

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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IN THE MATTER OF THE	:	FINAL DECISION AND ORDER
DISCIPLINARY PROCEEDINGS AGAINST	:	WITH VARIANCE
	:	
HEATHER M. LONG, R.N.,	:	DHA Case No. SPS-20-0029
RESPONDENT.	:	DLSC Case No. 18 NUR 383

BACKGROUND

On July 7, 2021, Administrative Law Judge Kristin Fredrick, State of Wisconsin, Division of Hearings and Appeals, issued a Proposed Decision and Order (PDO) in the above referenced matter. The PDO was mailed to all parties. The Division of Legal Services and Compliance filed a request for modification of the language of the PDO on July 26, 2021. The Respondent did not file any objections to the PDO. On August 12, 2021, the Board of Nursing (Board) met to consider the merits of the PDO. The Board voted to approve the PDO with variance. The PDO is attached hereto and incorporated in its entirety into this Final Decision and Order with Variance (Order).

VARIANCE

Pursuant to Wis. Stat. §§ 440.035(1) and 441.07, 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). The Board may make modifications to a PDO, a class 2 proceeding, pursuant to Wis. Stat. § 227.46(2). In the present case, the Board adopts the PDO in its entirety except for paragraphs two and three on page eight of the PDO, and the entire Order section. The Board finds that this variance will be more consistent with the facts of this matter and the Board's precedent in similar cases, and further finds that the proposed restrictions are necessary under the circumstances to protect the public health and safety.

Those paragraphs and that section are eliminated and the following are substituted in its place:

Page 8, paragraph 2:

The Respondent is willing to undergo an AODA assessment and twelve months of drug screen monitoring. The Respondent does not agree with any restriction prohibiting her from access to controlled substances through her employment. In the present case, there has been no evidence presented that the Respondent attempted to access or divert medications through her employment. In addition, there is no evidence that the Respondent currently suffers from an addiction or has unlawfully abused drugs in the past. There is also no evidence that the Respondent was impaired at work. Thus, a reprimand with a shortened period of monitoring is reasonable. Based upon the facts in this matter, the standard five-year monitoring order is not warranted. The Board's purpose of rehabilitation and the protection of the public would be aptly served with the imposition of the lesser, two-year monitoring order.

Page 8, paragraph 3:

Based upon the facts of this case and the factors set forth in *Aldrich*, and in full consideration of Board precedent, a reprimand and a two-year monitoring order is warranted.

ORDER

1. Respondent is REPRIMANDED.
2. The registered nurse license issued to Respondent (license number 173172-30) to practice nursing in the state of Wisconsin, and her privilege to practice in Wisconsin pursuant to the Enhanced Nurse Licensure Compact (Compact), are LIMITED as follows:
 - a. For a period of at least two (2) years from the date of this Order:
 - i. Respondent shall enroll and participate in a drug and alcohol monitoring program, which is approved by the Department (Approved Program). Enrollment shall occur within thirty (30) calendar days from the date of this Order.
 - ii. At the time Respondent enrolls in the Approved Program, Respondent shall review all of the rules and procedures made available by the Approved Program. Failure to comply with all requirements for participation in drug monitoring established by the Approved Program is a substantial violation of this Order. The requirements shall include:

1. Contact with the Approved Program as directed on a daily basis, including vacations, weekends, and holidays.
 2. Production of a urine, blood, sweat, fingernail, hair, saliva, or other specimen at a collection site designated by the Approved Program within five (5) hours of notification of a test.
 3. The Approved Program shall require the testing of specimens at a frequency of not less than forty-nine (49) times per year, for at least the first year of this Order. Thereafter, the Board may adjust the frequency of testing on its own initiative at any time.
- iii. Respondent shall abstain from all personal use of controlled substances as defined in Wis. Stat. § 961.01(4), except when prescribed, dispensed, or administered by a practitioner for a legitimate medical condition. Respondent shall disclose Respondent's drug history and the existence and nature of this Order to the practitioner prior to the practitioner ordering the controlled substance. Respondent shall at the time the controlled substance is ordered immediately sign a release in compliance with state and federal laws authorizing the practitioner to discuss Respondent's treatment with, and provide copies of treatment records to, the Board or its designee. Copies of these releases shall immediately be filed with the Department Monitor.
- iv. Respondent shall report to the Department Monitor all prescription medications and drugs taken by Respondent. Reports must be received within 24 hours of ingestion or administration of the medication or drug, and shall identify the person or persons who prescribed, dispensed, administered or ordered said medications or drugs. Each time the prescription is filled or refilled, Respondent shall immediately arrange for the prescriber or pharmacy to fax and mail copies of all prescriptions to the Department Monitor.
- v. Respondent shall provide the Department Monitor with a list of over-the-counter medications and drugs that she may take from time to time. Over-the-counter medications and drugs that mask the consumption of controlled substances, create false positive screening results, or interfere with Respondent's treatment and rehabilitation, shall not be taken unless ordered by a physician, in which case the drug must be reported as described in the paragraph 2(a)iv.

