

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.  
*Patricia P. Roman*  
Executive Director of the Board

BEFORE THE TEXAS BOARD OF NURSING

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In the Matter of Vocational Nurse	§	REINSTATEMENT
License Number 116301	§	
issued to DENISE MICHELLE MARTINEZ	§	AGREED ORDER

On this day came to be considered by the Texas Board of Nursing, hereinafter referred to as the Board, the Petition for Reinstatement of Vocational Nurse License Number 116301, held by DENISE MICHELLE MARTINEZ, hereinafter referred to as Petitioner.

An informal conference was held on August 16, 2011, at the office of the Texas Board of Nursing, in accordance with Section 301.464, Texas Occupations Code.

Petitioner appeared in person. Petitioner was notified of his right to be represented by legal counsel and elected to waive representation by counsel. In attendance were Denise Benbow, MSN, RN, Nurse Consultant, Executive Director's Designee; Jena Abel, Assistant General Counsel; Anthony L. Diggs, MSCJ, Director of Enforcement; and Carolyn Hudson, Investigator.

FINDINGS OF FACT

1. Prior to institution of Agency proceedings, notice of the matters specified below in these Findings of Fact was served on Petitioner and Petitioner was given an opportunity to show compliance with all requirements of the law for retention of the license.
2. Petitioner waived representation by counsel, notice and hearing, and consented to the entry of this Order.
3. Petitioner received a Certificate in Vocational Nursing from Grayson County College, Denison, Texas, on August 29, 1986. Petitioner was licensed to practice vocational nursing in the State of Texas on November 22, 1986.

4. Petitioner's vocational nursing employment history includes:

1986 - 1987	LVN	Gunther Convalescent Gunther, Texas
1988 - 1989	LVN	Woodville Convalescent Center Woodville, Texas
1990 - 1992	LVN	Autumn Hills Sugarland, Texas
1992 - 1995	LVN	Autumn Hills Richmond, Texas
1995 - 1997	LVN	TDCJ Terrell Unit Livingston, Texas
1997 - 1999	LVN	Woodville Convalescent Center Woodville, Texas
1999 - 1999	LVN	Fort Bend Nursing Home Rosenberg, Texas
Feb 1999 - May 2001	LVN	Rosenberg Health & Rehabilitation Rosenberg, Texas
Aug 2001 - Nov 2001	LVN	Jasper Convalescent Center Jasper, Texas
Nov 2001 - May 2002	LVN	Timberwood Health Care Livingston, Texas
May 2002 - April 2003	LVN	Avalon Nursing Care Wharton, Texas
April 2003 - May 2005	LVN	SPIST Rest Home Needville, Texas

Petitioner's vocational nursing employment history continued:

April 2006 - Feb 2008	LVN	Matagorda Nursing & Rehabilitation Bay City, Texas
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April 2008 - Present	Not employed in nursing
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5. On or about June 14, 2005, Petitioner's license to practice Vocational Nursing in the State of Texas was Suspended by the Texas Board of Nursing. The suspension was stayed, and Petitioner was placed on probation for two (2) years. A copy of the June 14, 2005, Agreed Order, Findings of Fact and Conclusions of Law is attached and incorporated, by reference, as part of this Order.
6. On April 17, 2008, Petitioner's license to practice vocational nursing in the State of Texas was Revoked by the Texas Board of Nursing. A copy of the Proposal For Decision and Order of the Board, is attached and incorporated, by reference, as a part of this Order.
7. On July 22, 2008, Petitioner plead guilty to the Class B Misdemeanor of Theft of Property By Check  $\geq$ \$20  $<$ \$500, in the County Court of Matagorda County, Texas, Cause No. 20-080570. Petitioner was sentenced to confinement in the Matagorda County Jail for a term of twenty (20) days. The imposition of the sentence was suspended and Petitioner was placed on community supervision for a term of three (3) months.
8. On March 3, 2009, an Order Revoking Probation was entered in the County Court of Matagorda County, Texas, Cause No. 20-080570 and Petitioner was confined in the Matagorda County Jail for twenty (20) days.
9. On or about March 22, 2010, Petitioner submitted a Petition for Reinstatement of License to practice vocational nursing in the State of Texas.
10. Petitioner presented the following in support of his petition:
  - 10.1. Letter of support from Ronnie Miller states that he has known Petitioner for several years and she assisted with his care after he had a bilateral fem pop bypass related to hip fractures. Mr. Miller states that Petitioner helped with dressing changes and blood thinner injections twice a day. Mr. Miller recommends reinstatement of Petitioner's nursing license.

