STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Robyn M. Burton

DECISION

ML-09-0137

The above-named petitioner requested a hearing on May 14, 2009. Prior to conducting a hearing, the petitioner's counsel, Attorney Robert J. Lightfoot, submitted a January 13, 2010 Motion to Dismiss with Exhibits A, B and C to the Division of Hearings and Appeals (DHA) asserting that the Department lacks jurisdiction to substantiate a finding of caregiver misconduct (neglect) against Robyn Burton, on the grounds that the petitioner holds a credential as a licensed practical nurse (LPN), and therefore is not subject to the provisions of Wisconsin's Caregiver Laws. The Department's counsel, Jesus G.Q. Garza, submitted Respondent's January 28, 2010 Brief in Opposition to the Petitioner's Motion to Dismiss with Exhibits R-1 and R-2. Attorney Lightfoot submitted petitioner's February 5, 2010 Reply Brief in Support of Petitioner's Motion to Dismiss with an Affidavit by the petitioner.

The issue for determination is whether petitioner's Motion to Dismiss the Department's Finding of Substantiated Caregiver Misconduct (neglect) against Robyn Burton for lack of jurisdiction should be granted.

PARTIES IN INTEREST:

Petitioner's representative:

Attorney Robert J. Lightfoot II
von Briesen & Roper, S.C.
3 South Pinckney Street, Suite 100
Madison, WI 53703

Respondent:

Wisconsin Department of Health Services

By: Attorney Jesus G.Q. Garza
Office of Legal Counsel
P.O. Box 7870
Madison, WI 53707-7850

ADMINISTRATIVE LAW JUDGE:
Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Michalenes is a community-based residential (CBRF) facility licensed under Wis. Stat ch. 50 and Wis. Admin. Code ch. DHS 83, and is also an entity as defined in Wis. Stat. § 146.40(1)(as).
2. The petitioner is licensed as a practical nurse (LPN) in the State of Wisconsin pursuant to Wis. Stat. §. 441.10 and Wis. Admin. Code ch. N 2.
3. At all times relevant to the instant case, the petitioner was in active status and was eligible to practice as an LPN.
4. An LPN license is a "credential" as defined in Wis. Stat. § 146.40(1)(ag) and 440.01(2)(a)
5. At all times relevant to the instant case, the petitioner was an "employee" at Michalenes as defined in Wis. Admin. Code § DHS 83.02(22).
6. The petitioner is not a nurse aide, as defined in Wis. Admin. Code § 146.40(1)(d), and is therefore not listed on Wisconsin's Nurse Aide Registry.
7. The petitioner has been continuously employed at Michalenes as a Facility Manager since July 14, 1997. Exhibit R-1.
8. The Department of Health Services (DHS) sent an April 20, 2009 Notice of Substantiated Finding of Caregiver Misconduct (neglect) to the petitioner stating that a substantiated finding of neglect will be listed on the Wisconsin Caregiver Registry against the petitioner. Exhibit R-2.
9. The petitioner was hired by Michalenes as the manager in part due to her status as an LPN. February 5, 2010 Affidavit of petitioner attached to Petitioner's Reply Brief.
10. There are several job responsibilities of the Facility Manager at Michalenes that necessitated the petitioner to be credentialed as an LPN. Exhibit R-1, #5, #6, and #14. See Petitioner's Reply Brief, pages 1 and 2.

DISCUSSION

Wis. Admin. Code § 13.03(4) defines the "caregiver misconduct registry" to mean:

Information collected and preserved in a database by the department on all caregivers who have been found to have abused or neglected a client or misappropriated a client's property, **except** for persons licensed, permitted, certified, or registered under ch. **441**, 448, 449, 450, 451, 455, or 459, Stats. (Emphasis added).

Wisconsin Statute Chapter 441 is the Board of Nursing of which § 441.10 refers to Licensed Practical Nurses.

Wis. Admin Code § 13.03(5) defines the "caregiver registry to mean:

> The registry required under s. 146.40(4g), Stats., which consists of 2 lists, the list under s. DHS 129.10 of nurse aides qualified by training and testing to work in a hospital or nursing home or for a home health agency or hospice program, and the caregiver misconduct registry, which includes nurse aides, under this chapter.

Attorney Lightfoot submitted a January 13, 2010 Motion to Dismiss to DHA requesting that the Department's Finding of Substantiated Caregiver Misconduct (neglect) be dismissed due to lack of jurisdiction by the Wisconsin Department of Health Services and the Office of Caregiver Quality. Mr. Lightfoot confirmed that petitioner is a licensed practical nurse (LPN) pursuant to Wis. Stats. 441.10 and Wis. Admin. Code Board of Nursing ch. N2. The petitioner is not a nurse aide or non-certified, non-credentialed caregiver who is enrolled in the Wisconsin Caregiver Misconduct Registry or the Nurse Aide Training. Mr. Lightfoot argued that while petitioner as an LPN could be viewed as a "caregiver" as defined by DHS 13.03(3), the Wisconsin Caregiver Misconduct Registry and the responsibilities of the Office of Caregiver Quality (OCQ) are only intended to cover those caregivers without licenses or credentials. See Petitioner Exhibit C. Petitioner's attorney asserted that any misconduct by an LPN or even an RN are contemplated by Wis. Admin. Code Board of Nursing chapters N6 and N7.