- vi. All positive test results are presumed valid and may result in automatic suspension of licensure by the Board or the Board's designee. Respondent must prove by a preponderance of the evidence an error in collection, testing, fault in the chain of custody or other valid defense.
- vii. If any urine, blood, sweat, fingernail, hair, saliva, or other specimen is positive or suspected positive for any controlled substances, Respondent shall promptly submit to additional tests or examinations as the Board or its designee shall determine to be appropriate to clarify or confirm the positive or suspected positive test results.
- viii. Respondent shall practice only in a work setting pre-approved by the Board or its designee.
- ix. 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/or employment current as of the date of this Order.
- x. Respondent shall not work as a nurse or other health care provider in a setting in which Respondent has access to controlled substances. Respondent shall provide the Department Monitor with written acknowledgment from each nursing employer that Respondent does not have access to controlled substances. Such acknowledgement shall be provided to the Department Monitor within fourteen (14) days from the date of this Order for any current employer and on a quarterly basis thereafter from each nursing employer.

3. Pursuant to the Compact, Respondent may not practice in another Compact State, other than Wisconsin, while their license is encumbered by any term or restriction of this Order.

4. The Board or its designee may, without hearing, suspend Respondent's nursing license upon receipt of information that Respondent is in substantial or repeated violation of any provision of this Order. A substantial violation includes, but is not limited to, a positive drug screen. A repeated violation is defined as the multiple violations of the same provision or violation of more than one provision. The Board or its designee may, in conjunction with the suspension, prohibit Respondent from seeking termination of the suspension for a specified period of time.

5. The Board or its designee may terminate the suspension if provided with sufficient information that Respondent is in compliance with the Order and that it is appropriate for the suspension to be terminated. Whether to terminate the suspension shall be wholly in the discretion of the Board or its designee.

6. After the first year from the date of this Order, Respondent may petition the Board on an annual basis for a modification of the terms of this Order. After two (2) consecutive years of successful compliance, the Respondent may petition the Board for return of full licensure. The Board may grant or deny any petition, in its discretion, or may modify this Order as it sees fit.

7. Payment of costs (made payable to the Wisconsin Department of Safety and Professional Services) shall be sent by Respondent to the Department Monitor at 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) 266-2112; Fax (608) 266-2264
DSPSMonitoring@wisconsin.gov

Respondent may also submit this information at: <https://dspsmonitoring.wi.gov>.

8. In the event Respondent violates any term of this Order, Respondent's license (173172-30), or Respondent's right to renew her license, may, in the discretion of the Board or its designee, be SUSPENDED, without further notice or hearing, until 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 Respondent pay all recoverable costs in this matter, as limited above, 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 listed in paragraph 7 above.

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 this 12th day of August 2021.

WISCONSIN BOARD OF NURSING

By: *Garey P. Jolietowski*
A Member of the Board

8/12/2021
Date



Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings
Against Heather M. Long, R.N., Respondent

DHA Case No. SPS-20-0029
DLSC Case No. 18 NUR 383

PROPOSED DECISION AND ORDER

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

Heather M. Long, R.N.
351 Fond du Lac
Waupun, WI 53963

Wisconsin Board of Nursing
P.O. Box 8366
Madison, WI 53708-8366

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

On October 9, 2020, the Wisconsin Department of Safety and Professional Services, Division of Legal Services and Compliance (Department), Division of Legal Services and Compliance (Division) filed a formal Complaint against Heather M. Long, R.N., (Respondent) alleging that Respondent 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 Respondent filed a timely answer on October 29, 2020. The matter was referred to the Division of Hearings and Appeals for the appointment of a hearing official to preside over the hearing. Administrative Law Judge Kristin P. Fredrick (ALJ) was assigned as the hearing official and a prehearing conference was held on November 12, 2020, at which time a scheduling order was entered, along with a briefing schedule to address the Division's proposed motion for summary judgment. The Division served an Amended Complaint on the Respondent on November 17, 2020, and Respondent filed an Answer to the Amended Complaint on November 30, 2020. Pursuant to the briefing schedule, the Division filed a Motion for Summary Judgment on December 22, 2020, and the Respondent submitted a written response on January 18, 2021. The ALJ issued

a written decision on February 24, 2021, denying the Division's Motion for Summary Judgment.

