

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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Before the
State Of Wisconsin
Board of Nursing

In the Matter of Disciplinary Proceedings Against
Debra L. Aker, L.P.N., Respondent

FINAL DECISION AND ORDER

Order No. 0005294

Division of Legal Services and Compliance Case Nos. 15 NUR 258 and 16 NUR 549


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 11th day of May, 2017.



Member
Board of Nursing



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
Debra L. Aker, L.P.N., Respondent

DHA Case No. SPS-17-0001
DLSC Case Nos. 15 NUR 258
16 NUR 549

PROPOSED DECISION AND ORDER

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

Debra L. Aker, L.P.N.
921 43rd Street
Kenosha, WI 53140

Wisconsin Board of Nursing
P.O. Box 8366
Madison, WI 53708-8366

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

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

PROCEDURAL HISTORY

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 Debra L. Aker, L.P.N., alleging that Respondent engaged in two counts of unprofessional conduct.¹

¹ The two counts are as follows: (1) "Failing to notify the board of a felony or misdemeanor conviction within 48 hours after the entry of the judgment of conviction," in violation of Wis. Admin. Code § N 7.03(1)(h); and (2) "After a request of the board, failing to cooperate in a timely manner with the board's investigation of a complaint filed against a license holder," in violation of Wis. Admin. Code § N 7.03(1)(c).

The Division served Respondent on January 5, 2017, by sending a copy of the Complaint and Notice of Hearing to the address on file with the Department via regular and certified mail. Respondent failed to file a timely Answer as required by Wis. Admin. Code § SPS 2.09(4).

On January 31, 2017, the undersigned Administrative Law Judge (ALJ) issued a Notice of Telephone Prehearing Conference which set a telephone hearing conference for February 8, 2017. Respondent failed to appear at the telephone prehearing conference, whereupon the Division moved for default judgment based on Respondent's failure to appear and failure to file an Answer to the Complaint.

On February 8, 2017, 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 February 28, 2017. On February 21, 2017, the Division timely filed its submission.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Fact 1-17 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Debra L. Aker, L.P.N., is licensed in the State of Wisconsin as a practical nurse, having license number 312160-31, first issued on February 17, 2010 and current through April 30, 2017.

2. Respondent's most recent address on file with the Department is 921 43rd Street, Kenosha, Wisconsin 53140.

15 NUR 258

3. On July 1, 2015, the Department opened case number 15 NUR 258 against Respondent based on allegations of potential diversion of narcotics and documentation issues.

4. On December 6, 2016, the Department sent a subpoena to Respondent's address on file for an investigative interview on December 21, 2016. The subpoena was sent via certified mail and via first class mail, return service requested.

5. The subpoena sent to Respondent's address on file by regular mail was not returned to the Department.

6. Respondent did not sign for the subpoena sent by certified mail to her address on file.

7. On December 21, 2016, Respondent failed to appear for her interview.

8. On December 21, 2016, a Department investigator sent an email to Respondent's email address on file requesting an explanation as to why she did not show up for her scheduled interview and requesting address information.

9. The investigator also telephoned Respondent's phone number on file requesting the same information. Respondent failed to respond to either request.

16 NUR 549

10. On October 7, 2016, the Department opened case number 16 NUR 549 against Respondent based on allegations that she had been convicted on August 19, 2016, of operating a firearm while intoxicated, in violation of Wis. Stat. § 941.20(1)(b), a misdemeanor, in Kenosha County case number 2015CM395.

11. The criminal charge was based on conduct which occurred on March 2, 2015, in which Respondent was involved in a motor vehicle crash. Law enforcement responded to the scene and noted that Respondent's speech was slurred and that there was the odor of alcoholic beverages in the vehicle.

12. Law enforcement issued Respondent a ticket for operating a motor vehicle while intoxicated. While performing an inventory search, police discovered a loaded firearm in her purse. Respondent possesses a valid permit to carry a concealed weapon.

13. Respondent did not notify the Department of the conviction within 48 hours of the entry of judgment of conviction.

14. On October 24, 2016, a Department investigator sent a letter to Respondent's address on file requesting a response to the allegations; an explanation of the circumstances of the crime; and an explanation as to why she did not report the conviction within 48 hours of the judgment being entered.

15. Respondent failed to respond to the letter or send the requested information to the Department.

16. On November 11, 2016, a Department investigator sent an email to Respondent at her address of record requesting the same information as in the October 24, 2016 letter.

17. Respondent failed to respond to the November 11,² 2016 email.

Facts Related to Default

18. The Complaint and Notice of Hearing in this matter were served on Respondent on January 5, 2017, by both certified and regular mail, consistent with Wis. Admin. Code

² The Division's Complaint and its recommended proposed decision and order refer in this paragraph to the "November 16, 2016 email" (emphasis added). Given that the Complaint's paragraph 16 states that the email was sent November 11, 2016, it is assumed that the "6" was a typographical error.

§ 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 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.” The documents sent via regular mail were not returned to the Department by the United States Postal Service. On January 26, 2017, the certified mail was returned to the Department by the United States Postal Service as it went unclaimed by Respondent.

