

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS AND
PROFESSIONAL COUNSELORS
STATE OF MONTANA

IN THE MATTER OF DOCKET NOS. CC-09-0154-SWP AND CC-10-0090-SWP
REGARDING:

THE PROPOSED DISCIPLINARY) Case Nos. 2105-2009 and 771-2010
TREATMENT OF THE LICENSE OF)
MARTINA J. NELSON,)
LCSW License No. 799.)
)

**FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER OF DEFAULT**

I. PROCEDURAL BACKGROUND AND FINDINGS OF FACT

In conformity with this tribunal's February 8, 2010 order directing the licensee's counsel to file a written statement and to appear at a status conference on February 18, 2010, the hearing examiner held a telephonic status conference on February 18, 2010. Agency legal counsel Tyler Moss appeared as directed in the order. Licensee's counsel failed without cause to appear.

At the time of the November 4, 2009 pre-hearing scheduling conference, licensee's counsel appeared and agreed to dates for completion of discovery, exchange of witness lists and exhibit lists, a final pre-hearing conference, and a hearing date. In the scheduling order, the parties were specifically admonished that a failure to comport with any requirement of the order could result in the imposition of sanctions including default, dismissal of the appeal, or imposition of sanctions.

In conformity with the scheduling order, BSD's counsel timely propounded discovery requests. Licensee's counsel failed to respond at all to these discovery requests. This prohibited BSD counsel from comporting with this tribunal's deadlines for discovery. As a consequence, BSD counsel requested that the deadlines be extended in an order served on this tribunal and licensee's counsel on January 25, 2010.

In order to ascertain the basis for the licensee's failure to comport with discovery, on January 29, 2010, this tribunal set a status conference for February 5, 2010. Licensee's counsel was timely notified of this setting in the January 29, 2010 order setting the conference. Despite being duly noticed, licensee's counsel failed to appear for the February 5, 2010 conference.

As a result of the licensee's counsel's failure to appear, this tribunal issued its February 8, 2010 order directing licensee's counsel to file a written statement to this tribunal explaining counsel's failure to comport with any facet of the November 6, 2009 order. The February 8, 2010 order also ordered licensee's counsel to appear at a telephonic status conference on February 18, 2010. The February 8, 2010 order further admonished licensee's counsel in no uncertain terms that the failure to either file the statement or to appear at the February 18 conference would result in this tribunal dismissing the appeal and recommending that the Board enter its default against the licensee. Despite having been properly notified of the need to file a written statement and to appear at the February 18 conference, licensee's counsel failed to do either.

II. CONCLUSIONS OF LAW

Proceedings under Montana Code Annotated Title 37 are governed by the Montana Administrative Procedure Act (MAPA). Mont. Code Ann. § 37-1-310. MAPA specifically provides that informal disposition may be made of any contested case by, among other things, a default unless such disposition is precluded by law. Mont. Code Ann. § 2-4-603(1)(a). Nothing in Title 37 or Title 2 prohibits imposition of a default where a party fails to comport with any facet of a scheduling order and then further fails to respond to a tribunal's direct order to explain the failure and then does not appear at a conference to discuss that failure.

In this case, the licensee has been on notice since July 2009 that default could result if the directives of the scheduling order were not complied with. Despite this, neither the licensee nor her counsel have taken any steps to comport with any part of the scheduling order. When confronted with this fact by the hearing examiner and ordered to explain in writing the failure and to appear at a conference to explain the failure, the licensee and her counsel took no action. The public, whose safety is imperiled by the conduct alleged in the complaint, should not be subjected to unexplained, unreasonable and unnecessary delay caused solely by the licensee's failure to prosecute her right to a contested case hearing. Likewise, this tribunal, facing an already heavy docket and case load, should not be expected to sit by as the

licensee does nothing. Under the circumstances of this case, a recommendation of an entry of default is appropriate.

III. RECOMMENDED ORDER

Based on the foregoing, it is recommended that the Montana Board of Social Work Examiners and Professional Counselors enter its order defaulting the licensee and imposing sanctions it deems appropriate as provided in Mont. Code Ann. § 37-1-309(3).

DATED this 8th day of March, 2010.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner

NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.