On March 8, 2021, the ALJ held another prehearing telephone conference. A Scheduling Order was issued on March 9, 2021, and amended on March 18, 2021, setting the matter for remote hearing on May 25, 2021, due to restrictions and concerns related to the Covid-19 pandemic. Pursuant to the Scheduling Order, on April 23, 2021, the Division filed and served its Witness and Exhibit Lists. Respondent filed her Witness and Exhibit Lists on May 4, 2021. On May 14, 2021, the Division filed a Motion *in limine* to preclude Respondent from offering witness testimony outside of first-hand knowledge or perception, testimony which was not relevant to the facts at issue, and improper expert opinion testimony.

The hearing was held via remote video conference on May 25, 2021. Prior to the start of the hearing, the ALJ addressed the Division's Motion *in limine* on the record. The Division's objection to improper expert testimony was moot given that the Respondent's proposed expert witness was unavailable to testify. The remainder of the motion, which sought to limit testimony consistent with Wis. Stat. § 227.45 was granted. At the close of the hearing the ALJ set a deadline for the parties to submit post-hearing briefs, which were received. The Division submitted a reply brief, which has been excluded from the record given that the ALJ did not provide either party an opportunity to submit same. The record in this matter includes the pleadings, the parties respective motion submissions, the hearing recording and transcript, and post-hearing briefs.

FINDINGS OF FACT

1. Respondent, Heather M. Long, R.N. (hereinafter Respondent) is a licensed registered nurse in the State of Wisconsin (license number 17312-30). The Respondent obtained her registered nurse (RN) license on July 15, 2010, and her license is current through February 28, 2022. Prior to obtaining her RN license, the Respondent worked as a licensed practical nurse (LPN) and certified nursing assistant (CNA). She has worked in the healthcare industry for over fourteen years. (DLSC Ex. 10; Hearing testimony of Heather Long; Amended Complaint ¶ 1; Respondent's Answer ¶ 1)
2. At all times relevant to this proceeding, Respondent was employed as an RN at a nursing home (Facility) located in Beaver Dam, Wisconsin. In June 2018, the Respondent was the RN supervisor working on third shift at the Facility. (DLSC Ex. 10; H. Long hearing testimony; Amended Compl. ¶ 3; Resp. Answer ¶ 3)
3. Prior to the start of the Respondent's shift at the Facility on June 5, 2018, the Respondent obtained and ingested "Breathe Easy" tablets purchased from a gas station to help her stay awake during her work shift. The Respondent acknowledged using other substances such as energy drinks, coffee, and other over-the-counter medication like "No Doz" to stay awake during her shifts at the Facility. (DLSC Exs. 4 and 10; H. Long hearing testimony)
4. On June 6, 2018, during the course of executing her employment duties, the Respondent discovered that a container system for disposing used fentanyl patches in the Facility's med

room was full, causing fentanyl patches to become stuck in the disposal slot. In the process of attempting to dispose of a resident's fentanyl patch the Respondent dislodged a number of other fentanyl patches in the container and placed them in a cup, covered the cup with a latex glove, sealed it with tape and left it in the locked med room at the Facility. The Respondent failed to contact her supervisor, the director of nursing, or the pharmacy about the overflowing fentanyl patches and failed to properly dispose of the sealed cup of used fentanyl patches prior to leaving her shift for the day. (DLSC Ex. 10; H. Long hearing testimony; Amended Compl., ¶¶ 4 - 6; Resp. Answer, ¶¶ 4- 6)

5. Following the discovery of the fentanyl patches in the med room on June 6, 2018, the Respondent was asked to submit to a urine drug screen, which she did later that same day. (H. Long hearing testimony; Amended Compl. ¶ 8; Resp. Answer ¶ 8)
6. The Respondent's urine drug screen came back positive for amphetamines but not fentanyl. (DLSC Ex. 3; Hearing testimony of Daniel McManaway; H. Long hearing testimony; Amended Compl. ¶ 8; Resp. Answer ¶ 8)
7. Amphetamines are a Schedule II controlled substance requiring a prescription under Wis. Stat. §§ 961.16(5)(a) and 961.38(2). (Amended Compl., ¶ 12; Resp. Answer, ¶ 12)
8. The Respondent did not have a valid prescription for an amphetamine on June 6, 2018. (H. Long hearing testimony; Amended Compl. ¶ 10; Resp. Answer ¶ 10)
9. Amphetamines were not kept on site at the Facility. (Amended Compl. 9; Resp. Answer ¶ 9)
10. The Respondent's use of over-the-counter medications like "Breathe Easy" to stay awake would not result in a positive drug screen for amphetamines. (Hearing testimony of Dr. Richard Goldberg; McManaway hearing testimony)
11. The Respondent's husband was prescribed Vyvanse for ADHD in 2018. (DLSC Ex. 10; H. Long hearing testimony; hearing testimony of Jay Long)
12. Vyvanse contains ingredients that are a derivative of amphetamine and which would yield a positive drug screen result for amphetamine. (McManaway hearing testimony)
13. The Respondent testified that she may have unknowingly and unintentionally ingested her husband's Vyvanse medication. (H. Long hearing testimony)
14. The Respondent testified that she would have purchased and submitted synthetic urine to her employer had she known she would test positive for amphetamine. The Respondent believed that her employer was testing for fentanyl, and she was not aware that Vyvanse contained a controlled substance. (H. Long hearing testimony)

