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Before the
State Of Wisconsin
Board of Nursing

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JUL 22 2021

DIV LEGAL SERVICES & COMPLIANCE
DEPT SAFETY & PROFESSIONAL SERVICES

In the Matter of the Disciplinary Proceedings
Against Thomas T. Fickau, R.N., Respondent.

FINAL DECISION AND ORDER

Order **ORDER 0007518**

Division of Legal Services and Compliance Case No. 20 NUR 594

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 August, 2021.

Member
Board of Nursing



Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
Thomas T. Fickau, R.N., Respondent.

DHA Case No. SPS-21-0033
DLSC Case No. 20 NUR 594

PROPOSED DECISION AND ORDER

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

Thomas T. Fickau, R.N.
14930 West Olivia Lane
New Berlin, WI 53151

Wisconsin Board of Nursing
P.O. Box 8366
Madison, WI 53707-8366

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

Attorney Gretchen Mrozinski
Department of Safety and Professional Services
Division of Legal Services and Compliance
P.O. Box 7190
Madison, WI 53707-7190

PROCEDURAL HISTORY

The Notice of Hearing and the Complaint in this matter were served on Thomas T. Fickau, R.N. (Respondent), by the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), on April 29, 2021, by both certified and regular mail, pursuant to Wis. Admin. Code § SPS 2.08. An answer to a complaint must be filed within 20 days from the date of service of the complaint. Wis. Admin. Code § SPS 2.09(4). No answer was filed.

Following the expiration of the 20-day period to file an answer, Administrative Law Judge (ALJ) Angela Chaput Foy scheduled a telephone prehearing conference for June 8, 2021, at 10:00 a.m. Notice of this prehearing conference was sent to both parties. Attorney Gretchen Mrozinski appeared on behalf of the Division. The Respondent did not appear.

Based on the Respondent's failure to file an answer to the Complaint and failure to appear for the prehearing conference in this matter, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

On June 9, 2021, the ALJ issued a Notice of Default against the Respondent and ordered that the Division file a recommended proposed decision and order no later than July 9, 2021. The Division timely filed its submission.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Fact 1-12 are taken from the Division's Complaint filed against the Respondent in this matter.

1. The Respondent is licensed in the state of Wisconsin to practice as a registered nurse, having license number 123021-30, first issued on June 14, 1996, and current through February 28, 2022.

2. The most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) for the Respondent is 14930 West Olivia Lane, New Berlin, Wisconsin 53151.

3. At all times relevant to this proceeding, the Respondent was employed as a registered nurse at a medical center in West Allis, Wisconsin (Facility).

4. On November 12, 2020, Facility management questioned the Respondent regarding his access, administration, and wasting of the drug gabapentin while working.

5. Facility management suspected the Respondent of diverting gabapentin. The Respondent denied diverting gabapentin.

6. The Respondent advised the Facility that he does not use gabapentin, nor does he possess a valid prescription for gabapentin.

7. On November 12, 2020, per the Facility's request, the Respondent submitted to a drug screen. The drug screen results were positive for gabapentin.

8. On January 25, 2021, the Division attempted contact with the Respondent by sending an email to the address on file with the Department, FickauPrototypes@cs.com, requesting a response. No response was received.

9. On February 12, 2021, the Division sent a letter to the Respondent's address on file with the Department, 14930 West Olivia Lane, New Berlin, Wisconsin 53151, requesting a response. No response was received.

10. On March 25, 2021, the Division sent a subpoena via certified mail to the Respondent's address on file requesting that the Respondent appear for a phone call on April 14, 2021, should he not respond by April 2, 2021.

11. The Division did not receive a response from the Respondent by April 2, 2021.

12. The Respondent did not appear for the subpoenaed phone call on April 14, 2021.

Facts Related to Default

13. The Notice and Complaint were served on the Respondent at his address on record with the Department on April 29, 2021, by both Certified and regular mail.

14. The Respondent failed to file an answer to the Complaint. After the expiration of the 20-day period to file an answer, the ALJ scheduled a telephone prehearing conference for June 8, 2021. Notice of this prehearing conference was sent to both parties, with instructions that the Respondent contact the ALJ with a telephone number at which the Respondent could be reached for the conference no later than June 7, 2021. The Respondent did not contact the ALJ.

