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**Before the
State Of Wisconsin
Board of Nursing**

In the Matter of the Disciplinary Proceedings
Against David K. Schubert, R.N., Respondent.

FINAL DECISION AND ORDER
ORDER 0008302
Order No. _____

Division of Legal Services and Compliance Case No. 22 NUR 856

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 12th day of October, 2023.

Member
Board of Nursing



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of Disciplinary Proceedings Against
David K. Schubert, R.N., Respondent

DHA Case No. SPS-23-0028
DLSC Case No. 22 NUR 856

PROPOSED DECISION AND ORDER

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

David K. Schubert, R.N.
17048 Colony Lakes Blvd.
Fort Myers, FL 33908

Wisconsin Board of Nursing
P.O. Box 8366
Madison, WI 53708- 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 May 22, 2023, the Department of Safety and Professional Services (Department), Division of Legal Services and Compliance (Division), filed and served a formal Notice of Hearing and Complaint on the Respondent David K. Schubert, R.N., by mailing copies to his address on file with the Department via both certified and regular mail, pursuant to Wis. Stat. § 440.11(2) and Wis. Admin. Code § SPS 2.09. The Respondent failed to file an answer to the Complaint within 20 days from the date of service. Wis. Admin. Code § 2.09(4).

Following the expiration of the 20-day period to file an answer, the undersigned Administrative Law Judge (ALJ) scheduled a telephonic prehearing conference for June 29, 2023 at 10:30 a.m. The Respondent failed to appear.

On June 29, 2023, the ALJ issued a Notice of Default against the Respondent and ordered the Division to file a recommended proposed decision and order by July 28, 2023. The Division timely filed its submission.

FINDINGS OF FACT

Facts Related to the Alleged Violations

Findings of Fact 1-11 are set forth in the Division's Complaint filed against the Respondent in this matter.

1. The Respondent David K. Schubert is licensed in the state of Wisconsin to practice as a registered nurse with multistate privileges pursuant to the Nurse Licensure Compact (Compact), having license number 256308-30, first issued on August 31, 2020, and current through February 29, 2024.

2. The most recent address on file with the Wisconsin Department of Safety and Professional Services (Department) for the Respondent is 17048 Colony Lakes Blvd., Fort Myers, Florida 33908.¹

3. At all times relevant to this proceeding, the Respondent was employed as a registered nurse with a staffing agency and contracted to work at a hospital located in Roanoke, Virginia (Facility).

4. On November 7, 2022, Roanoke Fire EMS responded to a 911 call to the residence where the Respondent was staying. The 911 caller reported the Respondent may be having a seizure.

5. When Paramedics arrived, they found the Respondent lying on the floor in an altered state of consciousness.

6. Paramedics found multiple medications and used IV catheters in the residence, including an unopened vial of Retacrit.² The label on the bottle indicated it was dispensed from the Facility's pharmacy and belonged to a former Facility patient.

7. On November 7 and 8, 2022, the Respondent was a "no call no show" for his scheduled night shifts at the Facility. On November 8, 2022, the Facility called and texted the Respondent, but he did not respond.

8. On November 9, 2022, the Facility terminated the Respondent's contract.

¹ This is the Respondent's mailing address while he was working under his multistate privileges under the Compact in Florida. Respondent's declared state of primary state of residence is Wisconsin.

² Retacrit is a brand name for epoetin alfa, a controlled substance used to treat anemia.

9. On December 20, 2022, the Department received a complaint regarding the above incident and opened this matter for investigation on behalf of the Board of Nursing (Board).

10. On March 7, 2023, the Department sent a request for a response to the Complaint via email and USPS mail to the Respondent at his email and mailing addresses on file with the Department. The Respondent did not respond.

11. On March 23, 2023, a Department investigator called the Respondent at his telephone number on file with the Department. The Respondent did not answer, and the investigator left a voicemail message requesting he call back. That same day, the Department sent another email to the Respondent's email address on file with the Department. The Respondent did not return the telephone call or respond to the email.

Facts Related to Default

12. On May 22, 2023, the Division served the Notice of Hearing and Complaint on the Respondent at his last known address on file with the Department by both certified and regular mail.

