

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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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**

**YVETTE JOHNSON-HARRIS, R.N.
RESPONDENT.**

DHA Case No. SPS-14-0049
DLSC Case No. 13 NUR 133

0005463

BACKGROUND

On June 23, 2017, Administrative Law Judge Mark F. Kaiser (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 7, 2017, the Division of Legal Services and Compliance (Division) filed an objection, requesting the Board of Nursing (Board) modify the proposed discipline to be consistent with other orders. The Division also requested the Board assess one hundred percent (100%) of the total costs of this matter to Respondent and to add citations to specific Wisconsin Statutes and appellate case law regarding the imposition of costs. On July 11, 2017, Respondent filed an objection to the allocation of costs, arguing the Board should waive the imposition of costs. Respondent also responded to the Division's objections, urging the Board to adopt the ALJ PDO as the final decision and order. On September 14, 2017, the Board met to consider the merits of the PDO and the stated objections. The Board voted to approve the PDO with variance. The PDO is attached hereto and incorporated into this Final Decision and Order with Variance.

VARIANCE

Pursuant to Wis. Stat. §§ 440.035(1m) and 441.07(1g), 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)(b). The Board may make modifications to a PDO, in a class 2 proceeding, pursuant to Wis. Stat. § 227.46(2), provided the Board's decision includes an explanation of the basis for each variance.

In the present case, the Board adopts the PROCEDURAL HISTORY and FINDINGS OF FACT from the PDO. The Board also adopts the imposition of fifty percent (50%) costs, though varies the law and reasoning for the amount of costs imposed. The Board varies the remainder of the PDO as follows:

DISCUSSION

The Board of Nursing may "revoke, limit, suspend or deny renewal of a license of a registered nurse" if that nurse committed one or more violations of any rule adopted by the Board or committed misconduct or unprofessional conduct. Wis. Stat. §§ 441.07(1)(b) and (d).¹ The parties stipulated that the elements of the crimes the jury found the Respondent guilty of is the conduct that will be ascribed to her. This conduct constitutes misconduct or unprofessional conduct as defined in Wis. Admin. Code §§ N 7.04(1) and (13), respectively, by violating a law substantially related to the practice of professional nursing and by obtaining compensation by fraud. The only dispute is the appropriate discipline for the violations found and assessment of costs for the disciplinary proceedings.

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 has recommended as discipline, that Respondent be reprimanded and that her professional nursing license and her privilege to practice in Wisconsin pursuant to the Nurse Licensure Compact be limited to require her to complete four (4) hours of ethics education and five (5) hours of education on the topic of professional and legal accountability. The Division also recommended that Respondent's nursing license and privilege to practice in Wisconsin, pursuant to the Nurse Licensure Compact, be further limited to require her to 1) provide her nursing employer(s) with a copy of this Order before engaging in any nursing employment; 2) work only under direct supervision, and only in a work setting pre-approved by the Board for a period of two (2) years, which shall not include a home health, assisted living, agency or pool position; 3) provide quarterly reports to the Department from her employers for a period of two (2) years; 4) limit her practice to Wisconsin unless she receives written authorization from the Wisconsin Board and the regulatory authority in the state in which she proposes to practice; and 5) notify the Department of any change in employment.

As support for its recommendation, the Division cited the decision *In the Matter of Disciplinary Proceedings Against Kawana Hickman, L.P.N.*, Order No. 0002526 (July 11, 2013). Ms. Hickman was convicted of three (3) counts of theft by false representation, Wis. Stat. § 943.20(1)(a) (class A misdemeanors), for conduct that occurred in 2007 and 2008. She was charged with intentionally deceiving a Wisconsin Medicaid recipient and obtaining fraudulent Medicaid payments of over \$4,000. Ms. Hickman admitted to billing for services she did not provide and billing for services without appropriate documentation. The Board reprimanded Ms. Hickman and imposed the same limitations on her nursing license as that requested here, including no work in a home health, assisted living, agency or pool position, quarterly reports from her nursing employers, and limiting her practice to Wisconsin. Ms. Hickman was employed at a nursing home and the license restrictions imposed did not prohibit her current employment. Ms. Hickman was also ordered to complete, within 90 days of the date of the order, four (4)

¹ All citations are to the Wisconsin Statutes and Administrative Code in effect at the time of the conduct at issue.

hours of education on nursing ethics and five (5) hours of education on the topic of professional and legal accountability.

