

DOCKET NUMBER 507-11-4600

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 585164
ISSUED TO
BRANDIE LEE RACKLER

§ BEFORE THE STATE OFFICE
§
§ OF
§
§ ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

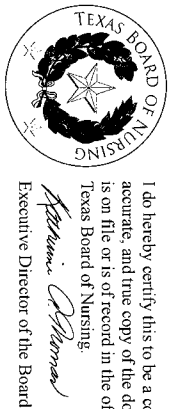
TO: BRANDIE LEE RACKLER
c/o GLEN D. SANBORN, ATTORNEY
P.O. BOX 9158
AMARILLO, TX 79105-9158

ANNE K. PEREZ
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on January 19-20, 2012, the Texas Board of Nursing (Board) considered the following items: (1) The Proposal for Decision (PFD) regarding the above cited matter; (2) Staff's recommendation that the Board adopt the PFD regarding the registered nursing license of Brandie Lee Rackler without changes; and (3) Respondent's recommendation to the Board regarding the PFD and order, if any.

The Board finds that after proper and timely notice was given, the above styled case was heard by an Administrative Law Judge (ALJ) who made and filed a PFD containing the ALJ's findings of facts and conclusions of law. The PFD was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed by any party.

The Board, after review and due consideration of the PFD, Staff's recommendations, and Respondent's presentation during the open meeting, if any, adopts all of the findings of fact and conclusions of law of the ALJ contained in the PFD as if fully set out and separately stated herein. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.



IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 585164, previously issued to BRANDIE LEE RACKLER, to practice nursing in the State of Texas be, and the same is hereby, REVOKED.

IT IS FURTHER ORDERED that this Order SHALL be applicable to Respondent's multi-state privileges, if any, to practice nursing in the State of Texas.

Entered this 19th day of January, 2012.

TEXAS BOARD OF NURSING

A handwritten signature in black ink, appearing to read "Katherine A. Thomas", is written over a horizontal line.

KATHERINE A. THOMAS, MN, RN, FAAN
EXECUTIVE DIRECTOR FOR THE BOARD

Attachment: Proposal for Decision; Docket No. 507-11-4600 (September 23, 2011).

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 23, 2011

Katherine A. Thomas, M.N., R.N.
Executive Director
Texas Board of Nursing
333 Guadalupe, Tower III, Suite 460
Austin, Texas 78701

VIA INTER-AGENCY

**RE: Docket No. 507-11-4600; In the Matter of Permanent Certificate
No. 585164 issued to Brandie Lee Rackler**

Dear Ms. Thomas:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "Anne K. Perez".

Anne K. Perez
Administrative Law Judge

AKP/LG(pp)
Enclosures

XC: Kyle Hensley, Staff Attorney, TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – **VIA INTER-AGENCY**
Dina Flores, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – (with 0 CD(s); Certified Evidentiary Record) – **VIA INTER-AGENCY – to be returned at a later date**
Glen D. Sanborn, Attorney, Underwood Attorneys and Counselors at Law, P.O. Box 9158, Amarillo, TX 79105-9158 – **VIA REGULAR MAIL**

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SOAH DOCKET NO. 507-11-4600

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE	§	
NO. 585164	§	OF
ISSUED TO	§	
BRANDIE LEE RACKLER	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Board of Nursing (Staff/Board) brought action against Brandie Lee Rackler (Respondent) for violating TEX. OCC. CODE ANN. (Code) § 301.452 and 22 TEX. ADMIN. CODE (TAC) § 217.12, based on Respondent's criminal history, including her felony probation for Tampering with a Governmental Record. The Administrative Law Judge (ALJ) recommends that Respondent's Registered Nurse (RN) license be revoked.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

ALJ Anne K. Perez convened the hearing on July 12, 2011, in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by R. Kyle Hensley, Assistant General Counsel. Respondent was represented by attorney Glen D. Sanborn. The record closed at the conclusion of the hearing.

Matters concerning notice and jurisdiction were undisputed. Those matters are set out in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Background and Allegations

Respondent has been licensed in Texas as an RN since 1992. On March 7, 2011, Staff sent Respondent a Notice of Formal Charges filed against her. On April 13, 2011, Staff sent Respondent a Notice of Hearing.

Staff asserts that Respondent's criminal history renders her unfit to practice as a nurse in the State of Texas. Specifically, Staff argues that Respondent's actions constitute grounds for disciplinary action under the Code and the Board's rules, which authorize sanctions against a licensee for:

- Conviction of, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude. Code § 301.452(b)(3);
- Unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public. Code § 301.452(b)(10); and
- Criminal conduct including but not limited to conviction or probation, with or without an adjudication of guilt. 22 TAC § 217.12(13).

B. Applicable Law

Violation of the referenced provisions is not automatic grounds for revocation. Code § 301.453 states that upon proof of a violation, a person is subject to disciplinary action up to, and including license revocation. The Board's Disciplinary at Matrix in 22 TAC § 217.33(b), provides guidance in determining the appropriate sanction for a violation.

Also applicable is chapter 53 of the Code (Chapter 53), which addresses the effect of a criminal conviction on licenses issued by the State of Texas. Code § 53.021 authorizes a licensing authority to revoke, suspend or deny a license on the basis that a person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed profession. To determine whether an offense directly relates to the duties and responsibilities of the licensed profession, licensing authorities are required to consider factors listed in Code § 53.022. The Board's Disciplinary Sanctions for Fraud, Theft, and Deception provide the rationale for considering those crimes to relate directly to the practice of nursing.¹ Another rule addresses the fitness to practice nursing of persons with criminal offenses.² Chapter 53 lists the circumstances that a licensing agency is required to consider when disciplinary action is taken on the basis of criminal conduct.³ In 2007, the Board established Disciplinary Guidelines for

¹ 22 TAC § 213.33. The Board's Disciplinary Sanctions for Fraud, Theft, and Deception were published on February 22, 2008, in the *Texas Register* (33 Tex. Reg. 1646).

² 22 TAC § 213.28.

³ Code § 53.023(a) directs a licensing authority to consider: the extent and nature of the person's past criminal activity; the age of the person when the crime was committed; the amount of time that has elapsed since the person's last criminal activity; the conduct and work activity of the person before and after the criminal activity; evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and other evidence of the person's fitness, including letters of recommendation from: prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person, the sheriff or chief of police in the community where the person resides and any other person in contact with the convicted person.

Criminal Conduct.⁴ The nature of the crimes committed may be cause to consider a nurse's professional character in accordance with 22 TAC § 213.22. And finally, the Board determines the correct sanction by considering the factors listed in 22 TAC § 213.33(c), in conjunction with the Disciplinary Matrix.⁵

C. Evidence

Staff offered the testimony of Melinda Hester, Ph.D., and multiple exhibits, all of which were admitted. Respondent testified on her own behalf. She offered no exhibits.

1. Undisputed Facts

Respondent is currently 41 years old. She has been an RN for 19 years. In June of 1992, she received her nursing degree from Methodist Hospital School of Nursing in Lubbock, Texas. Her previous employment as an RN includes: (1) St. Mary of the Plains Hospital in Lubbock, Texas (July 1992–July 1997); (2) University Medical Center in Lubbock, Texas (January 1998–August 2000); (3) Medical Staffing Network in Lubbock, Texas (May 2000–March 2003); and (4) Baptist St. Anthony's Hospital in Amarillo, Texas (March 2003–December 2004).⁶

Respondent's record of criminal activity includes the following events:

- **Deferred Adjudication:** On August 20, 2009, in Cause No. 59,101-E in the 108th District Court of Potter County, Texas, Respondent entered a plea of guilty to Tampering with a Governmental Record (a State Jail Felony offense

⁴ Published March 9, 2007 in the *Texas Register* (32 TexReg 1409)

⁵ Those factors are: evidence of actual or potential harm to patients, clients, or the public; evidence of a lack of truthfulness or trustworthiness; evidence of misrepresentation(s) of knowledge, education, experience, credentials, or skills which would lead a member of the public, an employer, a member of the health-care team, or a patient to rely on the fact(s) misrepresented where such reliance could be unsafe; evidence of practice history; evidence of present fitness to practice; whether the person has been subject to previous disciplinary action by the Board or any other health care licensing agency in Texas or another jurisdiction and, if so, the history of compliance with those actions; the length of time the person has practiced; the actual damages, physical, economic, or otherwise, resulting from the violation; the deterrent effect of the penalty imposed; attempts by the licensee to correct or stop the violation; any mitigating or aggravating circumstances; the extent to which system dynamics in the practice setting contributed to the problem; whether the person is being disciplined for multiple violations of the Act or its derivative rules and orders; the seriousness of the violation; the threat to public safety; evidence of good professional character; and any other matter that justice may require.