15. The Respondent was terminated from the Facility on June 13, 2018, following the completion of the Facility's investigation into the Respondent's conduct on June 6, 2018, and the issuance of the medical officer's review confirming the Respondent's positive test result for amphetamine without a valid prescription. (DLSC Ex. 4; Goldberg hearing testimony; Amended Compl. ¶ 11; Resp. Answer ¶ 11)
16. On October 9, 2020, the Department filed a Notice of Hearing and Complaint with the Division of Hearings and Appeals alleging that the Respondent violated Wis. Admin. Code § N 7.03(8)(e) by obtaining, possession, or attempting to obtain or possess a drug without lawful authority. An Amended Complaint was filed on November 17, 2020, merely correcting a date in the original Complaint.

DISCUSSION AND CONCLUSIONS OF LAW

Burden of Proof

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); *see also* Wis. Admin. Code § HA 1.17(2). Preponderance of the evidence means that it is "more likely than not" that an action occurred. *See State v. Rodriguez*, 2007 WI App. 252, ¶ 18, 306 Wis. 2d. 129, 743 N.W.2d 460, citing *United States v. Saulter*, 60 F.3d 270, 280 (7th Cir. 1995).

Jurisdictional Authority

The Wisconsin Board of Nursing (Board) has jurisdiction over this matter pursuant to Wis. Stat. § 441.07(1g). Wisconsin Stat. § 440.03(1) 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 Wis. Admin. Code ch. SPS 2.

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).

Violation

Pursuant to Wis. Stat. §§ 441.07(1g)(b) and (d), the 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). The Division's Amended Complaint alleged that the Respondent tested positive for amphetamines, that she did not have a valid prescription for amphetamines, and that she violated the standards of conduct by obtaining, possessing, or attempting to obtain or possess a drug without lawful authority. (Amended Complaint, ¶ 8-13).

There is no dispute that amphetamines are a controlled substance requiring a valid prescription. See Wis. Stat. §§ 961.16(5)(a) and 961.38(2).

Under Wis. Admin. Code § N 7.03, the potential grounds for taking disciplinary action on a nursing license, include the following relevant conduct:

...
(8) Improper prescribing, dispensing, or administering medication or drug related offenses, including any of the following:

...
(e) Obtaining, possessing, or attempting to obtain or possess a drug without lawful authority.

Wis. Admin. Code § 7.03(8)(e).

The Division asserts that Respondent's positive test for amphetamines is proof that she either obtained or possessed a drug without lawful authority contrary to Wis. Admin. Code § N 7.03(8)(e). In its post-hearing brief, the Division acknowledges that there is no direct evidence of the Respondent having possessed any amphetamines aside from her positive urine screen. (Dept. Brief., p. 16) The Division cites to criminal caselaw in support of the argument that the presence of drugs in the Respondent's system is sufficient circumstantial evidence of her possession of the same. See, *State v. Griffin*, 220 Wis. 2d 371, 381, 584 N.W.2d 127 (Ct. App. 1998). Under criminal law, "the presence of drugs in someone's system, standing alone, is not sufficient evidence to support a conviction for possession of a controlled substance." *State v. Patterson*, 2009 WI App 161, ¶ 25, citing *Griffin*, at 381. Rather, "possession" often requires that the person exercise control over the illegal drug. *Id.* (citing criminal jury instructions). However, "when combined with other corroborating evidence of sufficient probative value, evidence of [ingestion] can be sufficient to prove possession." *Patterson*, ¶ 25. The present matter is not a criminal case and is therefore, not held to the same burden of proof; however, it offers comparable guidance nonetheless.

In the present matter, the preponderance of the evidence convincingly established the validity of the drug testing, chain of custody, and test results confirming that the Respondent tested positive for amphetamines. (DLSC Exs. 1-6; Hearing testimony of Kassandra Haima; Hearing testimony of Christine Nueman; Hearing testimony of Mark Wuest; Hearing testimony of Daniel McManaway). Respondent did not present sufficient evidence to establish an error in collection, testing, or in the chain of custody to invalidate the test results. Thus, the primary issue to be resolved is whether the Division has established by a preponderance of the evidence that the Respondent obtained or possessed a drug without lawful authority as a basis to impose discipline pursuant to Wis. Stat. § 441.07(1g)(b) and (d).

The Division's case against the Respondent is largely based upon circumstantial evidence. There is no factual evidence that the Respondent improperly prescribed, dispensed, or administered medication. No evidence was submitted to demonstrate that the Respondent attempted to improperly divert or access drugs at work, or even outside of work, for herself or others. Moreover, it is undisputed that the Respondent did not have access to amphetamines

through her work. In addition, the Respondent was not accused of committing unprofessional conduct by being impaired or under the influence of a drug while at work. Not only did the Respondent deny intentionally ingesting amphetamine, but there is no testimony or evidence that the Respondent was observed having actually ingested amphetamines. Further, she was not charged with a criminal offense as a result of any alleged unlawful drug related conduct. The only work error alleged against her was that she failed to report to her supervisor that the fentanyl containment system had overflowed, which led to Respondent stuffing them into a taped cup and failing to properly dispose of the cup of fentanyl patches prior to leaving her shift.

The preponderance of evidence established that the Respondent did test positive for a drug that she was not prescribed. In response to the Division's allegations and throughout her testimony, the Respondent has consistently stated she did not *intentionally* or *knowingly* ingest amphetamines. But through her own testimony, the Respondent suggests that she had accidentally ingested her husband's Vyvanse medication, which she states could have been dissolved in a bottle of vitamin water she drank. (Respondent hearing testimony) The Respondent testified that she was not aware that Vyvanse contained amphetamine or that it would be considered a controlled substance. (Id.) Regardless, the evidence establishes that the Respondent had potential access to a drug that would result in a positive test result for amphetamine by virtue of living with her husband who was prescribed Vyvanse. The Division's expert explained that Vyvanse contains an amphetamine derivative that would yield a positive drug screen result for amphetamine. (McManaway testimony) While it is possible that Respondent was not aware that she would test positive for amphetamines by taking Vyvanse, I do not find the Respondent's testimony credible that as a nurse, she was not aware of or familiar with the medications her husband was prescribed. Moreover, the Respondent's testimony was contradicted by her husband's own testimony that Respondent was an active participant in his healthcare, that she attended his appointments, and that she was present when his doctor prescribed his medicine. (Hearing testimony of Jay Long) Also undermining the Respondent's testimony, the Respondent's husband further denied leaving dissolved Vyvanse in the fridge due to the fact that they had teenagers residing in their household. (Id.) Finally, I find it disturbing that the Respondent openly admits that she would have tried to fraudulently manipulate any drug test results by purchasing and submitting synthetic urine to her employer had she thought that her urine would test positive for an amphetamine.

It is the Division's burden to demonstrate that the Respondent "more likely than not" committed an act that is grounds for disciplining her license. Under Wis. Admin. Code § N 7.03(8), a "drug related offense" is separate sanctionable conduct from the "improper prescribing, dispensing, or administering medication" and based upon the language in the Code, such an offense would include the Respondent having "obtained or possessed a drug without lawful authority." The Division established that the Respondent tested positive for amphetamines and that Respondent's husband did have a prescription for Vyvanse, which if ingested would result in a positive test result for an amphetamine. Despite the testimony from the Respondent and her husband that he kept his prescriptions hidden away, the Respondent herself raised the possibility that she may have ingested her husband's medication, thus corroborating the Division's circumstantial evidence. Based upon the preponderance of the evidence and in light of the Respondent's less than credible testimony, I find it more likely than not that the Respondent

obtained or possessed and then ingested amphetamines without a prescription, i.e. "without lawful authority," which as a drug related offense is grounds for disciplining the Respondent.

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).

"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 discipline, monitoring, and limitations are appropriate. *Gilbert v. State Medical Examining Bd.*, 119 Wis. 2d 168, 189-90, 349 N.W.2d 68 (1984).

The Division requests that Respondent be reprimanded and that her nursing license and the associated privilege to practice under the Enhanced Nurse Licensure Compact, be subject to a two-year impairment order with required AODA monitoring and drug testing, along with the assessment of costs in this matter. The Division cites to prior Board orders approving stipulations that included reprimands and monitoring. None of the cases cited are directly on point with the present matter, however. They all involved clear abuse of alcohol and/or drugs, undisputed intentional conduct, and criminal behavior, none of which has clearly been established in the present matter. See *In the Matter of Disciplinary Proceedings Against Lisa M. Morgan, R.N.*, Order Number 0003971 (May 4, 2015) (nurse found in possession of multiple hydrocodone and Dilaudid pills without a valid prescription during an OWI stop.)¹ See also *In the Matter of Disciplinary Proceedings Against Tara L. Holman, L.P.N.*, Order Number 0004589 (March 10, 2016) (nurse whose urine drug screen tested positive for morphine, marijuana, and cocaine without a valid prescription and admitted to taking her husband's prescribed morphine for her own tooth pain)² See also *In the Matter of Disciplinary Proceedings Against Erin N. Leitz, R.N.*, Order Number 0007120 (December 10, 2020) (nurse who was apprehended for OWI tested positive for benzoylcegonine and amphetamine and found to have alcohol dependency.)³

The facts in *the Matter of Disciplinary Proceedings Against David M Knack*, Order No. 0003012 (Feb. 13, 2014), are slightly more in line with the present case. In *Knack*, the respondent nurse committed errors in charting, documenting, and administering medications. A subsequent drug screen of the Respondent's urine tested positive for marijuana. The Board reprimanded *Knack* and ordered that he complete six hours of education on medication dispensing and documentation. *Id.*⁴ Like *Knack*, the Respondent was tested following her error at work of failing to notify her

¹ This decision is available online at: <https://online.drl.wi.gov/decisions/2015/ORDER0003971-00011281.pdf>.

² This decision is available online at: <https://online.drl.wi.gov/decisions/2016/ORDER0004589-00012435.pdf>.

³ This decision is available online at: <https://online.drl.wi.gov/decisions/2020/ORDER0007120-00017269.pdf>.

⁴ This decision is available online at: <https://online.drl.wi.gov/decisions/2014/ORDER0003012-00009398.pdf>.

supervisor or properly dispose of overflowing fentanyl patches in the med room. Similar to *Knack*, the Respondent in the present matter tested positive for a substance unrelated to her work. Neither the Respondent in the present matter nor *Knack* were alleged to have been impaired during the course of their work, neither were alleged to have diverted patient medication, and neither were charged with criminal offenses.

The Respondent in the present matter is in agreement with the Division's recommendation for a reprimand. She is also willing to undergo an AODA assessment and twelve months of drug screen monitoring. The Respondent does not agree with any restriction prohibiting her from access to controlled substances through her employment. In the present case, there has been no evidence presented that the Respondent attempted to access or divert medications through her employment. In addition, there is no evidence that the Respondent currently suffers from an addiction or has unlawfully abused drugs in the past. There is also no evidence that the Respondent was impaired at work or that the public safety, or specifically, the Respondent's patients were at risk due to her conduct. Furthermore, the evidence does not establish that the Respondent is not competent to practice nursing safely. Thus, a reprimand with a shortened period of monitoring is reasonable. Further, a severe sanction for inadvertent ingestion of a drug will not likely serve as a deterrent to others who may engage in similar inadvertent behavior. Based upon the other mitigating facts in this matter, I believe that a shortened period of monitoring is appropriate, along with the Respondent's completion of an AODA assessment, and follow through with any treatment recommendations made as a result of the AODA assessment. I do not believe that it is necessary to limit the Respondent's ability to obtain employment based upon her access to controlled substances as there has been no evidence or allegation that she ever attempted to divert medication from her employment. A short period of monitoring and completion of an AODA assessment will serve to ensure the Board's purpose of rehabilitation and the protection of the public.

Based upon the facts of this case and the factors set forth in *Aldrich*, and in full consideration of Board precedent, I find that a reprimand is warranted. But based upon a review of prior discipline cases, I do not believe that the facts in evidence support the Division's recommendation to impose a two-year impairment order. Instead, I recommend that any period of monitoring and drug screens be limited to a one-year period without limitation on the Respondent's access to controlled substances at her employment, and that the Respondent successfully complete an AODA assessment along with follow up treatment, if any, recommended by the assessment.

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. *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 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 Buenzli-Fritz*, LS0802183CHI (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.

In the present matter, the Division alleged one count of misconduct by the Respondent. The Division's case rested solely on the Respondent having tested positive for a controlled substance, which she did not have access to through her employment. The Respondent was apparently cooperative in the disciplinary process, and she has had no prior discipline imposed against her. Further, the discipline sought in this matter involves a reprimand, and thus is on the lower end of the range of possible sanctions. Although costs should not be imposed against the Respondent merely because she consistently disputed that she knowingly or intentionally obtained or possessed amphetamines, the Respondent also disputed the findings of the drug screen results, which required the Division to present substantial evidence and testimony to support the validity of the urine screen results at the hearing in this case. However, I find that the Division's case did involve some wasted time, money and effort based, in part, upon the Division's unsuccessful Motion for Summary Judgment that was filed in December 2020 and denied in February 2021. Therefore, I deem those costs as unwarranted and superfluous.

Using *Noesen* as guidance, considering the Board's historical reasoning, and considering and applying such reasoning to the above facts, I recommend that full costs of this proceeding should be assessed against Respondent minus any costs associated with the Division's preparation of the unsuccessful summary judgment motion. See, Wis. Admin. Code § SPS 2.18.

CONCLUSIONS OF LAW

1. The Wisconsin Board of Nursing has jurisdiction to act in this matter pursuant to Wis. Stat. § 441.07 and Wis. Admin. Code § N 7.03.
2. Based upon the conduct set forth in the Findings of Fact, Respondent Heather M. Long, R.N., improperly obtained or possessed a drug without lawful authority contrary to Wis. Admin. Code § N. 7.03(8)(e).
3. As a result of the above conduct, Heather M. Long, R.N., is subject to discipline pursuant to Wis. Stat. § 441.07(1)(b) and (d).

ORDER

1. Respondent is REPRIMANDED.

2. The nursing license issued to Heather M. Long, R.N., (license number 17312-30) and her privilege to practice in Wisconsin pursuant to the Nurse Licensure Compact, are LIMITED as follows:

- a. Within 90 days of the date of this Order, Respondent shall at her own expense, successfully complete an Alcohol and Other Drug Abuse (AODA) assessment with a licensed counselor.
- b. The Respondent shall fully comply with any follow up treatment and/or counseling recommended as a result of the AODA assessment.
- c. Within 30 days of satisfactorily completing the AODA assessment and recommended treatment required above, Respondent shall submit, to the Department Monitor, proof of successful completion of the conditions imposed herein. Acceptable proof shall be written verification from the counselor and/or institution completing the assessment and providing the recommended treatment, if any.
- d. For a period of at least one (1) year from the date of this Order:
 - i. Respondent shall enroll and participate in a drug and alcohol monitoring program which is approved by the Department (Approved Program). Enrollment shall occur within thirty (30) calendar days from the date of this Order.
 - ii. At the time Respondent enrolls in the Approved Program, Respondent shall review all of the rules and procedures made available by the Approved Program. Failure to comply with all requirements for participation in drug monitoring established by the Approved Program is a substantial violation of this Order. The requirements shall include:
 1. Contact with the Approved Program as directed on at least a weekly basis, or as determined by the Approved Program.
 2. Production of a urine, blood, sweat, fingernail, hair, saliva, or other specimen at a collection site designated by the Approved Program within five (5) hours of notification of a test.
 3. The Approved Program shall require the random testing of specimens at a frequency of not less than four (4) times per month, for at least the first six months of this Order.
 - iii. Respondent shall abstain from all personal use of controlled substances as defined in Wis. Stat. § 961.01(4), except when prescribed, dispensed, or administered by a practitioner for a

legitimate medical condition. Respondent shall disclose Respondent's drug history and the existence and nature of this Order to the practitioner prior to the practitioner ordering the controlled substance. Respondent shall at the time the controlled substance is ordered immediately sign a release in compliance with state and federal laws authorizing the practitioner to discuss Respondent's treatment with, and provide copies of treatment records to, the Board or its designee. Copies of these releases shall immediately be filed with the Department Monitor.

- iv. Respondent shall report to the Department Monitor all prescription medications and drugs taken by Respondent. Reports must be received within 24 hours of ingestion or administration of the medication or drug, and shall identify the person or persons who prescribed, dispensed, administered, or ordered said medications or drugs. Each time the prescription is filled or refilled, Respondent shall immediately arrange for the prescriber or pharmacy to fax and mail copies of all prescriptions to the Department Monitor.
- v. Respondent shall provide the Department Monitor with a list of over-the-counter medications and drugs that she may take from time to time. Over-the-counter medications and drugs that mask the consumption of controlled substances, create false positive screening results, or interfere with Respondent's treatment and rehabilitation, shall not be taken unless ordered by a physician, in which case the drug must be reported as described in the paragraph 2(a)iv.
- vi. All positive test results are presumed valid and may result in automatic suspension of licensure by the Board or the Board's designee. Respondent must prove by a preponderance of the evidence an error in collection, testing, fault in the chain of custody or other valid defense.
- vii. If any urine, blood, sweat, fingernail, hair, saliva, or other specimen is positive or suspected positive for any controlled substances, Respondent shall promptly submit to additional tests or examinations as the Board or its designee shall determine to be appropriate to clarify or confirm the positive or suspected positive test results.
- viii. 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.

e. Pursuant to Uniform Nurse Licensure Compact regulations, Respondent's nursing practice is limited to Wisconsin during the pendency of this limitation. The Respondent may not practice in another Compact State, other than Wisconsin, while her license is encumbered by any term or restriction of this Order. 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.

f. This limitation shall be removed from Respondent's license after satisfying the Board or its designee that Respondent has successfully completed the ordered assessment, drug screens, and recommended follow up treatment.