The Division also cited to the decision *In the Matter of Disciplinary Proceedings Against Lara Skrzypczynski, R.N.*, Order No. 004141 (July 9, 2015). Ms. Skrzypczynski was convicted of Medicaid fraud (felony) and falsifying a health care record (misdemeanor). The convictions were based on conduct from 2007 through 2010, in which Ms. Skrzypczynski submitted numerous claims for payment to Medicaid for private duty nursing services, requesting payment for nursing care provided to two (2) clients when she had not performed the nursing services. She was sentenced to 90 days jail with work release, three (3) years of probation, counseling, and restitution in the amount of \$45,786.67. The Board suspended her nursing license for six (6) months and imposed limitations which required her to comply with the terms of her criminal probation, provide her nursing employers with a copy of her Order before engaging in any nursing employment, work only under direct supervision in a work setting pre-approved by the Board, not work in a home health, assisted living, agency, pool or as a nurse in a correctional setting, quarterly work reports, notify the Board of changes in employment, and no direct billing.²

The Respondent cited four (4) decisions involving similar violations asserting the discipline assessed was a reprimand with no license restrictions. Three (3) cases involved nurses and one (1) case related to a physician. Because the Board's authority is limited to practical and professional nurses, the Board will limit its review to those matters involving nurses. The first nursing case is *In the Matter of Disciplinary Proceedings Against Wendi J. Mueller, R.N.*, Order No. LS0911055NUR (Nov. 5, 2009). In this case, Ms. Mueller was convicted of three (3) counts of theft-false representation (misdemeanors) and she was required to complete two (2) years of probation. Ms. Mueller was given a reprimand by the Board and was further restricted from health care practice by one of the terms of her probation, which required Ms. Mueller not work in a position where she would be participating in direct billing to Medicare or Medicaid.

The next two (2) cases provided are *In the Matter of Disciplinary Proceedings Against Bella Yelin, R.N.*, Order No. LS05031010NUR (March 10, 2005), and *In the Matter of Disciplinary Proceedings Against Alla Lisak, R.N.*, Order No. LS0503104NUR (March 10, 2005). In these cases, both Ms. Yelin and Ms. Lisak were convicted of felony federal healthcare fraud and were required to complete 12 months of probation, pay restitution, and fines. Both of their respective nursing licenses were suspended for an indefinite period, with an immediate stay of suspension conditioned upon compliance with numerous limitations including: 1) indirect supervision of a licensed professional nurse or other licensed healthcare professional approved by the Board, 2) work setting pre-approval by the Board, 3) limitations on the total number of work hours allowable in any given week, 4) providing their nursing employer with a copy of their orders, 5) quarterly employer work reports assessing their work performance, and 6) reporting any change in employment status, residence, address, or telephone number within five

² The Division notes that the imposition of a significant suspension for Ms. Skrzypczynski was based on the extent and amount of billing fraud she engaged in. The amount and extent of which is not present in Respondent's case before the Board. As such, the Division is not recommending a period of suspension.

(5) days of the date of the change. These limitations were imposed for a period of at least three (3) years which required active nursing practice under the terms of the Order.

In the instant case, Respondent was convicted of one (1) misdemeanor count of theft by false representation and one (1) felony count of Medicaid fraud, both of which occurred while Respondent was employed as a professional nurse in a home health capacity. Respondent billed for providing continuous in-home nursing services for a particular patient. During the exact same time, Respondent also billed a different employer for providing multiple in-home medication management check services. These are serious offenses which relate to the practice of nursing. Respondent was convicted of both a misdemeanor level offense as well as a more serious felony level conviction.