⁶ Staff's Ex. 11, p. 8. Agreed Order dated August 8, 2006,

committed on July 18, 2008). As a result of the plea, adjudication of guilt was deferred and Respondent was placed on community supervision for a period of two years.

Terms of Community Supervision: Respondent was ordered to pay restitution of \$1,569, a \$150 fine, court costs, a monthly probation fee and various other fees; to complete 120 hours of Community Service Restitution, obey a curfew, submit to random drug and alcohol testing, and complete Rational Behavior Training. The final condition of Respondent's probation was her "voluntary disqualification from benefits for 12 months."⁷

- **Deferred Adjudication.** On August 18, 2009, in Cause No. 124113 in County Court at Law No. 2 in Potter County, Texas, Respondent entered a plea of guilty to Making a False Report to a Peace Officer (a Class B Misdemeanor offense committed on April 22, 2009).⁸
- **Terms of Community Supervision.** As a result of the plea, adjudication of guilt was deferred and Respondent was placed on probation for a period of nine months. She was ordered to pay a \$300 fine, court costs, a monthly probation fee and various other fees; to complete 50 hours of Community Service Restitution; and to submit to random drug and alcohol testing.
- **Conviction.** On March 7, 2011, in Cause No. 2010-5488-2 in County Court at Law No. 2 in Randall County, Texas, Respondent pled guilty to, and was convicted of Issuance of a Bad Check (a Class C Misdemeanor offense committed on May 12, 2010).

Sentence. The Court ordered Respondent to pay a \$100 fine, plus all costs associated with the proceeding.⁹

- **Impact of Conviction on Felony Probation.** On May 16, 2011, the Community Supervision and Corrections Department for Potter, Randall and Armstrong Counties reported:

⁷ Staff's Ex. 8. The court's judgment in Cause No. 59,101-E indicates that payment for all items (except monthly probation fees) was waived during periods when Respondent was paying for required items in accordance with the judgment in Cause No. 124113.

⁸ Staff's February 25, 2010, Investigatory Letter (Ex. 2) is obviously in error, as it states that Respondent's guilty plea was entered on August 18, 2009, four days before the offense occurred (on August 22, 2009). Staff's Formal Charges (Ex. 3) state that the offense was committed on April 22, 2009. An uncertified copy of the judgment (Staff's Ex. 9) confirms Respondent's plea of guilty entered on August 18, 2009, but it does not specify the offense date. Of the available documents, the most credible evidence is the record maintained by the court and it establishes that Respondent's plea of guilty was accepted by the court on August 18, 2009. This date, as well as the chronology of events established by other documentary evidence, indicates that Respondent committed the offense of Making a False Report to a Peace Officer on April 22, 2009.

⁹ Staff's Ex. 10.

"[Respondent] is currently being supervised by the Department for Tampering with a Governmental Record. She was arrested in February 2011 for Theft by Check. In lieu of revocation, she has been ordered to complete Financial Management. In addition, her supervision has been extended until February 20, 2012. It should be noted that she does report, make monthly payments and is working community service."¹⁰

On two occasions, Respondent accepted an Agreed Order with disciplinary sanctions imposed by the Board. The Agreed Orders describe Respondent's actionable conduct, as well as the disciplinary action taken:

- **Violation:** On July 15, 1997, Respondent misappropriated 200 mg of Demerol and 50 mg of Phenagram from the hospital where she was employed as a staff nurse, and administered the medication to her mother, who was admitted to the facility with problems associated with Multiple Sclerosis.

Disciplinary Action: On February 10, 1998, Respondent was issued a warning with stipulations, requiring her to take and pass a nursing jurisprudence course within one year of the date of the order, and to pay a \$500 penalty.¹¹

- **Violation:** On January 20, 2005, Respondent attempted to pass a telephonically-communicated fraudulent, unauthorized prescription for Lortab at Walgreen's Pharmacy in Amarillo, Texas.

Disciplinary Action: On August 8, 2006, Respondent was issued a reprimand with stipulations for a one-year period, during which she was required: to take and pass courses in nursing jurisprudence and ethics; to notify her employer(s) of the Board's stipulations and provide a copy of the order; to ensure that her employer(s) file required quarterly reports with the Board; to be indirectly supervised by another RN; to submit to random drug and alcohol screening; and to pay a \$250 penalty.¹²

2. Respondent's Testimony¹³

Respondent testified that she moved to Amarillo, Texas in 2002, after living for many years in Lubbock. She is 41 years of age. She has four children (ages 18, 13, 10 and 8) but was

¹⁰ Staff's Ex. 12.

¹¹ Staff's Ex. 11, p.p. 1-6.

¹² Staff's Ex. 11, p.p. 7-17.

¹³ Staff examined Respondent as an adverse witness prior to the presentation of Respondent's direct case.

divorced from their father in 2008.¹⁴ Her ex-husband lives in Houston. Their three youngest children live with her and she receives \$400 per month in child support.

Respondent's parents moved to Amarillo following her divorce, but she reported that neither she nor her children have a close relationship with them. She described her family of origin as "dysfunctional." Her father, a retired Methodist minister, is not supportive of her mother and at times, he is even "abusive." This circumstance, in addition to the fact that her mother suffers from Multiple Sclerosis, causes Respondent to feel protective of her mother.

The Agreed Orders entered by the Board in 1998 and 2006 are both based on actionable conduct involving Respondent's mother. The earlier incident occurred on July 15, 1997. At the time, Respondent had worked as a nurse in the Labor and Delivery unit at St. Mary of the Plains Hospital for five years. Her father was admitted to the facility for knee surgery, accompanied by Respondent's mother. Her mother began to develop a migraine headache and appealed for help. Using the patient code assigned to her father when he was admitted, Respondent withdrew doses of Demerol and Phenergan from the hospital's Pyxis medication dispensing machine. She administered the medication to her mother.¹⁵

Respondent admitted that she knew her conduct was wrong. But at the time of the incident, she explained, "I was so tired of seeing her in pain" and "I didn't know what else to do." Her remorse was expressed in the statement that, "I've had to live with it for 13 years." In retrospect, Respondent acknowledged there were alternative ways to help her mother. She agreed that she could have escorted her mother to the hospital's Emergency Room for treatment.

Respondent's later disciplinary action is based on an incident that occurred on January 20, 2005, while her parents were in Amarillo for a visit. Respondent's mother was prescribed

¹⁴ In several instances, Respondent attributed conflicting dates to the same event. Most inconsistencies involve the correct year, *i.e.*, she testified variously that her arrest for Tampering with a Governmental Record occurred in January 2009 and in January 2010, but credible evidence establishes she was arrested only once for this charge. To the extent possible, the ALJ has resolved discrepancies by comparing Respondent's testimony with the chronology of events established by other evidence.

Lortab¹⁶ for pain, but she had run out medication because Respondent's sister was "taking it." Respondent indicated she was angry at her father because "as usual, he was doing nothing" to address either her sister's behavior or her mother's pain.

Respondent said that her mother's treating physician maintained his practice in Dallas; to complicate matters further he was out of town and was expected to be unavailable for several more weeks. She testified that her mother had been planning to change doctors and begin seeing the Amarillo physician who also employed Respondent as a nurse. Respondent admitted that on January 20, 2005, her mother was not an established patient. Nevertheless, Respondent telephoned a local pharmacy and requested that her mother's prescription for Lortab-30 count (dosage unknown) be filled; during the phone call, Respondent represented that the prescription had been authorized by her employer/physician. Once again, Respondent acknowledged that her conduct was wrong, but explained, "I felt like I had to call in the Lortab ... 30 [tablets] would get her through."

Between 2003 and 2007, Respondent worked part-time work as an RN, but her primary focus was her children. However, sometime in 2007 her husband moved out. Although it was financially difficult she remained in their Amarillo home with all four children. She sought full-time employment, but the first nursing position she was offered would have required her to work 12-hour shifts, making the cost of childcare prohibitive. She stayed in her current part-time position in the hopes that it would become full-time. In December 2007 her employer told her that additional hours would not become available. She resigned. In January 2008, she applied for monthly benefits from a food stamp assistance program.