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

20. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for February 8, 2017. Notice of this prehearing conference was sent to both parties, with instructions that Respondent provide the ALJ with a telephone number at which she could be reached for the conference no later than February 7, 2017. The Notice instructed Respondent: “The Respondent’s failure to appear at the scheduled conference or hearing may result in default judgment being entered against the Respondent.” Respondent failed to provide a telephone number at which she could be reached for the conference.

21. At the prehearing conference held on February 8, 2017, at 11:00 a.m., the Division provided a telephone number for Respondent, at which the ALJ attempted to reach Respondent. During the first call to Respondent, someone picked up the telephone but then immediately hung up or was disconnected. The ALJ attempted to call again but received an answering machine for “Debra” (Respondent’s first name). The ALJ left a voicemail indicating that Respondent must return the ALJ’s telephone call by 11:15 a.m. or the ALJ would entertain a motion for default. When Respondent had not returned the ALJ’s call by 11:20 a.m., the ALJ proceeded with the prehearing conference with counsel for the Division, who moved for default judgment based on Respondent’s failure to file an Answer to the Complaint and failure to appear at the prehearing conference in this matter, pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c). The ALJ granted the motion for default.

22. On February 8, 2017, the ALJ issued a Notice of Default and Order which required the Division to file and serve no later than February 28, 2017, a recommended proposed decision and order.

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

24. Respondent did not file a response to either the ALJ’s Notice of Default and Order or to the Division’s recommended proposed decision and order. Respondent has had no contact with the Division of Hearings and Appeals.

DISCUSSION AND CONCLUSIONS OF LAW

Default

As stated in the February 8, 2017 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 February 14, 2017. As a result, an order may be entered against her 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 Statute and Administrative Code

The Wisconsin Board of Nursing (Board) may revoke, limit, suspend or deny renewal of a license of a licensed practical nurse if it finds that the licensee has engaged in “[o]ne or more violations of this subchapter or any rule adopted by the board under the authority of this subchapter” or in “[m]isconduct or unprofessional conduct.” Wis. Stat. § 441.07(1g)(b) and (d), respectively.

By failing to report her August 19, 2016 conviction of operating a firearm while intoxicated, Respondent violated Wis. Admin. Code § N 7.03(1)(h), which prohibits “failing to notify the board of a felony or misdemeanor conviction within 48 hours after the entry of the judgment of conviction.”

In addition, by repeatedly ignoring the Department’s request for information regarding its investigation, Respondent violated Wis. Admin. Code § N 7.03(1)(c), which prohibits “after a request of the board, failing to cooperate in a timely manner with the board’s investigation of a complaint filed against a license holder.”

As a result of this conduct, she is subject to discipline pursuant to Wis. Stat. § 441.07(1g)(b) and (d).

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 Department requests Respondent be reprimanded and that her practical nursing license and her privilege to practice nursing in Wisconsin pursuant to the Nurse Licensure Compact be limited in ways designed to promote her rehabilitation, ensure the public’s safety and deter others from engaging in such misconduct.

In order to protect the public, Respondent should be required to work under direct supervision for two years, provide quarterly work reports, notify all employers of this disciplinary order and notify the Department of any changes in employment. Direct supervision will ensure that any issues with record keeping, administration of medications or poor work

performance will be addressed by Respondent's supervisors or will be brought to the attention of the Board through the quarterly work reports. The direct supervision and quarterly reports will also promote rehabilitation of Respondent through accountability for her cooperation and compliance with the terms of the order.

In addition, the discipline imposed against Respondent should include a requirement that she complete education on nurse practice acts. Respondent has failed to cooperate with the Department's investigations by failing to show up for an interview and failing to respond to multiple requests by email and regular mail from the Department for information. This lack of cooperation shows disregard for the Board's authority and impedes the Board's ability to thoroughly investigate allegations of misconduct.

In order to deter other licensees from similar conduct, Respondent should be reprimanded for her lack of cooperation. Such discipline will put others on notice that ignoring requests from the Board will not be tolerated.

The discipline imposed in this case is consistent with prior Board decisions. For example, in the case, *In the Matter of Disciplinary Proceedings Against Jacob F. Kummer, R.N.*, Case No. 0004649 (April 14, 2016),³ a nurse provided false information to the Department during the course of an investigation into the circumstances of a criminal conviction. The nurse also admitted to ingesting a medication that was not prescribed to him and to having blackouts. The Board reprimanded the nurse and limited his license for two years. His license limitations included a fitness to practice assessment, an AODA assessment, completing education on nurse disciplinary actions, enrolling and participating in a drug monitoring program with random drug testing of not less than 49 times per year, providing a copy of the order to his employer, practicing only in a work setting pre-approved by the Board, practicing only in Wisconsin during the pendency of the limitations and paying costs.

In the case, *In the Matter of Disciplinary Proceedings Against Alicia R. Underwood, R.N.*, Case No. 0003976 (May 14, 2015),⁴ a nurse failed to cooperate with the Department during the course of an investigation into the circumstances of a criminal conviction which involved giving her personal prescription medication to a co-worker. The Board reprimanded the nurse and limited her license by requiring her to complete education on the topics of medication errors, boundaries and nurse practice acts. She was also limited to practicing only in Wisconsin during the pendency of the limitations and was required to pay costs.