15. At the prehearing conference held on June 8, 2021, Attorney Gretchen Mrozinski appeared on behalf of the Division. The ALJ attempted to reach the Respondent at the telephone number that the Department had on file for him. The ALJ called the Respondent at approximately 10:03 a.m., 10:07 a.m., and 10:20 a.m. When the first call was placed, the call connected, but only background music could be heard. The ALJ identified herself and that she was looking to speak with the Respondent, but no one spoke. In the latter two calls, a recording announced that the voicemailbox for the Respondent was full and could not accept new messages. The ALJ also emailed the Respondent at the email address that the Department had on file for him at 10:06 a.m. The email was returned as undeliverable. The Respondent did not contact the ALJ at the telephone number or email address provided by the ALJ.

16. The Division moved for a finding that the Respondent was in default based on his failure to answer the Complaint, as well as his failure to appear for the prehearing conference pursuant to Wis. Admin. Code §§ SPS 2.14 and HA 1.07(3)(c).

17. On June 9, 2021, the ALJ issued a Notice of Default and ordered that the Division file and serve a recommended proposed decision and order no later than July 9, 2021.

18. The Division timely filed its recommended proposed decision and order.

DISCUSSION

Jurisdictional Authority

The Wisconsin Board of Nursing (Board) has jurisdiction over this matter. Wis. Stat. § 441.07(1c). Section 440.03(1) of the Wisconsin Statutes provides that the Department "may promulgate rules defining uniform procedures to be used by the department . . . and all examining boards and affiliated credentialing boards attached to the department or an examining

board, for . . . conducting [disciplinary] hearings.” These rules are codified in Chapter SPS 2 of the Wisconsin Administrative Code.

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

Default

The Division properly served the Notice and Complaint on the Respondent by mailing a copy to his address on record with the Department. Service by mail is complete upon mailing. Wis. Admin. Code § SPS 2.08(1). If a respondent “fails to answer as required by s. SPS 2.09 or fails to appear at the hearing at the time fixed therefor, the respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence.” Wis. Admin. Code § SPS 2.14; *See also* Wis. Admin. Code § HA 1.07(3)(c).

Here, the Respondent violated section SPS 2.09(4) of the Wisconsin Administrative Code by failing to file an answer to the Complaint within 20 days from the date of service. The Respondent also failed to appear at the prehearing telephone conference on June 8, 2021. Therefore, the Respondent is in default, and findings and an order may be entered based on the Complaint.

The burden of proof in disciplinary proceedings before the Board is a preponderance of the evidence. *See* Wis. Stat. § 440.20(3). However, given the Respondent’s failure to answer the allegations in the Complaint and default, the facts in this proceeding are undisputed and are found based on the Complaint.

Violations

Following an investigation, if the Board determines that a nurse has committed one or more violations of the Wisconsin Statutes or administrative rules adopted by the Board, or if the Board finds that a nurse has committed misconduct or unprofessional conduct, it may “revoke, limit, suspend or deny a renewal of a license” of that registered nurse. Wis. Stat. §§ 441.07(1g)(b) and (d).

Sections 441.07(1g)(b), (c), and (d) of the Wisconsin Statutes, along with section N. 7.03 of the Wisconsin Administrative Code, provide the Board with grounds for taking disciplinary action. The latter provides grounds for taking disciplinary action on the Respondent’s license as follows:

- a. After request of the Board, failing to cooperate in a timely manner, with the Board’s investigation of a complaint filed against a license holder. Wis. Admin. Code § N 7.03(1)(c).
- b. Violating a law substantially related to the practice of nursing. Wis. Admin. Code § N 7.03(2).

- c. Obtaining, possessing, or attempting to obtain or possess a drug without lawful authority. Wis. Admin. Code § N 7.03(8)(e).