Respondent was approved for food stamp benefits and received a Lone Star card in January 2008. At the time, she testified, she understood that assistance had been approved for a six-month period ending in June 2008, after which she would have to re-apply to receive additional benefits. She continued looking for work. At the beginning of April 2008, she started

¹⁵ Respondent's testimony is plainly inconsistent with the Board's February 10, 1998, finding that: "Respondent misappropriated and administered the medication to her mother, who was admitted to the facility with problems associated with Multiple Sclerosis." Staff's Ex. 11.

¹⁶ The generic equivalent of Lortab is acetaminophen and hydrocodone.

a full-time job as an RN. According to Respondent, she was unaware that the food stamp assistance program requires recipients who obtain full-time work to report the change in employment status within 10 days of beginning a full-time job. She did not provide the required notice and continued to receive food stamp benefits through May 2008.

Respondent testified that she was going through a divorce in July 2008 when her brother Kelly suddenly passed away. She recalled receiving a letter from the food stamp program a few days after his death. She testified that at the time, she had not used food stamps in over a month. However, she was distraught and not thinking straight. She said she did not read the letter before filling out the enclosed form and sending it back.

In early-August 2008, a caseworker for the food stamp assistance program called Respondent and inquired about her employment status. Respondent said that up until this telephone call she was unaware there was problem with her benefits. She testified she told the caseworker the truth: that she had been working full-time since April 2008; that she had not paid attention to the program's July 2008 correspondence because she was grief-stricken from the divorce and her brother's death; and that she had stopped using her Lone Star card some time ago. After Respondent was informed that she received \$1,500 in overpaid food stamp benefits, she said she told the caseworker she would pay the money back.

In September 2008 Respondent was contacted by a man who identified himself as a food stamp fraud investigator. She said he called her at the end of the work day and demanded her appearance in his office within 30 minutes, or he would have her arrested. She arranged for her children to be picked up by a neighbor and went to the meeting. Respondent testified that she tried to explain how her confusion and mistakes were the cause of the overpaid benefits, but the investigator would not listen; instead, he directed her to fill out a written statement and instructed her regarding the information to include in the statement. Once she completed an affidavit, the investigator reportedly said, "Okay, now you can tell your side." In the end, he informed her that the information he had gathered would be forwarded to the district attorney, who would notify Respondent of any further action.

Respondent testified that several months went by and she heard nothing. In January 2009, she was assisting her oldest son with his application for a driving permit at the Department of Motor Vehicles (DMV). The application required Respondent's driver's license information. The DMV's verification process revealed that there was an outstanding warrant for her arrest. She said that a state trooper arrested her in front of her son. Respondent was taken into custody and her son was taken home in a police vehicle.

Respondent acknowledged that she was represented by counsel on August 20, 2009, the date she pled guilty to Tampering with a Governmental Record, a felony offense. The Potter County District Court chose not to adjudicate Respondent's guilt at that time and placed her on community supervision for a period of two years, through August 19, 2011.

Respondent acknowledged that her misdemeanor offense (Making a False Report to a Peace Officer) "came later," but insisted that this offense was (her July 18, 2008, submission of false information to a government assistance program). As with the disposition of the felony case, the court accepted Respondent's plea of guilty to the misdemeanor charge, deferred adjudication of her guilt and placed her on probation for a period of nine months.

Respondent's most recent criminal conduct occurred in May 2010. She issued a check to the Amarillo Independent School District (Amarillo ISD) for \$60, which was not paid by her bank because the account was closed. She explained that the bank account was open on May 12, 2010, the date she wrote the check to cover her son's prom expenses. However, because her ex-husband still had access to the account she closed it and opened another account. She was not aware that the check to Amarillo ISD had not been paid. As the school year ended shortly thereafter, Respondent testified that she did not learn about the returned check until September or October of 2010. She called the school district to make it right but the matter had already been turned over to the district attorney for legal action. She acknowledged that she ultimately pled guilty to the misdemeanor offense of Issuance of a Bad Check in March 2011, but noted that the incident did not significantly impact the status of her on-going felony probation. The terms of her probation were modified to require her completion of a money management class.

According to Respondent, her period of supervision was extended until February 20, 2012, due to the limited availability of the required class.

Respondent's more recent employment history as an RN at facilities in Amarillo includes: (1) Northwest Texas Hospital (March 2008–September 2008); (2) Compassion Home Care (September 2009–August 2010); and (3) Interim House (December 2010–present). Respondent currently works as a case manager for Interim House, a home hospice care company. The position requires her to maintain a caseload of approximately 15 terminally-ill patients and their families. With the assistance of an LVN and a home health aide, Respondent provides direct care to patients in their homes, as well as guidance for family caregivers. She testified that she has a good rapport with her elderly patients and enjoys the work.

Respondent emphasized that despite the episodes resulting in court-ordered sanctions and Board discipline, in her 19-year career as an RN the quality of her nursing skills has never been questioned. Many of her former patients have expressed gratitude for the nursing care she provided, especially during her 10 years as a labor and delivery nurse. Her skills and abilities as a nurse have also been the subject of uniform praise by both past and present supervisors, who she describes as "some of my best friends."

Respondent also noted that she has more than complied with the terms of her probation. She testified that she paid all court-ordered restitution (\$1,569) within the first six months of her probation period and currently, she is ahead of schedule on court-ordered payments for other items. To date, she has paid a total of \$6,000 for her criminal offenses – far more than the value of any benefit she obtained from her commission of those crimes. In her mind she has suffered the consequences of her actions many times over.

3. Testimony of Dr. Melinda Hester, Ph.D.¹⁷

Dr. Hester holds a bachelor's degree in nursing science, a master's degree in nursing science, and recently achieved a doctorate in nursing science.¹⁸ As the Board's Lead Practice Consultant, she is the Board's interpreter of the Nurse Practice Act and of the Board's rules.

Dr. Hester has been an RN for 32 years, most of that time practicing in a public health setting. She has been with the Board for five years. She has also worked as a school nurse, a health educator and a nursing instructor.¹⁹

Dr. Hester testified that based on her review of the facts, the relevant statutes and rules, the Disciplinary Matrix, and the Board's Disciplinary Sanctions for Fraud, Theft, and Deception, she believes that revocation of Respondent's RN license is the appropriate sanction. After considering Respondent's testimony at hearing, Dr. Hester confirmed that her opinions and recommendation had not changed.

With respect to the alleged violations of Act § 301.452(b)(3) and Board Rule 217.12(13), relating to criminal conduct, Dr. Hester opined that Respondent's crimes indicate she cannot distinguish right from wrong, a factor that significantly undermines her professional character. See 22 TAC § 213.27. She has also demonstrated a tendency to engage in wrongful conduct "when no one was looking," *i.e.*, at times when she is less likely to be discovered. This propensity is very troubling, Dr. Hester explained, because of the power differential between a nurse and her patients. Because nurses have an opportunity to exploit or abuse patients who are sick, elderly or vulnerable for other reasons, it is essential that a nurse be trustworthy. If a nurse's conduct - personal or professional - demonstrates a lack of honesty and integrity, or an inability to abide by the rules of society, the nurse's patients may become victims.

¹⁷ Staff examined Respondent as an adverse witness prior to the presentation of Respondent's direct case.

¹⁸ Staff Ex. 13.

¹⁹ *Id.*

Along those lines, Dr. Hester expressed concern that Respondent's work with a terminally ill, home-bound population allows her to be alone in the patient's home with access to all of the patient's belongings, not to mention sensitive information such as social security numbers and financial records. A nurse providing hospice care also functions autonomously. Respondent has misappropriated, or attempted to misappropriate narcotics on two separate occasions. A nurse who provides home hospice care has ample opportunity to commit the same type of crime. The fact that Respondent's felony crime involves theft from a governmental entity is also of great concern, as the patients she cares for receive Medicaid/Medicare benefits.

In Dr. Hester's opinion, Respondent's criminal and disciplinary history also demonstrates a lack of judgment. Respondent committed another crime despite the fact that she was on felony probation. Her misappropriation of narcotics occurred while she was working as hospital staff. And her conduct reflects an inability to honor interpersonal boundaries.