Based on the facts of this case, the criteria in *Aldrich*, and prior Board decisions, it is appropriate to impose the discipline recommended by the Division and set forth in more detail in the order section below.

Costs

The Department is vested with discretion concerning whether to assess all or part of the costs of this proceeding against Respondent. See Wis. Stat. § 440.22(2). In exercising such

³A copy of this order can be found at <https://online.drl.wi.gov/decisions/2016/ORDER0004649-00012559.pdf>.

⁴A copy of this order can be found at <https://online.drl.wi.gov/decisions/2015/ORDER0003976-00011286.pdf>.

discretion, the Department must look at aggravating and mitigating facts of the case; it may not assess costs against a licensee based solely on a "rigid rule or invocation of an omnipresent policy," such as preventing those costs from being passed on to others. *Noesen v. State Department of Regulation & Licensing, Pharmacy Examining Board*, 2008 WI App 52, ¶¶ 30-32, 311 Wis. 2d 237, 751 N.W.2d 385. The Department has also, in previous orders, considered many factors when determining if all or part of the costs should be assessed against a Respondent. Factors have included: (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 (Aug. 14, 2008). It is within the Department's discretion as to which, if any, of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

Respondent's failure to participate in these proceedings negates any mitigation of imposing the full costs of this matter. Respondent's conduct is of a serious nature. The factual allegations were deemed admitted and there is no argument to indicate any factual findings or litigation were unnecessary. The Division has proven all counts alleged. The Division is seeking a reprimand with significant limitations of Respondent's nursing license. Respondent has failed to cooperate with the disciplinary process. By nature of being in default, Respondent has made no argument concerning whether costs should be assessed against her. Furthermore, 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 HEREBY ORDERED that:

1. Respondent Debra L. Aker, L.P.N., is REPRIMANDED.
2. Respondent's practical nursing license and her privilege to practice in Wisconsin pursuant to the Nurse Licensure Compact are LIMITED as follows:
 - a. Within ninety 90 days of the date of this Order, Respondent, at her own expense, shall complete four hours of education on the topic of nurse practice acts. Respondent is responsible for finding an appropriate course and submitting the course information to the Board or its designee for approval prior to taking the course and in sufficient time to obtain Board approval within the 90-day time frame, taking into account the Board's meeting schedule. Respondent shall provide proof of completion of the education to the Department Monitor.
 - b. Respondent shall provide her nursing employer with a copy of this Order before engaging in any nursing employment. Respondent shall provide the Department Monitor with written acknowledgment from each nursing

employer that a copy of this Order has been received. Such acknowledgment shall be provided to the Department Monitor within 14 days of beginning new employment and/or within 14 days of the date of this Order for employment current as of the date of this Order.

- c. For a period of at least two years while working at least half-time as a nurse, Respondent shall work only under direct supervision, and only in a work setting pre-approved by the Board. Respondent shall not work in a home health, assisted living, agency, pool or as a nurse in a correctional setting.
- d. For a period of at least two years while working at least half-time as a nurse, Respondent shall arrange for her nursing employer(s) to send to the Department Monitor quarterly reports, reporting the terms and conditions of Respondent's employment and evaluating her work performance.
- e. Pursuant to Nurse Licensure Compact regulations, Respondent's nursing practice is limited to Wisconsin during the pendency of this limitation. This requirement may be waived only upon the prior written authorization of both the Wisconsin Board of Nursing and the regulatory board in the state in which Respondent proposes to practice.
- f. Respondent shall notify the Department Monitor of any change of nursing employment during the time in which the Order is in effect. Notification shall occur within 15 days of a change of employment and shall include an explanation of the reasons for the change.
- g. After two years of working at least half-time as a nurse, Respondent may petition the board for the modification or termination of the limitation. The Board may grant or deny the petition, in its discretion, or may modify this Order as it sees fit.

3. Requests for approval of courses and work settings, proof of successful course completion, quarterly work reports, and acknowledgement that her employers received a copy of the order shall be sent by Respondent to the Department Monitor at the address below:

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

4. Violation of any of the terms of this Order may be construed as conduct imperiling public health, safety and welfare and may result in a summary suspension of Respondent's license. The Board in its discretion may in the alternative impose additional conditions and limitations or other additional discipline for a violation of any of the terms of this Order. In the

event Respondent fails to timely submit quarterly reports, fails to show this Order to employers, fails to submit acknowledgement that her employer received a copy of the Order, works in an unapproved setting, or fails to submit proof of successful completion of the ordered education as set forth above, Respondent's license may, in the discretion of the Board or its designee, be suspended, without further notice or hearing, until Respondent has submitted quarterly work reports, provides proof that her employer received a copy of the Order, has work settings approved, and has submitted proof of successful completion of the ordered education.

IT IS FURTHER ORDERED that 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 7190
Madison, WI 53707-7190

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

Dated at Madison, Wisconsin on April 7, 2017.

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