The Board finds the Division's recommended discipline is appropriate in this matter and consistent with prior Board decisions. Similar facts warrant similar discipline. In each of the cited cases, which involve a felony medical fraud conviction, or multiple misdemeanor medical fraud convictions, the Respondent received at least a reprimand and limitations for a period of at least two (2) years. *See In the Matter of Disciplinary Proceedings Against Kawana Hickman, L.P.N.*, (Three (3) counts theft by false representation (misds.) resulted in reprimand and license limitations for two (2) years); *In the Matter of Disciplinary Proceedings Against Lara Skrzypczynski, R.N.*, (One (1) count Medicaid fraud (fel.) and one (1) count falsifying a health care record (misd.), resulting in six (6) month suspension and license limitations for two (2) years); *In the Matter of Disciplinary Proceedings Against Wendi J. Mueller, R.N.*, (three (3) counts of theft-false representation (misds.) resulted in a reprimand³); *In the Matter of Disciplinary Proceedings Against Bella Yelin, R.N.*, and *In the Matter of Disciplinary Proceedings Against Alla Lisak, R.N.*, (One (1) count healthcare fraud (fel.), resulted in a suspension and limitations for three (3) years). The required limitations in each of these cases are also similar to those requested by the Division. Further, these cases reflect the Board's effort to promote rehabilitation of licensees and protection of the public through education and monitoring of nursing practice.

The Respondent has failed to acknowledge any deficiencies in her billing practices, and as such, the education component is essential to provide needed rehabilitation through education. The licensure limitations further advance the causes of discipline as the order notifies the employer of the licensees past billing deficiencies and allows for the employer to ensure the licensees billing practices are monitored and completed properly. Direct supervision in a pre-approved worksite will ensure that issues with billing will be addressed and brought to the Board's attention through the quarterly work reports. Direct supervision and quarterly work reports will also promote the rehabilitation of Respondent through accountability for her nursing practice, including her billing practices. Additionally, limitations are necessary to remove the licensee from the home health setting in order to remove the opportunity and temptation to continue to overbill or fraudulently bill for nursing services. Finally, the Division's recommended discipline is necessary to deter other licensed nurses from engaging in similar conduct.

³ Ms. Mueller's nursing employment opportunities were limited by a term of her probation for her convictions which forbade working in a position where she would participate in direct billing to Medicare or Medicaid.

Costs

The Board has authority to assess costs for these disciplinary proceedings, pursuant to Wis. Stat. § 440.22(2), which reads, in part:

In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder.

The Board is not required to go through any particular analysis when determining whether to assess all or part of the costs of this proceeding against the Respondent. Nevertheless, guidance can be found in *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. In *Noesen*, the Court opined:

Under Wis. Stat. § 440.22(2), the Board may, in its discretion, "assess all or part of the costs of the proceeding" against the licensee if the Board takes disciplinary action as a result. We give due weight to the Board's exercise of discretion. Wis. Stat. § 227.57(10). In reviewing the exercise of discretion, we look to determine whether the decision maker examined the relevant facts, applied the proper standard of law, and reached a reasonable conclusion. *Doerschling*, 138 Wis. 2d at 328.

Id. ¶ 30.

In addition to the mandatory authority of *Noesen*, in previous orders, such as *In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz* (LS 0802183 CHI), the Board has considered the following non-mandatory factors to aid in determining if all or part of the costs should be assessed against a Respondent:

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 of Safety and Professional Services is a "program revenue" agency; and
7. Any other relevant circumstances.

In considering these factors, the Board has the discretion to give each factor the weight appropriate given present circumstances. In this case, the Board finds that the imposition of fifty percent (50%) of the costs is warranted.

The Division cited two (2) criminal convictions and alleged that those convictions constituted misconduct and unprofessional conduct. The conduct was serious in that Respondent

fraudulently took Medicaid funds to which she was not entitled. The level of discipline sought by the Division, and imposed by the Board, is a reprimand and certain practice limitations on Respondent's license and on her privilege to practice under the Nurse Licensure Compact. The discipline is serious, but less severe than a suspension or revocation of the Respondent's license. With regard to the fourth and fifth factors, the Respondent has cooperated in these proceedings and she has had no prior disciplinary actions taken against her license. This was also a case with a unique procedural history, owing to actions by both the Respondent and the Board.

Finally, the Department of Safety and Professional Services is a program revenue agency, whose operating costs are funded by the revenue received from credential holders. This is a fact that weighs heavily into the calculation of the appropriate amount of costs to be borne by the Respondent. Based on the foregoing, the Board finds the Respondent shall pay fifty percent (50%) of the costs of this matter.