The repetitive nature of Respondent's crimes also disturbs Dr. Hester. Each incident involved her dishonesty and/or misrepresentation. She violated the trust of her employer more than once. In addition, she was not a young person when her misconduct occurred. When all of these factors are considered, Respondent's crimes make her unfit to practice nursing.

D. Analysis and Recommendation

Code § 301.452(b)(3) provides that a person is subject to disciplinary action for "a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude." The Board's Disciplinary Guidelines for Criminal Conduct state that "Tampering with a Governmental Record" is directly related to the practice of nursing because it reflects an intent to defraud, and indicates untrustworthiness; the recommended sanction is license revocation. Code § 301.452(b)(10) also permits disciplinary action for unprofessional or dishonorable conduct likely to deceive or defraud a patient or the public. In addition, the Board's rule at 22 TAC § 213.27(b)(3) provides that one of the factors to consider in evaluating good professional character in disciplinary matters is any "conviction for a felony or for a misdemeanor involving

moral turpitude or order of probation with or without an adjudication of guilt for an offense that would be a felony or misdemeanor involving moral turpitude if guilt were adjudicated."

These provisions authorize the Board to take disciplinary action against Respondent, up to and including the revocation of her license. Respondent's crimes involve dishonesty, deception and misrepresentation, and are directly related to the nursing profession. The conclusion that Respondent's criminal conduct and violation of professional standards make her unfit to practice nursing is bolstered by several factors: the repetitive nature of her wrongdoing, the fact that her misconduct spans a 13-year period; the fact that she was well into adulthood when the transgressions occurred; the fact that her last crime occurred recently, on May 12, 2010; and the fact that she is still on felony probation as a result of that misdemeanor offense.

One matter was not fully addressed by the evidence. On April 18, 2009, Respondent entered a plea of guilty to the misdemeanor offense of Making a False Report to a Peace Officer. The best evidence indicates the crime occurred on April 22, 2009. Respondent insisted that this offense was related to or part of her felony offense committed on July 18, 2008 (Tampering with a Government Record), *i.e.*, the two offenses should be viewed as only one crime. Her claim is supported by the fact that both cases were disposed of almost simultaneously (although by different courts), and the fact that the judgment ordering felony probation waived Respondent's payment of court-ordered fees while she was paying identical fees pursuant to the judgment ordering probation for her misdemeanor drimr. Still, the offenses occurred nine months apart. The underlying details of the misdemeanor offense are not known because the record evidence does not include the charging instrument. Respondent did not explain why or how the two incidents are related. One matter is clear, however: the offenses should not be viewed as one crime if the underlying circumstances involve Respondent's provision of false information to law enforcement during an investigation of Respondent's fraudulent actions on July 18, 2008.

In some instances, the documentary evidence undermines the veracity of Respondent's testimony. For example, she testified that she did not learn about the charge for Issuance of Bad Check until September or October 2010. However, the indictment for the offense (Staff's Ex. 10) was issued on July 1, 2010. The indictment states that Respondent received notice of the bad check at her address listed on the check itself, and Respondent testified she has lived in the same

home since 2003. Respondent's testimony is also inconsistent with the February 10, 1998, Agreed Order. The Board's finding in the order reflects its understanding that Respondent's mother was a patient of the hospital at the time Respondent misappropriated medication and administered it to her. However, Respondent testified that her mother was present at the hospital because her father was admitted for knee surgery. Respondent also testified that instead of misappropriating narcotics, she could have escorted her mother to the emergency room for treatment. If Respondent's mother was already admitted to the hospital the treatment of her migraine headache would be legitimate; it would be unnecessary to steal medication for her.

Respondent had an explanation for each episode of misconduct that suggested she was not at fault, and either minimized the seriousness of her offense or shifted the blame onto others. She implied that her misappropriation of narcotics was justified by her mother's fragile medical condition and her own need to protect her mother. She excused her administration of stolen narcotics to her mother, noting that after it happened one of the doctors said, "I would've helped you." Her felony conviction for food stamp fraud was the result of her confusion, mistakes and emotional state, not intentional deceit. According to Respondent, it was the food stamp fraud investigator who was disrespectful and coercive; she was the victim. She likewise implied that the state trooper who arrested her in front of her son exhibited conduct far worse than her own.

Respondent's testimony suggests that she is not ready to acknowledge that only she is responsible for her behavior. Her misconduct has not only been repetitive and extensive, but recent. Given that she can apply for reinstatement of her license in one year, revocation of her license at this time is warranted.

Based upon the above discussion, the ALJ recommends that Respondent's registered nursing license be revoked.

III. FINDINGS OF FACT

1. Brandie Lee Rackler (Respondent) has been licensed as a registered nurse by the Texas Board of Nursing (Staff/Board) since 1992.
2. On March 7, 2011, Staff sent Respondent a Notice of Formal Charges filed against her.
3. On April 13, 2011, Staff mailed its Notice of Hearing to Respondent.

4. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. The hearing convened July 12, 2011, in the William P. Clements Building, 300 West 15th Street, Austin, Texas.
6. On August 20, 2009, in Cause No. 59,101-E in the 108th District Court of Potter County, Texas, Respondent entered a plea of guilty to Tampering with a Governmental Record (a State Jail Felony offense committed on July 18, 2008). The Court deferred adjudication of Respondent's guilt and placed on her community supervision for a period of two years. She was ordered to pay restitution of \$1,569, a fine, court costs and other fees, in addition to completing classes and performing community service.
7. On August 18, 2009, in Cause No. 124113 in County Court at Law No. 2 in Potter County, Texas, Respondent entered a plea of guilty to Making a False Report to a Peace Officer (a Class B Misdemeanor offense committed on April 22, 2009). The Court deferred adjudication of Respondent's guilt and placed her on probation for a period of nine months, with terms that required her to pay a fine, court costs and other fees, and to perform community service.
8. On March 7, 2011, in Cause No. 2010-5488-2 in County Court at Law No. 2 in Randall County, Texas, Respondent pled guilty to, and was convicted of Issuance of a Bad Check (a Class C Misdemeanor offense committed on May 12, 2010). She was ordered to pay a \$100 fine, plus all costs associated with the proceeding.
9. As a result of Respondent's conviction of Issuance of a Bad Check, she was ordered to complete Financial Management and her period of community supervision for her felony conviction was extended until February 20, 2012.
10. Respondent has paid all court-ordered restitution and is ahead of schedule on court-ordered payments for other items. She is also in compliance with the remaining terms of her community supervision.
11. Respondent's disciplinary history includes two Agreed Orders entered by the Board on February 10, 1998, and August 8, 2006, respectively.
12. Both disciplinary actions involve Respondent's misappropriation, or attempted misappropriation, of narcotics while acting as a registered nurse.
13. Respondent's criminal conduct involves dishonesty, deception and misrepresentation, and is directly related to the practice of nursing.
14. Respondent's misconduct has been repetitive.

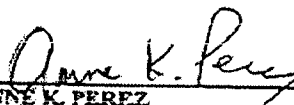
15. Respondent's misconduct was not an isolated incident and occurred over a period of 13 years.
16. Respondent's misconduct was not the result of youthful indiscretion.
17. Respondent's last crime occurred recently.
18. Respondent has not been released from felony probation.
19. Nurses occupy a position of public trust and have access to the sensitive personal and financial information, medical records, and belongings of patients.
19. If Respondent is permitted to continue practicing as a nurse, she will have opportunities to repeat her misconduct.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. TEX. OCC. CODE ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE ch. 2003.
3. Proper and timely notice of the hearing was provided. TEX. GOV'T CODE ch. 2001; 22 TEX. ADMIN. CODE § 213.10.
4. A nurse is subject to discipline for:
 - a. conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude. TEX. OCC. CODE § 301.452(b)(3);
 - b. unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public. TEX. OCC. CODE § 301.452(b)(10); and
 - c. criminal conduct including but not limited to conviction or probation, with or without an adjudication of guilt. 22 TEX. ADMIN. CODE § 217.12(13).
5. A record of conviction or order of deferred adjudication is conclusive evidence of guilt. 22 TEX. ADMIN. CODE § 217.27(c)(1).
6. A licensing authority may deny, suspend or revoke a license on the basis that a person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed profession. TEX. OCC. CODE § 53.021.

7. Tampering with a Governmental Record is a crime directly related to the practice of nursing. TEX. OCC. CODE § 53.022; 22; TEX. ADMIN. CODE § 213.33.
8. Making a False Report to a Peace Officer is a misdemeanor involving moral turpitude. TEX. OCC. CODE § 301.452(b)(3).
9. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent violated TEX. OCC. CODE §§ 301.452(b)(3) and 301.452(b)(10), and 22 TEX. ADMIN. CODE § 217.12(13), and she also is subject to sanction under TEX. OCC. CODE § 53.021.
10. The foregoing Findings of Fact and Conclusions of Law indicate that the Board is authorized to sanction Respondent.
11. Factors to be used when recommending a sanction on the basis of criminal conduct are set forth at 22 TEX. ADMIN. CODE § 213.33(c) and TEX. OCC. CODE § 53.023(a).
12. Under the Board's Disciplinary Matrix found at 22 TEX. ADMIN. CODE § 213.33(b), the conduct exhibited by Respondent warrants revocation of her nursing license.

SIGNED September 23, 2011



ANNE K. PEREZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 23, 2011

Katherine A. Thomas, M.N., R.N.
Executive Director
Texas Board of Nursing
333 Guadalupe, Tower III, Suite 460
Austin, Texas 78701

VIA INTER-AGENCY

**RE: Docket No. 507-11-4600; In the Matter of Permanent Certificate
No. 585164 issued to Brandie Lee Rackler**

Dear Ms. Thomas:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "Anne K. Perez".

Anne K. Perez
Administrative Law Judge

AKP/LG(pp)
Enclosures

XC: Kyle Hensley, Staff Attorney, TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – **VIA INTER-AGENCY**
Dina Flores, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – (with 0 CD(s); Certified Evidentiary Record) – **VIA INTER-AGENCY** – to be returned at a later date
Glen D. Sanborn, Attorney, Underwood Attorneys and Counselors at Law, P.O. Box 9158, Amarillo, TX 79105-9158 -**VIA REGULAR MAIL**

300 W. 15th Street, Suite 502, Austin, Texas 78701/ P.O. Box 13025, Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.322.2061 (Fax)
www.soah.state.tx.us

SOAH DOCKET NO. 507-11-4600

**IN THE MATTER OF
PERMANENT CERTIFICATE
NO. 585164
ISSUED TO
BRANDIE LEE RACKLER**

§
§
§
§
§

**BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

Staff of the Texas Board of Nursing (Staff/Board) brought action against Brandie Lee Rackler (Respondent) for violating TEX. OCC. CODE ANN. (Code) § 301.452 and 22 TEX. ADMIN. CODE (TAC) § 217.12, based on Respondent's criminal history, including her felony probation for Tampering with a Governmental Record. The Administrative Law Judge (ALJ) recommends that Respondent's Registered Nurse (RN) license be revoked.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

ALJ Anne K. Perez convened the hearing on July 12, 2011, in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by R. Kyle Hensley, Assistant General Counsel. Respondent was represented by attorney Glen D. Sanborn. The record closed at the conclusion of the hearing.

Matters concerning notice and jurisdiction were undisputed. Those matters are set out in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Background and Allegations

Respondent has been licensed in Texas as an RN since 1992. On March 7, 2011, Staff sent Respondent a Notice of Formal Charges filed against her. On April 13, 2011, Staff sent Respondent a Notice of Hearing.

Staff asserts that Respondent's criminal history renders her unfit to practice as a nurse in the State of Texas. Specifically, Staff argues that Respondent's actions constitute grounds for disciplinary action under the Code and the Board's rules, which authorize sanctions against a licensee for:

- Conviction of, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude. **Code § 301.452(b)(3);**
- Unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public. **Code § 301.452(b)(10);** and
- Criminal conduct including but not limited to conviction or probation, with or without an adjudication of guilt. **22 TAC § 217.12(13).**

B. Applicable Law

Violation of the referenced provisions is not automatic grounds for revocation. Code § 301.453 states that upon proof of a violation, a person is subject to disciplinary action up to, and including license revocation. The Board's Disciplinary at Matrix in 22 TAC § 217.33(b), provides guidance in determining the appropriate sanction for a violation.

Also applicable is chapter 53 of the Code (Chapter 53), which addresses the effect of a criminal conviction on licenses issued by the State of Texas. Code § 53.021 authorizes a licensing authority to revoke, suspend or deny a license on the basis that a person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed profession. To determine whether an offense directly relates to the duties and responsibilities of the licensed profession, licensing authorities are required to consider factors listed in Code § 53.022. The Board's Disciplinary Sanctions for Fraud, Theft, and Deception provide the rationale for considering those crimes to relate directly to the practice of nursing.¹ Another rule addresses the fitness to practice nursing of persons with criminal offenses.² Chapter 53 lists the circumstances that a licensing agency is required to consider when disciplinary action is taken on the basis of criminal conduct.³ In 2007, the Board established Disciplinary Guidelines for

¹ 22 TAC § 213.33. The Board's Disciplinary Sanctions for Fraud, Theft, and Deception were published on February 22, 2008, in the *Texas Register* (33 Tex. Reg. 1646).

² 22 TAC § 213.28.

³ Code § 53.023(a) directs a licensing authority to consider: the extent and nature of the person's past criminal activity; the age of the person when the crime was committed; the amount of time that has elapsed since the person's last criminal activity; the conduct and work activity of the person before and after the criminal activity; evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and other evidence of the person's fitness, including letters of recommendation from: prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person, the sheriff or chief of police in the community where the person resides and any other person in contact with the convicted person.

Criminal Conduct.⁴ The nature of the crimes committed may be cause to consider a nurse's professional character in accordance with 22 TAC § 213.22. And finally, the Board determines the correct sanction by considering the factors listed in 22 TAC § 213.33(c), in conjunction with the Disciplinary Matrix.⁵

C. Evidence

Staff offered the testimony of Melinda Hester, Ph.D., and multiple exhibits, all of which were admitted. Respondent testified on her own behalf. She offered no exhibits.

1. Undisputed Facts

Respondent is currently 41 years old. She has been an RN for 19 years. In June of 1992, she received her nursing degree from Methodist Hospital School of Nursing in Lubbock, Texas. Her previous employment as an RN includes: (1) St. Mary of the Plains Hospital in Lubbock, Texas (July 1992–July 1997); (2) University Medical Center in Lubbock, Texas (January 1998–August 2000); (3) Medical Staffing Network in Lubbock, Texas (May 2000–March 2003); and (4) Baptist St. Anthony's Hospital in Amarillo, Texas (March 2003–December 2004).⁶

Respondent's record of criminal activity includes the following events:

- **Deferred Adjudication:** On August 20, 2009, in Cause No. 59,101-E in the 108th District Court of Potter County, Texas, Respondent entered a plea of guilty to Tampering with a Governmental Record (a State Jail Felony offense

⁴ Published March 9, 2007 in the *Texas Register* (32 TexReg 1409)

⁵ Those factors are: evidence of actual or potential harm to patients, clients, or the public; evidence of a lack of truthfulness or trustworthiness; evidence of misrepresentation(s) of knowledge, education, experience, credentials, or skills which would lead a member of the public, an employer, a member of the health-care team, or a patient to rely on the fact(s) misrepresented where such reliance could be unsafe; evidence of practice history; evidence of present fitness to practice; whether the person has been subject to previous disciplinary action by the Board or any other health care licensing agency in Texas or another jurisdiction and, if so, the history of compliance with those actions; the length of time the person has practiced; the actual damages, physical, economic, or otherwise, resulting from the violation; the deterrent effect of the penalty imposed; attempts by the licensee to correct or stop the violation; any mitigating or aggravating circumstances; the extent to which system dynamics in the practice setting contributed to the problem; whether the person is being disciplined for multiple violations of the Act or its derivative rules and orders; the seriousness of the violation; the threat to public safety; evidence of good professional character; and any other matter that justice may require.

⁶ Staff's Ex. 11, p. 8. Agreed Order dated August 8, 2006,

committed on July 18, 2008). As a result of the plea, adjudication of guilt was deferred and Respondent was placed on community supervision for a period of two years.

