argues, however, that the Decision was not effective on December 1, 2011 or even on the date of mailing because, he asserts, the Division failed to comply with *Wis. Stat. § 227.48(1)*, which states that “every decision when made, signed and filed, shall be served forthwith by personal delivery or mailing of a copy to each party to the proceedings or to the party's attorney of record.” Attorney Johnson states that the December 1, 2011 Decision was not mailed “forthwith” as required by *Wis. Stat. § 227.48(1)* because it was mailed December 6, 2011.<sup>5</sup> Attorney Johnson has provided no authority demonstrating that a delay from December 1, 2011, which was a Thursday, to December 6, 2011, the following Tuesday, constitutes a failure to serve the Decision “forthwith.” Likewise, he has failed to provide authority supporting his suggestion that the remedy for any such failure would be to render the Decision ineffective, even where, as here, he was aware that the Board would issue a final decision on the matter and had filed objections to the ALJ's proposed decision for the Board's consideration, and the Board's agenda for its December 1, 2011 Board meeting was posted on the Department's website.

I conclude that, at a minimum, the Decision was effective the day it was mailed and that this is true even if the Decision was mailed to Attorney Johnson rather than to Ms. Walters herself.<sup>6</sup> *See Wis. Stat. § 227.48(1)* (“[E]very decision when made, signed and filed, shall be served forthwith by personal delivery or mailing of a copy to each party to the proceedings *or to*

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<sup>4</sup> *See* footnote 3

<sup>5</sup> *See* footnote 3.

<sup>6</sup> As stated in Finding of Fact 7, the Department, in re-sending the Notice on December 19, 2011, suggested that the date of service was December 19, 2011. Although not argued by Attorney Johnson, I note that the December 19 service date is erroneous as the Decision containing the information required by *Wis. Stat. § 227.48(2)* was served on December 5 or 6, 2011.



*the party's attorney of record.*") (Emphasis added.) Assuming Attorney Johnson is correct that the envelope containing the Decision was postmarked on December 6, 2011, the Decision was effective at least as of that date. The undisputed facts establish that Ms. Walters worked as a nurse on December 2, 3, 4, 12, 13, 14, 15, 16, 27, 28, 29 and 30. Given that Ms. Walters worked on nine days after December 6, 2011, which establishes a violation of Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(14), I need not consider whether the Decision was effective on December 1, 2012 or whether Ms. Walters also violated these statutory and administrative code provisions on December 2, 3 and 4, 2011.

Attorney Johnson also argues that the Decision was not effective when mailed because the "Notice of Rights of Appeal" form attached to the Decision did not include a copy of the statutes governing rehearing and judicial review, although the Notice stated the statutes were copied on the reverse side of the Notice. He relies on Wis. Stat § 227.48(2), which provides:

(2) Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to be named as respondent. No time period specified under s. 227.49 (1) for filing a petition for rehearing, under s. 227.53 (1) (a) for filing a petition for judicial review or under any other section permitting administrative review of an agency decision begins to run until the agency has complied with this subsection.

I agree with the Division's characterization of this argument as a "weak red herring." (Division's Brief-in-Chief at 5). Attorney Johnson has not argued, and the record does not support, that the Department's Notice failed to inform Ms. Walters of her right to rehearing and judicial review, the time allowed for filing such petitions, and the name of the party to be named as respondent. Indeed, the new Notice sent to Attorney Johnson on December 20, 2011 indicates that the first page of the Notice, which was mailed to Attorney Johnson or Ms. Walters on December 5 or 6, 2011, contains this information required by Wis. Stat § 227.48(2). Rather, the specific objection, as evidenced in Attorney Johnson's December 16, 2011 letter to the

Department, is that the Notice did not contain copies of the statutes on the reverse side. The law does not require an agency or Board to send copies of the statutes themselves to the parties or their attorneys. The Board's procedure of sending copies of the statutes themselves, in addition to the Notice containing the required information, appears to be nothing but a courtesy. Attorney Johnson does not explain why he, Ms. Walters' attorney, could not have found the text of the appeal and rehearing statutes himself, particularly given that the statutes were cited in the Notice which was sent on December 5 or 6, 2011.

Moreover, according to Wis. Stat. § 227.48(2), failure to provide the statutorily required information affects only the time for filing an appeal or petition for rehearing; it does not affect whether or not the decision is effective or whether, in this case, Ms. Walters had notice that she was suspended.

However, even if the Decision were not effective the date it was mailed and actual notice were required, Attorney Johnson admits that he had actual notice no later than December 9, 2011, when he received the letter to Ms. Walters from Ms. Horn which explicitly informed Ms. Walters that her license was suspended, "[e]ffective December 1, 2011." Thus, Ms. Walters would still be in violation for the same nine dates in December of 2011. While Attorney Johnson and Ms. Walters claim that, for whatever reason, Ms. Walters did not receive this important letter from Attorney Johnson until December 12, 2011, I cannot conclude that the effective date of a Decision can be determined by how long an attorney chooses to hang onto, rather than release to his client, notification informing his client that her license is suspended. However, even if actual notice to the client, rather than to the client's attorney, were required, Ms. Walters admits that on December 12, 2011, she received the December 6, 2011 letter notifying her that the Board had issued a decision suspending her nursing license. Nonetheless, she worked as a nurse on eight

days following that notification, in violation of Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(14).

Attorney Johnson also suggests that because the December 6, 2011 letter from Ms. Horn stated that a certified copy of the decision would be sent within ten days and Ms. Walters did not receive the certified copy, it was not effective on either the date Ms. Walters received it, December 12, 2011, or on the date he received it, December 9, 2011. To the extent such an argument is made, it is offered without any legal support and is unpersuasive. Attorney Johnson has not provided any legal authority suggesting that a decision must be sent by certified mail for the terms of the decision to be effective. In fact, any such suggestion is contradicted by Wis. Stat. § 227.48(1), which states that service may be “by personal delivery or mailing.”

In any case, even if any of the arguments advanced by Attorney Johnson above had merit, he unequivocally admits, and it is undisputed, that Ms. Walters was aware of the suspension no later than December 21, 2011, which would still make her in violation of Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(14) for working as a nurse on December 27, 28, 29 and 30, 2011.

The Division has met its burden of establishing by undisputed evidence that Ms. Walters worked as a nurse in December of 2011, both before and after the date she admits she knew she was suspended, in the form of billing records from Medicaid and supporting evidence from a fellow nurse in the form of an affidavit of investigator Steve Rohland and from the nurse herself.

Ms. Walters had billed Medicaid for approximately 120 hours of services to Patient K.G. on 12 dates in December of 2011, although only the 9 dates after December 6, 2012 will be considered here. Notably, four of those billings were for dates of service after even Attorney Johnson acknowledges that his client was aware she was suspended.

The undisputed material facts leave no doubt that Ms. Walters knowingly worked as a nurse after her nursing license was suspended by the Board, in violation of the Board order. Thus, as a matter of law Ms. Walters engaged in misconduct or unprofessional conduct and is therefore subject to discipline pursuant to Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(14).

### **Discipline and Costs**

Although not argued within the framework of summary judgment proceedings, the Division requests that Ms. Walters' nursing license be revoked and that the full costs of these proceedings be imposed upon Ms. Walters.

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).

With respect to imposition of costs, factors to consider include: (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 cooperation of the respondent; (5) any prior discipline; and (6) the fact that the Department is a program revenue agency, funded by other licensees. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI).

The Division sets forth numerous factors supporting revocation and imposition of full costs, including the egregiousness of Ms. Walters' conduct and consistency with prior Board decisions. Attorney Johnson has made no argument with respect to discipline or costs.

In light of the discretionary nature of determining both discipline and costs, the exercise of which entails consideration of a wide variety of factors, and in view of the fact that the parties have not briefed these discretionary determinations within the framework of summary judgment

standards, I cannot conclude that imposition of a particular discipline or percentage of costs is required as a matter of law under Wis. Stat. § 802.08. Therefore, a telephone status conference will be held as set forth in the Order section below, at which the parties shall inform the undersigned ALJ whether they wish to submit written arguments on the issues of discipline and costs (or, in the Division's case, to rest on those arguments presented in the submissions already filed) or whether a hearing on the issues of discipline and costs is required.

### **ORDER**

For the reasons set forth above, IT IS ORDERED that:

1. The Division's motion for summary judgment is granted with respect to the issue of whether Ms. Walters engaged in misconduct or unprofessional conduct in violation of Wis. Stat. § 441.07(1)(d) and Wis. Admin. § N.7.04(14).

2. A status conference will be held on January 15, 2013 at 11:00 a.m. to establish whether the issues of discipline and costs may be determined on the basis of the parties' written submissions or whether a hearing is required on these issues, and if a hearing is required, to establish a date for such hearing.

Dated at Madison, Wisconsin on January 4, 2012.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_

Jennifer E. Nashold  
Administrative Law Judge