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**Before the
State of Wisconsin
Massage Therapy and Bodywork Therapy Affiliated Credentialing Board**

In the Matter of the Disciplinary Proceedings
Against Coleen M. Dunahee, M.T.B.T.,
Respondent.

FINAL DECISION AND ORDER

Order No. **ORDER 0007401**

Division of Legal Services and Compliance Case No. 19 MAB 016

The State of Wisconsin, Massage Therapy and Bodywork Therapy Affiliated Credentialing Board, 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, Massage Therapy and Bodywork Therapy Affiliated Credentialing Board.

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 1 day of June, 2021.

A handwritten signature in black ink, appearing to be "John J. [unclear]".

Member
Massage Therapy and Bodywork Therapy Affiliated
Credentialing Board



Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
Colleen M. Dunahee, L.M.T., Respondent

DHA Case No. SPS-20-0028
DLSC Case No. 19 MAB 016

PROPOSED DECISION AND ORDER

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

Colleen M. Dunahee, L.M.T.

[REDACTED]

Windsor, WI 53598-9777

Wisconsin Massage Therapy and Bodywork Therapy Affiliated Credentialing Board
P.O. Box 8366
Madison, WI 53708-8366

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

Attorney Carley J. Peich Kiesling
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 on October 9, 2020, when the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed a formal complaint against Respondent Colleen M. Dunahee, L.M.T. (Respondent).

The Complaint alleged that the Respondent failed to notify the Department of two misdemeanor convictions within 48 hours after the entry of the judgment of the convictions in violation of Wis. Stat. § 440.03(13)(am) and engaged in unprofessional conduct under Wis. Admin. Code § MTBT 5.02(1) and 5.02(3) by making a material misstatement in her application for the renewal of her license and by not reporting the convictions in violation of Wis. Stat. § 460.14(2)(a) to (j).

Administrative Law Judge Kristin Fredrick (ALJ) was assigned to the matter, and an initial prehearing conference was held on November 12, 2020. At that time, the Respondent indicated that she had not received the Notice of Hearing and Complaint. The Department resent the Notice of Hearing and Complaint to Respondent on November 12, 2021, both by email and certified mail. The Respondent filed an Answer by email on December 7, 2020.

A second prehearing conference was held on December 8, 2020, at which a hearing date was set along with deadlines for discovery and the exchange of witness lists and exhibits. The hearing in this matter was held in-person on Monday, January 25, 2021, at the Hill Farms State Office Building in Madison, Wisconsin.

FINDINGS OF FACT

1. The Respondent, Colleen M. Dunahee, L.M.T., is licensed in the state of Wisconsin to practice massage therapy and bodywork therapy, having license number 10560-146, first issued on January 20, 2011, and current through February 28, 2021.

2. The Respondent's address is [REDACTED] Windsor, Wisconsin 53598-9777.

3. On October 27, 2017, the Respondent was convicted in Sauk County Circuit Court Case No. 2017CT102 of one count of OWI (3rd), a misdemeanor, in violation of Wis. Stat. § 346.63(1)(a). (Division Ex. 1)

4. On October 27, 2017, the Respondent was convicted in Sauk County Circuit Court Case No. 2017CM240 of one count of Bail Jumping, a misdemeanor, in violation of Wis. Stat. § 946.49(1)(a). (Division Ex. 2)

5. The Respondent did not report the convictions to the Department or the Massage Therapy and Bodywork Therapy Affiliated Credentialing Board (Board) within 48 hours after the entry of the judgment of the convictions, or at any time thereafter. (Respondent hearing testimony)

6. The Respondent renewed her license online on February 21, 2017. As part of that renewal, she checked a box indicating that she had read and understood a statement that required her to report "any convictions or misdemeanors" to the Department in writing. (Division Ex. 3 at p. 011; Hearing testimony of Melinda Boyle)

7. The Respondent renewed her license online on February 26, 2019. As part of that renewal, she again checked a box indicating that she had read and understood a statement that required her to report "any convictions or misdemeanors" to the Department in writing. (Exhibit 3 at 8). Also, as part of this renewal, she checked a box indicating, "No, I do not have pending charges and/or convictions" since her last license renewal. (Division Ex. 3 at p. 008; Boyle hearing testimony)

8. The Division served a Notice of Hearing and Complaint on the Respondent on October 9, 2020, alleging violations under Wis. Stat. §§ 440.03(13)(am) and 460.14(2)(a) and unprofessional conduct under Wis. Admin. Code § MTBT 5.02(1) and (3).

DISCUSSION

Jurisdictional Authority and Burden of Proof

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). 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).