Terms of Community Supervision: Respondent was ordered to pay restitution of \$1,569, a \$150 fine, court costs, a monthly probation fee and various other fees; to complete 120 hours of Community Service Restitution, obey a curfew, submit to random drug and alcohol testing, and complete Rational Behavior Training. The final condition of Respondent's probation was her "voluntary disqualification from benefits for 12 months."⁷

- **Deferred Adjudication.** On August 18, 2009, in Cause No. 124113 in County Court at Law No. 2 in Potter County, Texas, Respondent entered a plea of guilty to Making a False Report to a Peace Officer (a Class B Misdemeanor offense committed on April 22, 2009).⁸
- **Terms of Community Supervision.** As a result of the plea, adjudication of guilt was deferred and Respondent was placed on probation for a period of nine months. She was ordered to pay a \$300 fine, court costs, a monthly probation fee and various other fees; to complete 50 hours of Community Service Restitution; and to submit to random drug and alcohol testing.
- **Conviction.** On March 7, 2011, in Cause No. 2010-5488-2 in County Court at Law No. 2 in Randall County, Texas, Respondent pled guilty to, and was convicted of Issuance of a Bad Check (a Class C Misdemeanor offense committed on May 12, 2010).

Sentence. The Court ordered Respondent to pay a \$100 fine, plus all costs associated with the proceeding.⁹

- **Impact of Conviction on Felony Probation.** On May 16, 2011, the Community Supervision and Corrections Department for Potter, Randall and Armstrong Counties reported:

⁷ Staff's Ex. 8. The court's judgment in Cause No. 59,101-E indicates that payment for all items (except monthly probation fees) was waived during periods when Respondent was paying for required items in accordance with the judgment in Cause No. 124113.

⁸ Staff's February 25, 2010, Investigatory Letter (Ex. 2) is obviously in error, as it states that Respondent's guilty plea was entered on August 18, 2009, four days before the offense occurred (on August 22, 2009). Staff's Formal Charges (Ex. 3) state that the offense was committed on April 22, 2009. An uncertified copy of the judgment (Staff's Ex. 9) confirms Respondent's plea of guilty entered on August 18, 2009, but it does not specify the offense date. Of the available documents, the most credible evidence is the record maintained by the court and it establishes that Respondent's plea of guilty was accepted by the court on August 18, 2009. This date, as well as the chronology of events established by other documentary evidence, indicates that Respondent committed the offense of Making a False Report to a Peace Officer on April 22, 2009.

⁹ Staff's Ex. 10.

"[Respondent] is currently being supervised by the Department for Tampering with a Governmental Record. She was arrested in February 2011 for Theft by Check. In lieu of revocation, she has been ordered to complete Financial Management. In addition, her supervision has been extended until February 20, 2012. It should be noted that she does report, make monthly payments and is working community service."¹⁰

On two occasions, Respondent accepted an Agreed Order with disciplinary sanctions imposed by the Board. The Agreed Orders describe Respondent's actionable conduct, as well as the disciplinary action taken:

- **Violation:** On July 15, 1997, Respondent misappropriated 200 mg of Demerol and 50 mg of Phenagram from the hospital where she was employed as a staff nurse, and administered the medication to her mother, who was admitted to the facility with problems associated with Multiple Sclerosis.

Disciplinary Action: On February 10, 1998, Respondent was issued a warning with stipulations, requiring her to take and pass a nursing jurisprudence course within one year of the date of the order, and to pay a \$500 penalty.¹¹

- **Violation:** On January 20, 2005, Respondent attempted to pass a telephonically-communicated fraudulent, unauthorized prescription for Lortab at Walgreen's Pharmacy in Amarillo, Texas.

Disciplinary Action: On August 8, 2006, Respondent was issued a reprimand with stipulations for a one-year period, during which she was required: to take and pass courses in nursing jurisprudence and ethics; to notify her employer(s) of the Board's stipulations and provide a copy of the order; to ensure that her employer(s) file required quarterly reports with the Board; to be indirectly supervised by another RN; to submit to random drug and alcohol screening; and to pay a \$250 penalty.¹²

2. Respondent's Testimony¹³

Respondent testified that she moved to Amarillo, Texas in 2002, after living for many years in Lubbock. She is 41 years of age. She has four children (ages 18, 13, 10 and 8) but was

¹⁰ Staff's Ex. 12.

¹¹ Staff's Ex. 11, p.p. 1-6.

¹² Staff's Ex. 11, p.p. 7-17.

¹³ Staff examined Respondent as an adverse witness prior to the presentation of Respondent's direct case.

divorced from their father in 2008.¹⁴ Her ex-husband lives in Houston. Their three youngest children live with her and she receives \$400 per month in child support.

Respondent's parents moved to Amarillo following her divorce, but she reported that neither she nor her children have a close relationship with them. She described her family of origin as "dysfunctional." Her father, a retired Methodist minister, is not supportive of her mother and at times, he is even "abusive." This circumstance, in addition to the fact that her mother suffers from Multiple Sclerosis, causes Respondent to feel protective of her mother.

The Agreed Orders entered by the Board in 1998 and 2006 are both based on actionable conduct involving Respondent's mother. The earlier incident occurred on July 15, 1997. At the time, Respondent had worked as a nurse in the Labor and Delivery unit at St. Mary of the Plains Hospital for five years. Her father was admitted to the facility for knee surgery, accompanied by Respondent's mother. Her mother began to develop a migraine headache and appealed for help. Using the patient code assigned to her father when he was admitted, Respondent withdrew doses of Demerol and Phenergan from the hospital's Pyxis medication dispensing machine. She administered the medication to her mother.¹⁵

Respondent admitted that she knew her conduct was wrong. But at the time of the incident, she explained, "I was so tired of seeing her in pain" and "I didn't know what else to do." Her remorse was expressed in the statement that, "I've had to live with it for 13 years." In retrospect, Respondent acknowledged there were alternative ways to help her mother. She agreed that she could have escorted her mother to the hospital's Emergency Room for treatment.

Respondent's later disciplinary action is based on an incident that occurred on January 20, 2005, while her parents were in Amarillo for a visit. Respondent's mother was prescribed

¹⁴ In several instances, Respondent attributed conflicting dates to the same event. Most inconsistencies involve the correct year, *i.e.*, she testified variously that her arrest for Tampering with a Governmental Record occurred in January 2009 and in January 2010, but credible evidence establishes she was arrested only once for this charge. To the extent possible, the ALJ has resolved discrepancies by comparing Respondent's testimony with the chronology of events established by other evidence.

Lortab¹⁶ for pain, but she had run out medication because Respondent's sister was "taking it." Respondent indicated she was angry at her father because "as usual, he was doing nothing" to address either her sister's behavior or her mother's pain.

Respondent said that her mother's treating physician maintained his practice in Dallas; to complicate matters further he was out of town and was expected to be unavailable for several more weeks. She testified that her mother had been planning to change doctors and begin seeing the Amarillo physician who also employed Respondent as a nurse. Respondent admitted that on January 20, 2005, her mother was not an established patient. Nevertheless, Respondent telephoned a local pharmacy and requested that her mother's prescription for Lortab-30 count (dosage unknown) be filled; during the phone call, Respondent represented that the prescription had been authorized by her employer/physician. Once again, Respondent acknowledged that her conduct was wrong, but explained, "I felt like I had to call in the Lortab ... 30 [tablets] would get her through."

Between 2003 and 2007, Respondent worked part-time work as an RN, but her primary focus was her children. However, sometime in 2007 her husband moved out. Although it was financially difficult she remained in their Amarillo home with all four children. She sought full-time employment, but the first nursing position she was offered would have required her to work 12-hour shifts, making the cost of childcare prohibitive. She stayed in her current part-time position in the hopes that it would become full-time. In December 2007 her employer told her that additional hours would not become available. She resigned. In January 2008, she applied for monthly benefits from a food stamp assistance program.

Respondent was approved for food stamp benefits and received a Lone Star card in January 2008. At the time, she testified, she understood that assistance had been approved for a six-month period ending in June 2008, after which she would have to re-apply to receive additional benefits. She continued looking for work. At the beginning of April 2008, she started

¹⁵ Respondent's testimony is plainly inconsistent with the Board's February 10, 1998, finding that: "Respondent misappropriated and administered the medication to her mother, who was admitted to the facility with problems associated with Multiple Sclerosis." Staff's Ex. 11.

¹⁶ The generic equivalent of Lortab is acetaminophen and hydrocodone.

a full-time job as an RN. According to Respondent, she was unaware that the food stamp assistance program requires recipients who obtain full-time work to report the change in employment status within 10 days of beginning a full-time job. She did not provide the required notice and continued to receive food stamp benefits through May 2008.

Respondent testified that she was going through a divorce in July 2008 when her brother Kelly suddenly passed away. She recalled receiving a letter from the food stamp program a few days after his death. She testified that at the time, she had not used food stamps in over a month. However, she was distraught and not thinking straight. She said she did not read the letter before filling out the enclosed form and sending it back.

In early-August 2008, a caseworker for the food stamp assistance program called Respondent and inquired about her employment status. Respondent said that up until this telephone call she was unaware there was problem with her benefits. She testified she told the caseworker the truth: that she had been working full-time since April 2008; that she had not paid attention to the program's July 2008 correspondence because she was grief-stricken from the divorce and her brother's death; and that she had stopped using her Lone Star card some time ago. After Respondent was informed that she received \$1,500 in overpaid food stamp benefits, she said she told the caseworker she would pay the money back.

In September 2008 Respondent was contacted by a man who identified himself as a food stamp fraud investigator. She said he called her at the end of the work day and demanded her appearance in his office within 30 minutes, or he would have her arrested. She arranged for her children to be picked up by a neighbor and went to the meeting. Respondent testified that she tried to explain how her confusion and mistakes were the cause of the overpaid benefits, but the investigator would not listen; instead, he directed her to fill out a written statement and instructed her regarding the information to include in the statement. Once she completed an affidavit, the investigator reportedly said, "Okay, now you can tell your side." In the end, he informed her that the information he had gathered would be forwarded to the district attorney, who would notify Respondent of any further action.

Respondent testified that several months went by and she heard nothing. In January 2009, she was assisting her oldest son with his application for a driving permit at the Department of Motor Vehicles (DMV). The application required Respondent's driver's license information. The DMV's verification process revealed that there was an outstanding warrant for her arrest. She said that a state trooper arrested her in front of her son. Respondent was taken into custody and her son was taken home in a police vehicle.

Respondent acknowledged that she was represented by counsel on August 20, 2009, the date she pled guilty to Tampering with a Governmental Record, a felony offense. The Potter County District Court chose not to adjudicate Respondent's guilt at that time and placed her on community supervision for a period of two years, through August 19, 2011.

Respondent acknowledged that her misdemeanor offense (Making a False Report to a Peace Officer) "came later," but insisted that this offense was (her July 18, 2008, submission of false information to a government assistance program). As with the disposition of the felony case, the court accepted Respondent's plea of guilty to the misdemeanor charge, deferred adjudication of her guilt and placed her on probation for a period of nine months.

Respondent's most recent criminal conduct occurred in May 2010. She issued a check to the Amarillo Independent School District (Amarillo ISD) for \$60, which was not paid by her bank because the account was closed. She explained that the bank account was open on May 12, 2010, the date she wrote the check to cover her son's prom expenses. However, because her ex-husband still had access to the account she closed it and opened another account. She was not aware that the check to Amarillo ISD had not been paid. As the school year ended shortly thereafter, Respondent testified that she did not learn about the returned check until September or October of 2010. She called the school district to make it right but the matter had already been turned over to the district attorney for legal action. She acknowledged that she ultimately pled guilty to the misdemeanor offense of Issuance of a Bad Check in March 2011, but noted that the incident did not significantly impact the status of her on-going felony probation. The terms of her probation were modified to require her completion of a money management class.

According to Respondent, her period of supervision was extended until February 20, 2012, due to the limited availability of the required class.

Respondent's more recent employment history as an RN at facilities in Amarillo includes: (1) Northwest Texas Hospital (March 2008–September 2008); (2) Compassion Home Care (September 2009–August 2010); and (3) Interim House (December 2010–present). Respondent currently works as a case manager for Interim House, a home hospice care company. The position requires her to maintain a caseload of approximately 15 terminally-ill patients and their families. With the assistance of an LVN and a home health aide, Respondent provides direct care to patients in their homes, as well as guidance for family caregivers. She testified that she has a good rapport with her elderly patients and enjoys the work.

Respondent emphasized that despite the episodes resulting in court-ordered sanctions and Board discipline, in her 19-year career as an RN the quality of her nursing skills has never been questioned. Many of her former patients have expressed gratitude for the nursing care she provided, especially during her 10 years as a labor and delivery nurse. Her skills and abilities as a nurse have also been the subject of uniform praise by both past and present supervisors, who she describes as "some of my best friends."

Respondent also noted that she has more than complied with the terms of her probation. She testified that she paid all court-ordered restitution (\$1,569) within the first six months of her probation period and currently, she is ahead of schedule on court-ordered payments for other items. To date, she has paid a total of \$6,000 for her criminal offenses – far more than the value of any benefit she obtained from her commission of those crimes. In her mind she has suffered the consequences of her actions many times over.

3. Testimony of Dr. Melinda Hester, Ph.D.¹⁷

Dr. Hester holds a bachelor's degree in nursing science, a master's degree in nursing science, and recently achieved a doctorate in nursing science.¹⁸ As the Board's Lead Practice Consultant, she is the Board's interpreter of the Nurse Practice Act and of the Board's rules.

Dr. Hester has been an RN for 32 years, most of that time practicing in a public health setting. She has been with the Board for five years. She has also worked as a school nurse, a health educator and a nursing instructor.¹⁹

Dr. Hester testified that based on her review of the facts, the relevant statutes and rules, the Disciplinary Matrix, and the Board's Disciplinary Sanctions for Fraud, Theft, and Deception, she believes that revocation of Respondent's RN license is the appropriate sanction. After considering Respondent's testimony at hearing, Dr. Hester confirmed that her opinions and recommendation had not changed.

With respect to the alleged violations of Act § 301.452(b)(3) and Board Rule 217.12(13), relating to criminal conduct, Dr. Hester opined that Respondent's crimes indicate she cannot distinguish right from wrong, a factor that significantly undermines her professional character. See 22 TAC § 213.27. She has also demonstrated a tendency to engage in wrongful conduct "when no one was looking," *i.e.*, at times when she is less likely to be discovered. This propensity is very troubling, Dr. Hester explained, because of the power differential between a nurse and her patients. Because nurses have an opportunity to exploit or abuse patients who are sick, elderly or vulnerable for other reasons, it is essential that a nurse be trustworthy. If a nurse's conduct - personal or professional - demonstrates a lack of honesty and integrity, or an inability to abide by the rules of society, the nurse's patients may become victims.

¹⁷ Staff examined Respondent as an adverse witness prior to the presentation of Respondent's direct case.

¹⁸ Staff Ex. 13.

¹⁹ *Id.*

Along those lines, Dr. Hester expressed concern that Respondent's work with a terminally ill, home-bound population allows her to be alone in the patient's home with access to all of the patient's belongings, not to mention sensitive information such as social security numbers and financial records. A nurse providing hospice care also functions autonomously. Respondent has misappropriated, or attempted to misappropriate narcotics on two separate occasions. A nurse who provides home hospice care has ample opportunity to commit the same type of crime. The fact that Respondent's felony crime involves theft from a governmental entity is also of great concern, as the patients she cares for receive Medicaid/Medicare benefits.

In Dr. Hester's opinion, Respondent's criminal and disciplinary history also demonstrates a lack of judgment. Respondent committed another crime despite the fact that she was on felony probation. Her misappropriation of narcotics occurred while she was working as hospital staff. And her conduct reflects an inability to honor interpersonal boundaries.

The repetitive nature of Respondent's crimes also disturbs Dr. Hester. Each incident involved her dishonesty and/or misrepresentation. She violated the trust of her employer more than once. In addition, she was not a young person when her misconduct occurred. When all of these factors are considered, Respondent's crimes make her unfit to practice nursing.

D. Analysis and Recommendation

Code § 301.452(b)(3) provides that a person is subject to disciplinary action for "a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude." The Board's Disciplinary Guidelines for Criminal Conduct state that "Tampering with a Governmental Record" is directly related to the practice of nursing because it reflects an intent to defraud, and indicates untrustworthiness; the recommended sanction is license revocation. Code § 301.452(b)(10) also permits disciplinary action for unprofessional or dishonorable conduct likely to deceive or defraud a patient or the public. In addition, the Board's rule at 22 TAC § 213.27(b)(3) provides that one of the factors to consider in evaluating good professional character in disciplinary matters is any "conviction for a felony or for a misdemeanor involving

moral turpitude or order of probation with or without an adjudication of guilt for an offense that would be a felony or misdemeanor involving moral turpitude if guilt were adjudicated.”