CONCLUSIONS OF LAW

1. Pursuant to Wis. Stat. §§ 441.07(1)(b) and (d), the Wisconsin Board of Nursing has jurisdiction to act in this matter and impose the discipline ordered below.

2. The Respondent's convictions for Medicaid fraud (Wis. Stat. § 49.49(1)(a)1.) and theft by false representation (Wis. Stat. § 943.20(1)(d)) constitute misconduct and unprofessional conduct as defined in Wis. Admin. Code § Nur 7.04(1) and (13).

3. The discipline set forth in the Order section below is warranted pursuant to the facts of record and factors delineated in *Aldrich*.

4. Imposition of fifty percent (50%) of the costs of these proceedings on Respondent, pursuant to Wis. Stat. § 440.22, is appropriate under the facts of this case and the factors from *Noesen* and *Buenzli-Fritz*.

ORDER

For the reasons set forth above it is hereby ORDERED:

1. Respondent Yvette Johnson-Harris, R.N., is REPRIMANDED.
2. The professional license issued to Respondent Yvette Johnson-Harris, R.N. (license number 107880-30) 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 shall at her own expense, successfully complete four (4) hours of education on the topic of ethics and five (5) hours of education on the topic of professional and legal accountability 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.

3. The professional license issued to Respondent Yvette Johnson-Harris, R.N. (license number 107880-30) and her privilege to practice in Wisconsin pursuant to the Nurse Licensure Compact, are further LIMITED as follows:

- a. 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 fourteen (14) days of beginning new employment and/or within fourteen (14) days of the date of this Order for employment current as of the date of this Order.
- b. For a period of at least two (2) 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 setting.
- c. For a period of at least two (2) 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.
- d. 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.
- e. 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 fifteen (15) days of a change of employment and shall include an explanation of the reasons for the change.


- f. After two (2) 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.

4. Respondent shall pay fifty percent (50%) of all recoverable costs in this matter in an amount to be established, pursuant to Wis. Stat. § 440.22(2) and 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 & Compliance
1400 East Washington Ave., P.O. Box 7190
Madison, WI 53707-7190

5. The terms of this Order are effective on the date of the Final Decision and Order in this matter is signed by the Board.

Dated at Madison, Wisconsin this 10th day of October, 2017

By: 
A Member of the Board



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

In the Matter of Disciplinary Proceedings Against
Yvette Johnson-Harris, R.N., Respondent

DHA Case No. SPS-14-0049
DLSC Case No. 13 NUR 133

PROPOSED DECISION AND ORDER

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

Yvette Johnson-Harris, R.N., by

Attorney Diane M. Welsh
Pines & Bach
122 West Washington Avenue, Suite 900
Madison, WI 53703

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

This proceeding was initiated by the filing of a complaint by the Department of Safety and Professional Services, Division of Legal Services and Compliance (Division), on June 10, 2014, against Yvette L. Johnson Harris, R.N. (Respondent). The disciplinary action against the Respondent was commenced after she was convicted of one count of Medicaid fraud and one count of theft by false misrepresentation. The matter was assigned to Administrative Law Judge Jennifer Nashold. ALJ Nashold issued a Proposed Decision based on a stipulation of facts and written argument. The Respondent filed objections to the Proposed Decision with the Wisconsin Board of Nursing (Board). The Board remanded the matter to the Division of Hearings and Appeals “for the purpose of opening the record to consider the Respondent’s objections to the

ALJ's Proposed Decision and Order and the Division's response to the Respondent's objections, to take additional testimony if needed, and to issue a new Proposed Decision and Order after further consideration." After the remand, the matter was reassigned to Administrative Law Judge Mark F. Kaiser.

The Respondent's objections to the Proposed Decision and Order included an allegation that the stipulation did not accurately describe the Respondent's conduct and that the convictions were going to be appealed. After the remand, the parties agreed that further proceedings before the Division of Hearings and Appeals should be continued until the criminal appeal was resolved. After a lengthy delay during which an appeal of the convictions was not be filed, it was decided that proceeding before the Division of Hearings and Appeals should no longer be continued. A status conference was conducted on June 15, 2016. During the status conference, the following process for issuing a new Proposed Decision and Order on remand was established.