In the Department's January 28, 2010 Brief in Opposition to the Petitioner's Motion to Dismiss, Attorney Garza indicated that petitioner was hired by Michalenes as a manager, and that as a manager she signed a job description on July 14, 1997. See Exhibit R-1. Mr. Garza contended on page 4 of his brief that none of the 21 listed job responsibilities required petitioner to perform any duty or task that required her to be an LPN, and there is nothing in her job description that requires her to be an LPN or hold any other credential issued by the Department of Regulation and Licensing. Basically, the respondent argued that petitioner was hired to be a manager, and petitioner just happened to also be an LPN. Based upon her job responsibilities as the facility manager, petitioner was a caregiver subject o the Wisconsin's Care Law of Wis. Stat. §§ 50.065(1)(ag), 146.40 and Wis. Admin. Code ch. DHS 13.

However, Mr. Garza acknowledged in Respondent's brief that: "According to Wis. Stat. § 146.40(4r)(em), if the subject of a report of alleged caregiver misconduct holds a credential, then the Department is required to refer the report of alleged misconduct to the Department of Regulation and Licensing, <u>but only if the credential</u>, i.e. being an LPN in this particular situation, is related to the individual's employment at . . . the entity." See Garza brief, p4. The Department argued that in this case, petitioner was not hired to be an LPN, was not required to be an LPN in order to function as the facility manager at Michalenes, and therefore the misconduct in this case did not need to be referred to the Department of Regulation and Licensing.

However, such assertions in the Respondent's brief are undermined by the petitioner's Affidavit which was attached to Petitioner's Reply Brief. In that February 5, 2010 Affidavit, Robyn Burton stated under oath that she was "specially hired as the Manager of Michalenes because of my status as an LPN" Affidavit statement #3. Furthermore, petitioner stated in her affidavit that she functioned in many clinical roles as an LPN such as providing basic nursing care to residents, assisting in collection of resident medical data, reporting to the physician changes in residents' conditions, and managing and directing nursing care at Michalenes.

In his Reply Brief, Mr. Lightfoot further asserted that several job responsibilities of petitioner as Facility Manager necessitated that she be credentialed as an LPN, and cited correctly to Exhibit R-1, #5, #6, and #14. Petitioner Reply Brief, pages 1 and 2. Such LPN duties required the skill and training of an LPN which fall under the purview of an LPN pursuant to the Wis. Admin. Code N 6.04(1). Specifically, the petitioner as an LPN performed the following duties at Michalenes under physician supervision: 1) accepted patient care assignments she was competent to perform; 2) provided basic nursing care; 3) recorded nursing care and reported to the physician changes in residents' conditions; 4) assisted with the collection of residents' medical data; 5) reinforced teaching provided by a physician; 6) followed written protocols and procedures; and 7) managed and directed nursing care.

Wis. Stat. 146.40(4r)(b) states in pertinent part:

> Except as provided in pars (em) and (er), the department shall review and investigate any report [of "caregiver misconduct"] received under par. (a) or (am) and, if the allegation is substantiated, make specific, documented findings concerning the misappropriation of property or the neglect or abuse . . . .

Wis. Stat. 146.40(4r)(em) states that:

> If the department receives a report under par. (a) or (am) and determines that an individual who is the subject of the report holds a credential that is related to the individual's employment at, or contract with, the entity, <u>the department shall refer the report to the department of regulation and licensing</u>.

(Emphasis added).

The petitioner established that she had job duties as a manager that were supervisory but also clinical in nature that required her status as an LPN Facility Manger. While the petitioner as an LPN legally fits within the regulatory definition of a caregiver, alleged misconduct by petitioner in her role as an LPN Facility Manager does not subject her to being listed in the Wisconsin Caregiver Misconduct Registry or the Nurse Aid Registry, but instead subjects her to the authority of the Department of Regulation and Licensing per Wis. Admin. Code N 6. Accordingly, based upon all of the above, I conclude that the petitioner's Motion to Dismiss the Department's Finding of Substantiated Caregiver Misconduct (neglect) against Robyn Burton for lack of jurisdiction is granted.

CONCLUSIONS OF LAW

1. Petitioner's Motion to Dismiss is granted because the Department lacks jurisdiction for the Division of Hearings and Appeals to consider the merits of the Department's April 20, 2009 Substantiated Finding of Caregiver Misconduct (neglect) against the petitioner.

2. Petitioner's status and role as an LPN Facility Manager does not subject her to being listed in the Wisconsin Caregiver Misconduct Registry or the Nurse Aid Registry.

NOW, THEREFORE, it is **ORDERED**

The matter is remanded to the Department of Health Services with instructions to take the necessary actions to implement Conclusion of Law #2 above within 10 days of the date of this Decision.

This is a final administrative decision. You may petition for an administrative rehearing by submitting a specific written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. This request must be received by the office within twenty (20) days of the date of this Order. In an appeal to Circuit Court, the respondent is the Department of Health and Family Services, P.O. Box 7850, Madison, WI 53707-7850. The procedure for filing a rehearing petition is contained in Wis. Stat. § 227.49 and the procedure for filing a petition for judicial review is contained in Wis. Stat. § 227.53.

Given under my hand at the City of Madison, Wisconsin, this _____ day of _____, 2010.

_____

Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals
921/

cc: