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Before the
State Of Wisconsin
Board of Nursing

In the Matter of the Disciplinary Proceedings
Against Brian D. Borowski, R.N., Respondent.

FINAL DECISION AND ORDER

Order **ORDER 0008118**

Division of Legal Services and Compliance Case No. 21 NUR 253

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 16th day of August, 2022.

A. Rohmeyer **DSPS Chief Legal Counsel,**
-Member **Delegate**
Board of Nursing



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Disciplinary Proceedings Against
Brian D. Borowski, R.N., Respondent

DHA Case No. SPS-22-0017
DLSC Case No. 21 NUR 253

PROPOSED DECISION AND ORDER

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

Brian D. Borowski
335 Sandclay Dr.
Spring Lake, NC 28390

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

PROCEDURAL HISTORY

On March 18, 2022, the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), served the Notice of Hearing and the Complaint in this matter on Respondent Brian D. Borowski, R.N. (Respondent), by mailing copies to his address on file with the Department via both certified and regular mail, pursuant to Wis. Admin. Code § SPS 2.08 and Wis. Stat. § 440.11(2). Respondent failed to file an answer to the Complaint as required per Wis. Admin. Code § 2.09(4).

Following expiration of the 20-day time period to file an Answer, the undersigned administrative law judge (ALJ) scheduled a telephone prehearing conference for April 28, 2022, at 11:00 a.m. Respondent did not appear.

On April 28, 2022, the Division moved for default based on the Respondent's failure to file an answer to the Complaint and failure to appear at the prehearing conference, pursuant to Wis. Admin. Code § SPS 2.14 and Wis. Admin. Code § HA 1.07(3)(c).

On May 3, 2022, the ALJ issued a Notice of Default and Order against Respondent and ordered the Division to file a recommended proposed decision and order by May 27, 2022. The Division timely filed its submission.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Facts 1-13 are set forth in the Division's Complaint against Respondent filed in this matter.

1. The Respondent (DOB: January 17, 1983) is licensed in the state of Wisconsin to practice as a registered nurse, having license number 175724-30, first issued on February 1, 2011, and expired on February 28, 2022. Respondent's license is currently suspended due to a delinquency in support payments pursuant to Wis. Stat. § 440.13.

2. Respondent retains a five-year right to apply for renewal of his license to practice as a registered nurse in Wisconsin pursuant to Wis. Stat. § 440.08(3).

3. Respondent's most recent address on file with the Department is 335 Sandclay Drive, Spring Lake, North Carolina 28390.

4. Respondent was licensed in North Carolina as a registered nurse (license number 256552) with multistate privileges, through January 31, 2022.

5. On November 22, 2020, while working as a nurse in an emergency department located in North Carolina, Respondent took a personal cell phone from a patient's personal belongings, without permission from the patient or anyone else. Later that same day, Respondent sold the patient's cell phone at an eco-ATM kiosk for \$36.00.

6. On December 25, 2020, Respondent was arrested in North Carolina and charged with obtaining property by false pretenses, misdemeanor larceny, and misdemeanor possession of stolen goods for stealing a patient's cell phone and selling it for \$36.00 at a kiosk in a local shopping mall.

7. On April 20, 2021, the North Carolina Board of Nursing reprimanded Respondent as a result of his conduct in paragraphs five (5) and six (6).

8. On April 22, 2021, the Division contacted Respondent via his email address on file with the Department requesting a response to the allegations. No response was received.

9. On April 30, 2021, the Division contacted Respondent via his email address on file with the Department requesting a response to the allegations. On May 4, 2021, Respondent replied stating that he would send the information as soon as possible. However, Respondent did not send any additional information.

10. On May 10, June 10, and September 15, 2021, the Division contacted Respondent via his email address on file with the Department requesting a response to the allegations. No response was received.

11. On October 29, 2021, the Division mailed a letter to Respondent at his address on file (North Carolina address) with the Department requesting a response to the allegations. No response was received.

12. On January 7, 2022, the Division mailed a letter via certified mail to Respondent at his address on file (North Carolina address) with the Department requesting a response. No response was received.

13. On February 2, 2022, the Division mailed a letter via certified mail to Respondent at a Wisconsin address on file with the Department (a former address provided by Respondent to the Department) requesting a response. No response was received.

Facts Related to Default

14. On March 18, 2022, the Division served the Notice and Complaint on Respondent at his address of record with the Department by both certified and regular mail.

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

16. Following expiration of the 20-day time period to file an Answer, the undersigned administrative law judge (ALJ) scheduled a telephone prehearing conference for April 28, 2022, at 11:00 a.m. Notice of this prehearing conference was sent to both parties, with instructions that Respondent contact the ALJ with a telephone number at which Respondent could be reached for the conference no later than April 27, 2022. Respondent did not contact the ALJ. At the prehearing conference held on April 28, 2022, the ALJ attempted to reach Respondent at his telephone number on file with the Division. Respondent did not answer the telephone. The ALJ emailed Respondent at the email address on file with the Division, indicating he should contact the ALJ at the phone number provided within ten minutes, consistent with Wis. Admin. Code § HA 1.07(3)(c). As of the date of this Proposed Decision and Order, Respondent has not contacted the ALJ.