The Respondent engaged in conduct qualifying as grounds for taking disciplinary action on his license by failing to cooperate in a timely manner with the Board's investigation. *See* Wis. Admin. Code § N 7.03(1)(c) The Respondent failed to reply to a January 25, 2021 email request for information, failed to reply to a February 12, 2021 letter request for information, and failed to comply with a subpoena for the Respondent's telephone appearance on April 14, 2021. In addition, the Respondent failed to appear and participate in these proceedings. The Respondent's actions, or lack thereof, demonstrate his repeated failure to cooperate in a timely manner with the Board's investigation.

The Respondent engaged in conduct qualifying as grounds for taking disciplinary action on his license by failing to respond to the Division's subpoena, violating a law substantially related to the practice of nursing. *See* Wis. Admin. Code § N 7.03(2). The Department has authority to issue subpoenas for the attendance of witnesses and the production of documents or other materials prior to the commencement of disciplinary proceedings. Wis. Stat. §§ 440.03(4) and 885.01(4). In the case at hand, the Division utilized this authority when a Division investigator sent a subpoena via Certified U.S. mail, to the address the Respondent has on file with the Department requiring his appearance for a telephone interview on April 14, 2021. The Respondent was legally obligated to comply with the subpoena, and he failed to do so.

The Department, through the Division, is responsible for investigating and prosecuting nurses who are licensed in Wisconsin and who have allegedly violated laws related to the practice of nursing. The Department's subpoena power is one of the most important tools available to the Division to carry out investigations. The subpoena issued to the Respondent was solely based upon the Respondent's practice and licensure as a nurse in Wisconsin and the allegations of wrongdoing in the case at hand. Had the Respondent not been licensed as a nurse in Wisconsin, he would not have been subject to a subpoena in this matter. As such, the Respondent's practice as a registered nurse in Wisconsin is substantially related to the violation of the subpoena. *See* Wis. Stat. §§ 440.03(4) and 885.01(4).

The Respondent violated Wis. Admin. Code § N 7.03(8)(e) when he obtained, possessed, or attempted to obtain or possess a drug without lawful authority. The Respondent tested positive, via a drug screen, for gabapentin. Gabapentin is a prescription medication.¹ The Respondent did not possess a valid prescription for gabapentin. The Wisconsin Controlled Substances Board, in their *Report to the Legislature*,² concerning designating gabapentin as a controlled drug, dated February 1, 2021, stated as follows:

Gabapentin is a prescription medication approved by the Federal Food and Drug Administration for the treatment of neuropathic pain and epileptic disorders. In recent years however, gabapentin has been increasingly encountered by law enforcement, documented in national crime lab reports, reported to poison control centers, and diverted

¹ https://www.accessdata.fda.gov/scripts/cder/ob/search_product.cfm

² <https://dsps.wi.gov/Documents/RulesStatutes/CSB4LRRD.pdf>

for illicit use. The Researched Abuse, Diversion and Addictive—Related Surveillance (RADARS) indicates an increase in gabapentin diversion. The Drug Abuse Warning Network (DAWN) indicates a rise of emergency department visit rates for gabapentin.

The Board has long held that testing positive for a prescription drug, without having a valid prescription for such drug, is a violation of Wis. Admin. Code. § N 7.03(8)(e). *See In the Matter of Disciplinary Proceedings Against Joan S. Heath, R.N.*, Order Number 0007083 (November 12, 2020) (Nurse tested positive for oxycodone and did not have a prescription);³ *In the Matter of Disciplinary Proceedings Against Jill Y. Kimmes, L.P.N.*, Order Number 0006239 (June 13, 2019) (Nurse tested positive for methadone and did not have a prescription);⁴ and *In the Matter of Disciplinary Proceedings Against Julie F. Rabe, R.N.*, Order Number 0003300 (July 10, 2014) (Nurse tested positive for hydromorphone and did not have a prescription).⁵ The credible evidence, along with Board precedent, establishes by a preponderance of the evidence that the Respondent obtained, possessed, or attempted to obtain or possess a drug without lawful authority.

By engaging in conduct qualifying as grounds for taking disciplinary action on his license, along with the Respondent's failure to make any argument to the contrary, the Respondent is subject to discipline. Wis. Stat. §§ 441.07(1g)(b), (c), and (d), and Wis. Admin. Code § N 7.03.

Discipline

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).