The factual basis for imposing discipline on the Respondent are her convictions for Medicaid fraud in violation of Wis. Stat. § 49.49(1)(a)1 and for theft by false misrepresentation in violation of Wis. Stat. § 943.20(1)(d). In lieu of an evidentiary hearing or a stipulation, the parties submitted a copy of the transcript of the criminal trial. Using the trial transcript in lieu of an evidentiary hearing, the parties submitted written argument on the appropriate discipline for the Respondent's conduct.

FINDINGS OF FACT

1. Respondent Yvette L. Johnson Harris, R.N. (D.O.B. February 5, 1963), is licensed in the State of Wisconsin as a professional nurse, having license number 107880-30, first issued on September 5, 1991 and current through February 28, 2018 (see exh. 1 attached to Respondent's response brief).

2. The Respondent's most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) is 8820 West Spokane Street, Milwaukee, Wisconsin 53224.

3. At all times relevant to this proceeding, Respondent was employed as a professional nurse in a home health capacity.

4. On March 8, 2013, Respondent was convicted in Milwaukee County Circuit Court Case Number 12 CF 1844 of one count of Medicaid fraud, in violation of Wis. Stat. § 49.49(1)(a)1 (a class H felony) and one count of theft by false representation ≤ \$2,500.00, in violation of Wis. Stat. § 943.20(1)(d) (a class A misdemeanor). The conduct that formed the basis of the convictions occurred on three days in 2010, June 5, June 11, and August 1. This matter was set for decision based on the transcript of the Respondent's criminal trial. The conduct that the Respondent will be considered to have engaged in is the elements of the two statutes that she was convicted of violating. The elements of those crimes as described in the jury instructions provided by the trial judge are:

- A. For the conviction of Medicaid fraud/benefit application (Wis. Stat. § 49.49(1)(a)1) the elements are:
 - i. The respondent caused to be made a statement of material fact in an application for payment in connection with a medical assistance program.
 - ii. The material statement was false when made.
 - iii. The respondent made the statement willfully which requires that the respondent intentionally caused the statement to be made, knowing it was false.
 - iv. The application for payment was submitted for payment.
 - B. For the conviction of theft by false misrepresentation (Wis. Stat. § 943.20(1)(d) the elements are:
 - i. The respondent made a false representation about a fact to the Wisconsin Medicaid Administration.
 - ii. The respondent knew or believed that the representation was false.
 - iii. The respondent made the false representation with intent to deceive or defraud Medicaid.
 - iv. The respondent obtained title to the property of Medicaid (payment) by the false representation.
 - v. Medicaid was deceived by the false representation.
 - vi. Medicaid was defrauded by the false representation.
5. As a result of the convictions, the Respondent was sentenced to:
- A. pay \$1,214.84 in restitution;
 - B. 100 days in jail, with Huber privileges for work, eldercare, and childcare;
 - C. one year and nine months prison time imposed and stayed upon the successful completion of one year and eighteen months of probation;
 - D. a mental health assessment.

The Respondent was also placed on the U.S. Department of Health Services Office of the Inspector General List of Excluded Individuals and Entities (Exclusion List) (see exh. 2, attached to Respondent's response brief). According to the Respondent, the consequence of being placed on this registry is she is prohibited from being a Medicare or Medicaid certified provider and she cannot work for any organization that receives federal health care funding for five years. The Division did not dispute this characterization of the effect of placement on the Exclusion List.

DISCUSSION

The Board of Nursing may “revoke, limit, suspend or deny renewal of a license of a registered nurse” if that nurse committed one or more violations of any rule adopted by the Board or committed misconduct or unprofessional conduct. Wis. Stat. § 441.07(1)(b) and (d) (Wisconsin Statutes 2011-2012). The parties stipulated that the elements of the crimes the jury found the Respondent guilty of is the conduct that will be ascribed to her. This conduct constitutes misconduct or unprofessional conduct as defined in Wis. Admin. Code § N 7.04(1) and (13), respectively, by violating a law substantially related to the practice of professional nursing and by obtaining compensation by fraud. (These are the applicable provisions as they existed at the time of the conduct at issue in 2010.) The only dispute is the appropriate discipline for the violations found and assessment of costs for the disciplinary proceedings.

The Division recommended as discipline that Respondent be reprimanded and that her professional nursing license and her privilege to practice in Wisconsin pursuant to the Nurse Licensure Compact be limited to require her to complete four hours of ethics education and five hours of education on the topic of professional and legal accountability. The Division also recommended that Respondent’s nursing license and privilege to practice in Wisconsin pursuant to the Nurse Licensure Compact be further limited to require her to (1) provide her nursing employers with a copy of this Order before engaging in any nursing employment; (2) work only under direct supervision, and only in a work setting pre-approved by the Board for a period of two years, which shall not include a home health, assisted living, agency or pool position; (3) provide quarterly reports to the Department from her employers for a period of two years; (4) limit her practice to Wisconsin unless she receives written authorization from the Wisconsin Board and the regulatory authority in the state in which she proposes to practice; and (5) notify the Department of any change in employment.

As support for its recommendation, the Division cited the decision *In the Matter of Disciplinary Proceedings Against Kawana Hickman, L.P.N.*, Order No. 0002526 (July 11, 2013). Ms. Hickman was convicted of three counts of theft by false representation, Wis. Stat. § 943.20(1)(a) (class A misdemeanors), for conduct that occurred in 2007 and 2008. She was charged with intentionally deceiving a Wisconsin Medicaid recipient and obtaining fraudulent Medicaid payments of over \$4,000. Ms. Hickman admitted to billing for services she did not provide and billing for services without appropriate documentation. The Board reprimanded Ms. Hickman and imposed the same limitations on her nursing license as that requested here, including no work in a home health, assisted living, agency or pool position; quarterly reports from her nursing employers; and limiting her practice to Wisconsin. Ms. Hickman was employed at a nursing home and the license restrictions imposed did not prohibit her current employment. Ms. Hickman was also ordered to complete, within 90 days of the date of the order, four hours of education on nursing ethics and five hours of education on the topic of professional and legal accountability.

The Respondent cited four decisions involving similar violations where the discipline assessed was a reprimand with no license restrictions. Three cases involved nurses. In the nursing cases, other limitations restricted the practices of the respective respondents. The nursing cases are *In the Matter of Disciplinary Proceedings Against Wendi J. Mueller, R.N.*, Order No. LS0911055NUR (Nov. 5, 2009), *In the Matter of Disciplinary Proceedings Against*

Bella Yellin, R.N., Order No. LS0503104NUR (March 10, 2005), and *In the Matter of Disciplinary Proceedings Against Alla Lisak, R.N.*, Order No. LS0503104NUR (March 10, 2005). In these decisions, Ms. Mueller was only given a reprimand. However, as the result of her conviction, she was placed on probation for two years and one of the conditions of her probation was that she not work in a position where she would be participating in direct billing to Medicare or Medicaid. Ms. Yellin and Ms. Lisak both had their licenses suspended, but the suspensions were stayed on condition that they comply with terms and conditions limiting their licenses. The limitations included working in settings approved by the Board and under the indirect supervision of a licensed professional nurse or other licensed health care professional approved by the Board. The fifth decision cited by the Respondent involved a physician convicted of six counts of filing false Medicaid claims. The physician only received a reprimand as discipline.

There is insufficient information in the cited decisions to discern a basis for the disparate discipline in these cases. The Division offered no explanation for the disparate discipline other than that the case it cited was the most recent. The Division cited no guidance or written policy that supports the more severe discipline it recommended for the Respondent. The case that appears most similar to the instant case is that of Wendi Mueller. Ms. Mueller received only a reprimand from the Board, but one of the conditions of the probation she was placed on as the result of her criminal conviction was that she not work in a position where she would be participating in direct billing to Medicare or Medicaid. Similarly, the Respondent's placement on the Exclusion List precludes her from being a Medicare or Medicaid certified provider and working for any organization that receives federal funding.

