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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

FINAL DECISION AND ORDER
WITH VARIANCE

JEREMY K. WETHERALD, R.N.,
RESPONDENT.

DHA Case No. SPS-16-0068
DLSC Case No. 15 NUR 572

0005391

BACKGROUND

On April 12, 2017, Administrative Law Judge Jennifer Nashold (ALJ), Division of Hearings and Appeals, issued a Proposed Decision and Order (PDO) in the above-referenced matter. The PDO was mailed to all parties. On July 13, 2017, the Board of Nursing (Board) met to consider the merits of the PDO. The Board voted to approve the PDO with a variance. The PDO is attached hereto and incorporated in its entirety into this Final Decision and Order with Variance (Order).

VARIANCE

Pursuant to Wis. Stat. §§ 440.035(1m) and 441.07, the Board is the regulatory authority and final decision maker governing disciplinary matters of those credentialed by the Board. The matter at hand is characterized as a class 2 proceeding pursuant to Wis. Stat. § 227.01(3). The Board may vary a PDO in a class 2 proceeding pursuant to Wis. Stat. § 227.46(2).

In the present case, the Board adopts the PDO in its entirety with the exception of a variance to the section titled, "**ORDER**" on pages 7-10 of the PDO. The Board issues the following variance to the PDO because Respondent's license is expired. Consistent with past practice, the Board shall place any necessary limitations on Respondent's license at the time that he renews said license, if that occurs.

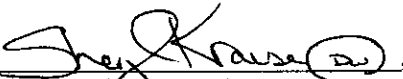
The section titled "ORDER" is varied as follows:

Paragraphs 2 through 7 (and any subparagraphs) and the paragraph immediately following paragraph 7 relating to the payment of costs are deleted. The following is substituted in its place:

IT IS FURTHER ORDERED, that should Respondent attempt to renew his license within the applicable five (5) year right to renew period, Respondent shall first pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18 prior to the Board of Nursing's consideration of any such renewal application.

IT IS FURTHER ORDERED, that should Respondent attempt to renew his license within the applicable five (5) year right to renew period, the Board of Nursing may determine whether and under what terms and conditions such renewal may be granted.

Dated this 8 day of August 2017.

By: 
A Member of the Board



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
Jeremy K. Wetherald, R.N., Respondent

DHA Case No. SPS-16-0068
DLSC Case No. 15 NUR 572

0005391

PROPOSED DECISION AND ORDER

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

Jeremy K. Wetherald
141 Riverside Drive
Waterford, WI 53185

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 Amanda L. Florek
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 Jeremy K. Wetherald, R.N. (Respondent), alleging that Respondent engaged in unprofessional conduct by obtaining, possessing or attempting to obtain or possess a drug without lawful authority, in violation of Wis. Admin. Code § N 7.03(8)(e).

The Division served Respondent on December 6, 2016, by sending a copy of the Notice of Hearing and Complaint to Respondent via certified and regular mail. On December 25, 2016, Respondent filed an Answer to the Division's Complaint, admitting all of the allegations contained in paragraphs 1-18 in the Complaint.

On January 4, 2017, the undersigned administrative law judge (ALJ) issued a Notice of Telephone Prehearing Conference which set a telephone pre-hearing conference for January 18, 2017.

On January 18, 2017, the ALJ held a prehearing telephone conference at which time Respondent confirmed that he did not dispute the Division's factual allegations as contained in the Division's Complaint and that the facts constituted unprofessional conduct for which discipline may be imposed. The parties agreed that the remaining issues of discipline and costs may be determined through briefing.

The ALJ subsequently issued a briefing order, pursuant to which the Division filed its initial brief on February 6, 2017, Respondent filed a response on February 28, 2017, and the Division filed a reply on March 9, 2017.