- 10.2. Letter of support from Krystle Sanchez states that Petitioner was employed from July 2008 to January 2009, as a private duty sitter for her mother-in-law. Petitioner helped to monitor the blood sugar levels and assisted with insulin as the sliding scale required. Ms. Sanchez states that Petitioner would make an excellent nurse and recommends of reinstatement of Petitioner's nursing license.
- 10.3. Verification of successful completion of twenty (20) Type I Continuing Education Contact Hours.

#### CONCLUSIONS OF LAW

1. Pursuant to Texas Occupations Code, Sections 301.451-301.555, the Board has jurisdiction over this matter.
2. Pursuant to Section 301.467, Texas Occupations Code, the Board may refuse to issue or renew a license, and may set a reasonable period that must lapse before reapplication.
3. Pursuant to 22 TEX. ADMIN. CODE §213.26, the Board may impose reasonable conditions that a Petitioner must satisfy before reissuance of an unrestricted license.

#### ORDER

IT IS THEREFORE AGREED, subject to ratification by the Texas Board of Nursing, that the petition of DENISE MICHELLE MARTINEZ, Vocational Nurse License Number 116301, to practice vocational nursing in the state of Texas, be and the same is hereby GRANTED SUBJECT TO THE FOLLOWING CONDITIONS SO LONG AS THE PETITIONER complies in all respects with the Nursing Practice Act, Texas Occupations Code, §301.001 *et seq.*, the Rules and Regulations Relating to Nurse Education, Licensure and Practice, 22 TEX. ADMIN. CODE §211.1 *et. seq.* and the stipulations contained in this Order:

IT IS FURTHER AGREED and ORDERED that, while under the terms of this Order, this Order SHALL apply to any and all future licenses issued to Respondent to practice nursing in the State of Texas.

IT IS FURTHER AGREED and ORDERED that this Order SHALL be applicable to Petitioner's multistate licensure privilege, if any, to practice vocational nursing in the State of Texas.

IT IS FURTHER AGREED and ORDERED that while Petitioner's license is encumbered by this Order, Petitioner may not work outside the State of Texas pursuant to a multistate licensure privilege without the written permission of the State of Texas and the Board of Nursing in the party state where Petitioner wishes to work.

(1) PETITIONER SHALL pay a monetary fine in the amount of two-hundred fifty dollars (\$250.00). PETITIONER SHALL pay this fee within forty-five (45) days of relicensure. Payment is to be made directly to the Texas Board of Nursing in the form of cashier's check or U.S. money order. Partial payments will not be accepted.

(2) PETITIONER SHALL NOT seek employment or practice nursing for compensation until he has paid all re-registration fees and is issued a license to practice vocational nursing in the State of Texas. Said license issued to DENISE MICHELLE MARTINEZ, shall be subject to the following agreed post-licensure stipulations:

(3) PETITIONER SHALL, within one (1) year of relicensure, successfully complete a course in nursing jurisprudence and ethics. PETITIONER SHALL obtain Board approval of the course prior to enrollment only if the course is not being offered by a pre-approved provider. Home study courses and video programs will not be approved. In order for the course to be approved, the target audience shall include nurses. It shall be a minimum of six (6) contact hours in length. The course's content shall include the Nursing Practice Act, standards of practice, documentation of care, principles of nursing ethics, confidentiality, professional boundaries, and the Board's Disciplinary Sanction Policies regarding Sexual Misconduct, Fraud, Theft and Deception, Nurses with Substance

Abuse, Misuse, Substance Dependency, or other Substance Use Disorder, and Lying and Falsification. Courses focusing on malpractice issues will not be accepted. PETITIONER SHALL CAUSE the sponsoring institution to submit a Verification of Course Completion form, provided by the Board, to the Office of the Board to verify PETITIONER's successful completion of the course. This course is to be taken in addition to any other courses stipulated in this Order, if any, and in addition to any continuing education requirements the Board may have for relicensure.

*Board-approved courses may be found at the following Board website address: Board-approved courses may be found at the following Board website address: <http://www.bon.state.tx.us/disciplinaryaction/stipscourses.html>.*

(4) PETITIONER SHALL, within one (1) year of relicensure, successfully complete the course "Sharpening Critical Thinking Skills," a 3.6 contact hour online program provided by the National Council of State Boards of Nursing (NCSBN) Learning Extension. In order to receive credit for completion of this program, PETITIONER SHALL SUBMIT the continuing education certificate of completion for this program to the Board's office, to the attention of Monitoring. This course is to be taken in addition to any continuing education requirements the Board may have for relicensure. *Information regarding Board-approved courses may be found at the following Board website address: <http://www.bon.state.tx.us/disciplinaryaction/stipscourses.html>.*

**IT IS FURTHER AGREED, SHOULD PETITIONER PRACTICE AS A VOCATIONAL NURSE IN THE STATE OF TEXAS, PETITIONER WILL PROVIDE DIRECT PATIENT CARE AND PRACTICE IN A HOSPITAL, NURSING HOME, OR OTHER CLINICAL SETTING A MINIMUM OF SIXTY-FOUR (64) HOURS PER MONTH UNDER THE FOLLOWING STIPULATIONS FOR THREE (3) YEARS OF**

EMPLOYMENT. THE LENGTH OF THE STIPULATION PERIOD WILL BE EXTENDED UNTIL SUCH THIRTY-SIX (36) MONTHS HAVE ELAPSED. PERIODS OF UNEMPLOYMENT OR OF EMPLOYMENT THAT DO NOT REQUIRE THE USE OF A VOCATIONAL NURSE (LVN) LICENSE WILL NOT APPLY TO THIS STIPULATION PERIOD:

(5) PETITIONER SHALL notify all future employers in vocational nursing of this Order of the Board and the stipulations on PETITIONER's license. PETITIONER SHALL present a complete copy of this Order and all Proposals for Decision issued by the Administrative Law Judge, if any, to each future employer prior to accepting an offer of employment.

(6) PETITIONER SHALL CAUSE each future employer to submit the Notification of Employment form, which is provided to the Petitioner by the Board, to the Board's office within five (5) days of employment as a vocational nurse.

(7) For the first year of employment as a vocational nurse under this Order, PETITIONER SHALL be directly supervised by a Registered Nurse or a Licensed Vocational Nurse. Direct supervision requires another professional or vocational nurse to be working on the same unit as PETITIONER and immediately available to provide assistance and intervention. PETITIONER SHALL work only on regularly assigned, identified and predetermined unit(s). The PETITIONER SHALL NOT be employed by a nurse registry, temporary nurse employment agency, hospice, or home health agency. PETITIONER SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

(8) For the remainder of the stipulation period, PETITIONER SHALL be supervised by a Registered Nurse or a Licensed Vocational Nurse who is on the premises. The supervising nurse is not required to be on the same unit or ward as PETITIONER, but should be on the facility grounds and readily available to provide assistance and intervention if necessary. The supervising nurse shall have a minimum of two (2) years experience in the same or similar practice setting to which the Petitioner is currently working. PETITIONER SHALL work only regularly assigned, identified and predetermined unit(s). PETITIONER SHALL NOT be employed by a nurse registry, temporary nurse employment agency, hospice, or home health agency. PETITIONER SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

(9) PETITIONER SHALL CAUSE each employer to submit, on forms provided to the Petitioner by the Board, periodic reports as to Petitioner's capability to practice vocational nursing. These reports shall be completed by the Registered Nurse or Licensed Vocational Nurse who supervises the PETITIONER. These reports shall be submitted by the supervising nurse to the office of the Board at the end of each three (3) months for three (3) years of employment as a vocational nurse.