Of the five cases cited the amount of fraud for which the Respondent was convicted was the lowest. Accordingly, imposing the most severe discipline is unreasonable. Additionally, one of the purposes of the Division's recommended license restriction is to protect Medicaid and Medicare funds. As a result of her conviction the Respondent is on a federal Exclusion List preventing her from working in a capacity where Medicaid or Medicare funds will be at risk. The Division did not dispute this contention. Placement on the Exclusion List drastically limits the Respondent's employment options. Providing home health care to private pay patients (the Respondent's current employment) is one of the few options available to her. A restriction limiting the Respondent to working in a setting with direct supervision would preclude this employment.

In its reply brief, the Division did not identify any employment options that would be available to the Respondent under the restrictions it recommended. The Division's only response to the Respondent's contention that the proposed license restrictions would make her unemployable was that if the Respondent had not objected to the first Proposed Decision, the restrictions would have expired by now. This response does not address the fact that the Respondent would apparently be unemployable during the time period that the restrictions were in effect. If the Division's intention was to prevent the Respondent from working as a nurse, it could have sought a suspension or revocation, as opposed to a restriction, of her license. The fact that the Division did not seek a suspension or revocation suggests that barring the Respondent from employment as a nurse is not the Division's objective.

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 imposition of a reprimand and the sentence that the Respondent received as the result of the criminal conviction will adequately promote the rehabilitation of the Respondent and deter others from engaging in similar conduct. The third purpose, protection of the public has two components in the instant case. One component is protecting the general public (*i.e.* taxpayers) by preventing the Respondent from committing any further Medicaid or Medicare fraud. The general public is protected by the placement of the Respondent on the Exclusion List. The other component is protecting the patients of the Respondent. There is no evidence that the Respondent is a threat to defraud her private pay patients. The Respondent was found not guilty of the one charge that involved individuals, the charge of defrauding patients. For the instant case a reprimand without any license restrictions is appropriate discipline.

The Division has the authority to assess costs pursuant to Wis. Stat. § 440.22. The factors to consider with respect to imposition of 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 cooperation of the respondent; (5) any prior discipline; (6) the fact that the Department is a program revenue agency, funded by other licensees; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz*, Order No. LS0802183CHI (Aug. 14, 2008).

Based on the factors set forth above, imposition of fifty percent of the costs is appropriate. The Division cited two criminal convictions and alleged that those convictions constituted misconduct and unprofessional conduct. The conduct was serious in that Respondent fraudulently took Medicaid funds to which she was not entitled. The level of discipline sought by the Division, a reprimand and certain practice limitations on Respondent's license and on her privilege to practice under the Nurse Licensure Compact, is less severe than a suspension or revocation of the Respondent's license. With regard to the fourth and fifth factors, the Respondent has cooperated in these proceedings and she has had no prior disciplinary actions taken against her license.

The only factor operating in favor of the Division's request is the fact that the Department is a "program revenue" agency, whose operating costs are funded by the revenue received from licensees, and that costs should not be imposed on members of the nursing profession who have not engaged in such conduct. However, because this matter was remanded for a new decision, the costs will be large for a relatively routine disciplinary action. Assessment of the full costs in this matter would be unduly harsh. Accordingly, imposition on Respondent of fifty percent of the costs is warranted.

CONCLUSIONS OF LAW

1. The Respondent's convictions for violating Wis. Stat. §§ 49.49(1)(a)1 and 943.20(1)(d) constitute misconduct and unprofessional conduct as defined at Wis. Admin. Code § Nur 7.04(1) and (13).

2. Pursuant to Wis. Stat. §441.07(1c), the Wisconsin Board of Nursing has jurisdiction to act in this matter and impose the discipline ordered below.

3. Based on the findings of misconduct and unprofessional conduct the Wisconsin Board of Nursing has authority pursuant to Wis. Stat. § 440.22 to impose the following assessment of costs.

ORDER

For the reasons set forth above, IT IS ORDERED:

1. Respondent Yvette L. Johnson Harris, R.N., is REPRIMANDED.

2. Respondent Yvette L. Johnson Harris shall pay fifty percent 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**

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

4. IT IS FURTHER ORDERED that the above-captioned matter is hereby closed as to Respondent Yvette Johnson Harris.

Dated at Madison, Wisconsin on June 23, 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: 
Mark F. Karsner
Administrative Law Judge