The Division recommends that the Respondent's license to practice as a registered nurse be suspended indefinitely. In addition, the Division proposes that if the Board grants the Respondent's petition for a stay of the suspension, the Board should be authorized to impose additional limitations upon the Respondent's license to protect the health, safety, and welfare of the patients and the public. Given that the Respondent has made no argument to the contrary and has failed to appear for any part of these proceedings, and because the recommended discipline is consistent with the purposes articulated in *Aldrich* and case law, I adopt the Division's recommendation for an indefinite suspension of the Respondent's license. Regarding the Board's authority to impose future limitations on the Respondent's license, the case law is clear that discipline must be responsive to the licensee's specific misconduct and warranted under the facts of the case. I therefore recommend that the order specify that the Board is authorized to limit Respondent's license only to the extent that the limitations are consistent with the purposes articulated in *Aldrich*. Any such limitation must be tailored to specifically address Respondent's violations – failing to cooperate with the Board's investigation, violating a law substantially

³ <https://online.drl.wi.gov/decisions/2020/ORDER0007083-00017195.pdf>

⁴ <https://online.drl.wi.gov/decisions/2019/ORDER0006239-00015577.pdf>

⁵ <https://online.drl.wi.gov/decisions/2014/ORDER0003300-00010028.pdf>

related to the practice of nursing by failing to respond to the Division's subpoena, and obtaining, possessing, or attempting to obtain or possess a drug without lawful authority.

The case at hand involves the Respondent's positive test for gabapentin without having a valid prescription for it. This case also involves allegations of diversion of gabapentin, a prescription drug that authorities are finding is increasingly being diverted for illicit use. When the Board opened this case, the Division on behalf of the Board attempted to investigate the allegations so as to provide the Board with a fully vetted case on which to base a decision. The Respondent thwarted investigative efforts by failing to respond to multiple attempts at communication by the Division, including a subpoena. The Respondent continued to ignore the authority of the Board and the hearing tribunal by failing to appear and participate in these proceedings. The Respondent's actions impeded the Division's investigation which put public safety at risk. The Board's number one priority is to protect the public by licensing and regulating nurses. If a nurse will not recognize that authority, the Board must take action to protect the public by suspending the nurse's license. To date, the Respondent maintains an active license to practice as a registered nurse in Wisconsin. An Order that suspends the Respondent's license is necessary to protect the public, to force the Respondent to cooperate with the Board, and to ensure that the Respondent is not possessing, ingesting, and diverting prescription drugs that are not prescribed to him.

The Order allows the Respondent to petition the Board to stay the suspension. The Board has authority to stay the suspension once the Respondent cooperates with the Division by providing information requested by the Division in relation to this matter.⁶ The Order allows the Board to institute additional limitations and/or restrictions on the Respondent's license, following the Respondent's cooperation with the Division. Depending on the information provided by the Respondent to the Division, such limitations and/or restrictions may be less than a suspension and allow the Respondent to return to practice as a registered nurse.

Suspending the Respondent's license indefinitely under these conditions protects the public from other potential instances of misconduct. "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). It follows that if the Board, via the Department, cannot assure the public of the licensee's competence to practice the profession, then suspension is appropriate. *Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 189-90, 349 N.W.2d 68 (1984). In the present case, the Board cannot assure the public that a registered nurse who fails to cooperate with a lawful investigation into his conduct is competent to practice nursing.

⁶ Division investigations involving possession or diversion of prescription drugs when the respondent does not have a valid prescription for the same include, among other things, questions concerning a respondent's prior and current drug and alcohol use, AODA assessments, prior allegations of diversion, and current employment status and job duties.

Suspending the Respondent's license indefinitely also deters other credential holders from engaging in similar conduct. The Respondent has disregarded the Board's authority as well as the laws in place to protect public health and welfare. Therefore, the suspension of the Respondent's license to practice nursing in Wisconsin is an appropriate response.