(10) PETITIONER SHALL abstain from the consumption of alcohol, Nubain, Stadol, Dalgan, Ultram, or other synthetic opiates, and/or the use of controlled substances, except as prescribed by a licensed practitioner for a legitimate purpose. If prescribed, PETITIONER SHALL CAUSE the licensed practitioner to submit a written report identifying the medication, dosage and the date the medication was prescribed. The report shall be submitted directly to the office of the Board by the prescribing practitioner, within ten (10) days of the date of the prescription. In the event that prescriptions for controlled substances are required for periods of two (2) weeks or



longer, the Board may require and PETITIONER SHALL submit to an evaluation by a Board approved physician specializing in Pain Management or Psychiatry. The performing evaluator will submit a written report to the Board's office, including results of the evaluation, clinical indications for the prescriptions, and recommendations for on-going treatment within thirty (30) days from the Board's request.

(11) PETITIONER SHALL submit to random periodic screens for controlled substances, tramadol hydrochloride (Ultram), and alcohol. For the first three (3) month period, random screens shall be performed at least once per week. For the second three (3) month period, random screens shall be performed at least twice per month. For the next six (6) month period, random screens shall be performed at least once per month. For the remainder of the stipulation period, random screens shall be performed at least once every three (3) months. All random screens SHALL BE conducted through urinalysis. Screens obtained through urinalysis is the sole method accepted by the Board.

Specimens shall be screened for at least the following substances:

Amphetamines	Meperidine
Barbiturates	Methadone
Benzodiazepines	Methaqualone
Cannabinoids	Opiates
Cocaine	Phencyclidine
Ethanol	Propoxyphene
tramadol hydrochloride (Ultram)	

A Board representative may appear at the PETITIONER's place of employment at any time during the stipulation period and require PETITIONER to produce a specimen for screening.

All screens shall be properly monitored and produced in accordance with the Board's policy on Random Drug Testing. A complete chain of custody shall be maintained for each specimen obtained and analyzed. PETITIONER SHALL be responsible for the costs of all random drug screening during the stipulation period.

Any positive result for which the nurse does not have a valid prescription or failure to report for a drug screen, which may be considered the same as a positive result, will be regarded as non-compliance with the terms of this Order and may subject the nurse to further disciplinary action including EMERGENCY SUSPENSION pursuant to Section 301.4551, Texas Occupations Code, or REVOCATION of Petitioner's license and multistate licensure privileges, if any, to practice nursing in the State of Texas.

IT IS FURTHER AGREED, that upon full compliance with the terms of this Order, all encumbrances will be removed from PETITIONER's license and PETITIONER shall be eligible for multistate licensure privileges, if any, to practice vocational nursing in the State of Texas.

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PETITIONER'S CERTIFICATION

I understand that I have the right to legal counsel prior to signing this Reinstatement Agreed Order. I waive representation by counsel. I certify that my past behavior, except as disclosed in my Petition for Reinstatement of Licensure, has been in conformity with the Board's professional character rule. I have provided the Board with complete and accurate documentation of my past behavior in violation of the penal law of any jurisdiction which was disposed of through any procedure short of convictions, such as: conditional discharge, deferred adjudication or dismissal. I have no criminal prosecution pending in any jurisdiction.

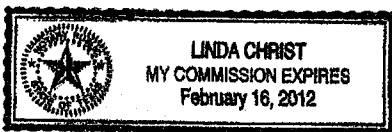
I have reviewed this Order. By my signature on this Order, I agree to the Findings of Fact, Conclusions of Law, Order, and any conditions of said Order. I waive judicial review of this Order. I understand that this Order is subject to ratification by the Board. When this Order is ratified, the terms of this Order become effective, and a copy will be mailed to me. I agree to inform the Board of any other fact or event that could constitute a ground for denial of licensure prior to reinstating my license to practice vocational nursing in the state of Texas. I understand that if I fail to comply with all terms and conditions of this Order, I will be subject to investigation and disciplinary sanction, including revocation of my license to practice vocational nursing in the State of Texas, as a consequence of my noncompliance.

Signed this 14 day of September 2011.

*Denise Michelle Martinez*  
DENISE MICHELLE MARTINEZ, Petitioner

Sworn to and subscribed before me this 14 day of September 2011.

