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Before The
State Of Wisconsin
BOARD OF NURSING

In the Matter of the Disciplinary Proceedings
Against **JOAN W. CUMINGS, R.N.**, Respondent

FINAL DECISION AND ORDER

Order No. _____
ORDER 0002528

Division of Legal Services and Compliance Case No. 12 NUR 303

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.

Guelin Nelson, RN
Member
Board of Nursing



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

In the Matter of the Disciplinary Proceedings
Against **JOAN W. CUMINGS, R.N.**, Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS-13-0014

Division of Legal Services and Compliance Case No. 12 NUR 303

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

Joan W. Cumings, R.N.
5597 Beaver Lake Road
Saginaw, MN 55779

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

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

Attorney Aaron A. Konkol
Department of Safety and Professional Services
Division of Legal Services and Compliance
P. O. Box 8935
Madison, WI 53708-8935

PROCEDURAL SUMMARY

These proceedings were initiated when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed a formal Complaint against Respondent Joan W. Cumings, R.N., alleging that Respondent's license was subject to disciplinary action pursuant to Wis. Stat. § 441.07(1)(d) and Wis. Admin. Code § N 7.04(2). The Division served Respondent on March 12, 2013 by sending a copy of the Notice of Hearing and Complaint to her last known address.

Respondent failed to file an Answer to the Complaint, as required by Wis. Admin. Code § SPS 2.09, and failed to appear at the telephonic prehearing conference held before the Division of Hearings and Appeals on April 15, 2013. The Division moved for default and filed a recommended Proposed Decision and Order on April 29, 2013.

FINDINGS OF FACT

Facts Related to the Alleged Violation

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

1. Respondent Joan W. Cumings, R.N. is licensed in the State of Texas as a professional nurse, having license number 727492, first issued on May 22, 2006 and current through January 31, 2014.

2. Pursuant to Wis. Stat. § 441.50, Wisconsin and Texas are party states of the multi-state Nurse Licensure Compact, which provides for multi-state licensure privileges and allows a nurse with a license from a "home state" to engage in the practice of nursing in all other party states, which are called "remote states."

3. Respondent was practicing in Wisconsin pursuant to the Nurse Licensure Compact privilege to practice.

4. Respondent's most recent address on file with the Department is 5597 Beaver Lake Road, Saginaw, Minnesota 55779.

5. On June 6, 2012, Respondent voluntarily submitted to a pre-employment drug test as a condition of employment to Golden Living Center, Superior, Wisconsin.

6. On June 13, 2012, results of the above mentioned drug test confirmed Respondent tested positive for methadone, a Class II controlled substance.

7. Respondent admitted to the Golden Living Center drug testing coordinator that she did not possess a prescription for methadone in her name.

8. Respondent was denied employment by Golden Living Center.

Facts Related to Default

9. The Complaint and Notice of Hearing in this matter were served on Respondent on March 12, 2013, 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 "[she would] be found to be in default, and a default judgment may be entered against [her] on the basis of the Complaint and other evidence and the Wisconsin Board of Nursing may take disciplinary action against [her] and impose the costs of the investigation, prosecution and decision of this matter upon [her] without further notice or hearing."

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

11. Following expiration of the 20-day time period to file an Answer, the administrative law judge (ALJ) scheduled a telephone prehearing conference for April 15, 2013. 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 April 10, 2013.

12. Respondent failed to provide a telephone number and could not be reached for the prehearing conference.

13. The Division moved for default, and on April 29, 2013, filed a recommended Proposed Decision and Order.

DISCUSSION AND CONCLUSIONS OF LAW

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

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), Respondent is in default for failing to answer the telephone, failing to appear, 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) and SPS 2.14, Respondent has admitted to the allegations of the Complaint. As such, it is undisputed that the Respondent was practicing in Wisconsin pursuant to the Nurse Licensure Compact privilege to practice. It is also undisputed that on June 6, 2012, Respondent voluntarily submitted to a pre-employment drug test as a condition of employment to Golden Living Center, in Superior, Wisconsin. On June 13, 2012, results of the above mentioned drug test confirmed Respondent tested positive for methadone, a Schedule II controlled substance. Respondent admitted to the Golden Living Center drug testing coordinator that she did not possess a prescription for methadone in her name. Respondent was denied employment by Golden Living Center.

Respondent is licensed to practice in Texas as a professional nurse. Pursuant to Wis. Stat. § 441.50, Wisconsin and Texas are party states of the multi-state Nurse Licensure Compact, which provides for multi-state licensure privileges and allows a nurse with a license from a “home state” to engage in the practice of nursing in all other party states, which are called “remote states.”

The general purposes of the Nurse Licensure Compact are as follows:

1. To facilitate the states’ responsibility to protect the public’s health and safety.
2. To ensure and encourage the cooperation of party states in the areas of nurse licensure and regulation.
3. To facilitate the exchange of information between party states in the areas of nurse regulation, investigation and adverse actions.
4. To promote compliance with the laws governing the practice of nursing in each jurisdiction.
5. To invest all party states with the authority to hold a nurse accountable for meeting all state practice laws in the state in which the patient is located at the time care is rendered through the mutual recognition of party state licenses.

Wis. Stat. § 441.50(1)(b). The Nurse Licensure Compact gives the Board the authority to limit or revoke Respondent’s privilege to practice nursing. Wisconsin Stat. § 441.50(3)(b) provides that “party states may, in accordance with state due process laws, limit or revoke the multistate licensure privilege of any nurse to practice in their state and may take any other actions under their applicable state laws necessary to protect the health and safety of their citizens.” Further, Wis. Stat. § 441.50(3)(c) states that “[e]very nurse practicing in a party state must comply with the state practice laws of the state in which the patient is located at the time care is rendered.” In addition, Wis. Stat. § 441.50(5)(c) provides: “A remote state may take adverse action affecting the multistate licensure privilege to practice within that party state. However, only the home state shall have the power to impose adverse action against the license issued by the home state.” Finally, Wis. Stat. § 441.50(6)(c) states that the Board in a party state may “[i]ssue cease and desist orders to limit or revoke a nurse’s authority to practice in their state.”

In the instant case, there are grounds for disciplinary action against Respondent’s privilege to practice in Wisconsin. Wisconsin Stat. § 441.07(1)(d) provides that the Board may “revoke, limit, suspend or deny renewal of a license of a registered nurse . . . or may reprimand a registered nurse . . . if the board finds that the person committed . . . [m]isconduct or unprofessional conduct.”

Wisconsin Admin. Code § N 7.04(2) states that “misconduct or unprofessional conduct” means “any practice or behavior which violates the minimum standards of the profession necessary for the protection of the health, safety, or welfare of a patient or the public” and includes “administering, supplying or obtaining any drug other than in the course of legitimate practice or as otherwise prohibited by law.” Respondent engaged in misconduct or unprofessional conduct as defined in Wis. Admin. Code § N 7.04(2) by obtaining methadone without a valid prescription other than in the course of legitimate practice or as otherwise prohibited by law. Pursuant to Wis. Stat. § 961.16(3)(r), methadone is a Schedule II controlled substance for which a prescription is required pursuant to Wis. Stat. § 961.38(1r).

Based on the foregoing, Respondent has violated Wis. Stat. § 441.07(1)(d) because her conduct constitutes misconduct or unprofessional conduct. Her privilege to practice nursing in Wisconsin may therefore be limited or revoked pursuant to Wis. Stat. § 441.50.

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. *See State v. Aldrich*, 71 Wis. 2d 206, 209, 237 N.W.2d 689 (1976).

The Division request that Respondent's privilege to practice nursing in Wisconsin be revoked. Under the circumstances of this case, such a result is warranted. Respondent tested positive for methadone after submitting to a pre-employment drug screen. Respondent subsequently was denied employment by Golden Living Center. Respondent did not have a valid prescription for methadone. Methadone is normally prescribed to patients who have opiate addictions. Respondent obtained the methadone outside the course of legitimate nursing practice for her personal use. Clearly, the actions of Respondent constitute unprofessional misconduct as defined by the Board of Nursing Code. There is also the risk that Respondent has an undisclosed substance abuse disorder. Respondent's actions are below minimum standards of the profession necessary for the protection of the health, safety and welfare of a patient or the public. Respondent should not be in a position with narcotic access. The Division's recommendation protects the public by preventing Respondent from practicing in the immediate future and ensures that she cannot harm the patients for whom she cares.

Also, Respondent's failure to participate during these proceedings demonstrates that she has not been rehabilitated. Respondent is clearly not able to safely practice nursing as evidenced by her positive drug screen of a Schedule II narcotic. In addition, the Division's recommendation deters other license holders from engaging in similar conduct. Finally, similar discipline has been ordered by the Board of Nursing for similar conduct. *See In the Matter of Disciplinary Proceedings Against Krystal A. Bauer, R.N.*, 07NUR448 (June 5, 2008).

As evidenced by the facts of this case, it is appropriate to revoke Respondent's privilege to practice in the State of Wisconsin pursuant to the Nurse Licensure Compact.

Costs

Wisconsin Stat. § 441.50(6)(a) provides that the Board may "[i]f otherwise permitted by state law, recover from the affected nurse the costs of investigations and disposition of cases resulting from any adverse action taken against that nurse." State law provides the Board with authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Respondent be ordered to pay the full costs of its investigation and of these proceedings.

The factors to be considered in assessing costs are: (1) the number of counts charged, contested and proven; (2) the nature and seriousness of the misconduct; (3) the level of discipline sought by the prosecutor; (4) the respondent's cooperation with the disciplinary process; (5) prior discipline, if any; (6) the fact that the Department 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; and (7) any other

relevant circumstances. *See In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008).

Respondent's conduct is of a serious nature. The factual allegations were deemed admitted and there is no argument to indicate any factual allegations or litigation were unwarranted. The Division states that it offered Respondent a stipulation, but Respondent failed to respond to the Division's offer. Respondent has failed to participate in these proceedings in any way. Finally, it would be unfair to impose the costs of pursuing discipline in this matter on those licensees who have not engaged in misconduct. Therefore, it is appropriate for Respondent to pay the full costs of the investigation and of these proceedings.

ORDER

Accordingly, IT IS ORDERED that:

1. The privilege of Respondent Joan W. Cumings, R.N., to practice nursing in the State of Wisconsin, pursuant to the Nurse Licensure Compact, is hereby REVOKED.

2. Respondent shall pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to:

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

3. The ordered terms of this decision are effective the date the Board signs the Final Decision and Order in this matter.

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Joan W. Cumings.

Dated at Madison, Wisconsin on May 2, 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