13. The Respondent did not file an Answer to the Complaint.

14. Following the expiration of the 20-day time period to file an Answer, the ALJ scheduled a telephone prehearing conference for June 29, 2023 at 10:30 a.m.

15. Notice of the prehearing conference was sent to both parties, with instructions to the Respondent to contact the ALJ with a telephone number at which the Respondent could be reached for the conference no later than June 28, 2023. The Respondent did not contact the ALJ.

16. At the prehearing conference on June 29, 2023, the Respondent did not appear. The ALJ attempted to reach the Respondent at a phone number on file. The ALJ also emailed the Respondent at his email address on file. The ALJ did not receive a response.

17. On June 29, 2023, the Division moved for default based on the Respondent's failure to answer the Complaint and failure to appear for the prehearing conference pursuant to Wis. Admin. Code §§ SPS 2.14 and HA 1.07(3)(c).

18. On June 29, 2023, 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 July 28, 2023. The Division timely filed its submission.

DISCUSSION AND CONCLUSIONS OF LAW

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 the Respondent by mailing a copy to his last known address. Wis. Stat. § 440.11(2). Service by mail is complete upon mailing. Wis. Admin. Code § SPS 2.08(1). Notice of the prehearing conference was also properly served by mail. *See* Wis. Admin. Code § HA 1.03.

An answer to a complaint shall be filed within 20 days from the date of service of the Complaint. Wis. Admin. Code § SPS 2.09(4). 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, respondent is in default and the disciplinary authority may make findings and enter an order on the basis of the complaint and other evidence.” Wis. Admin. Code § SPS 2.14.

For a telephone prehearing conference, the ALJ 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 a 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. Wis. Admin. Code § HA 1.07(3)(c).

Here, the Respondent failed to file an answer to the Complaint, failed to appear at the prehearing telephone conference scheduled for June 29, 2023, 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 be ready to proceed with the prehearing conference as scheduled. Therefore, the Respondent is in default, and findings and an order may be entered based on the Complaint.

Violations of Wisconsin Statute and Administrative Code

The Board has the authority to impose discipline against the Respondent pursuant to Wis. Stat. §§ 441.07 and 441.51. Following an investigation, if the Board determines that a nurse has committed “[o]ne or more violations 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). The Board maintains jurisdiction over the Respondent’s out of state conduct, must give it the same priority and effect as if it occurred in Wisconsin, and must apply Wisconsin laws to determine the appropriate action. *See* Wis. Stat. § 441.51(5)(a)1.b.

Conduct that is grounds for the Board to take disciplinary action includes:

- a. After a request from the Board, failing to cooperate in a timely manner, with the Board's investigation of a complaint filed against a license holder. Wis. Admin. Code § N 7.03(1)(c).
- b. Failing to report to or leaving a nursing assignment without properly notifying appropriate supervisory personnel and ensuring the safety and welfare of the patient or client. Wis. Admin. Code § N 7.03(6)(d).
- c. Obtaining, possessing, or attempting to obtain or possess a drug without lawful authority. Wis. Admin. Code § N 7.03(8)(e).

The Respondent engaged in conduct that constitutes grounds for disciplinary action under Wis. Admin. Code § N 7.03(1)(c) by failing to cooperate in a timely manner with the Board's investigation. The Respondent failed to respond to any of the Division's attempts to contact him during the Division's investigation of this case.

The Respondent engaged in conduct qualifying as grounds for disciplinary action pursuant to Wis. Admin. Code § N 7.03(6)(d) by failing to report to or leaving a nursing assignment without properly notifying appropriate supervisory personnel and ensuring the safety and welfare of the patient or client. On November 7 and 8, 2022, The Respondent was a "no call no show" for his scheduled night shifts at the Facility. On November 8, 2022, the Facility called and texted the Respondent, but he did not respond.

The Respondent engaged in conduct qualifying as grounds for disciplinary action pursuant to Wis. Admin. Code § N 7.03(8)(e) by obtaining, possessing, or attempting to obtain or possess a drug without lawful authority. On November 7, 2022, law enforcement found a vial containing patient medication and used IV catheters from the Facility. The Facility confirmed that the medication had been dispensed by the Facility's pharmacy for a former patient at the Facility.

