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**Before the
State of Wisconsin
Board of Nursing**

In the Matter of Disciplinary Proceedings Against
Dana A. Wheeler, R.N., Respondent

FINAL DECISION AND ORDER

Order No. **ORDER 0006708**

Division of Legal Services and Compliance Case Nos. 18 NUR 296 and 18 NUR 299

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 12 day of March, 2020.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Member
Board of Nursing



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

In the Matter of Disciplinary Proceedings Against
Dana A. Wheeler, R.N., Respondent

DHA Case No. SPS-19-0064
DLSC Case No. 18 NUR 296
18 NUR 299

PROPOSED DECISION AND ORDER

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

Dana A. Wheeler
E8610 50th Avenue
Mondovi, WI 54755

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

PROCEDURAL HISTORY

The proceedings were initiated on November 1, 2019, when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed a formal complaint against Respondent Dana A. Wheeler, R.N., alleging that Respondent violated a law substantially related to the practice of nursing, in violation of Wis. Admin. Code § N 7.03(2) and 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 November 1, 2019, by sending a copy of the Notice of Hearing and Complaint to Respondent's address on file with the Department via certified and first-class mail. Three attempts were made to deliver the certified mail documents to Respondent's address on November 4, 2019, November 9, 2019, and November 19, 2019. On

November 27, 2019, the documents were marked as “unclaimed” and “return to sender.” The returned documents were received at the Department on December 6, 2019.

At the expiration of the 20-day time period to file an Answer, Administrative Law Judge (ALJ) Sally Pederson scheduled a telephone prehearing conference for December 6, 2019. The ALJ’s notice of the prehearing conference instructed Respondent to provide the ALJ with a telephone number at which she could be reached for the conference no later than December 5, 2019. Respondent failed to provide a telephone number to the ALJ. During the prehearing conference on December 6, 2019, the ALJ confirmed that the Department was unaware of a valid telephone number for the Respondent. Accordingly, the conference proceeded without the Respondent, and the Division moved for default based on Respondent’s failure to appear and failure to file an answer, pursuant to Wis. Admin. Code § SPS 2.14 and § HA 1.07(3)(c).

On December 6, 2019, the ALJ issued a Notice of Default and Order against Respondent and ordered the Division to file and serve a recommended proposed decision and order by January 24, 2020. The Division timely filed its submission.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Facts 1-9 are taken from the Division’s Complaint against Respondent that was filed on October 31, 2019.

1. Respondent Dana A. Wheeler, R.N., is licensed in the state of Wisconsin as a registered nurse, having license number 164862-30, first issued on July 30, 2008, and current through February 29, 2020.
2. Respondent’s most recent address on file with the Department is E8610 50th Avenue, Mondovi, Wisconsin 54755.
3. At all times relevant to this proceeding, Respondent was contracted to work as a registered nurse at post-acute care facilities (Facilities), located in Bloomer and Chetek, Wisconsin.
4. On or about April 29, 2018, discrepancies were noted in the narcotic documentation at the Facilities which indicated diversion and forgery.
5. An investigation across several law enforcement agencies, including the Bloomer and Chetek Police Departments, was undertaken. During the investigation, Respondent admitted to diverting lorazepam and hydrocodone, both controlled substances.
6. Respondent was criminally charged in Chippewa County Circuit Court case 2019CF113 with two counts of obtaining controlled substances by fraud, in violation

of Wis. Stat. § 961.43(1)(a), class H felonies, and two counts of theft by false representation, in violation of Wis. Stat. § 943.20(1)(d), class A misdemeanors.

7. On June 12, 2019, Respondent was convicted in case 2019CF113 of two counts of obtaining prescription drugs with fraud, in violation of Wis. Stat. § 450.11(7)(a), misdemeanors, and she received a deferred prosecution on one count of obtaining controlled substances by fraud, in violation of Wis. Stat. § 961.43(1)(a), a class H felony. The remaining charges were dismissed.
8. In written communication with the Department, Respondent admitted to diverting the controlled substances, as alleged.
9. Under Wis. Stat. §§ 961.20(2)(er) and 961.16(2)(a)7, respectively, lorazepam and hydrocodone are controlled substances, the possession of which requires a prescription under Wis. Stat. § 961.38 (2) and (3).

Facts Related to Default

10. The Notice of Hearing and Complaint were served on Respondent on November 1, 2019, by both certified and first-class mail. The Notice instructed Respondent: "If you do not provide a proper answer within 20 days, you will be found to be 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."
11. Respondent failed to file an Answer to the Complaint.
12. At the expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for December 6, 2019. Notice of the prehearing conference was mailed to Respondent, and it instructed Respondent to provide the ALJ with a telephone number at which she could be reached for the conference no later than December 5, 2019. Respondent failed to provide a telephone number to the ALJ.
13. During the prehearing conference on December 6, 2019, the ALJ confirmed that the Department was unaware of a valid telephone number for Respondent. The telephone prehearing conference proceeded without Respondent, and the ALJ granted the Division's motion for default based on Respondent's failure to appear and failure to file an answer
14. On December 6, 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 January 24, 2020. The Division timely filed its submission.