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

18. On May 3, 2022, the ALJ issued a Notice of Default against the Respondent and ordered the Division to file and serve a recommended Proposed Decision and Order no later than May 27, 2022.

19. The Division timely filed its recommended Proposed Decision and Order.

DISCUSSION AND CONCLUSIONS OF LAW

Jurisdictional Authority

The Wisconsin Board of Nursing (Board) has jurisdiction over this matter pursuant to Wis. Stat. § 441.07(1c) and (1g). 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.” Wis. Stat. § 440.03(1). These rules are codified in Wis. Admin. Code ch. SPS 2.

The Division of Hearings and Appeals has authority to issue the proposed decision and order pursuant to Wis. Stat. § 227.43(1m) and Wis. Admin. Code § SPS 2.10(2).

Default

The Division properly served the Notice of Hearing and Complaint upon Respondent by mailing a copy to his address of record with the Department. Wis. Stat. § 440.11(2). Service by mail is complete upon mailing. Wis. Admin. Code § SPS 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 April 28, 2022. For a telephone prehearing conference, the administrative law judge may find a failure to appear grounds for default if any of the following conditions exist for more than 10 minutes after the scheduled time for prehearing conference: (1) the failure to provide a telephone number to the ALJ after it had been requested; (2) the failure to answer the telephone; (3) the failure to free the line for the proceeding; and (4) the failure to be ready to proceed with the prehearing conference as scheduled. *See* Wis. Admin. Code § HA 1.07(3)(c).

Here, Respondent failed to file an answer to the Complaint, failed to appear at the prehearing conference on April 28, 2022, failed to provide a telephone number to the ALJ after it had been requested, failed to answer the telephone when the ALJ called, and failed to proceed with the prehearing conference as scheduled. Therefore, the Respondent is in default.

The burden of proof in disciplinary proceedings before the Board is a preponderance of the evidence. Wis. Stat. § 440.20(3). However, given that Respondent defaulted in this matter, the facts in this proceeding are undisputed and are found on the basis of the Complaint.

Violations

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 provides that the following constitute grounds for taking disciplinary action against a nurse:

- a. Having a license to practice nursing or a nurse licensure compact privilege to practice denied, revoked, suspended, limited, or having the credential holder otherwise disciplined in another state, territory, or country. Wis. Admin. Code § N 7.03(1)(b).
- b. 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).
- c. Violating or aiding and abetting a violation of any law substantially related to the practice of nursing or being convicted of a crime substantially related to the practice of nursing. Wis. Admin. Code § N 7.03(2).

In addition, Wis. Stat. § 440.20(5)(a) provides for discipline should a credential holder fail to respond, to the satisfaction of the Board, within 30 days to a request for information, in connection with an investigation of alleged misconduct of the credential holder.

Here, Respondent violated Wis. Admin. Code § N 7.03(1)(b) by having his license to practice nursing or a nurse licensure compact privilege to practice suspended in another state. On April 20, 2021, the North Carolina Board of Nursing (NC Board) reprimanded Respondent as a result of stealing a patient’s personal cell phone and selling it at a kiosk in a local shopping mall for cash.

Respondent also violated Wis. Admin. Code § N 7.03(1)(c) and Wis. Stat. § 440.20(5)(a) by failing to cooperate in a timely manner with the Board’s investigation. On multiple occasions, Respondent failed to respond to the Division’s attempts to contact him during the Division’s investigation of this case. In addition, Respondent failed to appear and participate in these proceedings. Respondent’s actions, or lack thereof, demonstrate a repeated failure to cooperate in a timely manner with the Board’s investigation.

Finally, Respondent, while working as a nurse, stole personal property belonging to a patient. As such, he violated or aided and abetted a violation of any law substantially related to the practice of nursing or was convicted of a crime substantially related to the practice of nursing within the meaning of Wis. Admin. Code § N 7.03(2).

Based on the above misconduct, along with Respondent's failure to make any argument to dispute the Division's allegations, I find that Respondent is subject to discipline pursuant to Wis. Stat. § 441.07(1g)(b) and (d), and Wis. Admin. Code § N 7.03.

Discipline

The Division recommends that Respondent's license to practice as a registered nurse in Wisconsin, and his right to apply for renewal of his license, be suspended indefinitely. Because Respondent has been found in default for his failure to participate in any part of these proceedings, and because the recommended discipline is consistent with the purposes articulated in *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976), I adopt the Division's recommendation.

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. *Id.*

While Respondent's rehabilitation may be possible, this can only be determined if the Respondent cooperates with the Board. The Division's recommendation accounts for this by allowing Respondent to petition the Board to stay the suspension once Respondent provides information requested by the Department in relation to the matter.¹ Depending on the information provided, the Board may grant the petition to stay the suspension and impose conditions on Respondent's license that promote rehabilitation, such as requiring education, work supervision, and work reports.

The recommended discipline also 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, 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). Respondent's North Carolina license was reprimanded after Respondent stole a patient's cell phone and sold it for cash without the patient's permission. He has since failed to communicate with the Division's multiple requests for information on behalf of the Board, making it impossible for the Board to ensure that Respondent can safely and responsibly practice nursing. As such, an indefinite suspension is appropriate to protect the public.

The recommended discipline deters other nurses licensed in Wisconsin from engaging in similar conduct. Licensees should be on notice that they cannot avoid disciplinary action by simply

¹ Department investigations involving out of state discipline, theft, criminal convictions, and a failure to respond to requests from the Division include, among other things, questions concerning the circumstances surrounding the theft and/or criminal conviction, whether Respondent cooperated with the employer and/or police investigation, whether Respondent is compliant with the terms of his conviction/parole, whether Respondent is remorseful for his conduct and has taken responsibility, and why Respondent failed to respond to the Division during this investigation.

refusing to cooperate with the Board. Suspension of Respondent's license, and his right to apply for renewal of that license, will serve to deter others from committing similar violations.

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 nurse'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);² *In the Matter of the Disciplinary Proceedings Against Amanda Nabbefeldt, R.N.*, Order Number 0007516 (August 12, 2021) (Board suspended nurse's license indefinitely for failing to cooperate with the Board's investigation and proceedings);³ *In the Matter of the Disciplinary Proceedings against Philip M. Lemon, Sr., L.P.N.*, Order No. 0007411 (June 10, 2021) (Nurse was unable to practice safely due to alcohol or substance use, nurse failed to respond to Division requests for information, and nurse failed to appear for hearing proceedings; nurse's license and right to renew the license was revoked);⁴ *In the Matter of the Disciplinary Proceedings Against Jessica A. Lunde, R.N.*, Order No. 0007216 (February 11, 2021) (Right to renew license was revoked after nurse's MN license was suspended, nurse did not disclose suspension on application for licensure in Wisconsin, and nurse failed to respond to requests for information).⁵

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 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 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 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.

² *In the Matter of the Disciplinary Proceedings Against Linda L. Polanco, R.N.*, Order Number 0007563

³ *In the Matter of the Disciplinary Proceedings Against Amanda Nabbefeldt, R.N.*, Order Number 0007516

⁴ *In the Matter of the Disciplinary Proceedings Against Philip M. Lemon, Sr., L.P.N.*, Order No. 0007411

⁵ *In the Matter of the Disciplinary Proceedings Against Jessica A. Lunde, R.N.*, Order No. 0007216

Considering the above factors, it is appropriate for Respondent to pay the full costs of the investigation and prosecution of these proceedings. Respondent defaulted, and the factual allegations identified in the Complaint were deemed admitted. Respondent's misconduct is serious as it includes stealing personal property from a patient as well as a history of out of state discipline. The misconduct also includes 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 an indefinite suspension, which is a proportionate and substantial level of discipline in response to the violations. Respondent has not offered any acceptable justification for his actions, neither during the investigation nor during the hearing proceedings. Such conduct demonstrates disregard for the authority of the Board and disregard for his duties as a nurse.

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:

1. Respondent's license to practice as a registered nurse in Wisconsin (license no. 175724-30), Respondent's right to apply for renewal of his license, and Respondent's ability to practice in Wisconsin pursuant to a multistate privilege granted by a member state of the Nurse Licensure Compact, are SUSPENDED for an indefinite period.
2. Respondent may petition the Board for a STAY of the suspension by contacting the Department Monitor and providing any information requested by the Board or its designee in relation to this matter in a timely fashion.
3. The Board or its designee may stay the suspension upon determination that Respondent has cooperated fully with the Division and provided any information requested by the Board or Division in relation to this matter. The Board or its designee may impose any conditions and/or limitations on Respondent's license that it deems appropriate to protect the health, safety, and welfare of patients and the public.
4. Whether the Board or its designee grants Respondent's petition for a stay of suspension, and/or imposes any conditions and limitations on Respondent's license, Respondent's right to apply for renewal of his license, and Respondent's ability to practice in Wisconsin pursuant to a multistate privilege granted by a member state of the Nurse Licensure Compact, is within its sole discretion and is not subject to appeal.
5. Respondent shall pay recoverable costs in this matter in an amount to be established pursuant to Wis. Admin. Code § SPS 2.18.

6. 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

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

7. 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 Milwaukee, Wisconsin on June 23, 2022.

STATE OF WISCONSIN
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By: Andrea Brauer
Andrea E. Brauer
Administrative Law Judge