FINDINGS OF FACT

1. Respondent Jeremy K. Wetherald, R.N., is licensed in the State of Wisconsin as a professional nurse, having license number 190088-30, first issued on June 6, 2012. This license expired on February 29, 2016. (Complaint, ¶ 1; Answer, ¶ 1)

2. Respondent has not renewed this license. (Complaint, ¶ 2; Answer, ¶ 1)

3. Pursuant to Wis. Stat. § 440.08(3), Respondent retains the right to renew upon payment of a fee until February 27, 2021. (Complaint, ¶ 3; Answer, ¶ 1)

4. At all times relevant to this proceeding, Respondent was employed as a professional nurse at a medical center (Center), located in Burlington, Wisconsin. (Complaint, ¶ 6; Answer, ¶ 1)

5. Respondent's professional nursing license is currently suspended pursuant to Board of Nursing Order Number 3388, dated September 11, 2014. (Complaint, ¶ 7; Answer, ¶ 1)

6. On July 13, 2013, the Walworth County Sheriff's Department executed a search warrant on Respondent's residence. (Complaint, ¶ 8; Answer, ¶ 1)

7. During the execution of the search warrant, detectives discovered the following:

- a. Drug paraphernalia, commonly used to smoke marijuana;
- b. Several baggies containing marijuana;
- c. One vial of lorazepam;
- d. One vial of atropine sulfate;
- e. One vial of tetanus toxoid;

- f. 22 tablets of Nitrostat 0.4 mg; and
- g. One hypodermic needle.

(Complaint, ¶ 9; Answer, ¶ 1)

8. Respondent does not have physicians' prescriptions for the medications found at his residence. (Complaint, ¶ 10; Answer, ¶ 1)

9. On October 13, 2015, Respondent, in Racine County Circuit Court case number 2015CM095, was convicted of one count of possession of drug paraphernalia, in violation of Wis. Stat. § 961.573(1), a misdemeanor; and one count of possession of tetrahydrocannabinol, in violation of Wis. Stat. § 961.41(3g)(e), a misdemeanor. (Complaint, ¶ 11; Answer, ¶ 1)

10. Respondent timely reported this conviction to the Department. (Complaint, ¶ 12; Answer, ¶ 1)

11. On May 16, 2016, Respondent, in an interview with a Department investigator, admitted that the medications found in his residence came from his employer. (Complaint, ¶ 13; Answer, ¶ 1)

12. Respondent explained that he forgot to empty his pockets at the end of his shift and intended to return the medication on his next shift. (Complaint, ¶ 14; Answer, ¶ 1)

13. Respondent acknowledged that the medication should have been properly wasted and denied intentionally diverting the medication. (Complaint, ¶ 15; Answer, ¶ 1).

14. Respondent further admitted to smoking marijuana recreationally and denied being dependent on any other drug, illicit or prescription. (Complaint, ¶ 16; Answer, ¶ 1).

DISCUSSION AND CONCLUSIONS OF LAW

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. Sauter*, 60 F.3d 270, 280 (7th Cir. 1995)

Violations

The Wisconsin Board of Nursing (Board) may revoke, limit, suspend or deny renewal of a license of a registered 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.

Respondent has admitted that, by the conduct described above, he engaged in unprofessional conduct as defined by Wis. Admin. Code § N 7.03(8)(e), by obtaining, possessing or attempting to obtain or possess a drug without lawful authority. (Complaint, ¶ 17; Answer, ¶ 1) Respondent has admitted that, as a result of the above violation, he is subject to discipline pursuant to Wis. Stat. § 441.07(1g)(b) and (d). (Complaint, ¶ 18; Answer, ¶ 1)

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 argues that Respondent should be reprimanded, that his license be limited for two years to provide for drug monitoring and treatment, and that he be required to take four hours of education on the topic of medication errors. The Division's recommended discipline is appropriate. Nurses are responsible for handling controlled substances that they have access to due to their professional licensure. Respondent's conduct in bringing home medications from his employer violates the trust needed to ensure controlled substances are properly handled, administered and disposed of. Furthermore, Respondent has admitted to use of marijuana, an illicit substance, for personal use.

Respondent argues that he did not intentionally bring medication home from his workplace. He states that he mistakenly brought them home, that law enforcement and hospital investigations proved he did not divert them, and that although he was originally charged with four misdemeanor criminal offenses related to these facts, he was not prosecuted with respect to the medications because, after extensive investigation, no criminal intent was found. As pointed out by the Division, however, there is nothing in the record to support Respondent's statements. The record contains no information regarding Respondent's employment situation or why he was not convicted of any charges relating to the medications. Thus, it cannot be assumed that Respondent did not intentionally divert medications, and the discipline imposed must take into account that possibility. In addition, the discipline must address Respondent's use of marijuana.