By engaging in conduct that is grounds for taking disciplinary action against his credential, along with his failure to participate in these proceedings and make any argument to the contrary, the Respondent is subject to discipline pursuant to Wis. Stat. § 441.07(1g)(b), (c), and (d) and Wisconsin Admin. Code § N 7.03.

Discipline

The Division recommends that the Respondent's credential to practice as a registered nurse in Wisconsin, and his right to renew his credential, be suspended indefinitely. The Respondent may petition the Board for a stay of the suspension. If the Board chooses to stay the suspension, it may impose conditions or limitations on the Respondent's license that it deems appropriate to protect the health, safety, and welfare of patients and the public, provided they are related to the misconduct proven in this matter and serve the three purposes of discipline as outlined in *State v. Aldrich*, 71 Wis. 2d 206, 237 N.W.2d 689 (1976). Because the Respondent has been found in

default, and because the recommended discipline is consistent with the purposes articulated in *Aldrich*, I adopt the Division's recommendation.

The three purposes of discipline are: (1) to promote the rehabilitation of the licensee; (2) to protect the public from other instances of misconduct; and (3) to deter other licensees from engaging in similar conduct. *Id.*

The recommended discipline is consistent with the purposes articulated in *Aldrich*. The allegations in the Complaint are serious. The Respondent took a patient's medication and medical supplies and failed to report to his scheduled shifts. Roanoke paramedics responded to a call at the location the Respondent was staying and found him in an altered state on the floor. Paramedics discovered a patient's medication as well as medical supplies belonging to the Facility. The Respondent was transported and admitted to the hospital. The Facility confirmed the medication had been issued to a former Facility patient. Furthermore, the Respondent was scheduled to work at the Facility on dates following this incident and did not contact the Facility or report for his shifts. When the staffing agency called him to discuss the allegations, the Respondent hung up and failed to provide a written response. The Respondent also failed to respond to the Department's requests for information.

The Respondent's rehabilitation may be possible, but this can only be determined if the Respondent cooperates with the Board. The Department's recommendation accounts for this by allowing the Respondent to petition for a stay of the suspension by contacting the Department Monitor and providing any information requested by the Board regarding this matter.

The Division's recommended discipline protects the public from other potential instances of misconduct by ensuring that the Respondent cannot practice nursing while the Board cannot adequately monitor his competence. "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). The Respondent's conduct poses a serious threat to patient safety, but the Respondent has failed to participate in the Board's efforts to address it. It is impossible for the Board to ensure the Respondent is safely practicing nursing. As such, an indefinite suspension is appropriate to protect the public.

The recommended discipline also deters other credential holders from engaging in similar conduct. Licensees should be on notice that they cannot avoid disciplinary action by simply refusing to cooperate with the Board. Suspension of the Respondent's credential 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 the 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);³ *In the Matter of the Disciplinary Proceedings Against Amanda Nabbefeldt, R.N.*, Order Number 0007516 (August 12, 2021) (Board suspended the Respondent's license indefinitely for failing to cooperate with the Board's investigation and proceedings);⁴ *In the Matter of the Disciplinary Proceedings Against Nancy M. Mokaya, R.N.*, Order Number 0008013 (June 9, 2022) (Board suspended the Respondent's license indefinitely for failing to cooperate with the Board's investigation and proceedings and Board granted ability to impose conditions and/or limitations on the license upon stay of suspension).⁵

Based upon the facts of this case, the factors set forth in *Aldrich*, and prior Board decisions, the discipline recommended by the Division is warranted.

Costs

The Board is vested with discretion concerning whether to assess all or part of the costs of this proceeding against the Respondent. *See* Wis. Stat. § 440.22(2). In exercising such discretion, the Board must look at aggravating and mitigating facts of the case. *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 of these factors to consider, whether other factors should be considered, and how much weight to give any factors considered.

It is appropriate for the Respondent to pay the full costs of the investigation and prosecution of these proceedings. Because the Respondent defaulted and did not file an answer, the factual allegations identified in the Division's Complaint were deemed admitted. The level of discipline sought is an indefinite suspension with the Respondent's ability to petition the Board to terminate the suspension, a substantial level of discipline responsive to the violations in this matter. The Respondent's misconduct includes failure to cooperate with the Board's investigation, failing to report to the Facility for his scheduled shifts, and for obtaining, possessing, or attempting to obtain or possess a drug without lawful authority. The Respondent has not offered any acceptable justification for his actions. Such conduct demonstrates disregard for the authority of the Board and disregard for his duties as a nurse.

