

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 00-2257

Cir. Ct. No. 99-CV-1442

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STACIE NELDAUGHTER, R.N.,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN BOARD OF NURSING,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
GERALD C. NICHOL, Judge. *Affirmed.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Stacie Neldaughter appeals an order that affirms a decision of the Wisconsin Board of Nursing. The Board disciplined Neldaughter, formerly a registered nurse in Wisconsin, for misconduct and unprofessional conduct. She contends that the Board misinterpreted the administrative code provisions under which she was disciplined, violated her right to due process,

lacked sufficient evidence for the decision, and disciplined her for speech protected under the First Amendment. We affirm on all issues.

¶2 For several years, Neldaughter worked as a registered nurse on the psychiatric unit at Saint Mary's Hospital in Madison. In early 1994, she transferred to a different unit because she objected to the unit's policies concerning electro-convulsive therapy (ECT). She later transferred to a non-nursing position. However, she remained active in efforts to change Saint Mary's ECT policies.

¶3 In September 1994, she encountered a psychiatric in-patient, Tammi H., while leaving the hospital after work. Neldaughter knew Tammi from Tammi's prior stays in the psychiatric unit while Neldaughter worked there. They talked for several minutes about various matters concerning the unit, including Neldaughter's reason for leaving it. When Tammi asked if Neldaughter had any messages for unit staff, Neldaughter responded with obscenities directed at three staff members.

¶4 The next day Neldaughter called Tammi and invited her to dinner that evening in the hospital cafeteria. Tammi accepted. Neldaughter does not dispute the Board's findings that at the ensuing dinner she told Tammi that psychiatric unit patients were receiving ECT without their consent; asked Tammi whether she heard screaming on the unit by patients who did not want ECT; gave Tammi an information sheet on ECT and asked her to distribute it on the unit; told Tammi that her therapists were spreading derogatory information about her to other staff members; described a mock awards ceremony held by staff that she described as disrespectful toward patients; told Tammi that staff personnel eavesdropped on patients; asked Tammi to discuss ECT issues with an

investigative organization; and asked Tammi to attend a protest rally in front of the hospital.

¶5 Tammi was hospitalized for recurrent major depression, complicated by personality and stress disorders. There was evidence that Neldaughter's comments greatly upset Tammi and worsened her condition.

¶6 Consequently, the enforcement division of the Department of Regulation and Licensing charged Neldaughter with violating WIS. ADMIN. CODE § N 7.04, prohibiting "misconduct or unprofessional conduct" that violates minimum standards for protecting a patient or the public, and § N 7.04(4), prohibiting the use of mental pressure which could reasonably cause a patient to suffer mental anguish or fear. The Board found Neldaughter guilty of the first charge, but dismissed the latter because Tammi was not a "patient" under the definition the Board held applicable to § N 7.04(4).

¶7 On appeal from the circuit court order affirming the Board's decision Neldaughter argues: (1) that the narrow definition of "patient" that applies to WIS. ADMIN. CODE § N 7.04(4) applies to § N 7.04 as well, and the Board erred by determining otherwise; (2) that the Board construed § N 7.04 in an unconstitutionally vague manner; (3) that the Department's expert witness did not testify that a consensus of expert opinion would deem Neldaughter's conduct below minimum professional standards; and (4) that Neldaughter's violation consisted of speech on a matter of public concern, protected under the First Amendment.

¶8 We review an agency's decision *de novo*. ***Zignego Co. v. DOR***, 211 Wis. 2d 819, 824, 565 N.W.2d 590 (Ct. App. 1997). An agency's interpretation of the rules it administers is entitled to great weight deference if, as here, the agency

has long experience in the matter at hand, and value and policy issues bear on the proper interpretation. *Id.* at 823. Under great weight deference to an agency’s rule interpretation, we will affirm if the interpretation is reasonable, even if a more reasonable interpretation is also available. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 287, 548 N.W.2d 57 (1996). We may give deference to the Board’s interpretation of WIS. ADMIN. CODE § N 7.04 when “[a] court would be poorly placed to decide whether the practice or behavior of a registered nurse violated the minimum standards of the profession,” such as the case presented here. *See Bracegirdle v. Department of Regulation & Licensing*, 159 Wis. 2d 402, 421, 464 N.W.2d 111 (Ct. App. 1990). However, we review constitutional challenges to rules *de novo*, without deference to the agency. *See State ex rel. Warren v. Schwarz*, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997), *aff’d*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998). We will affirm an agency’s finding of fact if the evidence is sufficient to support the finding under any reasonable view. *See* WIS. STAT. § 227.57(6) (1999-2000).¹

¶9 The Board reasonably interpreted WIS. ADMIN. CODE § N 7.04 to cover Neldaughter’s conduct. The Board dismissed the § N 7.04(4) charge because Tammi was not Neldaughter’s “patient” under WIS. ADMIN. CODE § N 7.02(5), which defines “patient” as “any person receiving nursing care for which the nurse is compensated.” However, the Board reasonably determined that § N 7.02(5) did not restrict the scope of the conduct proscribed in § N 7.04. Section N 7.04(4) expressly prohibits specific acts against “patients.” Section N 7.04 prohibits any conduct below the minimal standards necessary to protect “patients

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

or the public.” Thus, unlike § N 7.04(4), it imposes no requirement that a specific person who is a “patient” of the violating nurse suffer a specific harm.

¶10 WISCONSIN ADMIN. CODE § N 7.04 is not unconstitutionally vague as applied to Neldaughter. She contends that the rule gave inadequate notice that her conduct violated its provisions. That argument has been considered and rejected by our supreme court in an analogous context, and we likewise reject it here. *See Strigenz v. Department of Regulation & Licensing Dentistry Examining Bd.*, 103 Wis. 2d 281, 287-91, 307 N.W.2d 664 (1981) (concluding that a prohibition against “conduct unbecoming a professional person” in practicing dentistry is not unconstitutionally vague).

¶11 The Board heard sufficient expert testimony to find that Neldaughter breached the minimal standards of her profession. Professional misconduct under § N 7.04 is conduct that fails to conform to standards of professional behavior that are recognized by a consensus of expert opinion as necessary to protect the public. *See Strigenz*, 103 Wis. 2d at 290. Neldaughter contends that the evidence fell short of meeting this standard because the expert testifying against her stated only that a preponderance of experts, as opposed to a consensus, would define her acts as professional misconduct. Leaving aside the question whether “preponderance” substantially differs from “consensus,” the expert did in fact provide testimony that a consensus in the field deemed it misconduct and below minimum standards to become friends with former patients, contact or socialize with them or communicate personal information to them for other than therapeutic reasons. That testimony provided substantial evidence that a consensus of experts would agree that Neldaughter committed professional misconduct.

¶12 Additionally, we conclude that the Board did not discipline Neldaughter in violation of her First Amendment rights. The speech of a government employee is protected if it addresses matters of public concern and the employee's interest in speaking on the matter is not outweighed by the injury to the State, as an employer, in promoting the efficiency of its public services. *Waters v. Churchill*, 511 U.S. 661, 668 (1994). Neldaughter contends that this principle should apply to disciplinary proceedings, and that it protects her from discipline if applied in her case. We reject the proposition that the First Amendment protects licensed professionals from meeting minimal professional standards, even if the professional violates those standards by speech. Additionally, as Neldaughter concedes, many of the statements forming the basis of her misconduct clearly did not address matters of public concern.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

