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**Before the
State Of Wisconsin
Medical Examining Board**

In the Matter of Disciplinary Proceedings Against
Michel H. Malek, M.D., Respondent

FINAL DECISION AND ORDER

Order No. 0004821

Division of Legal Services and Compliance Case No. 15 MED 278

The State of Wisconsin, Medical Examining Board, 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, Medical Examining Board.

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 20th day of July, 2016.

A handwritten signature in black ink, appearing to read "Kent B. Smith", written over a horizontal line.

Member
Wisconsin Medical Examining Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
Michel H. Malek, M.D., Respondent

DHA Case No. SPS-16-0022
DLSC Case No. 15 MED 278

0004821

PROPOSED DECISION AND ORDER

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

Michel H. Malek, M.D.
P.O. Box 709
Kankakee, IL 60901-0709

Wisconsin Medical Examining Board
P.O. Box 8366
Madison, WI 53708-8366

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

Attorney Yolanda McGowan
Department of Safety and Professional Services
Division of Legal Services and Compliance
P. O. Box 7190
Madison, WI 53707-7190

PROCEDURAL HISTORY

The Notice of Hearing and the Complaint in this matter were served on Respondent Michel H. Malek, M.D. (Respondent), by the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), on February 23, 2016, by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. Respondent failed to file an Answer to the Complaint, as required by Wis. Admin. Code § SPS 2.09, and failed to appear at the telephone prehearing conference held before the Division of Hearings and Appeals on March 29, 2016.

The Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c). In light of Respondent's failure to file an Answer to the Complaint and failure to appear at the prehearing conference, the undersigned Administrative Law Judge (ALJ) found Respondent to be in default. On March 29, 2016, the ALJ issued a

Notice of Default and Order against Respondent and ordered that the Division file a recommended proposed decision and order no later than April 29, 2016. The Division timely filed its required submission.

FINDINGS OF FACT

Facts Related to the Alleged Violation

Findings of Fact 1-10 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Michel H. Malek, M.D., is licensed in the State of Wisconsin to practice medicine and surgery, having license number 60371-20, first issued on March 21, 2013, with registration expired as of November 1, 2015.

2. Respondent currently retains the right to automatically renew registration of his license to practice medicine and surgery.

3. Respondent's most recent address on file with the Department is P.O. Box 709, Kankakee, Illinois 60901-0709.

4. On June 16, 2015, the Illinois Department of Financial and Professional Regulation, Division of Professional Regulation, indefinitely suspended Respondent's license to practice as a physician and surgeon in the State of Illinois for being more than thirty days delinquent in the payment of child support.

5. Respondent did not inform the Department of the aforementioned suspension of his license to practice as a physician and surgeon in the State of Illinois.

6. On October 20, 2015, the Department commenced an investigation after receiving notice from the Federation of State Medical Boards that Respondent's license had been suspended in Illinois.

7. On August 25, 2015 and September 21, 2015, Department staff mailed letters to Respondent at his address of record notifying him of the investigation in this matter and requesting a response.

8. On September 21, 2015 and November 20, 2015, Department staff sent emails to Respondent at his email address of record notifying him of the investigation in this matter and requesting a response.

9. On December 12, 2015, Department staff telephoned Respondent at his telephone number of record seeking to notify him of the investigation of this matter and obtain a response.

10. Respondent did not respond to any of the Department's inquiries.

Facts Related to Default

11. The Notice of Hearing and Complaint were served on Respondent on February 23, 2016, by certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing instructed Respondent: “If you do not provide a proper Answer within 20 days, you will be found in default and a default judgment may be entered against you on the basis of the Complaint and other evidence. In addition, the Medical Examining Board may take disciplinary action against you and impose the costs of the investigation, prosecution and decision of this matter upon you without further notice or hearing.”

12. Respondent was served at his address of record with the Department, as reflected above. Wisconsin Stat. § 440.11 requires Respondent to provide the Department with current contact information.

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

14. Following expiration of the 20-day time period in which to file an Answer, the ALJ scheduled a prehearing conference for Tuesday, March 29, 2016. Notice of this prehearing conference was sent to both parties, with instructions that Respondent provide to the ALJ a telephone number at which he could be reached for the conference no later than March 24, 2016. The Notice further informed Respondent that: “A respondent’s failure to appear at a scheduled conference or hearing may result in default judgment being entered against the respondent.”

15. Respondent failed to provide a telephone number at which he could be reached. At the prehearing conference held on March 29, 2016, the Division provided two telephone numbers for Respondent. The ALJ left voicemails for Respondent at each number, indicating that Respondent should contact the ALJ at the telephone number provided in the next ten minutes, failing which the ALJ would proceed with the conference without Respondent. Respondent never contacted the ALJ at the telephone number provided.

16. The Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c). Based on Respondent’s failure to file an Answer to the Complaint and his failure to appear at the March 29, 2016 prehearing conference, the ALJ granted the motion for default.

17. On March 29, 2016, the ALJ issued a Notice of Default and Order, ordering that the Division submit a recommended proposed decision and order by April 29, 2016.

18. The Division timely filed its recommended proposed decision and order.

19. Respondent did not file a response to either the Division’s submission or to the Notice of Default and Order.

DISCUSSION AND CONCLUSIONS OF LAW

Default

As stated in the March 29, 2016 Notice of Default and Order, Respondent is in default for failing to file an Answer to the Complaint and failing to appear at the telephone conference held on March 29, 2016. As a result, an order may be entered against him on the basis of the Complaint and other evidence. *See* Wis. Admin. Code § SPS 2.14; Wis. Admin. Code § HA 1.07(3)(b) and (c).