DISCUSSION AND CONCLUSIONS OF LAW

Jurisdictional Authority

Pursuant to Wis. Admin. Code § SPS 2.10(2), the undersigned ALJ has authority to preside over this disciplinary proceeding in accordance with Wis. Stat. § 227.46(1).

Default

Respondent is in default for failing to file an Answer to the Complaint and for failing to appear at the telephone prehearing conference on December 6, 2019. Accordingly, an order may be entered against Respondent on the basis of the Complaint and other evidence. *See* Wis. Admin. Code § SPS 2.14; Wis. Admin. Code § HA 1.07(3).

Violations

Pursuant to Wis. Stat. §§ 441.07(1g)(b) and (d), the Wisconsin Board of Nursing (Board) has the authority to discipline any licensee or license holder for violating the standards of conduct established by the examining board under Wis. Stat. § 440.03(1) and for engaging in unprofessional conduct as defined in Wis. Admin. Code Wis. Admin. Code § N 7.03. The definition of unprofessional conduct includes, but is not limited to, being convicted of a crime substantially related to the practice of nursing and obtaining, possessing, or attempting to obtain or possess a drug without lawful authority. *See* Wis. Admin. Code §§ N 7.03(2) and 7.03(8)(e).

Because Respondent failed to file an Answer and has been found in default, the allegations in the Complaint have been accepted as true and included herein as the Findings of Fact, and the ALJ may enter an order on the basis of the Complaint. *See* Wis. Admin. Code §§ SPS 2.14 and HA 1.07(3)(b).

Here, the undisputed facts establish that, while working as a registered nurse at post-acute care facilities, Respondent diverted, obtained, and possessed two controlled substances without lawful authority and without a prescription. Respondent's actions constitute unprofessional conduct under Wis. Admin. Code § N 7.03(8)(e).

In addition, Respondent was convicted of two counts of obtaining prescription drugs with fraud, in violation of Wis. Stat. § 450.11(7)(a), and she received a deferred prosecution for one count of obtaining controlled substances by fraud, in violation of Wis. Stat. § 961.43(1)(a). Respondent was convicted of a crime substantially related to the practice of nursing, meaning that she engaged in unprofessional conduct as define by Wis. Admin. Code § N 7.03(2).

As a result of the above violations, Respondent is subject to discipline by the Board, pursuant to Wis. Stat. §§ 441.07(1g)(b) and (d).

Appropriate 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 requests that the professional nursing license of Respondent, Dana A. Wheeler, R.N., and privilege to practice under the Enhanced Nurse Licensure Compact be revoked pursuant to the terms and conditions of the Order section below.

The recommended discipline is consistent with the purposes articulated in *Aldrich*. Protection of the public is one of the purposes of discipline and is the purpose of requiring a license. *See State ex rel. Green v. Clark*, 235 Wis. 628, 631, 294 N.W. 25 (1940). When a license is granted to an individual, the Board is assuring the public that the licensed individual is competent in his or her profession. *Stringez v. Dep't of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 281, 287, 307 N.W.2d 664 (1981).

Here, Respondent admitted to diverting controlled substances for personal use. This diversion involved fraud and theft in acute-care facilities, thereby seriously damaging the trust that patients need to have in the nursing profession. She disregarded her responsibilities to her patients, and she disregarded the law. In light of Respondent's serious violations and criminal conduct, the Board cannot assure the public that Respondent is competent or safe to practice nursing safely if permitted to continue. Imposing any discipline other than license revocation would imply that such conduct is tolerable and would not serve to deter similar conduct by others licensed in the nursing profession. Accordingly, revocation is the only appropriate means to safeguard the public.

The recommended discipline is also consistent with Board precedent. *See In the Matter of Disciplinary Proceedings Against Dayna L. Hines, L.P.N.*, Order Number LS0608042NUR (January 25, 2007) (nurse who diverted controlled substances for personal use and was subsequently convicted of theft of a controlled substance had license to practice practical nursing revoked).¹ *See also In the Matter of Disciplinary Proceedings Against Regina M. Fabian, R.N.*, Order Number LS0710234NUR (February 28, 2008) (nurse who admitted to diversion and theft of controlled substances for personal use had license revoked).² *See also In the Matter of Disciplinary Proceedings Against Kristie L. Rynders, R.N.*, Order Number LS0709202NUR (September 4, 2008) (nurse who diverted controlled substances for personal use and failed to respond to the Board during disciplinary proceedings had license to practice professional nursing revoked).³ *See also In the Matter of Disciplinary Proceedings Against Carol A. Garber-Hintze, R.N.*, Order Number LS0902171NUR (March 23, 2009) (nurse who diverted controlled substances for personal use and failed to respond to the Board during disciplinary proceedings had license revoked).⁴ *See also In the Matter of Disciplinary Proceedings Against Jennifer L.*