In order to promote rehabilitation and public protection, therefore, the discipline imposed should include drug testing to ensure Respondent is not taking non-prescribed medications or illegal drugs. Drug testing is the only way that the Board will know if Respondent has ingested any medications that are not prescribed to him or are otherwise illegal. That testing should continue for a period of two years, with testing for at the least first year at a frequency of 49 times per year. Education is also needed and will help rehabilitate Respondent on proper medication handling practices.

Further, public protection requires that Respondent provide the order in this matter to all nursing employers to ensure that Respondent is adequately monitored and that any unusual

behavior can be brought to the attention of the Board or its designee. Having access to controlled substances provides too much of an opportunity for Respondent to obtain substances he cannot legally possess. As such, Respondent should be prohibited from having access to controlled substances. Additionally, Respondent should be restricted to work in Wisconsin pursuant to the Nurse Licensure Compact during the pendency of the limitations because otherwise monitoring becomes too difficult.

Reprimanding Respondent will deter other nurses from diverting medication from their employers, either intentionally or unintentionally. A reprimand will also deter other nurses from using illicit substances.

The Division cites several decisions involving nurses using or diverting controlled substances in which the Board imposed discipline similar discipline to that requested by the Division in this case. In *In the Matter of Disciplinary Proceedings Against Monica J. Stout, R.N., A.P.N.P.*, Order No. 000361 (Jan. 8, 2015),¹ a nurse diverted 26 tablets of Vicodin. She did not ingest the medication at work. The Board reprimanded her and limited her license for two years. The nurse's license limitations included 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 her employer, not working in a setting where she had access to controlled substances, completing education on the topics of ethics in nursing and medication dispensing, practicing only in Wisconsin during the pendency of the limitations and paying costs.

In another case, *In the Matter of Disciplinary Proceedings Against Kimberly Hughes, L.P.N.*, Order No. 0004958 (Oct. 13, 2016),² a nurse was acting unusual while on duty and complained of abdominal pain. She was taken to the emergency department and underwent a urine screen. The urine screen was positive for tetrahydrocannabinol (THC). The Board reprimanded the nurse and limited her license for two years. Her license limitations included 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 her employer, providing acknowledgment from her employer that the employer has reviewed a copy of the order, practicing only in a work setting pre-approved by the Board, practicing only in Wisconsin during the pendency of the limitations, and paying costs.

Two other cases cited by the Division involved nurses who tested positive for THC during pre-employment drug screens. In *In the Matter of Disciplinary Proceedings Against Rachel A. Weese, R.N.*, Order No. 0003529 (Nov. 10, 2014),³ the Board reprimanded the nurse and limited her license for two years. The license limitations included enrolling and participating in a drug monitoring program with random drug testing of not less than 49 times per year, showing a copy of the order to her employers, working in Wisconsin during the pendency of the limitations, and payment of costs. In *In the Matter of Disciplinary Proceedings Against Catherine A. Stoehr, L.P.N.*, Order No. 0003395 (Sept. 11, 2014),⁴ the Board also reprimanded the nurse and limited her license for two years. The license limitations included enrolling and

¹ A copy of this order is can be found at <https://online.drl.wi.gov/decisions/2015/ORDER0003621-00010651.pdf>.

² A copy of this order can be found at <https://online.drl.wi.gov/decisions/2016/ORDER0004958-00013122.pdf>.

³ A copy of this order can be found at <https://online.drl.wi.gov/decisions/2016/ORDER0003529-00010493.pdf>.

⁴ A copy of this order can be found at <https://online.drl.wi.gov/decisions/2014/ORDER0003395-00010204.pdf>.

participating in a drug monitoring program with random drug testing of not less than 49 times per year, working in Wisconsin during the pendency of the limitations, and payment of costs. Unlike the instant case, neither of these cases involved any indication of diversion of medications from employers. Therefore, no limitations were imposed with respect to working with access to controlled substances or practicing in work settings pre-approved by the Board.