These provisions authorize the Board to take disciplinary action against Respondent, up to and including the revocation of her license. Respondent's crimes involve dishonesty, deception and misrepresentation, and are directly related to the nursing profession. The conclusion that Respondent's criminal conduct and violation of professional standards make her unfit to practice nursing is bolstered by several factors: the repetitive nature of her wrongdoing, the fact that her misconduct spans a 13-year period; the fact that she was well into adulthood when the transgressions occurred; the fact that her last crime occurred recently, on May 12, 2010; and the fact that she is still on felony probation as a result of that misdemeanor offense.

One matter was not fully addressed by the evidence. On April 18, 2009, Respondent entered a plea of guilty to the misdemeanor offense of Making a False Report to a Peace Officer. The best evidence indicates the crime occurred on April 22, 2009. Respondent insisted that this offense was related to or part of her felony offense committed on July 18, 2008 (Tampering with a Government Record), *i.e.*, the two offenses should be viewed as only one crime. Her claim is supported by the fact that both cases were disposed of almost simultaneously (although by different courts), and the fact that the judgment ordering felony probation waived Respondent's payment of court-ordered fees while she was paying identical fees pursuant to the judgment ordering probation for her misdemeanor crime. Still, the offenses occurred nine months apart. The underlying details of the misdemeanor offense are not known because the record evidence does not include the charging instrument. Respondent did not explain why or how the two incidents are related. One matter is clear, however: the offenses should not be viewed as one crime if the underlying circumstances involve Respondent's provision of false information to law enforcement during an investigation of Respondent's fraudulent actions on July 18, 2008.

In some instances, the documentary evidence undermines the veracity of Respondent's testimony. For example, she testified that she did not learn about the charge for Issuance of Bad Check until September or October 2010. However, the indictment for the offense (Staff's Ex. 10) was issued on July 1, 2010. The indictment states that Respondent received notice of the bad check at her address listed on the check itself, and Respondent testified she has lived in the same

home since 2003. Respondent's testimony is also inconsistent with the February 10, 1998, Agreed Order. The Board's finding in the order reflects its understanding that Respondent's mother was a patient of the hospital at the time Respondent misappropriated medication and administered it to her. However, Respondent testified that her mother was present at the hospital because her father was admitted for knee surgery. Respondent also testified that instead of misappropriating narcotics, she could have escorted her mother to the emergency room for treatment. If Respondent's mother was already admitted to the hospital the treatment of her migraine headache would be legitimate; it would be unnecessary to steal medication for her.

Respondent had an explanation for each episode of misconduct that suggested she was not at fault, and either minimized the seriousness of her offense or shifted the blame onto others. She implied that her misappropriation of narcotics was justified by her mother's fragile medical condition and her own need to protect her mother. She excused her administration of stolen narcotics to her mother, noting that after it happened one of the doctors said, "I would've helped you." Her felony conviction for food stamp fraud was the result of her confusion, mistakes and emotional state, not intentional deceit. According to Respondent, it was the food stamp fraud investigator who was disrespectful and coercive; she was the victim. She likewise implied that the state trooper who arrested her in front of her son exhibited conduct far worse than her own.

Respondent's testimony suggests that she is not ready to acknowledge that only she is responsible for her behavior. Her misconduct has not only been repetitive and extensive, but recent. Given that she can apply for reinstatement of her license in one year, revocation of her license at this time is warranted.

Based upon the above discussion, the ALJ recommends that Respondent's registered nursing license be revoked.

III. FINDINGS OF FACT

1. Brandie Lee Rackler (Respondent) has been licensed as a registered nurse by the Texas Board of Nursing (Staff/Board) since 1992.
2. On March 7, 2011, Staff sent Respondent a Notice of Formal Charges filed against her.
3. On April 13, 2011, Staff mailed its Notice of Hearing to Respondent.

4. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. The hearing convened July 12, 2011, in the William P. Clements Building, 300 West 15th Street, Austin, Texas.
6. On August 20, 2009, in Cause No. 59,101-E in the 108th District Court of Potter County, Texas, Respondent entered a plea of guilty to Tampering with a Governmental Record (a State Jail Felony offense committed on July 18, 2008). The Court deferred adjudication of Respondent's guilt and placed on her community supervision for a period of two years. She was ordered to pay restitution of \$1,569, a fine, court costs and other fees, in addition to completing classes and performing community service.
7. On August 18, 2009, in Cause No. 124113 in County Court at Law No. 2 in Potter County, Texas, Respondent entered a plea of guilty to Making a False Report to a Peace Officer (a Class B Misdemeanor offense committed on April 22, 2009). The Court deferred adjudication of Respondent's guilt and placed her on probation for a period of nine months, with terms that required her to pay a fine, court costs and other fees, and to perform community service.
8. On March 7, 2011, in Cause No. 2010-5488-2 in County Court at Law No. 2 in Randall County, Texas, Respondent pled guilty to, and was convicted of Issuance of a Bad Check (a Class C Misdemeanor offense committed on May 12, 2010). She was ordered to pay a \$100 fine, plus all costs associated with the proceeding.
9. As a result of Respondent's conviction of Issuance of a Bad Check, she was ordered to complete Financial Management and her period of community supervision for her felony conviction was extended until February 20, 2012.
10. Respondent has paid all court-ordered restitution and is ahead of schedule on court-ordered payments for other items. She is also in compliance with the remaining terms of her community supervision.
11. Respondent's disciplinary history includes two Agreed Orders entered by the Board on February 10, 1998, and August 8, 2006, respectively.
12. Both disciplinary actions involve Respondent's misappropriation, or attempted misappropriation, of narcotics while acting as a registered nurse.
13. Respondent's criminal conduct involves dishonesty, deception and misrepresentation, and is directly related to the practice of nursing.
14. Respondent's misconduct has been repetitive.

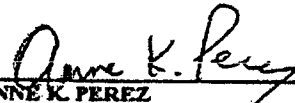
15. Respondent's misconduct was not an isolated incident and occurred over a period of 13 years.
16. Respondent's misconduct was not the result of youthful indiscretion.
17. Respondent's last crime occurred recently.
18. Respondent has not been released from felony probation.
19. Nurses occupy a position of public trust and have access to the sensitive personal and financial information, medical records, and belongings of patients.
19. If Respondent is permitted to continue practicing as a nurse, she will have opportunities to repeat her misconduct.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. TEX. OCC. CODE ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE ch. 2003.
3. Proper and timely notice of the hearing was provided. TEX. GOV'T CODE ch. 2001; 22 TEX. ADMIN. CODE § 213.10.
4. A nurse is subject to discipline for:
 - a. conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude. TEX. OCC. CODE § 301.452(b)(3);
 - b. unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public. TEX. OCC. CODE § 301.452(b)(10); and
 - c. criminal conduct including but not limited to conviction or probation, with or without an adjudication of guilt. 22 TEX. ADMIN. CODE § 217.12(13).
5. A record of conviction or order of deferred adjudication is conclusive evidence of guilt. 22 TEX. ADMIN. CODE § 217.27(c)(1).
6. A licensing authority may deny, suspend or revoke a license on the basis that a person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed profession. TEX. OCC. CODE § 53.021.

7. Tampering with a Governmental Record is a crime directly related to the practice of nursing. TEX. OCC. CODE § 53.022; 22; TEX. ADMIN. CODE § 213.33.
8. Making a False Report to a Peace Officer is a misdemeanor involving moral turpitude. TEX. OCC. CODE § 301.452(b)(3).
9. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent violated TEX. OCC. CODE §§ 301.452(b)(3) and 301.452(b)(10), and 22 TEX. ADMIN. CODE § 217.12(13), and she also is subject to sanction under TEX. OCC. CODE § 53.021.
10. The foregoing Findings of Fact and Conclusions of Law indicate that the Board is authorized to sanction Respondent.
11. Factors to be used when recommending a sanction on the basis of criminal conduct are set forth at 22 TEX. ADMIN. CODE § 213.33(c) and TEX. OCC. CODE § 53.023(a).
12. Under the Board's Disciplinary Matrix found at 22 TEX. ADMIN. CODE § 213.33(b), the conduct exhibited by Respondent warrants revocation of her nursing license.

SIGNED September 23, 2011



ANNE K. PEREZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS