

WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES



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STATE OF WISCONSIN
BEFORE THE BOARD OF NURSING

IN THE MATTER OF THE	:	FINAL DECISION AND ORDER
DISCIPLINARY PROCEEDINGS AGAINST	:	WITH VARIANCE
	:	ORDER 0007712
ERNEST W. COLBURN.,	:	DHA Case No. SPS-21-0052
RESPONDENT.	:	DLSC Case No. 19 NUR 525

BACKGROUND

On September 30, 2021, Administrative Law Judge Sally Pederson, 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 parties did not file any objections to the PDO. On November 11, 2021, the Board of Nursing (Board) delegated consideration of the merits of the PDO to the Department of Safety and Professional Services' Chief Legal Counsel Aloysius Rohmeyer. Pursuant to this delegation of authority, Chief Legal Counsel Rohmeyer determined it was appropriate to approve the PDO with a 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 and amends the "ORDER" section of the PDO to add the following provisions:

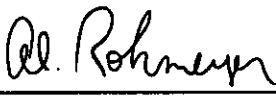
IT IS FURTHER ORDERED that pursuant to Wis. Stat. 441.51(5)(b), Respondent's multistate licensure privilege to practice in all Compact states besides Wisconsin is deactivated during the pendency of this Order.

IT IS FURTHER ORDERED that the Board, within its discretion, may impose additional limitations on Respondent's license when considering a petition for reinstatement of his license to an active status or any other request made by Respondent.

The Board finds that these additions are necessary to bring this order into compliance with the requirements of the Nursing Licensure Compact statute (Wis. Stat. §441.51(5)(b)), and better protect the public given the nature and gravity of the complaint against the license holder.

Dated at Madison Wisconsin this 3rd day of December 2021.

WISCONSIN BOARD OF NURSING

By: 

Aloysius Rohmeyer
Chief Legal Counsel
Department of Safety and Professional Services



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings
Against Ernest W. Colburn, R.N., Respondent

DHA Case No. SPS-21-0052
DLSC Case No. 19 NUR 525

PROPOSED DECISION AND ORDER

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

Ernest W. Colburn

Milwaukee, WI 53209

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

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

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

PROCEDURAL HISTORY

On June 9, 2021, the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed a formal complaint alleging that Respondent Ernest W. Colburn, R.N., failed to respond to requests for information related to a complaint received by the Division alleging that Respondent had engaged in unprofessional conduct and that his failure to cooperate in a timely manner with the Wisconsin Board of Nursing's (Board) investigation makes him subject to discipline pursuant to Wis. Stat. §§ 441.07(1g)(b) and (d) and Wis. Admin. Code § N 7.03.

The Division served Respondent with the Notice of Hearing and the Complaint on June 9, 2021, by both certified and regular mail. Respondent was required to file an Answer within 20 days from the date of service of the Complaint. No Answer was filed.

Following expiration of the 20-day time period to file an Answer, Administrative Law Judge (ALJ) Andrea Brauer sent written notice to both parties of a telephone prehearing conference scheduled for July 30, 2021, at 11:00 a.m. The notice instructed Respondent to contact the ALJ no later than July 29, 2021 with a telephone number at which he could be reached for the conference.

Respondent did not contact the ALJ to provide a telephone number and did not appear for the prehearing conference held on July 29, 2021. At the prehearing conference, the ALJ attempted to reach the Respondent at approximately 11:00 a.m. and 11:10 a.m. at his telephone number on file with the Division. The Respondent did not answer either phone call, and the phone line played a continuous busy tone rather than ringing, so the ALJ was unable to leave a voicemail message.

Based on Respondent's failure to file an Answer to the Complaint and failure to appear at the prehearing conference, the Division moved for default pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c). On August 2, 2021, the ALJ issued a Notice of Default against Respondent and ordered the Division to file a recommended proposed decision and order no later than August 31, 2021.

On August 24, 2021, ALJ Sally Pederson sent written notice to the parties via U.S. mail that this matter had been reassigned to her for adjudication. On August 30, 2021, the Division timely filed a recommended proposed decision and order.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Facts 1-8 are set forth in the Division's Complaint filed in this matter.

1. Ernest W. Colburn, R.N. (Respondent), (DOB: 12/17/1969) is licensed in the state of Wisconsin as a registered nurse, having license number 151725-30, first issued on August 11, 2005, and current through February 28, 2022.

2. The most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) for Respondent is Milwaukee, Wisconsin 53209.

3. At all times relevant to the proceedings, Respondent was licensed as a registered nurse in Wisconsin.

4. On August 27, 2019, the Division received a complaint alleging unprofessional conduct by Respondent.

5. On November 7, 2019, a Division complaint intake specialist sent a request for information pertaining to the complaint to Respondent's email address on file with the Division.