SEAL



*Linda Christ*  
Notary Public in and for the State of TEXAS

WHEREFORE, PREMISES CONSIDERED, the Texas Board of Nursing does hereby ratify and adopt the Reinstatement Agreed Order that was signed on the 14th day of September, 2011, by DENISE MICHELLE MARTINEZ, Vocational Nurse License Number 116301, and said Order is final.

Effective this 27th day of October, 2011.



Katherine A. Thomas, MN, RN  
Executive Director on behalf  
of said Board

BEFORE THE BOARD OF NURSE EXAMINERS  
FOR THE STATE OF TEXAS

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In the Matter of Vocational Nurse License Number 116301           §     AGREED  
issued to DENISE MICHELLE MARTINEZ                               §     ORDER

On this day the Board of Nurse Examiners for the State of Texas, hereinafter referred to as the Board, considered the matter of DENISE MICHELLE MARTINEZ, Vocational Nurse License Number 116301, hereinafter referred to as Respondent.

Information received by the Board produced evidence that Respondent may have violated Section 302.402(a)(3)(B),(9)&(10), Texas Occupations Code. Respondent waived representation by counsel, informal conference, notice and hearing, and agreed to the entry of this Order offered on April 3, 2005, by Katherine A. Thomas, MN, RN, Executive Director, subject to ratification by the Board.

FINDINGS OF FACT

1. Prior to the institution of Agency proceedings, notice of the matters specified below in these Findings of Fact was served on Respondent and Respondent was given an opportunity to show compliance with all requirements of the law for retention of the license.
2. Respondent waived representation by counsel, informal conference, notice and hearing, and agreed to the entry of this Order.
3. Respondent is currently licensed to practice vocational nursing in the State of Texas.
4. Respondent received a Certificate in Vocational Nursing from Grayson County College, Denison, Texas, on August 29, 1986. Respondent was licensed to practice vocational nursing in the State of Texas on November 22, 1986.
5. Respondent's complete vocational nursing employment history is unknown.

6. On or about February 12, 2002, Respondent was arrested by the Richmond Sheriff's Office, Fort Bend County, Texas, for BURGLARY OF A HABITATION (a Second Degree Felony offense committed on May 22, 2001), and POSSESSION OF A CONTROLLED SUBSTANCE ANALOGUE PG 1 < 1G (a State Jail Felony offense committed on June 28, 2001).
7. On or about April 15, 2002, Respondent entered a plea of Guilty to POSSESSION OF A CONTROLLED SUBSTANCE, NAMELY: COCAINE IN AN AMOUNT OF LESS THAN ONE GRAM (a State Jail Felony offense committed on June 28, 2001), in the 240<sup>th</sup> Judicial District Court of Fort Bend County, Texas, under Cause No. 34999. As a result of the Guilty plea, the proceedings against Respondent were deferred without entering an adjudication of guilt, and Respondent was placed on probation for a period of three (3) years. Additionally, Respondent was ordered to pay a one hundred dollar (\$100.00) fine and restitution in the amount of four hundred dollars (\$400.00), along with court costs and assessed fees. Furthermore, Respondent was ordered to complete a drug/alcohol evaluation; a psychological evaluation; and one hundred twenty (120) hours of Community Service Restitution.
8. On or about April 15, 2002, the Second Degree Felony charge of BURGLARY OF A HABITATION that had been filed against Respondent in the 240<sup>th</sup> Judicial District Court of Fort Bend County, Texas, under Cause No. 34976, was dismissed by the Court as a result of the Court taking the related case into consideration under Cause No. 34999, and ordering Respondent to pay restitution for the offense through Cause No. 34999.
9. On or about September 9, 2002, a Motion for Adjudication of Guilt was filed in the 240<sup>th</sup> Judicial District Court of Fort Bend County, Texas, under Cause No. 34999, by the District Attorney of Fort Bend County, Texas. The Motion, and an Order of alias capias for arrest of Respondent were subsequently entered by the Court based on Findings that Respondent had substantially violated the terms and conditions of the Deferred Adjudication probation that she had been previously granted under Cause No. 34999, in that:

Respondent was arrested on July 26, 2002, in Brazoria County, Texas, for the offense of THEFT BY RECEIVING.

Respondent failed to avoid any use of dangerous drugs, controlled substances, marijuana and alcoholic beverages, to-wit: On July 16, 2002, Respondent admitted both verbally and in writing to Community Corrections Officer Jason Hyatt that she had been drinking beer at home the previous night.

Respondent failed to submit an accurately completed and signed Probationer's Monthly Report, to-wit: On August 8, 2002, Respondent submitted a false report to Community Corrections Officer Jason Hyatt concerning her arrest for THEFT BY RECEIVING, and having a pending court appearance.

Respondent failed to complete one hundred twenty (120) hours of Community Service Restitution for Fort Bend County, as assigned by the Community Service Restitution Coordinator at a rate of not less than four (4) hours per week for the months of May, June and July 2002.

10. On or about March 3, 2003, a Motion for Modification was filed in the 240<sup>th</sup> Judicial District Court of Fort Bend County, Texas, under Cause No. 34999, by Respondent's Community Corrections Officer. The Motion requested that in lieu of Revoking the Deferred Adjudication that Respondent had been granted under Cause No. 34999, that the Court extend Respondent's Deferred Adjudication probation for a period of one (1) year beginning on April 14, 2005, and ending on April 13, 2006.
11. On or about March 3, 2003, the 240<sup>th</sup> Judicial District Court of Fort Bend County, Texas granted the Motion for Modification filed under Cause No. 34999, and extended Respondent's Deferred Adjudication probation for a period of one (1) year, with a term ending date of April 13, 2006.
12. On March 27, 2003, Respondent was convicted of THEFT BY RECEIVING STOLEN PROPERTY (a Class B Misdemeanor offense committed on July 18, 2002), in the County Court at Law No. 3 of Brazoria County, Texas, under Cause No. 125,180B. As a result of the conviction, Respondent was ordered to be imprisoned in the County Jail of Brazoria County, Texas, for a period of three (3) days (with four (4) days credit given for jail time served). Furthermore, Respondent was ordered to pay a four hundred dollar (\$400.00) fine, and court costs.
13. On or about January 6, 2004, Respondent submitted her LVN License Renewal Form to the Board of Vocational Nurse Examiners for the State of Texas. On the Renewal, Respondent answered "No" to the question: "Were you convicted of a misdemeanor other than a minor traffic violation since your last renewal". Respondent's conduct was deceptive to the Board of Vocational Nurse Examiners for the State of Texas, and could have affected their decision to renew her licensure.
14. The Board finds that there exists serious risks to public health and safety as a result of impaired nursing care due to intemperate use of controlled substances or chemical dependency.

#### CONCLUSIONS OF LAW

1. Pursuant to Texas Occupations Code, Sections 301.451-301.555, the Board has jurisdiction over this matter.
2. Notice was served in accordance with law.

3. The evidence received is sufficient to prove violations of Section 302.402(a)(3)(B),(9)&(10), Texas Occupations Code, and 22 TEX. ADMIN. CODE §239.11(8),(28)&(29)(A)(iii), as amended.
4. The evidence received is sufficient cause pursuant to Section 301.452(b), Texas Occupations Code, to take disciplinary action against Vocational Nurse License Number 116301, heretofore issued to DENISE MICHELLE MARTINEZ, including revocation of Respondent's license to practice vocational nursing in the State of Texas.

ORDER

IT IS THEREFORE AGREED and ORDERED, subject to ratification by the Board of Nurse Examiners, that Vocational Nurse License Number 116301, previously issued to DENISE MICHELLE MARTINEZ, to practice vocational nursing in Texas is hereby suspended for a period of two (2) years with the suspension stayed and Respondent is hereby placed on probation for two (2) years with the following agreed terms of probation:

IT IS FURTHER AGREED and ORDERED that this Order SHALL be applicable to Respondent's multistate privilege, if any, to practice vocational nursing in the State of Texas.

IT IS FURTHER AGREED and ORDERED that while Respondent's license is encumbered by this order the Respondent may not work outside the State of Texas pursuant to a multistate licensure privilege without the written permission of the State of Texas and the Board of Nursing in the party state where Respondent wishes to work.

(1) RESPONDENT SHALL comply in all respects with the Nursing Practice Act, Revised Civil Statutes of Texas as amended, Texas Occupations Code, §§301.001 *et seq.*, the Rules and Regulations Relating to Nurse Education, Licensure and Practice, 22 TEX. ADMIN. CODE §211.01 *et seq.* and this Order.

(2) RESPONDENT SHALL deliver the wallet-sized license issued to DENISE



MICHELLE MARTINEZ, to the office of the Board of Nurse Examiners within three weeks of the date of this Order for appropriate notation.

(3) RESPONDENT SHALL pay a monetary fine in the amount of two hundred fifty (\$250) dollars. RESPONDENT SHALL pay this fine within forty-five (45) days of entry of this Order. Payment is to be made directly to the Board of Nurse Examiners in the form of cashier's check or U.S. money order. Partial payments will not be accepted.

(4) RESPONDENT SHALL, within one (1) year of entry of this Order, successfully complete a course in Texas nursing jurisprudence. RESPONDENT SHALL obtain Board approval of the course prior to enrollment only if the course is not being offered by a pre-approved provider. Home study courses and video programs will not be approved. In order for the course to be approved, the target audience shall include Nurses. It shall be a minimum of six (6) contact hours in length. The course's content shall include the Nursing Practice Act, standards of practice, and documentation of care. Courses focusing on malpractice issues will not be accepted. RESPONDENT SHALL CAUSE the sponsoring institution to submit a Verification of Course Completion form, provided by the Board, to the Office of the Board to verify RESPONDENT's successful completion of the course. This course shall be taken in addition to any other courses stipulated in this Order, if any, and in addition to any continuing education requirements the Board has for relicensure. *Board-approved courses may be found on the Board's website, [www.bne.state.tx.us](http://www.bne.state.tx.us) (under BNE events).*

(5) RESPONDENT SHALL, within one (1) year of entry of this Order, successfully complete a course in nursing ethics. RESPONDENT SHALL obtain Board approval of the course prior to enrollment only if the course is not being offered by a pre-approved

provider. Home study courses and video programs will not be approved. The course shall be a minimum of six (6) contact hours in length. In order for the course to be approved, the target audience shall include Nurses. The course shall include content on the following: principles of nursing ethics; confidentiality; and professional boundaries. RESPONDENT SHALL CAUSE the sponsoring institution to submit a Verification of Course Completion form, provided by the Board, to verify RESPONDENT's successful completion of the course. This course is to be taken in addition to any continuing education requirements the Board may have for relicensure. Board approved courses may be found on the Board's website, [www.bne.state.tx.us](http://www.bne.state.tx.us) (under BNE events).

**THE FOLLOWING TERMS OF THIS PROBATION MAY ONLY BE SERVED WHILE RESPONDENT IS EMPLOYED AS A LICENSED VOCATIONAL NURSE IN A HOSPITAL, NURSING HOME, OR OTHER CLINICAL PRACTICE SETTING AND RESPONDENT MUST WORK IN SUCH SETTING A MINIMUM OF SIXTY-FOUR (64) HOURS PER MONTH DURING THE TWO (2) YEAR PERIOD OF PROBATION. THE LENGTH OF PROBATION WILL BE EXTENDED UNTIL SUCH TWENTY-FOUR (24) MONTHS HAVE ELAPSED. PERIODS OF UNEMPLOYMENT OR OF EMPLOYMENT THAT DO NOT REQUIRE A LICENSED VOCATIONAL NURSE (LVN) LICENSE WILL NOT APPLY TO THIS PROBATION PERIOD.**

(6) RESPONDENT SHALL notify each present employer in vocational nursing of this Order of the Board and the probation conditions on RESPONDENT's license. RESPONDENT SHALL present a complete copy of this Order and all Proposals for Decision issued by the Administrative Law Judge, if any, to each present employer within five (5) days of receipt of this

Order. RESPONDENT SHALL notify all future employers in vocational nursing of this Order of the Board and the probation conditions on RESPONDENT's license. RESPONDENT SHALL present a complete copy of this Order and all Proposals for Decision issued by the Administrative Law Judge, if any, to each future employer prior to accepting an offer of employment.