Violations

The parties do not dispute that the Respondent was convicted of two misdemeanors in October 2017. The issues at the January 25, 2021, proceeding were: (I) whether the Department has established that the Respondent's failure to report her two misdemeanor convictions to the Department constituted a violation of Wis. Stat. § 440.03(13)(am); and (II) whether the Department has established that the Respondent's failure to disclose her misdemeanor convictions in her 2019 license renewal application amounted to material misstatement in her application and thus, unprofessional conduct under Wis. Admin. Code § MTBT 5.02(1) and 5.02(3).

I. Responsibility to Report Convictions

"A person holding a credential who is convicted of a felony or misdemeanor anywhere shall send a notice of the conviction by 1st class mail to the department within 48 hours after the entry of the judgment of conviction." Wis. Stat. § 440.03(13)(am). Each Department determines what information must be provided with the written notice. *Id.* The Respondent was required to notify the Department in writing of the date, place and nature of the conviction, and include a copy of the judgment of conviction and a copy of the complaint. (*See* Division Ex. 3 at p. 011).

It is undisputed that the Respondent did not notify the Department as required by statute within 48 hours, or at any time, following entry of her misdemeanor convictions. At the hearing, the Respondent indicated that she could not notify the Department within 48 hours because she was required to begin her jail sentence immediately, the same day as the convictions. However, the Respondent provided no evidence that she tried to notify the Department following her release from jail, or anytime thereafter. Instead, the Respondent testified that she did not know she was required to notify the Department of her convictions.

The Respondent applied for license renewal online on February 21, 2017. (Division Ex. 3 at p. 010). The application required the applicant to check a box attesting to having read and understood the following obligation:

License/Credential Holder Charges or Convictions

A holder of any of the credential/licenses set forth in Wis. Stat. s. 440.03(13)(b) who is convicted of a felony or misdemeanor, since the issuance of the license/credential or since the last renewal, in the state or elsewhere shall notify the department in writing of the date, place and nature of the conviction of finding within 48 hours after the entry of the judgment of conviction. Notice shall be by mail....

(*Id.* at p. 011). The Respondent in the present matter checked the box that stated:

I have read and understand the above statement regarding the responsibility to report any convictions or misdemeanors, since the issuance or last renewal of my license.

(*Id.*) Based upon her 2017 license renewal application, the Respondent did have notice and was aware of her responsibility to notify the Department of her convictions. The preponderance of the evidence supports the Division's determination that the Respondent violated Wis. Stat. § 440.03(13)(am) when she failed to report her two misdemeanor criminal convictions within 48 hours of entry of the judgments of convictions.

II. 2019 License Renewal Application

The Board may reprimand a license holder if it finds that the license holder has "[m]ade a material misstatement in an application for a license or for renewal of a license." Wis. Stat. § 460.14(2)(a). Pursuant to the administrative code governing massage therapists, "unprofessional conduct" includes violating section 460.14(2)(a) of the Wisconsin Statutes, as well as, "[e]ngaging in fraud, misrepresentation, or deceit in applying for or procuring a license to practice massage therapy or bodywork therapy, in connection with applying for or procuring periodic renewal of a license, or in otherwise maintaining a license." Wis. Admin. Code § MTBT 5.02(1) and (3).

In the present matter the Respondent applied for license renewal online on February 26, 2019. (Division Ex. 3). This was the first renewal following her October 2017 misdemeanor convictions. Similar to the 2017 application, the Respondent's 2019 application contained an attestation requiring her to report any convictions or misdemeanors. (*Id.* at p. 008). Additionally, the application included the following:

Since your last renewal *or* initial licensure (if this is your first renewal), do you have any pending charges, and/or have you violated any federal or state laws, or any local ordinances (does not include minor traffic violations that do not involve alcohol or drugs, such as speeding, running stoplights, and seat belt violations)?

(*Id.*). Following this statement, two options were available as answers:

- o Yes, I have pending charges and/or convictions
- o No, I do not have pending charges and/or convictions.

(*Id.*) The Respondent marked the choice that stated, "No, I do not have pending charges and/or convictions." (*Id.*) The Respondent testified that she read this question and answer to mean

whether she had any pending charges or *pending* convictions, and she indicated, “no” because she did not have anything “pending.” (Respondent Hearing testimony) Even if the wording of the one response confused the Respondent, the response was incorrect. The Respondent’s answer indicating that she had no convictions, in conjunction with her failure to report her convictions despite her acknowledgement of her responsibility to notify the Department of any convictions or misdemeanors, was a material misstatement by the Respondent in her application for license renewal on February 26, 2019. Moreover, although the Respondent’s failure to disclose her criminal convictions in her 2019 application may not have been done with intent to deceive or to commit fraud, it still was a misrepresentation.

The Department has established by a preponderance of the evidence that the Respondent violated Wis. Stat. § 440.03(13)(am) and Wis. Admin. Code § MTBT 5.02(1) and (3) by failing to report her criminal convictions prior to and in her 2019 application for license renewal. Thus, the Board has the authority to impose discipline against the Respondent.

Discipline

Both parties filed post-hearing submissions with regard to the issue of what the appropriate discipline should be in this case. The Division requests that the Respondent be reprimanded and that she be ordered to pay the costs of this proceeding. Although she does not believe that her conduct requires the requested discipline, the Respondent suggests that she be given a “verbal warning” and allowed to complete volunteer hours in lieu of any monetary sanction due to an alleged inability to pay fines.

The three purposes of discipline in a professional misconduct case 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, 209, 237 N.W.2d 689 (1976). A public reprimand in this case is consistent with the purposes articulated in *Aldrich*. Reprimanding the Respondent will remind her of her responsibility to timely report required information to the Department. A reprimand will also indicate to the Respondent and other credential holders that a failure to report required information, or to provide misinformation, has serious consequences for continued licensure.

Furthermore, the recommended discipline also protects the public. “Protection of the public is the purpose of requiring a license.” *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). By not disclosing her convictions as required, and by omitting the information in her renewal application, the Respondent in the present matter deprived the Board from the opportunity to review whether the convictions raise any concerns about her fitness or competency. Contrary to the Respondent’s assertion, neither the Board nor the Department are tasked with reviewing the criminal background of every applicant and licensee; rather, the obligation to report convictions rests upon the applicant and license holder. Licensees are required to be aware of the legal obligations that go along with the privilege of holding a license granted by the Department. Imposing anything less than a reprimand would not deter other credential holders from engaging in similar conduct.

Based upon the facts of this case and the factors set forth in *Aldrich*, issuance of a reprimand to the Respondent is reasonable, consistent with the purposes of discipline and warranted.

Costs

The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against the 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. *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 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, funded by other licensees; and (7) any other relevant circumstances. *See In the Matter of Disciplinary Proceedings Against Elizabeth Buenzli-Fritz*, LS0802183CHI (Aug. 14, 2008). It is within the Board's discretion as to which of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

Considering the above factors, it is appropriate for Respondent to pay the costs of the investigation and of these proceedings. The Department established by the preponderance of the evidence that the Respondent not only failed to report her 2017 criminal convictions, but that she failed to accurately report those convictions in her 2019 license renewal application. To her credit, there is no evidence of any prior discipline against the Respondent. However, the Respondent's insistence that she was not aware of her obligations is not credible. And although the Department is only seeking a reprimand and costs, 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 costs of pursuing discipline in this matter on those licensees who have not engaged in misconduct. After weighing the evidence presented, I find it is appropriate for Respondent to pay the full costs of the investigation and this proceeding, as determined pursuant to Wis. Admin. Code § SPS 2.18.

In her post-hearing submission, the Respondent suggested that beyond a "verbal warning" she should be allowed to volunteer in the community in lieu of being required to pay costs given her limited financial means. Unfortunately, it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to issue equitable remedies or issue decisions on equitable grounds. *See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes and administrative code provisions. However, the Respondent is encouraged to contact the Department to arrange for a payment plan.

ORDER

For the reasons set forth above, IT IS ORDERED that Respondent Colleen M. Dunahee, L.M.T., License No. 10560-146 is hereby REPRIMANDED.

IT IS FURTHER ORDERED that Respondent pay all recoverable costs in this matter in an amount to be established, pursuant to Wis. Admin. Code § SPS 2.18. After the amount is established, payment shall be made by certified check or money order payable to the Wisconsin Department of Safety and Professional Services and sent to the address below:

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

Respondent may also submit this information online via DSPS' Monitoring Case Management System, here:
<https://dspsmonitoring.wi.gov>

IT IS FURTHER ORDERED that in the event the Respondent violates any term of this Order, Respondent's license (No. 10560-146), or the right to renew her license, may, in the discretion of the Board or its designee, be SUSPENDED, without further notice or hearing, until the Respondent has complied with the terms of the Order. The Board may, in addition and/or in the alternative refer any violation of this Order to the Division of Legal Services and Compliance for further investigation and action.

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

Dated at Madison, Wisconsin, on this 24th day of March, 2021.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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Tel. (608) 266-2447
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By: 

Kristin P. Fredrick
Administrative Law Judge