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Before the
State of Wisconsin
Board of Nursing

In the Matter of Disciplinary Proceedings Against
Jill Y. Kimmes, L.P.N. Respondent

FINAL DECISION AND ORDER

Order No. 17NUR031-6239

Division of Legal Services and Compliance Case No. 17 NUR 031


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 13 day of June, 2019.



Member
Board of Nursing



Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
Jill Y. Kimmes, L.P.N. Respondent

DHA Case No. SPS-19-0024
DLSC Case No. 17 NUR 031

PROPOSED DECISION AND ORDER

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

Jill Y. Kimmes
6417 S. County Road P
Lake Nebagamon, WI 54849

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 Elizabeth K. Bronson
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 Jill Y. Kimmes, L.P.N. The Complaint alleged that Respondent's license was subject to disciplinary action pursuant to Wis. Stat. §§ 441.07(1g)(b) and (d), because Respondent engaged in unprofessional conduct under Wis. Admin. Code § N 7.03(8)(e).

The Division served Respondent on March 18, 2019, by sending a copy of the Notice of Hearing and Complaint to 6417 South County Road P, Lake Nebagamon, Wisconsin via certified and regular mail. Respondent failed to file an Answer to the Complaint.

Following expiration of the 20-day time period to file an Answer, the administrative law judge (ALJ), scheduled a telephone prehearing conference for April 23, 2019. The Notice for the prehearing conference instructed Respondent to provide a telephone number that she could be reached at by April 19, 2019. Respondent failed to provide a number to the ALJ. At the prehearing conference on April 23, 2019, the ALJ attempted to call Respondent at the number provided by the Division but was unable to leave a voice message as an automated message stated that the voice mailbox had not been set up. The ALJ waited until 10:20 a.m. but did not receive a telephone call from Respondent. Based upon Respondent's failure to file an Answer to the Complaint and failure to appear at the prehearing conference, the Division moved for default, pursuant to Wis. Admin Code § SPS 2.14 and Wis. Admin Code § HA 1.07(3)(c).

On April 23, 2019, the ALJ issued a Notice of Default and Order against Respondent and ordered the Division to file a recommended proposed decision and order by May 7, 2019. The Division timely filed its submission.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Facts 1-8 are taken from the Division's Complaint against Respondent filed in this matter.

1. Respondent Jill Y. Kimmes is licensed in the state of Wisconsin as a practical nurse, having license number 318793-31, first issued on September 22, 2014, and current through April 30, 2019.
2. Respondent's most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) is 6417 South County Road P, Lake Nebagamon, Wisconsin 54849.
3. At all times relevant to this proceeding, Respondent was employed as a practical nurse at a health and rehab center (Center) located in South Range, Wisconsin.
4. On February 16, 2017, the Center received a photo taken at Respondent's residence that depicted several plastic pill pouches for crushing medications and two syringes.
5. On February 17, 2017, Respondent submitted to a reasonable suspicion urine drug screen.
6. On February 21, 2017, the results for the urine drug screen were released, which indicated a positive result for methadone.
7. The Respondent was unable to produce a valid prescription for methadone.
8. On February 24, 2017, Respondent's employment at the Center was terminated.

Facts Related to Licensure Status

9. Respondent's license expired on April 30, 2019.
10. Pursuant to Wis. Stat. § 440.08(3), Respondent retains the right to renew her license upon payment of a fee until April 30, 2024.

Facts Related to Default

11. The Notice of Hearing and Complaint in this matter were served on Respondent on March 18, 2019, by both certified and regular mail, consistent with Wis. Admin. Code § SPS 2.08. The Notice of Hearing informed Respondent that she was required to file an Answer within 20 days, pursuant to Wis. Admin. Code § SPS 2.09(4), and that if she failed to do so, she would be found in default and default judgment would be entered against her on the basis of the Complaint and other evidence. The Notice further informed Respondent that a failure to file an Answer could result in the Board taking disciplinary action against her and imposing the costs of the investigation, prosecution, and decision in this matter upon her without further notice or hearing.
12. Respondent failed to file an Answer as required by Wis. Admin Code § SPS 2.09(4).
13. Following expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for April 23, 2019. In the Notice of Telephone Prehearing conference, the ALJ stated, "[t]he Respondent Jill Kimmes must contact the undersigned ALJ no later than April 19, 2019, by electronic mail, telephone or written correspondence . . . for the sole purpose of providing the telephone number at which the Respondent may be reached for the telephone conference on April 23, 2019."
14. Respondent failed to provide a telephone number to the ALJ.
15. At the prehearing conference on April 23, 2019, the ALJ attempted to contact Respondent via the telephone number provided by the Division. Respondent did not answer. An automated message stated the voice message system had not been set up.
16. Pursuant to Wis. Admin Code § SPS 2.14, the Division moved for default, based upon Respondent's failure to file an Answer and appear at the prehearing conference.
17. On April 23, 2019, the ALJ issued a Notice of Default and Order, which required the Division to file and serve a recommended proposed decision and order by May 7, 2019.
18. The Division timely filed its recommended proposed decision and order.

DISCUSSION

Default

As stated in the April 23, 2019 Notice of Default and Order, Respondent is in default for failing to file an Answer to the Complaint and appear at the Prehearing Conference. Accordingly, an order may be entered against Respondent on the basis of the Complaint and other evidence. *See Wis. Admin. Code § SPS 2.14.*

Violations

Pursuant to Wis. Stat. §§ 441.07(1g)(b) and (d), the Wisconsin Board of Nursing (Board) may revoke, limit, suspend, or deny renewal of a license of a 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 has committed misconduct or unprofessional conduct.

Respondent violated Wis. Admin. Code § N 7.03(8)(e), by obtaining and possessing a drug without lawful authority. Pursuant to Wis. Stat. § 961.16(3)(r), methadone is a Schedule II controlled substance for which a prescription is required pursuant to Wis. Stat. § 961.38(2). On February 17, 2017, Respondent submitted to a reasonable suspicion drug screen that was positive for methadone. Respondent did not have a valid prescription. Therefore, the positive urine drug screen substantiates that she was in possession of a drug without authority, in violation of Wis. Admin. Code § N 7.03(8)(e).

As a result of the above violation, Respondent is subject to discipline pursuant to Wis. Stat. § 441.07.

Discipline

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

The Division recommends revocation of Respondent’s right to renew her practical nursing license.

The recommended discipline is appropriate and consistent with the purposes articulated in *Aldrich*. In this case, Respondent submitted to a urine drug screen because her employer received a photo that showed plastic pill pouches for crushing medications and syringes at Respondent’s residence. Respondent’s resultant drug screen was positive for methadone, and Respondent did not have a valid prescription. These facts raise concerns of drug abuse. In addition, Respondent has not cooperated with the disciplinary proceedings by failing to file an Answer and failing to appear at the prehearing conference. Further, she failed to timely renew her license. Respondent’s actions and failure to cooperate indicate that she is likely not amenable

to rehabilitation. Thus, revocation of Respondent's right to renew her license will protect the public and may deter others from similar conduct.

The recommended discipline is also consistent with prior Board decisions. *See In the Matter of Disciplinary Proceedings Against Kelly L. Kowalkowski, R.N.*, 0004613 (March 18, 2016)¹ (Board revoked nurse's right to renew her license and privilege to practice nursing pursuant to the Nurse Licensure Compact because she failed to cooperate with the Board's investigation after being charged with several drug-related offenses); *In the Matter of Disciplinary Proceedings Against Regina M. Fabian, R.N.*, 00076265 (February 28, 2008)² (Board revoked nurse's license for failing to cooperate with Board's investigation into nurse diverting controlled substances intended for patient use); *In the Matter of Disciplinary Proceedings Against Diane Zakopyko, R.N.*, 0002470 (June 12, 2018)³ (Board revoked nurse's license for failing to appear at prehearing conference and failing to file an Answer).

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

Costs

The Board 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 Board must look at aggravating and mitigating factors 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. In previous orders, Boards have considered the following factors when 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 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; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings against Elizabeth Buenzli-Fritz, D.C.*, LS 0802183 CHI (Aug. 14, 2008). It is within the Board'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.

Here, in light of the Respondent's default, the factual allegations were deemed admitted, and the Division proved all counts alleged. Respondent's conduct was serious; the positive drug screen result indicated Respondent ingested methadone without a valid prescription. Opioid abuse by a nurse poses a threat to the health and safety of patients, as well as the nurse. In addition, Respondent failed to participate in the formal disciplinary proceedings. Respondent failed to provide an Answer or any argument regarding the allegations brought against her license to practice nursing. The Department is a program revenue agency whose operating costs are funded by the revenue received from credential holders. It would be unfair to impose the

¹ This decision is available online at <https://online.drl.wi.gov/decisions/2016/ORDER0004613-00012486.pdf>

² This decision is available online at <https://online.drl.wi.gov/decisions/2008/ls0710234nur-00076265.pdf>

³ This decision is available online at <https://online.drl.wi.gov/decisions/2013/ORDER0002470-00008559.pdf>

costs of pursuing discipline in this matter on those licensees who have not engaged in misconduct. Therefore, it is appropriate for Respondent to pay full costs of the investigation and these proceedings, in the event Respondent applies for a credential with the Department in the future.

ORDER

Accordingly, it is hereby ORDERED that the right to renew the license and privilege of Respondent Jill Y. Kimmes (license number 318793-31) to practice as a nurse in the State of Wisconsin under the Enhanced Nurse Licensure Compact are REVOKED effective on the date the final decision is signed by the Board.

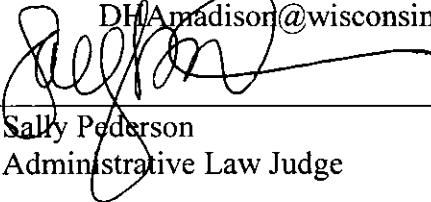
In the event Respondent petitions the Board of Nursing for reinstatement as a nurse in the future, the Board may enter an order denying such application without further notice or hearing. Whether to grant a license and whether to impose any limitations or restrictions on any license granted shall be in the discretion of the Board. In addition, the Board will not consider a petition for reinstatement until Respondent has paid all costs associated with this matter.

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.

Dated at Madison, Wisconsin on May 13, 2019.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____


Sally Pederson
Administrative Law Judge