Respondent agrees that it is appropriate to impose a reprimand combined with educational requirements and costs, but argues that other limitations requested by the Division are unwarranted. In support of this position, he relies in part on *In the Matter of Disciplinary Proceedings Against David Knack, R.N.*, Order No. 0003012 (Feb. 13, 2014), in which a nurse was involved in improper charting, improper documentation of medication administration and removal of controlled substances from PYXIS that was unaccounted for. In addition, the nurse in that case underwent a drug screen due to reasonable suspicion which tested positive for THC. The Board imposed a reprimand along with six hours of education on the topic of responsible medication dispensing and documentation. There was no testing, monitoring or other significant limitation imposed. It is difficult to square the discipline imposed in *Knack* with that imposed in *Weese and Stoehr*. The nurses in *Weese and Stoehr* tested positive to THC only as part of a pre-employment test, and were not suspected of diversion in any way, whereas the nurse in *Knack* tested positive based on reasonable suspicion and there was also evidence of possible diversion of medications from patients. Nevertheless, the discipline imposed on the nurses in *Weese and Stoehr* was much more restrictive than that imposed in *Knack*. The Division attempts to explain this discrepancy as a change in policy resulting from the “substance abuse epidemic.” This explanation is not persuasive, as all three decisions were issued in 2014. That said, however, it appears that the greater weight of prior Board decisions supports the type of discipline requested in this case. Moreover, unlike Respondent in this case, neither the nurse in *Knack* nor the nurses in any of the other cases had received prior discipline from the Board. Here, as acknowledged by the parties, Respondent has already been disciplined by the Board on a prior occasion. Although that disciplinary action did not involve drug allegations but instead involved sexual activity with a minor, the prior discipline militates in favor of the need for greater monitoring of Respondent.

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 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.

The Division requests that all costs be assessed against Respondent. Respondent states that he has taken responsibility for his conduct and agrees he should be assessed costs. It is not clear whether Respondent's acceptance of costs is contingent upon his receiving the less severe limitations on his license he requested but did not receive in this matter. Nevertheless, I conclude that although Respondent showed extensive cooperation in this matter, he should be assessed the full costs of these proceedings. Respondent does not contest costs or the one count alleged. Respondent's conduct in mishandling medications, possessing drug paraphernalia and marijuana, and having been convicted of misdemeanors is serious conduct. Furthermore, Respondent's admission to law enforcement that he ingests marijuana recreationally is also serious conduct. Significantly, this is not the first time Respondent has been disciplined by the Board. He was recently disciplined by the Board for engaging in sexual activity with a minor. Also, 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 Jeremy K. Wetherald, R.N., is REPRIMANDED.
2. Respondent's license to practice nursing in the State of Wisconsin, and his privilege to practice in Wisconsin pursuant to the Nurse Licensure Compact, are LIMITED as follows:
 - a. For a period of at least two years from the date of this Order:
 - i. Respondent shall enroll and participate in a drug monitoring program which is approved by the Department (Approved Program). Enrollment shall occur within 30 calendar days from the date of this Order.
 - ii. At the time Respondent enrolls in the Approved Program, Respondent shall review all of the rules and procedures made available by the Approved Program. Failure to comply with all requirements for participation in drug monitoring established by the Approved Program is a substantial violation of this Order. The requirements shall include:
 1. Contact with the Approved Program as directed on a daily basis, including vacations, weekends and holidays.
 2. Production of a urine, blood, sweat, fingernail, hair, saliva or other specimen at a collection site designated by the Approved Program within five hours of notification of a test.