¹ This decision is available online at: <https://online.drl.wi.gov/decisions/2007/ls0608042nur-00072552.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/2008/ls0709202nur-00077135.pdf>

⁴ This decision is available online at: <https://online.drl.wi.gov/decisions/2009/ls0902171nur-00076470.pdf>

Schlorf, R.N., Order Number LS0904033NUR (January 28, 2010) (nurse who diverted morphine and hydromorphone for personal use and was convicted of possession/illegally obtained prescription had license revoked).⁵ See also *In the Matter of Disciplinary Proceedings Against Monique R. Bradley, R.N.*, Order Number 0000970 (July 21, 2011) (nurse who diverted controlled substances for personal use and was convicted of obtaining a prescription drug by fraud had license revoked).⁶

Based upon the facts of this case and the factors set forth in *Aldrich*, I find revocation of Respondent's professional nursing license and privilege to practice professional nursing in Wisconsin under the Enhanced Nurse Licensure Compact, as well as the conditions and limitations of the Order section below, are warranted.

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 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. *Noesenv. 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 considered the following factors when determining if all or part of the costs should be assessed against the 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 respondent's cooperation with the disciplinary process; (5) prior discipline, if any; (6) the fact that the Department is a "program revenue" agency, whose operating costs are funded by the revenue received from licenses, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct; and (7) any other relevant circumstances. See *In the Matter of Disciplinary Proceedings Against Elizabeth S. Buenzli-Fritz, D.C.*, LS0802183CHI (August 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.

In the instant case, it is appropriate for Respondent to be assessed the full costs of this proceeding for the following reasons. Because Respondent defaulted, the factual allegations were deemed admitted, and the Division proved all counts alleged. Therefore, this is not a case where the Division wasted resources by alleging multiple counts without proving those counts. Second, Respondent's conduct was serious. She not only took controlled substances without prescription, but then diverted those medications, thereby depriving the rightful patients of their treatment. Third, as a result of Respondent's serious misconduct, the Division previously sought Respondent's surrender of her privilege to practice. The Department now seeks revocation. This level of discipline is significant and demonstrates the need to publicly warn Respondent. Fourth, Respondent failed to file an Answer to the Complaint and failed to appear at the prehearing

⁵ This decision is available online at: <https://online.drl.wi.gov/decisions/2010/ls0904033nur-00004757.pdf>

⁶ This decision is available online at: <https://online.drl.wi.gov/decisions/2011/ORDER0000970-00006226.pdf>

conference, demonstrating a lack of cooperation. Fifth, the Department is a program revenue agency whose operating costs are funded by the revenue received from credential holders. As such, fairness weighs heavily in favor of requiring Respondent to pay the costs of this proceeding, rather than spreading the costs among all Board licensees in Wisconsin. Finally, Respondent has failed to present any argument as to why full costs should not be assessed.

Using *Noesen* as guidance and applying the Board's historical reasoning to the facts in this case, I find that the full costs of this proceeding should be assessed against Respondent and the amount of costs should be determined pursuant to Wis. Admin. Code § SPS 2.18.

ORDER

Accordingly, IT IS ORDERED that the right of Dana A. Wheeler, R.N., (license number 164862-30) to practice as a registered nurse in the state of Wisconsin, and her privilege to practice in Wisconsin pursuant to the Enhanced Nurse Licensure Compact, is REVOKED.

IT IS FURTHER ORDERED that the Respondent may not petition for reinstatement of her registered nursing license pursuant to Wis. Stat. § 441.07(2), earlier than one (1) year from the date of revocation.

IT IS FURTHER ORDERED that Respondent shall pay all recoverable costs in this matter, the amount to be established in accordance with 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:

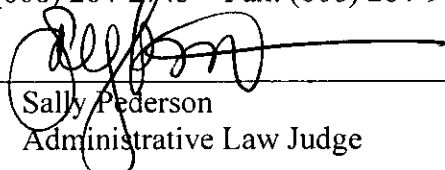
Department Monitor
Division of Legal Services and Compliance
Department of Safety and Professional Services
P.O. Box 7190, Madison, WI 53707-7190
Telephone (608) 267-3817; Fax (608) 266-2264
DSPSMonitoring@wisconsin.gov

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

Dated at Madison, Wisconsin on 14 of February, 2020.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, 5th Floor
Madison, Wisconsin 53705
Tel. (608) 264-2745 Fax: (608) 264-9885

By: _____


Sally Pederson

Administrative Law Judge