



I do hereby certify this to be a complete, accurate, and true copy of the document which is on file or is of record in the offices of the Texas Board of Nursing.
Kerrie Jo Qualtrough
Executive Director of the Board

DOCKET NO. 507-11-9431

IN THE MATTER OF

PERMANENT CERTIFICATE

NUMBER 129243 ISSUED TO

RITA FAYE SIMS

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARING

**ORDER NO. 1
PROBABLE CAUSE ORDER**

On September 7, 2011, the Administrative Law Judge (ALJ) convened a probable cause hearing pursuant to TEX. OCC. CODE § 301.455 to determine whether there is probable cause that the continued practice of nursing by Rita Faye Sims (Respondent) constitutes a continuing and imminent threat to the public welfare. The ALJ does not find that probable cause of a continuing and imminent threat exists to support the temporary suspension.

PROCEDURAL HISTORY, NOTICE & JURISDICTION

On August 24, 2011, the Board temporarily suspended the license of Rita Faye Sims (Respondent), a vocational nurse, after determining that she failed to comply with an April 29, 2011 Agreed Order. Also on August 24, Staff sent by certified mail the notice of the September 7, 2011 probable cause hearing to Respondent's last known address, as shown in the Board's records.¹

On September 7, ALJ Kerrie Jo Qualtrough convened the probable cause hearing at the hearing facilities of the State Office of Administrative Hearings (SOAH), 300 West 15th Street, Austin, Texas. Lance R. Brenton, attorney, represented the Board at the hearing. Respondent did not appear nor was she represented at the hearing.

The ALJ admitted Staff Exhibits No. 1 through 5 for jurisdictional purposes. The ALJ also admitted Staff Exhibits No. 6 and 7 into the evidentiary record, although these exhibits are

¹ Staff Ex. 1, Respondent's computer licensure record.

largely redundant of the information admitted for jurisdictional purposes. No witnesses testified at the probable cause hearing.

REASONS FOR DECISION

A. Allegations

On April 29, 2011, Respondent entered into an Agreed Order and agreed to enroll in the Texas Peer Assistance Program for Nurses (TPAPN) and pay a \$350 participation fee.² In its Formal Charges, Staff alleged the following acts as a basis for the Board's temporary suspension of Respondent's license:

On or about August 1, 2011, Respondent became non-compliant with the Agreed Order issued to her by the [Board] on April 29, 2011. Non-compliance is the result of Respondent's failure to pay a participation fee to the [TPAPN]. . . . On or about August 1, 2011, Respondent was dismissed from TPAPN and referred to the Board.³

Staff did not allege that Respondent's continued practice of nursing would constitute a continuing and imminent threat to the public welfare.

B. Burden of Proof and Relevant Definitions

Section 301.4551 of the Texas Occupation Code provides:

The board shall temporarily suspend the license of a nurse as provided by Section 301.455 if the nurse is under a board order prohibiting the use of alcohol or a drug or requiring the nurse to participate in a peer assistance program, and the nurse:

- (1) tests positive for alcohol or a prohibited drug;
- (2) refuses to comply with a board order to submit to a drug or alcohol test; or

² Staff Ex. 7, pg. 4.

³ Staff Ex. 4, pg. 7.

- (3) fails to participate in the peer assistance program and the program issues a letter of dismissal and referral to the board for noncompliance.

As stated in section 301.4551, to temporarily suspend the license of a nurse, the Board must follow the provisions of section 301.451. This section requires:

- (a) The license of a nurse shall be temporarily suspended or restricted on a determination . . . that, from the evidence or information presented, the continued practice of the nurse would constitute a continuing and imminent threat to the public welfare.
- (b) A license may be temporarily suspended or restricted under this section without notice or hearing on the complaint if:
 - (1) institution of proceedings for a hearing before [SOAH] is initiated simultaneously with the temporary suspension or determination to restrict; and
 - (2) a hearing is held as soon as possible under this chapter and Chapter 2001, Government Code.
- (c) [SOAH] shall hold a preliminary hearing not later than the 14th day after the date of the temporary suspension or restriction *to determine whether probable cause exists that a continuing and imminent threat to the public welfare exists*. The probable cause hearing shall be conducted as a *de novo* hearing.
- (d) A final hearing on the matter shall be held not later than the 61st day after the date of the temporary suspension or restriction.⁴

Since Respondent was not present at the probable cause hearing, resolution of this case as a default must also comport with the requirements found in 1 TAC § 155.501. When a party fails to appear at the hearing, the factual allegations listed in the notice of hearing will be deemed admitted.⁵ Further, an ALJ may deny the relief sought if the notice of hearing fails to establish the necessary elements of the case.⁶

⁴ TEX. OCC. CODE § 301.451 (emphasis added).

⁵ 1 TAC § 155.501(a).

⁶ *Id.* § 155.501(e)(1)(C).

As required by section 301.455(c), the issue to be decided is whether there is probable cause to believe that a continuing and imminent threat to the public welfare exists if Respondent is allowed to continue practicing under the license issued to her by the Board. To make this determination, the ALJ looks at the law and the facts pled by the Staff in its notice of hearing.

As alleged, Respondent failed to pay the \$350 participation fee and was dismissed from TPAPN.⁷ Also, the April 29, 2011 Agreed Order contains the following finding of fact:

11. In response to Finding of Fact Number Ten (10), Respondent states: In May 2009, she temporarily quit work to raise her granddaughter and during that time she started drinking and was having flashbacks of being shot and of being molested by family members when she was nine (9) years old. She states in July 2010, she went into rehab for alcohol and was released August 19, 2010. At the time of the statement, she was attending three (3) hours a day of aftercare and going to AA meetings two (2) to three (3) times a week.⁸

The notice of hearing contains no factual allegations regarding Respondent's current employment, capabilities, or level of impairment.

According to Staff, the Texas Legislature enacted section 301.4551 of the Texas Occupation Code to allow the Board to temporarily suspend a nurse's license when the nurse failed to participate in TPAPN and was dismissed from that program. Staff argues that Respondent's failure to participate in TPAPN constitutes probable cause of a continuing or imminent threat to the public welfare. Staff contends that it need prove no other facts regarding probable cause. Nevertheless, Staff asserts that Finding of Fact No. 11 from the April 29, 2011 Agreed Order provides the factual allegation necessary to show a continuing and imminent threat to the public welfare. In that finding of fact, Respondent stated that in May 2009, she started drinking and was having flashbacks. Staff maintains that these facts are sufficient to find that probable cause exists of a continuing and imminent threat.

⁷ Staff Ex. 4, pg. 7.

⁸ Staff Ex. 4, pg. 11.

Neither the Texas Nursing Practice Act nor the Board's rules appear to define the operative terms "probable cause" and "continuing and imminent threat." Therefore, lacking any statutory definition, the ALJ will use the ordinary, dictionary definition of those terms, with guidance from analogous statutes.

Most commonly used in criminal law, the "probable cause" standard requires a determination of whether a reasonable basis exists for believing a violation of the law occurred.⁹ Applied in this administrative context, the ALJ finds the probable cause standard requires a determination of whether a reasonable basis exists to believe Respondent would be a continuing and imminent threat to the public welfare.

"Continuing" has been defined as "constant, needing no renewal, and enduring," and "imminent" means "ready to take place, near at hand, and menacingly near."¹⁰ The term "threat" has been defined as "a person that might well cause harm."¹¹ The Texas Medical Practices Act defines a "continuing threat to the public welfare" as "a real danger to the health of a physician's patients or to the public from the acts or omissions of the physician caused through the physician's lack of competence, impaired status, or failure to care adequately for the physician's patients"¹²

The ALJ disagrees with Staff's position that the legislature intended a nurse's failure to participate in and dismissal from TPAPN to be sufficient, as a matter of law, to support a finding of probable cause of a continuing and imminent threat under section 301.455. There is no language in section 301.4551 to support such an interpretation. In fact, section 301.4551 directs the Board to temporarily suspend a license "as provided by Section 301.455."¹³ Section 301.455 allows the Board to act quickly, "without notice or hearing," if there a continuing and imminent

⁹ See, *Black's Law Dictionary*, 7th ed. (1999).

¹⁰ *Webster's Third International Dictionary*.

¹¹ *Black's Law Dictionary*, 7th ed. (1999).

¹² TEX. OCC. CODE § 151.002(a)(2).

¹³ TEX. OCC. CODE § 301.4551.

threat.¹⁴ However, not later than 14 days after that suspension, SOAH must conduct a hearing to make a *de novo* determination of whether probable cause of continuing and imminent threat exists to support the Board's temporary suspension done in the absence of notice and hearing.¹⁵

The ALJ does not conclude that the legislature intended to forego the continuing and imminent threat analysis whenever a nurse fails to participate in TPAPN, for whatever reason. Section 301.4551 sets out the grounds for a temporary suspension and directs the Board to follow the process specified in section 301.455 to effectuate that suspension. The ALJ does not find that the grounds for a temporary suspension constitute, as a matter of law, a continuing and imminent threat to the public welfare in every circumstance.

Nor do the factual allegations in the notice of hearing, taken as true, provide a sufficient factual basis to justify a finding of probable cause of a continuing and imminent threat to the public welfare. In May 2009, Respondent "temporarily quit work" and started drinking and having flashbacks of being shot and molested. She subsequently entered rehab in July 2010 and was discharged in August. In April 2011, she was attending aftercare and AA meetings. In August 2011, Respondent became non-compliant with the April 29, 2011 Agreed Order because "of Respondent's failure to pay a participation fee to the [TPAPN]."¹⁶ These facts do not show that Respondent poses a threat that is continuing and imminent, i.e. "ready to take place, near at hand, and menacingly near." Although Respondent was drinking and having flashbacks in May 2009, these facts alone do not support a finding that she is currently drinking or otherwise impaired. Further, the record reflects that Respondent quit working in 2009, and there is no allegation that she is currently working as a nurse. For these reasons, the ALJ finds that the facts as alleged in the notice of hearing are insufficient to demonstrate that there is probable cause to believe that Respondent poses a current and imminent threat to the public welfare.

Although the temporary suspension is not supported by adequate probable cause, the Staff also pled in its notice of hearing that Respondent's non-compliance with the April 29, 2011


¹⁴ TEX. OCC. CODE § 301.455(b).

¹⁵ *Id.* § 301.455(c).

¹⁶ Staff Ex. 4, pgs. 5 & 7.

Agreed Order constitutes grounds for disciplinary action in accordance with TEX. OCC. CODE § 301.452(b)(1) & (10) and 22 TAC § 217.12(9) & (11)(B). Therefore, the ALJ requires Staff to confer with Respondent, if possible, and submit alternative dates for the hearing on the merits on its proposed disciplinary action. Staff must submit these dates by **September 23, 2011**.

SIGNED September 13, 2011.



KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Permanent License
Number 129243, Issued to
RITA FAYE SIMS, Respondent

§ BEFORE THE TEXAS
§
§ BOARD OF NURSING

ORDER OF TEMPORARY SUSPENSION

TO: Rita Faye Sims
14357 Old Texaco Rd.
Conroe, TX 77302

A public meeting of the Texas Board of Nursing was held on August 24, 2011 at 333 Guadalupe, Room 2-225, Austin, Texas, in which the Temporary Suspension of Permanent Registered Nurse License Number 129243, issued to RITA FAYE SIMS was considered pursuant to Section 301.4551, TEXAS OCCUPATIONS CODE. Staff of the Texas Board of Nursing appeared and presented evidence and information concerning the conduct of RITA FAYE SIMS and the provisions of Section 301.4551, TEXAS OCCUPATIONS CODE.

After review and due consideration of the evidence and information presented, the Board finds that the following charges are substantiated:

On or about August 1, 2011, Respondent became non-compliant with the Agreed Order issued to her by the Texas Board of Nursing on April 29, 2011. Non-compliance is the result of Respondent's failure to pay a participation fee to the Texas Peer Assistance Program for Nurses (TPAPN). Stipulation Number One (1) of the Agreed Order dated April 29, 2011, states:

"(1) RESPONDENT SHALL, within forty-five (45) days following the date of entry of this final Order, apply to TPAPN and SHALL, within ninety (90) days following the date of entry of this final Order, sign and execute the TPAPN participation agreement, which SHALL include payment of a non-refundable participation fee in the amount of three hundred fifty dollars (\$350.00) payable to TPAPN."

On or about August 1, 2011, Respondent was dismissed from TPAPN and referred to the Board. A copy of the Findings of Fact, Conclusions of Law, and Agreed Order dated April 29, 2011, is attached and incorporated, by reference, as part of this pleading.

After review and due consideration of the evidence and allegations presented during the open meeting regarding Respondent's fitness to practice, the Texas Board of Nursing finds that the temporary suspension of Registered Nurse License No. 129243, issued to RITA FAYE SIMS, is justified pursuant to Section 301.4551, TEXAS OCCUPATIONS CODE.

NOW, THEREFORE, IT IS ORDERED that Permanent Certificate Number 129243, issued to RITA FAYE SIMS, to practice nursing in the State of Texas be, and the same is hereby, SUSPENDED IMMEDIATELY in accordance with Section 301.4551, TEXAS OCCUPATIONS CODE.

IT IS FURTHER ORDERED that a probable cause hearing be conducted in accordance with Section 301.455(c) not later than fourteen (14) days following the date of the entry of this order, and a final hearing on the matter be conducted in accordance with 301.455(d) not later than the 61st day following the date of the entry of this order.

Entered this 21st day of August, 20 11.

TEXAS BOARD OF NURSING

BY: Katherine A. Thomas
KATHERINE A. THOMAS, MN, RN
EXECUTIVE DIRECTOR