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Before The
State Of Wisconsin
BOARD OF NURSING

In the Matter of the Disciplinary Proceedings
Against **DEBORAH J. MISHLER, L.P.N.**,
Respondent

FINAL DECISION AND ORDER

Order No. 2531

Division of Legal Services and Compliance Case No. 12 NUR 020

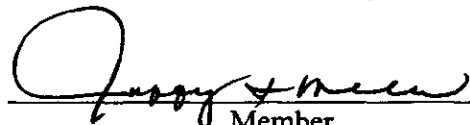
The State of Wisconsin, Board of Nursing, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, make the following:

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 8th day of January, ~~2014~~ 2015



Member
Board of Nursing



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Disciplinary Proceedings
Against **DEBORAH J. MISHLER, L.P.N.**,
Respondent

PROPOSED DECISION AND ORDER
DHA Case No. SPS-13-0031

ORDER 2531

Division of Legal Services and Compliance Case No. 12 NUR 020

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

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PROCEDURAL HISTORY

Summary Suspension Proceedings

On July 15, 2013, the Wisconsin Board of Nursing (Board) issued an order granting the Division's petition for summary suspension of Respondent Deborah Mishler's right to renew her license as a licensed practical nurse. In its order, the Board found probable cause to believe that Mishler had engaged in or is likely to engage in conduct such that the public health, safety or welfare imperatively required emergency suspension of her license to practice practical nursing. See Wis. Admin. Code § SPS 6.04(1). By separate order also dated July 15, 2013, the Board

delegated its authority pursuant to Wis. Admin. Code § SPS 6.11(1)(a) to an employee of the Department to preside over and rule in a hearing to show cause provided for in Wis. Admin. Code § SPS 6.09.

A show cause hearing was held on September 20 and 26, 2013, pursuant to Wis. Admin. Code § SPS 6.09. Mishler was represented by counsel at the show cause hearing and testified on her own behalf. On November 21, 2013, the administrative law judge (ALJ) in that proceeding, Yolanda McGowan, issued an Order Granting Continuation of Summary Suspension.

Proceedings Before This Tribunal

The proceedings before this tribunal began on July 16, 2013, when the Division served its Complaint on Mishler. The Complaint alleges that Mishler is mentally unfit or incompetent to practice practical nursing, and is therefore subject to discipline, pursuant to Wis. Stat. § 441.07(1g)(c)¹ and Wis. Admin. Code § N 7.03(3).

Mishler filed an Answer to the Division's Complaint on August 5, 2013. A telephone prehearing conference was held on August 20, 2013. Additional prehearing conferences were held on September 24 and 30, and November 25, 2013 to allow time for the summary suspension proceedings to conclude.

On August 5, 2013, Mishler filed a motion to dismiss, which was withdrawn on August 6, 2013 as the motion addressed summary suspension proceedings before ALJ McGowan.

On January 13, 2014, the Division filed a motion for summary judgment. On January 23, 2014, Mishler filed a motion to strike and a brief in opposition to the Division's motion for summary judgment. The Division filed a reply brief and a response in opposition to Mishler's motion to strike on February 6, 2014. The undersigned ALJ issued an Order denying the motion for summary judgment and the motion to strike on March 14, 2014.

A telephone scheduling conference was held on March 25, 2014 at which a contested case hearing was set for June 16, 2014. On April 18, 2014, Mishler filed a motion to dismiss for failure to state a claim upon which relief can be granted. The Division filed a response in opposition to Mishler's motion on May 1, 2014.

The hearing was held in this matter on June 16, 2014. At the hearing, Mishler objected to admission of the Division's proposed Exhibit 12, which were records from the Milwaukee Police Department regarding Mishler's 2009 and 2011 emergency detentions, and also objected to paragraphs 20-22 of the Division's proposed Exhibit 2, which relied on the police records. The ALJ allowed the parties to submit post-hearing briefs on admissibility of this evidence. The ALJ issued an order on July 18, 2014, excluding the evidence in question and setting the briefing schedule agreed to by the parties at hearing. The final brief in this case was submitted on October 20, 2014.

¹ At the time the Complaint was filed against Mishler, the numbering for this provision was Wis. Stat. § 441.07(1)(c) (2011-2012).

FINDINGS OF FACT

1. Deborah Mishler (D.O.B. December 14, 1957) is licensed in the State of Wisconsin as a licensed practical nurse (LPN), having license number 32519-31, first issued on June 21, 1994 and expired as of May 1, 2013. Mishler retains the right to automatically renew her license through April 30, 2018. (Complaint, ¶ 1; Answer, ¶ 1)

Mishler's Contacts with the Department

2. On January 18, 2012, Mishler left a telephone message at the Department, stating that she had gotten into some "trouble." Department employee Patera Horn returned Mishler's telephone call, and the two spoke for approximately ten minutes. Mishler informed Horn that her ex-boyfriend and her daughter believe that she is mentally ill but that it was not true. She stated that she was sent to a behavioral health facility and was not allowed to leave for three days, and that the doctor misdiagnosed her and determined her to be incompetent. As a result, she could not find a job. Mishler requested that Horn "stand up for her" with respect to the false allegation and accused Horn of not doing her job because, as a state employee, Horn had to "back [Mishler] up." Mishler's demeanor over the telephone was irrational and disconnected. She raised her voice, talked over Horn and at times did not seem to understand what Horn was telling her. Horn believed that Mishler seemed very unstable. Horn subsequently heard that two other employees at the Department had spoken with Mishler and that they also believed she had mental problems. Horn filed an informal complaint with the Department regarding Mishler. (Div. Ex. 1; Hrg. Tr., p. 34, 36, 52)

3. Horn's complaint against Mishler was assigned to Department investigator Tara Albedyll. On January 31, 2012, Albedyll had a telephone conversation with Mishler during which Mishler would not answer Albedyll's questions, talked over Albedyll, and was angry. She told Albedyll that the City of Milwaukee did an illegal search and seizure and took her to a mental institution three times, starting back in 2007, and that a doctor injected her against her will with psychotherapy drugs but she did not know what kind. Albedyll asked Mishler if she was calling to file a complaint, but Mishler responded she was not and just wanted to know why a doctor could do that. Mishler also told Albedyll that it was ironic that her house was being foreclosed and that Albedyll was contacting her now. Albedyll informed Mishler that because Mishler had previously stated that a physician had diagnosed her as incompetent, the Department was requesting that Mishler undergo a fitness to practice/psychological evaluation. Mishler denied that a physician had diagnosed her as incompetent. Mishler did not recall whether she spoke with Horn. (Div. Ex. 2, ¶¶ 1-19; Div. Ex. 3; Hrg. Tr., pp. 57-59)

4. On January 31, 2012, Albedyll wrote a letter to Mishler in which Albedyll:

- Identified herself as working "on behalf of the Wisconsin Board of Nursing;"
- Asked whether or not Mishler had been terminated or disciplined in a health care position, and if so, asked her to identify the facilities and explain why she was terminated or disciplined;
- Asked Mishler to obtain a "fit to practice evaluation and a psychology evaluation promptly;" and

- Advised Mishler that she must provide the requested information no later than February 17, 2012.

(Div. Ex. 5; Hrg. Tr., pp. 58, 60, 62)

5. On February 8, 2012, Albeyll and Mishler spoke again by telephone and Mishler was erratic and not making sense to Albeyll. Albeyll sent another letter to Mishler dated February 8, 2012, again identifying herself as an investigator working "on behalf of the Wisconsin Board of Nursing." In the February 8, 2012 correspondence, Albeyll:

- Explained that the case was opened "after [Mishler] called our agency and spoke with staff at our agency indicating that [she] got into some 'trouble;'"
- Stated that Mishler told Department staff that she was "misdiagnosed by a physician [who] determined that [she was] incompetent which is why [she is] unable to find a job;"
- Related that during the earlier telephone conversation, Mishler informed Albeyll that "in 2007 the police did an illegal search and took [Mishler] to a mental institution on three different occasions;"
- Asked Mishler to describe the period of institutionalization and what occurred in detail;
- Asked Mishler to identify when she had been "diagnosed as incompetent;"
- Asked Mishler to identify medications she was then taking;
- Reminded Mishler of her obligation to provide the information requested in Albeyll's January 31, 2012 letter; and
- Informed Mishler she could send the letter from her therapist to Albeyll.

(Div. Ex. 4; Hrg. Tr., p. 61)

6. Mishler responded to Albeyll's letter by letter dated February 13, 2012. In her letter, Mishler questioned what the complaint was about her practice as a nurse. She stated that she believed she was in compliance with her license and that she was in good health. She stated she was not working and had not been since October of 2010. She further informed Albeyll: "I guess you could say financially I lack the resources necessary to comply with your requests for the evaluations you need." She asked what the Board's next step would be, suggesting, "[p]erhaps a hold on my licensure until I can comply with the requests," and stated that she would await the Board's decision as to the next steps. (Div. Ex. 6)

7. Mishler failed to provide the following information requested by Albeyll on behalf of the Board:

- Whether Mishler had been terminated or disciplined in a health care position, and if so, identification of the health care facilities and locations in which she was terminated or disciplined and the reasons for such discipline or terminations;
- The results of a psychological evaluation and fitness to practice report;
- A description of the period of institutionalization and what occurred;
- Identification of medications Mishler was then taking;
- A letter from Mishler's therapist to Albedyll.

Mishler did not deny that: (1) she had called the Division stating that she had "gotten into some 'trouble,'" (2) she told Department staff that she had been misdiagnosed as "incompetent" and that this was why she believed she was unable to find a job, or (3) she had previously informed Albedyll that in 2007 police had taken her to a mental institution.

8. Mishler personally called the Secretary of the Department of Administration approximately two weeks prior to the hearing. However, she testified she could not recall what she was told during that phone call. Mishler also personally called the Division of Hearings and Appeals on more than one occasion during the pendency of this case. Mishler was represented by counsel when she made these telephone calls. (Hrg. Tr., pp. 260-261)

Involuntary Detentions

9. In 2006, Mishler was forcibly carried into a mental health facility by Eric Anderson and Nick D'Amato, her then-boyfriend and her daughter's then-boyfriend, respectively. According to Mishler, this event occurred because she was upset about a call she had received from the vice president of a bank informing her that the loan was due on her home mortgage. Mishler was hospitalized for approximately three days. (Hrg. Tr., pp. 148-151)

10. In 2007, Mishler was involuntarily detained at the request of her daughter, who is a nurse, and Mishler's boyfriend because, according to Mishler, she was nervous about a foreclosure, she was quitting smoking, and she was drinking too much Diet Coke. Mishler was held for approximately 17 days. (Hrg. Tr., pp. 103, 168, 152-54)

11. Either during or after Mishler's detention, a physician prescribed Risperdal for her, an antipsychotic medication, as well as Depakote, which is also used for psychosis and seizures. (Hrg. Tr., pp. 154-55, 262)

12. In 2009, Mishler was involuntarily detained again after she called police because a neighbor was burning electrical items in his back yard. Mishler told the police that she believed that her telephone had been bugged because the neighbor knew things about her that he shouldn't have. (Hrg. Tr., pp. 162-64)

13. In 2011, Mishler was involuntarily detained at the Milwaukee County Behavioral Health Division because, according to her testimony, she was under stress due to foreclosure. Mishler and her boyfriend Jeff Schroeder testified that the police reported that she was detained

because she threatened to kill her daughter and said she was going to walk into the light and not come back. However, Mishler testified that this never happened.² The petition for detention was dismissed for facial insufficiency because it was determined that Mishler was not a danger to herself or others. She was allowed to leave the hospital. Mishler has not been hospitalized since that time and has not been under any kind of treatment of mental health issues since then. (Resp. Ex. 108; Hrg. Tr., pp. 167-68, 245, 266-267)

Workplace Discipline and Terminations

14. Mishler did not disclose past workplace discipline and terminations to Albeyll as requested. However, Mishler subsequently provided some information regarding her employment history to Department employee Aaron Konkol on March 8, 2012, and Albeyll was able to contact some of Mishler's former employers and obtain employment records. When asked at hearing why she did not disclose her workplace discipline and terminations in response to Albeyll's request, Mishler's response was confusing, but appeared to suggest that she did not provide the information to Albeyll because she did not know what Albeyll would do with the information and because she did not want her former employers to relay information because she believed the first ones to tell their stories are believed. (Resp. Ex. 113; Hrg. Tr., pp. 68-69, 172-74)