3. In the event Respondent violates any term of this Order, Respondent's license (173172-30), or Respondent's right to renew her license, may, in the discretion of the Board or its designee, be **SUSPENDED**, without further notice or hearing, until Respondent has complied with the terms of the Order. The Board in its discretion may in the alternative impose additional conditions and limitations or other additional discipline and/or in the alternative refer any violation of this Order to the Division of Legal Services and Compliance for further investigation and action for a violation of any of the terms of this Order. In the event Respondent fails to timely submit payment of costs as ordered or fails to submit proof of successful completion of the ordered education as set forth above, Respondent's license (no. 173172-30) may, in the discretion of the Board or its designee, be **SUSPENDED**, without further notice or hearing, until Respondent has complied with payment of the costs and completion of the conditions set forth above.

4. Payment of costs (made payable to the Wisconsin Department of Safety and Professional Services) shall be sent by Respondent to the Department Monitor at 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) 266-2112; Fax (608) 266-2264
DSPSMonitoring@wisconsin.gov

Respondent may also submit this information at: <https://dpsmonitoring.wi.gov>.

IT IS FURTHER ORDERED that Respondent pay recoverable costs incurred before and after the Division's preparation of a summary judgment motion in this matter in an amount to be determined, 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 listed in paragraph 4 above.

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 7th day of July, 2021.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, 5th floor
Madison, Wisconsin 53705
Tel. (608) 264-7980
Fax: (608) 264-9885

By: 

Kristin P. Fredrick
Administrative Law Judge

NOTICE OF RIGHTS OF APPEAL

TO: Heather Long
351 Fond Du Lac
Waupun, WI 53963-1510

You have been issued a Final Decision and Order. For purposes of service the date of mailing of this Final Decision and Order is **October 1, 2021**. Your rights to request a rehearing and/or judicial review are summarized below and set forth fully in the statutes reprinted on the reverse side.

A. REHEARING.

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences on the day of personal service or the date of mailing of this decision. The date of mailing of this Final Decision is shown above.

The petition should name as the respondent the Department, Board, Examining Board, or Affiliated Credentialing Board which issued the Final Decision and Order. A copy of the petition for rehearing must be served upon the respondent at the address listed below.

A petition for rehearing shall specify in detail the grounds for relief sought and supporting authorities. Rehearing will be granted only on the basis of some material error of law, material error of fact, or new evidence sufficiently strong to reverse or modify the Order which could not have been previously discovered by due diligence. The agency may order a rehearing or enter an order disposing of the petition without a hearing. If the agency does not enter an order disposing of the petition within 30 days of the filing of the petition, the petition shall be deemed to have been denied at the end of the 30 day period. The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law. A petition for rehearing is not a prerequisite for judicial review.

B. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in section 227.53, Wisconsin Statutes (copy on reverse side). The petition for judicial review must be filed in circuit court where the petitioner resides, except if the petitioner is a non-resident, the proceedings shall be in the county where the dispute arose. The petition should name as the respondent the Department, Board, Examining Board, or Affiliated Credentialing Board which issued the Final Decision and Order. A copy of the petition for judicial review must also be served upon the respondent at the address listed below.

A petition for judicial review must be served personally or by certified mail on the respondent and filed with the court within 30 days after service of the final Decision and Order if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. Courts have held that the right to judicial review of administrative agency decisions is dependent upon strict compliance with the requirements of sec. 227.53(1)(a), Stats. This statute requires, among other things, that a petition for review be served upon the agency and be filed with the clerk of the circuit court within the applicable 30 day period.

The 30 day period for serving and filing a petition for judicial review commences on the day after personal service or mailing of the Final Decision and Order by the agency, or, if a petition for rehearing has been timely filed, the day after personal service or mailing of a final decision or disposition by the agency of the petition for rehearing, or the day after the final disposition by operation of the law of a petition for rehearing. The date of mailing of this Final Decision and Order is shown above.

The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is a person aggrieved by the decision, and the grounds specified in section 227.57, Wisconsin statutes, upon which the petitioner contends that the decision should be reversed or modified. The petition shall be entitled in the name of the person serving it as Petitioner and the Respondent as described below.

SERVE PETITION FOR REHEARING OR JUDICIAL REVIEW ON:

Wisconsin Board of Nursing
1400 East Washington Avenue
P.O. Box 8366
Madison, WI 53708-8366

227.49 Petitions for rehearing in contested cases.

(1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.53 Parties and proceedings for review.

(1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision as provided in this chapter and subject to all of the following procedural requirements:

(a)

1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board, the credit union review board, or the savings institutions review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1. to 4.

2. Unless a rehearing is requested under s. 227.49, petitions for review of contested cases shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review under this

subdivision shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this subdivision commences on the day after personal service or mailing of the decision by the agency.

227.57 Scope of review.

(1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.

(2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.

(4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

(5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

(6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(7) If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.

(8) The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(9) The court's decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.