Violations of Wisconsin Statutes and Administrative Code

If the Wisconsin Medical Examining Board (Board) determines that a credential holder is guilty of negligence in treatment or unprofessional conduct, the Board may warn or reprimand that person, or limit, suspend, or revoke any license, certificate, or limited permit granted by the Board to that person. Wis. Stat. § 440.02(3).

Pursuant to Wis. Admin Code § Med 10.03(3), “unprofessional conduct” includes, in relevant part:

(a) Failing, within 30 days, to report to the board any final adverse action taken against the licensee’s authority to practice medicine and surgery by another licensing jurisdiction concerned with the practice of medicine and surgery;

...

(c) Having any credential pertaining to the practice of medicine and surgery or any act constituting the practice of medicine and surgery become subject to adverse determination by any agency of this or another state, or by any federal agency or authority, and

...

(g) After a request by the board, failing to cooperate in a timely manner with the board’s investigation of a complaint filed against a license holder.

The undisputed facts are that Respondent’s credential to practice medicine and surgery in the State of Illinois was indefinitely suspended by the Illinois Department of Financial and Professional Regulation, Division of Professional Regulation, that Respondent failed to report the suspension of his Illinois credential to the Department, and that Respondent failed to cooperate with the Department’s investigation of this matter. Respondent’s conduct constitutes unprofessional conduct pursuant to Wis. Admin. Code § Med 10.03(3)(a), (c) and (g), and subjects him to discipline pursuant to Wis. Stat. § 448.02(3).

Appropriate Discipline

The three purposes of discipline are: (1) to protect the public from other instances of misconduct; (2) to promote the rehabilitation of the licensee; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976).

The Division recommends revocation of Respondent's license and any appurtenant right to renew that license. Based on the factors set forth in *Aldrich* and the facts of this case, the discipline requested by the Division is appropriate.

Respondent's refusal to comply with the laws of Illinois resulted in adverse action against his Illinois credential to practice medicine. That misconduct is compounded by Respondent's subsequent failure to comply with Wisconsin's rules and regulations governing the practice of medicine. Respondent's failure to follow the laws related to his profession in both Illinois and Wisconsin, and his apparent disregard for the Board's legitimate authority, raise concerns about his ability or willingness to follow other rules designed to ensure that he practices in a safe and competent manner.

Equally concerning is Respondent's blatant disregard for this process as evidenced by his failure to respond to the many and varied attempts by the Department to communicate with him, along with his failure to respond to the ALJ's two telephone calls and messages. This conduct also demonstrates a disregard for rules and regulations pertaining to Respondent's profession, including those specifically designed to ensure patient and public safety. It is also worth noting that Respondent has made no effort to renew his registration since its October 31, 2015 expiration. This evidences his own lack of interest in, and his willingness to forego, the right to practice medicine in Wisconsin. Respondent's conduct supports a conclusion that he will not or cannot be rehabilitated.

Lastly, other licensees must be put on notice that engaging in unprofessional conduct, and failing to cooperate with the Board's investigation of such conduct, will not be tolerated. The Board cannot perform its duly authorized functions relative to patient and public safety if its members can ignore or disregard the Board with impunity. For all the above reasons, revocation is the appropriate disciplinary remedy in the present case.

Costs

The Division has the authority to assess costs pursuant to Wis. Stat. § 440.22. The Division requests that Respondent be ordered to pay the full costs of this investigation and of these proceedings. Factors which may be considered in assessing costs 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 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, D.C.*, LS0802183CHI (Aug. 14, 2008). It is not mandatory that all or any of these factors be considered and it is within the Board's discretion to determine what weight, if any, to give any factors considered.

In the present case, there are no mitigating or other factors to support anything other than the full imposition of costs against the Respondent. The factual allegations were deemed admitted and proven. There is no argument to apportion any counts that were unproven, or that

certain factual findings were investigated and litigated that were unnecessary. The Division has proven each of the violations it alleged. By his lack of participation in these proceedings, Respondent has not presented any evidence to suggest any alternate considerations related to the imposition of costs. Respondent's misconduct is very serious and goes to public safety and protection. The proposed discipline is proportionate to the concerns about Respondent's inability to safely practice medicine. Finally, given the fact that the Department is a "program revenue" agency, whose operating costs are funded by the revenue received from applicants and licensees, fairness dictates imposing the costs of disciplining Respondent upon Respondent and not fellow members of the profession who have not engaged in such conduct.

Accordingly, full costs are assessed against Respondent in an amount to be determined pursuant to Wis. Admin. Code § SPS 2.18.

ORDER

Accordingly, IT IS HEREBY ORDERED:

(1) The license of Michel H. Malek, M.D., (license number 60371-20) to practice medicine and surgery in the State of Wisconsin, and the appurtenant right to renew that license are REVOKED.

(2) Respondent shall mail or physically deliver all indicia of Wisconsin licensure to practice medicine and surgery to the Department Monitor within 14 days of the effective date of this order.


(3) Should Respondent ever apply for a credential with the Department in the future, he shall, as prerequisite to such application, pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § 2.18.

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

Dated at Madison, Wisconsin on May 17, 2016.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Tel. (608) 266-7709
Fax (608) 264-9885

By: _____


Jennifer E. Nashold
Administrative Law Judge