15. Mishler last worked as a nurse in 2012 at Birchwood Health Care Center (Birchwood), where she worked for three months. While at Birchwood, Mishler refused certain assignments. She testified that she did not like that Birchwood was moving her too frequently from one unit to another. She also stated that sometimes her keys did not work for the door to the med room or for the med cart. She felt that supervisory staff was hostile to her and that she was being targeted because things had been posted online about her detentions in mental health facilities. These "postings" appear to be Circuit Court Access Program (CCAP) records that show her wages were garnished by Milwaukee County Behavioral Health. (Hrg. Tr., pp. 95-98, 143-44, 147-48)

16. When asked if she was fired from Birchwood, Mishler testified that she would say she quit, but that Birchwood would say they fired her. When asked why Birchwood would say that, Mishler gave a long, disjointed description of her last day at Birchwood, including claims that while in the med room during a narcotics count, a nurse threw medication cards at her and told her she hated her guts and that she was accused of being rude to an employee because she would not let the employee into the med room. Mishler indicated that she did not let the person in the room for the person's own good and that it would not have made any difference to her whether the person attempting to gain entry was a supervisor. When asked again why Birchwood would say she was fired, Mishler testified that she called Birchwood to ask if she had a job and was fired over the telephone. (Hrg. Tr., pp. 99-103, 105)

17. In October of 2010, Mishler was employed at Mount Carmel Health and Rehabilitation Center (Mount Carmel) for approximately six hours. Mishler was walked out of

² At hearing, there was a discrepancy regarding whether Mishler's daughter testified at the detention hearing that Mishler had threatened to kill her, with Mishler testifying that her daughter did not testify at the detention hearing and Schroeder testifying that the daughter testified at the detention hearing and stated Mishler had threatened to kill her. (Hrg. Tr., pp. 168-69, 266)

the building but testified that she did not know why. Mishler did not recall if she was given an explanation. According to Mount Carmel's documentation, Mishler was terminated for an inability to follow the direction of a registered nurse supervisor or unit nurse. (Div. Ex. 8, pp. 71-72; Hrg. Tr., pp. 106-107)

18. Also in 2010, Mishler worked at LindenGrove Health Care Center (LindenGrove) for approximately three months. Mishler was verbally counselled for a work rule violation because she had not finished her patient care summaries. She was also disciplined for telling a certified nursing assistant (CNA) to do something after a supervisor had specifically told the CNA to do something else. Mishler was also disciplined for improperly administering insulin by pre-drawing it for three patients. She was fired on September 27, 2010 while still in her probationary period, for disobeying a physician's order because she did not agree with it, which resulted in the patient not receiving insulin within the proper timeframe and a new order had to be entered by a physician because the patient's blood sugars were elevated. (Div. Ex. 9, pp. 154, 157-59, 162, 165, 169; Hrg. Tr., pp. 109-120)

19. For approximately a year between 2009 and 2010, Mishler worked at Eastside Health and Rehabilitation Center (Eastside). Mishler was written up for not punching in and out of work on a time clock. Mishler testified the time clock was broken. She was also written up for giving a patient Coumadin without checking the prothrombin time (PT) and international normalized ration (INR). Mishler testified that the copy of a portion of the medical administration record for the patient was not a true copy and that the employer "wrote what they wanted to write." Mishler refused to sign the Document of Employee Counseling related to this event. Under "Employee's Closing Comments," Mishler did not indicate that the patient's medical records were incomplete.

20. Mishler was also suspended at Eastside for speaking to a patient's family after specifically being told by a nursing supervisor not to go back into the patient's room or speak to the family. Mishler testified that when she was told by a supervisor not to go back to the patient's room, she did so anyway to advise the family that someone else would be taking care of the patient and to bring the patient some water she said she would bring. Mishler was sent home for this conduct. She subsequently quit Eastside without giving notice, believing that since Eastside was constantly suspending her, they did not need her. (Div. Ex. 7, p. 7; Hrg. Tr., pp. 131-32, 136-141)

21. Prior to Eastside, Mishler worked at Golden Living Centers for a few years, which she quit. Mishler testified that a CNA there threatened to "kick [her] ass." She felt that co-workers were sending her all over the building unnecessarily to get paperwork and that they were intentionally disabling office equipment on her shift. She also felt that things were being moved around her unit deliberately so she could not find them and that supplies were being withheld from her. She stated she was harassed every day. She stated she was asked to undergo a urine screen, which she did, but that her employer never submitted the urine screen for testing. She stated that during the urine screening process, a registered nurse threw a test sample cup at her and threatened to call the police after Mishler informed her that the cup should be covered in cellophane. She believed employees at Golden Living treated her this way because of information on the internet regarding her involuntary detentions. (Hrg. Tr., pp. 145-47, 156-158)

22. Mishler testified that at around this time, she saw two psychiatrists, one who diagnosed her as depressed and the other who called her a thief within three minutes of her entering the room and explaining her situation. (Hrg. Tr., pp. 159-162)

Ronald Bullen Testimony

23. Ronald Bullen, R.N., testified for the Division. He has had extensive experience over the last 15 years in training and managing nurses, including LPNs, doing hiring, firing, performance reviews and performance counseling, and advising other managers on such issues. He has also taught LPNs, teaching basic theories required for them to function competently in a clinical setting and following them through their clinical rotations. Typically, he does not know the employee's medical diagnosis is as that information is held in confidence through the HR process. Therefore, he only monitors whether the employees are competent to perform their jobs. (Hrg. Tr., p. 183-186)

24. Bullen's opinions were expressed to a reasonable degree of professional certainty. In preparation for his testimony, he reviewed extensive documentation related to this matter, including the Division's proposed Exhibits 1-11, which includes documents from Mishler's past employers, summaries of communications between Mishler and the Department, and the decision issued by the ALJ in the summary suspension proceeding. (Hrg. Tr., pp. 186-187, 191, 193-95, 198)

25. Bullen credibly testified that in order for nurses to be able to safely and reliably practice, they need to be able to listen and verbally communicate effectively, work cohesively, and collaborate with a hierarchical team, and possess the requisite technical skills, such as effectively administering medications. He also credibly testified that it is important for LPNs to trust their colleagues, including registered nurses and doctors. (Hrg. Tr., pp. 191-192, 202-203)

26. Bullen credibly testified that, based on his review of documents of past employers, Mishler is not safe to provide care until more information about her mental condition is gathered from a licensed physician. He noted significant concerns from her past employers, problems with her ability to communicate and follow directions and problems with medication administration. The fact that Mishler had been detained in mental health centers on multiple occasions also had a significant impact on his opinion. He also stated his opinion that there was a link between the mental health detentions and the workplace problems. (Hrg. Tr., pp. 194-195, 199-200)

Fitness to Practice Evaluation

27. Mishler has refused the Department's requests to get a fitness to practice evaluation, stating that she cannot afford it. A fitness to practice evaluation costs between a few hundred and thousands of dollars. However, Mishler did not know how much the fitness to practice evaluation would cost. She testified that she only contacted one psychiatrist to ask about a fitness to practice evaluation and the psychiatrist did not know what a fitness to practice evaluation was. Mishler's boyfriend testified that he would have loaned her the money to get a psychological evaluation if she had asked him to. He testified that he had previously paid for an evaluation for Mishler by someone in Port Washington. (Hrg. Tr., pp. 44-45, 64, 176, 268)

28. Mishler testified that she told Albedyll that she did not know what a fitness to practice evaluation is, that she was told by Albedyll that a fitness to practice evaluation and a psychological evaluation are the same thing, and that she knew what a psychological evaluation is. (Hrg. Tr., pp. 176-77)

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); *see also* Wis. Admin. Code § HA 1.17(2). 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).

Violations

Pursuant to Wis. Stat. § 441.07(1g)(c), the Board may take disciplinary action against a licensed practical nurse when it finds that he or she has engaged in acts which show the licensed practical nurse to be unfit or incompetent by reason of mental incompetency. “Mental incompetency” is evidenced by conduct which reflects an impaired ability of the licensee to safely or reliably perform duties.” Wis. Admin. Code § N 7.03(3).

The Division has established by a preponderance of the evidence that Mishler has an impaired ability to safely or reliably perform her duties as an LPN and that she is therefore unfit.

Respondent’s interaction with Department personnel has often been confused and irrational. In addition, Mishler has been unable to function in a nursing role in at least five different workplaces over the course of many years. Mishler quit or was fired from all of these jobs in time-frames ranging from six hours to a few years. She was repeatedly disciplined and terminated for multiple violations, including failure to document in a timely manner, medication errors, inappropriate interactions with coworkers, ignoring a physician’s order and repeatedly failing to follow or outright defying the instructions of nursing supervisors. In her testimony and elsewhere, Mishler offered various excuses and explanations for her conduct, often placing the blame on others. She has suggested in several instances that co-workers, supervisors and others were out to get her, stating that co-workers were disabling office equipment so that she could not use it and withholding supplies from her, and that her neighbor may have bugged her telephone.

Mishler’s excuses lacked credibility, both in her explanation of them and in light of: (1) the employers’ documentation of the events; (2) the lack of motive on the part of her employers to discipline and/or fire a qualified nurse; (3) the sheer volume of the reported problems with her employment by multiple employers over the course of several years.

Moreover, during approximately the same time period that she was unable to successfully function as a nurse, Mishler was involuntarily detained in mental health facilities on four separate occasions, in 2006, 2007, 2009 and 2011, including at the request of her daughter, who is herself a nurse. During this time period, one physician prescribed Mishler Risperdal, an antipsychotic medication, as well as Depakote, which is also used for psychosis and seizures.

Also persuasive is Bullen's testimony questioning Mishler's ability to safely and reliably practice as a nurse. I reject Mishler's argument that Bullen's testimony should be disregarded because it does not meet the criteria for expert testimony under Wis. Stat. § 907.02, which codified the standards in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and its progeny.

First, administrative law judges are "not bound by common law or statutory rules of evidence;" rather, they "shall admit all testimony having reasonable probative value." Wis. Stat. § 227.45(1). See also *Folding Furniture Works v. Wisconsin Labor Relations Board*, 232 Wis. 170, 188-89, 285 N.W. 851 (1939) (Witness offering opinion testimony need only have "some special knowledge reasonably entitling his opinion to some weight.")³ Bullen's testimony has reasonable probative value and Bullen has special knowledge reasonably entitling his opinion to weight, as he is a registered nurse with substantial experience in nursing and in supervising and teaching nurses.

Second, even if Mishler is correct that the standards in Wis. Stat. § 907.02 are applicable, Bullen's testimony meets these standards. Wis. Stat. § 907.02(1) provides:

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Bullen has the requisite knowledge, skill, experience and training to offer his opinion on Mishler's ability to safely and reliably practice nursing, and his testimony was based on sufficient facts and reliable methods, applying principles and methods reliably to the facts surrounding Mishler's conduct.

I also note that even without Bullen's testimony, the Division has established that it is more likely than not that Mishler's conduct reflects an impaired ability to safely or reliably perform her duties and that she is therefore unfit or incompetent by reason of mental incompetency under Wis. Stat. § 441.07(1g)(c) and Wis. Admin. Code § N 7.03(3).

³ See also *CFS, LLC v. Bayfield County Bd. of Adjustment*, 349 Wis. 2d 789, 837 N.W.2d 178 (Ct. App. 2013) (unpublished *per curiam* decision which is properly cited for its persuasive value as the prohibition on citing unpublished *per curiam* decisions in Wis. Stat. § 809.23 does not apply in administrative proceedings, only in courts).

A primary focus of Mishler's brief pertains to the Board's initial request that Mishler obtain a psychological evaluation and the summary suspension proceedings initiated by the Department and decided by the Board. These arguments include allegations that the Department and Board violated her due process rights and her rights under the Americans With Disabilities Act (ADA). Mishler made these arguments to ALJ McGowan in the show cause hearing on the summary suspension. ALJ McGowan either rejected Mishler's arguments, or, with regard to the ADA claim, declined to address it. To the extent that Mishler disagreed with the ALJ's conclusions, it appears that she had the right to appeal to circuit court under Wis. Stat. §§ 227.52 and 227.53 and did not do so.

In any event, the Board and Division's actions with respect to the summary suspension proceedings and the initial request for a psychological evaluation are not the subject of these proceedings. The disciplinary proceeding before the instant tribunal is a separate proceeding and the decision in this case is based on the evidence produced at the June 16, 2014 hearing. Neither the Division's Complaint nor this decision is based solely on the fact that Mishler was involuntarily detained in a mental health facility or that she has a disability or perceived disability. Rather, the decision is based on all of the evidence produced at hearing, particularly Mishler's work history, showing that it is more likely than not that she has an impaired ability to safely and reliably perform her duties as an LPN.⁴ Thus, if Mishler's ADA argument is intended to extend to the instant proceeding, the argument is without merit.

In view of Mishler's violation of Wis. Stat. § 441.07 and Wis. Admin. Code § N 7.03(3), she 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 recommends that Mishler's right to renew her license be suspended indefinitely, until Mishler provides evidence of an evaluation by a competent mental health care professional, under the terms set forth in the Order section below, indicating whether Mishler currently possesses a mental health condition which makes her unable to practice nursing with reasonable skill and safety. The Division's recommended discipline is appropriate, with the clarification that in order to have the suspension lifted, Mishler must not only submit such an evaluation, but the Board must also be satisfied that she has no impaired ability to safely and reliably perform her duties as an LPN.

Such discipline serves to protect patients from a nurse with a demonstrated impaired ability to safely and reliably practice. Medical patients are often in quite vulnerable states and must rely heavily on the competency, skill and good judgment of nurses. Based on the record before this tribunal, it cannot be said that Mishler may be trusted to perform her duties in a safe

⁴ Mishler's request that the Division delete certain information from its website is likewise outside the scope of these proceedings.

and reliable manner. Although a psychological evaluation may have indicated otherwise; Mishler has refused to obtain such an evaluation and a decision had to be made without that information.

The discipline recommended by the Division also serves to rehabilitate Mishler in that it shows her that her conduct raises serious concerns regarding her fitness to practice. It also may allow her to again practice nursing, provided that she either obtains a psychological evaluation that shows she is fit to practice with or without certain limitations, or undergoes recommended treatment that allows her to safely and reliably practice. Finally, this discipline has a deterrent function in that it shows other nurses that when there is legitimate evidence indicating unfitness to practice, a nurse may not simply continue to practice without a psychological evaluation showing that he or she is able to so in a safe and reliable manner.

Costs

The Department has the authority to assess costs pursuant to Wis. Stat. § 440.22. The factors to be considered in assessing full 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 parties; (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*, Order No. LS0802183CHI (Aug. 14, 2008).

In the instant case, only one count was charged and proven. The conduct is serious in that it goes to the heart of nursing – patient care and a nurse's ability to safely and reliably provide that care. However, because this case involves issues of mental impairment, the conduct may not be fully intentional. With respect to the third factor, the discipline sought and imposed is severe in that it involves an indefinite suspension, although the suspension may be lifted, depending on whether Mishler obtains an evaluation and on the results of such an evaluation. Regarding the fourth factor, Mishler has cooperated in the proceedings before this tribunal, although she did not cooperate fully in the investigation, refusing to provide requested information by the Division. Operating in Mishler's favor is the fact that she has had no disciplinary prior discipline imposed on her by the Board. Finally, in favor of the imposition of costs is the fact that it is Mishler who has engaged in the conduct which resulted in these proceedings, and other members of her profession should not be required to absorb the costs of these proceedings through their licensing fees.

Based on the foregoing, I conclude that 80 percent of the costs of the investigation and disciplinary proceedings should be imposed on Mishler, with the exception that no costs related to the Division's unsuccessful summary judgment motion may be assessed against Mishler.

CONCLUSIONS OF LAW

1. The Department met its burden of establishing by a preponderance of the evidence that Mishler is unfit or incompetent by reason of mental incompetency under Wis. Stat. § 441.07(1g)(c), in that her conduct reflects an impaired ability to safely or reliably perform her duties as an LPN under Wis. Admin. Code § N 7.03(3).

2. The Discipline set forth in the Order section below is warranted pursuant to the factors delineated in *Aldrich*.

3. Imposition of 80 percent of the costs of these proceedings on Mishler is warranted under the Department's prior decision in *Buenzli-Fritz*, except that Mishler may not be assessed costs related to the Division's summary judgment motion.

ORDER

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent Deborah Mishler's right to renew her license is indefinitely suspended until she undergoes a psychological evaluation by an evaluator preapproved by the Board's designee, under the terms enumerated below, and the Board is satisfied that Mishler has no impaired ability to safely and reliably perform her duties as an LPN. The evaluation must occur under the following terms:

1. Before undergoing the evaluation, Mishler shall submit to the Department Monitor a copy of the evaluator's curriculum vitae, and copies of professional license and certifications held.

2. The evaluator must be a licensed doctorate-level psychologist who is certified in a relevant field of practice by the American Board of Professional Psychology or a licensed psychiatrist who is certified in a relevant field of practice by the American Board of Psychiatry and Neurology. At the direction of the Board's designee, additional experience in a relevant field of practice may be substituted for Board certification. At the discretion of the Board's designee, alternate recognition, such as fellowships, may also be substituted for Board certification.

3. The evaluator must have had no previous personal or professional relationship with Mishler, and may not have previously evaluated or treated her.

4. The evaluator shall have had a minimum of ten years of experience in the practice of psychology or psychiatry, and may not have been previously disciplined by any credentialing authority.

5. While the evaluator remains responsible for the final evaluation, the evaluator may delegate testing or other components of the evaluation to other mental health professionals who the evaluator deems competent to conduct those tests or perform the delegated task.

6. The exact tests chosen for administration are within the discretion of the evaluator. However, the evaluation must include a comprehensive interview of Mishler and the use of rating scales, neuropsychological testing, and commonly used personality tests.⁵

7. The evaluation shall include an assessment of Mishler's ability to appropriately manage the triggers, degrees and effects of an angered emotional state.

8. Any evaluation submitted for the purpose of ending the suspension of Mishler's right to renew her license to practice must have been completed no more than 30 days prior to submission to the Board.

9. The evaluator shall identify restrictions on the nature of practice or practice setting or requirements for supervision of practice, if any, which are necessary to render Mishler able to practice nursing with reasonable skill and safety.

10. The evaluator shall identify specific mental health treatment goals, if any, which must be met before Mishler is able to practice nursing with reasonable skill and safety.

11. The evaluator's opinions and conclusions must be rendered to a degree of reasonable professional certainty.

12. Mishler must provide the evaluator with a copy of the Board's Final Decision and Order.

13. Mishler shall authorize release directly to the evaluator of records of mental health evaluations, diagnosis, treatment and treatment summaries that she has undergone since 2006, and such other records that the evaluator determines are necessary to a competent evaluation.

14. Mishler is responsible for the costs associated with the evaluation.

15. Mishler shall authorize the evaluator to discuss the results of the evaluation with the Board or its designee.

IT IS FURTHER ORDERED that Respondent shall pay 80 percent of the recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18, except that she may not be assessed for costs related to the summary judgment component of these proceedings. 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 mailed or otherwise delivered to:

**Department Monitor
Division of Legal Services and Compliance**

⁵ Commonly used tests include the Beck Anxiety Inventory, Beck Depression Inventory-II, Brief Psychiatric Rating Scale, Burns Anxiety Inventory, Burns Depression Inventory, Hamilton Anxiety Rating Scale, Hamilton Depression Rating Scale, Inventory to Diagnose Depression, Profile of Mood States, State-Trait Anxiety Inventory, Symptom Checklist-90-Revised, Taylor Manifest Anxiety Scale, Yale-Brown Obsessive-Compulsive Scale, Kaufman Adolescent and Adult Intelligence Test, Rorschach, Wechsler Adult Intelligence Scale-III or IV, Wechsler Memory Scale IV, Category Test, Continuous Performance Test, Halstead-Reitan Neuropsychological Test Battery, MMPI-2, NEO Personality Inventory, Personality Assessment Inventory, and the Thematic Apperception Test.

**Wisconsin Department of Safety and Professional Services
P.O. Box 7190
Madison, WI 53707-7190**

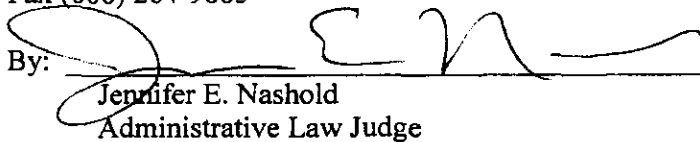
IT IS FURTHER ORDERED that the terms of this Order are effective the date the Final Decision and Order is signed by the Board.

IT IS FURTHER ORDERED that the above-captioned matter be and hereby is closed as to Respondent Deborah J. Mishler.

Dated at Madison, Wisconsin on this 20th day of November, 2014.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____


Jennifer E. Nashold
Administrative Law Judge