The Board has not previously considered a case with precisely the same facts at hand that resulted in a suspension. However, other health professions have addressed similar conduct and the Board takes its cue from that precedent. *See In the Matter of Disciplinary Proceedings Against Manuel J. Thomas, M.D.*, Order Number 0007046 (October 21, 2020) (Medical Examining Board suspended the respondent's license indefinitely for failing to cooperate with investigation and proceedings)⁷; *See In the Matter of Disciplinary Proceedings Against Michael N. Mangold, M.D.*, Order Number 0002433 (May 15, 2013) (Medical Examining Board suspended the respondent's license indefinitely or until a showing that the respondent recognized the authority of the Board and understood his obligations to comply with the Board's orders for practicing medicine without a valid license)⁸; and, *In the Matter of Disciplinary Proceedings Against Ossama Abdellatif, M.D.*, Order Number LS0904201MED (September 16, 2009) (Medical Examining Board suspended the respondent's license indefinitely for failing to cooperate with the Board's investigation and practicing medicine under another name).⁹

Based upon the facts of this case and the factors set forth in *Aldrich*, an indefinite suspension of the Respondent's license, pursuant to the terms and conditions of the Order below, is 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.

⁷ <https://online.drl.wi.gov/decisions/2020/ORDER0007046-00017113.pdf>

⁸ <https://online.drl.wi.gov/decisions/2013/ORDER0002433-00008486.pdf>

⁹ <https://online.drl.wi.gov/decisions/2009/ls0904201med-00076642.pdf>

Considering the above factors, it is appropriate for the Respondent to pay the full costs of the investigation and prosecution of these proceedings. The Respondent defaulted, and the factual allegations identified in this decision were deemed admitted. The allegations involve serious charges of diversion of a prescribed drug, obtaining/possessing a drug without lawful authority, violation of a substantially related law, and failure to cooperate with the Division's investigation. The level of discipline sought is an indefinite suspension, a high level of discipline responsive to the violations in this matter. The Respondent failed to cooperate with the Division's investigation and this disciplinary process by failing to respond to the Division's requests for information, failing to answer the Complaint, and failing to appear for the prehearing conference. The Respondent has not offered any acceptable justification for his actions.

Finally, 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 proceeding on those licensees who have not engaged in misconduct. Therefore, it is appropriate for the Respondent to pay the full costs of the investigation and prosecution in this matter, as determined pursuant to Wis. Admin. Code § SPS 2.18.

ORDER

For the reasons set forth above, IT IS ORDERED:

1. The Respondent's license to practice as a registered nurse in Wisconsin (license no. 123021-30), and the Respondent's right to renew his license, are SUSPENDED for an indefinite period.
2. The Respondent may petition the Board for a stay of suspension after contacting the Department Monitor and providing any information requested by the Board or its designee in relation to this matter.
3. The Board or its designee may stay the suspension upon determination that the Respondent has cooperated with the Division concerning this matter by providing any information requested by the Division in relation to this matter.
4. If the Board grants the Respondent's petition for a stay of suspension, the Board or its designee may impose any conditions and/or limitations on the Respondent's license deemed appropriate in order to protect the health, safety, and welfare of patients and the public. Any such limitation must serve the following purposes: promoting Respondent's rehabilitation, protecting the public from other instances of misconduct, and/or deterring other credential holders from engaging in similar conduct.
5. Should the Respondent have a Wisconsin multistate license pursuant to the Enhanced Nurse Licensure Compact (Compact), the Respondent may not practice in any Compact state, other than Wisconsin, while the Respondent's license is encumbered by any term(s) of this Order or subsequent orders.

6. The Respondent shall pay all recoverable costs in these matters in an amount to be established pursuant to Wis. Admin. Code. § SPS 2.18.

7. Petitions, payment of costs (made payable to the Department of Safety and Professional Services), and any other questions or submissions related to this Order, may be directed to the Department Monitor at:

Department Monitor
Division of Legal Services and Compliance
Department of Safety and Professional Services
P.O. Box 7190, Madison, WI 53707-7190
Telephone (608) 266-2112; Fax (608) 266-2264
DSPSMonitoring@wisconsin.gov

The Respondent may also submit payment online at: <http://dspsmonitoring.wi.gov>

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

Dated at Madison, Wisconsin, on July 20, 2021.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, 5th Floor North
Madison, Wisconsin 53705
Tel. (414) 227-4025
Email: Angela.ChaputFoy@wisconsin.gov

By: _____


Angela Chaput Foy

Administrative Law Judge