3. The Approved Program shall require the testing of specimens at a frequency of not less than 49 times per year, for at least the first year of this Order. Thereafter, the Board may adjust the frequency of testing on its own initiative at any time.
- iii. Respondent shall abstain from all personal use of controlled substances as defined in Wis. Stat. § 961.01(4), except when prescribed, dispensed or administered by a practitioner for a legitimate medical condition. Respondent shall disclose Respondent's drug history and the existence and nature of this Order to the practitioner prior to the practitioner ordering the controlled substance. Respondent shall at the time the controlled substance is ordered immediately sign a release in compliance with state and federal laws authorizing the practitioner to discuss Respondent's treatment with, and provide copies of treatment records to, the Board or its designee. Copies of these releases shall immediately be filed with the Department Monitor.
- iv. Respondent shall report to the Department Monitor all prescription medications and drugs taken by Respondent. Reports must be received within 24 hours of ingestion or administration of the medication or drug, and shall identify the person or persons who prescribed, dispensed, administered or ordered said medications or drugs. Each time the prescription is filled or refilled, Respondent shall immediately arrange for the prescriber or pharmacy to fax and mail copies of all prescriptions to the Department Monitor.
- v. Respondent shall provide the Department Monitor with a list of over-the-counter medications and drugs that he may take from time to time. Over-the-counter medications and drugs that mask the consumption of controlled substances, create false positive screening results, or interfere with Respondent's treatment and rehabilitation, shall not be taken unless ordered by a physician, in which case the drug must be reported as described in the paragraph 2(a)iv.
- vi. All positive test results are presumed valid and may result in automatic suspension of licensure by the Board or the Board's designee. Respondent must prove by a preponderance of the evidence an error in collection, testing, fault in the chain of custody or other valid defense.
- vii. If any urine, blood, sweat, fingernail, hair, saliva or other specimen is positive or suspected positive for any controlled substances, Respondent shall promptly submit to additional tests or examinations as the Board or its designee shall determine to be appropriate to clarify or confirm the positive or suspected positive test results.
- viii. Respondent shall practice only in a work setting pre-approved by the Board or its designee.

- ix. Respondent shall provide his 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.
- x. Respondent shall not work as a nurse or other health care provider in a setting in which Respondent has access to controlled substances. Respondent shall provide the Department Monitor with written acknowledgment from each nursing employer that Respondent does not have access to controlled substances. Such acknowledgement shall be provided to the Department Monitor within 14 days from the date of this Order for any current employer and on a quarterly basis thereafter from each nursing employer.

3. The professional nursing license issued to Respondent, and his privilege to practice in Wisconsin pursuant to the Nurse Licensure Compact, are further LIMITED as follows:

- a. Within 90 days of the date of this Order, Respondent shall at his own expense, successfully complete four hours of education on the topic of medication errors offered by a provider pre-approved by the Board's monitoring liaison, including taking and passing any exam offered for the courses.
- b. Respondent shall submit proof of successful completion of the education in the form of verification from the institution providing the education to the Department Monitor at the address stated below. None of the education completed pursuant to this requirement may be used to satisfy any continuing education requirements that have been or may be instituted by the Board or Department, and also may not be used in future attempts to upgrade a credential in Wisconsin.
- c. This limitation shall be removed from Respondent's license after satisfying the Board or its designee that Respondent has successfully completed all of the ordered education.

4. Pursuant to Uniform Nurse Licensure Compact regulations, Respondent's nursing practice is limited to Wisconsin during the pendency of these limitations. 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.

5. The Board or its designee may, without hearing, suspend Respondent's nursing license upon receipt of information that Respondent is in substantial or repeated violation of any provision of this Order. A substantial violation includes, but is not limited to, a positive drug screen. A repeated violation is defined as the multiple violations of the same provision or violation of more than one provision. The Board or its designee may, in conjunction with the

suspension, prohibit Respondent from seeking termination of the suspension for a specified period of time.

6. The Board or its designee may terminate the suspension if provided with sufficient information that Respondent is in compliance with the Order and that it is appropriate for the suspension to be terminated. Whether to terminate the suspension shall be wholly in the discretion of the Board or its designee.

7. After the first year from the date of this Order, Respondent may petition the Board on an annual basis for a modification of the terms of this Order. After two consecutive years of successful compliance, Respondent may petition the Board for return of full licensure. The Board may grant or deny any petition, in its discretion, or may modify this Order as it sees fit.


IT IS FURTHER ORDERED that Respondent shall pay all of the 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 12, 2017.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: 
Jennifer E. Nashold
Administrative Law Judge