³ *In the Matter of the Disciplinary Proceedings Against Linda L. Polanco, R.N.*, Order Number 0007563.

⁴ *In the Matter of the Disciplinary Proceedings Against Amanda Nabbefeldt, R.N.*, Order Number 0007516.

⁵ *In the Matter of Disciplinary Proceedings Against Nancy M. Mokaya, R.N.*, Order Number 0008013.

Finally, the Department is a program revenue agency whose operating costs are funded by the revenue received from credential holders. It would be unfair to impose the costs of pursuing discipline in this proceeding on those licensees who have not engaged in misconduct.

Therefore, it is appropriate for the Respondent to pay the full costs of the investigation and prosecution in this matter, as determined pursuant to Wis. Admin. Code § SPS 2.18.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Wis. Stat. § 441.07(1c) and (1g).
2. The Respondent engaged in conduct that constitutes grounds for disciplinary action under Wis. Admin. Code § N 7.01(1)(c) by, after a request from the board, failing to cooperate in a timely manner, with the board's investigation of a complaint filed against a license holder.
3. The Respondent engaged in conduct that constitutes grounds for disciplinary action under Wis. Admin. Code § N 7.01(6)(d) by failing to report to or leaving a nursing assignment without properly notifying appropriate supervisory personnel and ensuring the safety and welfare of the patient or client.
4. The Respondent engaged in conduct that constitutes grounds for disciplinary action under Wis. Admin. Code § N 7.01(8)(e) by obtaining, possessing, or attempting to obtain or possess a drug without lawful authority.
5. As a result of the above violations, the Respondent is subject to discipline pursuant to Wis. Stat. § 441.07(1g)(b) and (d).
6. As a result of the above violations, suspension of the Respondent's license as ordered is reasonable and appropriate. Wis Stat. §§ 441.07(1g)(b) and (d), and Wis. Admin. Code § N 7.03.
7. The Division of Hearings and Appeals has authority to issue this proposed decision pursuant to Wis. Stat. § 227.46 and Wis. Admin. Code § SPS 2.10.

ORDER

For the reasons set forth above, IT IS ORDERED:

1. The Respondent's license to practice as a registered nurse in the state of Wisconsin (license number 256308-30) and any privilege to practice in Wisconsin under a multi-state license issued by another state are **SUSPENDED** for an indefinite period.

2. The 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 regarding this matter in a timely fashion.

3. 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.

4. The Board or its designee may stay the suspension upon determination that the Respondent has cooperated fully with the Department and provided any information requested by the Board or Department in relation to this matter. The Board or its designee may impose conditions and/or limitations on the Respondent's privilege to practice in Wisconsin that it deems appropriate to protect the health, welfare and safety of patients and the public. Any conditions or restrictions must relate to the misconduct proven in this matter and must serve one of the following purposes: promoting the Respondent's rehabilitation, protecting the public from other instances of misconduct, or deterring other credential holders from engaging in similar conduct.

5. Whether the Board or its designee grants the Respondent's petition for a stay of suspension, and/or imposes any conditions or limitations on the Respondent's privilege to practice in Wisconsin, is within its sole discretion and is not subject to appeal.

6. In the event the Respondent violates any term of this Order, or any subsequent related Order, while a stay of suspension is in place, the Board or its designee may remove the stay, without further notice of hearing, until the Respondent has complied with the terms of the Order. The Board or its designee may, in conjunction with any removal of any stay, prohibit the Respondent for a specified period of time from seeking a reinstatement of the stay under paragraph 2.

7. The Respondent shall pay all recoverable costs in this matter in an amount to be established pursuant to Wis. Admin. Code § SPS 2.18.

8. Petitions, payments of costs (made payable to the Wisconsin Department of Safety and Professional Services), and any other requests for information or submissions related to this Order shall be submitted to the Department Monitor at:

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

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

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

Dated at Madison, Wisconsin on August 25, 2023.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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Andrea E. Brauer
Administrative Law Judge