This email was returned as undeliverable due to the mailbox being disabled. On the same date, the Division intake specialist sent a request for information by mail to Respondent's address on file with the Division. The Division did not receive a response.

6. On February 8, 2021, a Division investigator mailed another request for information to Respondent's address on file with the Division. The Division did not receive a response.

7. On March 1, 2021, a Division investigator completed a LexisNexis public records search of Respondent and mailed another request for information to Respondent at 5237 North 28th Street, Milwaukee, WI 53209. The Division sent a second request for information to this same address on March 22, 2021. The Division did not receive a response.

8. On April 21, 2021, a Division investigator placed three phone calls to Respondent's phone number on file with the Department. On each attempt, there was no answer, and the line played a continuous busy tone.

Facts Related to Default

9. On June 9, 2021, the Division served the Notice and Complaint on Respondent at his address of record with the Department by both certified and regular mail.

10. Respondent did not file an Answer to the Complaint.

11. After the expiration of the 20-day time period to file an Answer, ALJ Brauer scheduled a telephone prehearing conference for July 30, 2021. The ALJ sent written notice of the prehearing conference to both parties, with instructions that Respondent contact the ALJ no later than July 29, 2021 with a telephone number at which Respondent could be reached for the conference. Respondent did not contact the ALJ prior to the prehearing conference.

12. At the prehearing conference held on July 30, 2021, Attorney Nicholas Dalla Santa appeared on behalf of the Division. ALJ Brauer attempted to reach Respondent at a telephone number that was on file with the Department for Respondent. The ALJ called Respondent at approximately 11:00 a.m. and 11:10 a.m. The Respondent did not answer either phone call, and the phone line played a continuous busy tone rather than ringing, so the ALJ was unable to leave a voicemail message.

13. The Division moved for default based on Respondent's failure to file an Answer to the Complaint and failure to appear for the prehearing conference, pursuant to Wis. Admin. Code §§ SPS 2.14 and HA 1.07(3)(c).

14. On August 2, 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 August 31, 2021.

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

DISCUSSION

Jurisdictional Authority

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

Default

The Division properly served the Notice and Complaint upon Respondent by mailing a copy to his address of record with the Department. Service by mail is complete upon mailing. Wis. Admin. Code § 2.08(1). Under Wis. Admin. Code § SPS 2.14, 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.” *See also* Wis. Admin. Code § HA 1.07(3)(c).

Here, Respondent violated Wis. Admin. Code § SPS 2.09(4) by failing to file an Answer to the Complaint within 20 days from the date of service. Respondent also failed to appear at the prehearing telephone conference on July 30, 2021. Therefore, Respondent is in default pursuant to Wis. Admin. Code § 2.14, and findings and an order may be entered on the basis of the Complaint and other evidence.

Violations

The Board has the authority to impose discipline against the Respondent pursuant to Wis. Stat. § 441.07. Following an investigation, if the Board determines that a nurse has committed “[o]ne or more violations of this subchapter or any rule adopted by the board under the authority of this subchapter,” or has committed “[m]isconduct or unprofessional conduct,” it may “revoke, limit, suspend or deny a renewal of a license of a registered nurse. . . .” Wis. Stat. § 441.07(1g)(b) and (d). Wisconsin Admin. Code § N 7.03 further specifies that the following constitute grounds for disciplinary action:

- a. After a 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).

Here, Respondent engaged in conduct qualifying as grounds for disciplinary action pursuant to Wis. Admin. Code § N 7.03(1)(c) by failing to cooperate in a timely manner with the Board’s investigation. It is undisputed that Respondent failed to respond to any of the Division’s eight attempts to contact him between November 2019 and April 2021. In addition, Respondent failed to appear in these proceedings, offered no argument or evidence disputing the allegations

in the Complaint and was found in default. Respondent's actions, or lack thereof, demonstrate a repeated failure to cooperate in a timely manner with the Board's investigation.

By engaging in conduct that constitute grounds for disciplinary action on his license, Respondent is subject to discipline by the examining board, pursuant to Wis. Stat. §§ 441.07(1g)(b) and (d), and Wis. Admin. Code § N 7.03.

Discipline

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

The Division has recommended that Respondent's license be suspended until he is found to be in compliance with the terms of the Order section set forth below. The recommended discipline is consistent with the purposes articulated in *Aldrich*. Although promoting rehabilitation is one of the purposes of discipline, the likelihood of rehabilitation is unknown in this case. Respondent failed to respond to the Division's repeated requests for information about the allegations. Because Respondent did not file an Answer to the Complaint and failed to appear for the prehearing conference, the Board cannot determine whether measures aimed at rehabilitation would be effective. By his inaction, Respondent demonstrated a lack of respect for Board authority.

Respondent's absolute lack of cooperation with the Board's investigation is misconduct that is not to be taken lightly. By repeatedly failing to cooperate with the investigation, Respondent posed a threat to public safety since the complaint filed against him was not able to be thoroughly investigated. To date, Respondent maintains an active license to practice registered nursing in Wisconsin. The Board's duty to regulate the Respondent was severely impeded as a result of Respondent's failure to cooperate with the Division's investigation and the hearing proceedings. An Order that suspends Respondent's license is necessary to ensure that Respondent is practicing safely and that Respondent cooperates with the Board that issued and regulates his license.

Registered nurses are licensed to care for the sick and injured, a vulnerable population. "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, Wisconsin 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 state 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). Accordingly, suspension of Respondent's license is necessary to protect the public from other potential instances of misconduct.

Suspension is also necessary to deter other licensees from engaging in similar conduct. Failing to cooperate with the Board that issued a license to practice nursing is misconduct that simply cannot be tolerated. Suspension is an appropriate response to Respondent's disregard the licensing authority governing his profession. Other licensees must be put on notice that failing to cooperate with the Board is a not an option and that the consequences for engaging in such misconduct are severe. Licensees must cooperate so that the Board can ascertain whether a violation was committed and determine the appropriate outcome to rehabilitate the licensee while protecting the health, safety, and welfare of the public. Respondent has totally disregarded the Board's authority and the regulations in place to protect public health and welfare. Therefore, the suspension of Respondent's license to practice nursing in Wisconsin is an appropriate response.

Finally, the recommended discipline is consistent with Board precedent. *See In the Matter of the Disciplinary Proceedings Against Linda L. Polanco, R.N.*, Order Number 0007563 (August 25, 2021) (Board suspended Respondent's license indefinitely for failing to cooperate with the Board's investigation and proceedings and required completion of education in order to petition for license reinstatement);¹ *In the Matter of the Disciplinary Proceedings Against Amanda Nabbefeldt, R.N.*, Order Number 0007516 (August 12, 2021) (Board suspended Respondent's license indefinitely for failing to cooperate with the Board's investigation and proceedings).²

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

Costs

The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against Respondent. *See Wis. Stat. § 440.22(2)*. In exercising such discretion, the Board must look at aggravating and mitigating the 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 these 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* (LS0802183 CHI) (Aug. 14, 2008). It is within the

¹ *In the Matter of the Disciplinary Proceedings Against Linda L. Polanco, R.N.*, Order Number 0007563

² *In the Matter of the Disciplinary Proceedings Against Amanda Nabbefeldt, R.N.*, Order Number 0007516

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.

Considering the above factors, it is appropriate for Respondent to pay the full costs of the investigation and prosecution of these proceedings. Respondent is in default, and the factual allegations identified in this decision were deemed admitted. The allegations involve a serious charge of failure to cooperate with the Board's investigation – a violation that represents a clear disregard for the Board's authority. The level of discipline sought is a reprimand, education, and potential suspension, which is a substantial level of discipline responsive to the violations in this matter. Respondent failed to cooperate with the Division's investigation and the 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. 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 Respondent to pay 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 that Respondent's license to practice as a registered nurse in Wisconsin (license number 151725-30), and Respondent's right to renew his license, are SUSPENDED for an indefinite period.

IT IS FURTHER ORDERED that Respondent may petition for reinstatement of his license under the following conditions:

- a. Prior to submitting a petition for reinstatement, Respondent shall at his own expense take and successfully complete the Wisconsin Nurse Practice Act course provided/offered by the National Council of State Boards of Nursing (NSCBN) or an equivalent course offered by a provider pre-approved by the Board's monitoring liaison, including taking and passing any exam offered for the courses.
 - i. Respondent shall submit proof of successful completion of the education in the form of verification from the institution providing the education to the Department Monitor. None of the education completed pursuant to this requirement may be used to satisfy any continuing education requirements that have been or may be instituted by the Board or Department, and also may not be used in future attempts to upgrade a credential in Wisconsin.

- ii. This limitation shall be removed from Respondent's license after satisfying the Board or its designee that Respondent has successfully completed all of the ordered education.

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 Department Monitor at:

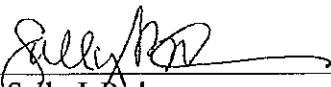
Department Monitor
Division of Legal Services and Compliance
Department of Safety and Professional Services
P.O. Box 7190, Madison, WI 53707-7190
Telephone (608) 266-2112; Fax (608) 266-2264
DSPSMonitoring@wisconsin.gov

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

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

Dated at Madison, Wisconsin on September 30, 2021.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way
Madison, Wisconsin 53705
Tel.: (608) 266-9347
Email: sally.pederson@wisconsin.gov

By: 
Sally J. Pederson
Senior Administrative Law Judge