(7) RESPONDENT SHALL CAUSE each present employer in vocational nursing to submit the Notification of Employment form, which is provided to the Respondent by the Board, to the Board's office within ten (10) days of receipt of this Order. RESPONDENT SHALL CAUSE each future employer to submit the Notification of Employment form, which is provided to the Respondent by the Board, to the Board's office within five (5) days of employment as a vocational nurse.

(8) For the first year of employment as a Licensed Vocational Nurse under this Order, RESPONDENT SHALL be directly supervised by a Registered Nurse or a Licensed Vocational Nurse. Direct supervision requires another professional or vocational nurse to be working on the same unit as RESPONDENT and immediately available to provide assistance and intervention. RESPONDENT SHALL work only on regularly assigned, identified and predetermined unit(s). The RESPONDENT SHALL NOT be employed by a nurse registry, temporary nurse employment agency, hospice, or home health agency. RESPONDENT SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

(9) For the remainder of the probation period, RESPONDENT SHALL be supervised by a Registered Nurse or a Licensed Vocational Nurse who is on the premises. The supervising nurse is not required to be on the same unit or ward as RESPONDENT, but should be on the facility grounds and readily available to provide assistance and intervention if necessary. The supervising

nurse shall have a minimum of two (2) years experience in the same or similar practice setting to which the Respondent is currently working. RESPONDENT SHALL work only regularly assigned, identified and predetermined unit(s). RESPONDENT SHALL NOT be employed by a nurse registry, temporary nurse employment agency, hospice, or home health agency. RESPONDENT SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

(10) RESPONDENT SHALL CAUSE each employer to submit, on forms provided to the Respondent by the Board, periodic reports as to RESPONDENT's capability to practice vocational nursing. These reports shall be completed by the Registered Nurse or Licensed Vocational Nurse who supervises the RESPONDENT. These reports shall be submitted by the supervising nurse to the office of the Board at the end of each three (3) months for two (2) years of employment as a vocational nurse.

(11) RESPONDENT SHALL abstain from the consumption of alcohol, Nubain, Stadol, Dalgan, Ultram, or other synthetic opiates, and/or the use of controlled substances, except as prescribed by a licensed practitioner for a legitimate purpose. If prescribed, RESPONDENT SHALL CAUSE the licensed practitioner to submit a written report identifying the medication, dosage and the date the medication was prescribed. The report shall be submitted directly to the office of the Board by the prescribing practitioner, within ten (10) days of the date of the prescription. In the event that prescriptions for controlled substances are required for periods of two (2) weeks or longer, the Board may require and RESPONDENT SHALL submit to an evaluation by a Board approved physician specializing in Pain Management or Psychiatry. The performing evaluator will submit a written report to the Board's office, including results of the evaluation, clinical indications for the prescriptions, and recommendations for on-going

treatment within thirty (30) days from the Board's request.

(12) RESPONDENT SHALL submit to random periodic screens for controlled substances, tramadol hydrochloride (Ultram), and alcohol. For the first three (3) month period, random screens shall be performed at least once per week. For the second three (3) month period, random screens shall be performed at least once per month. For the remainder of the probation period, random screens shall be performed at least once every three (3) months.

Specimens shall be screened for at least the following substances:

Amphetamines	Meperidine
Barbiturates	Methadone
Benzodiazepines	Methaqualone
Cannabinoids	Opiates
Cocaine	Phencyclidine
Ethanol	Propoxyphene
tramadol hydrochloride (Ultram)	

A Board representative may appear at the RESPONDENT's place of employment at any time during the probation period and require RESPONDENT to produce a specimen for screening.

All screens shall be properly monitored and produced in accordance with the Board's policy on Random Drug Testing. A complete chain of custody shall be maintained for each specimen obtained and analyzed. RESPONDENT SHALL be responsible for the costs of all random drug screening during the probation period.

Any positive result for which the nurse does not have a valid prescription will be regarded as non-compliance with the terms of this Order and may subject the nurse to further disciplinary action by this Board.

(13) RESPONDENT SHALL attend at least two (2) support group meetings each week, one of which shall be for substance abuse; and RESPONDENT SHALL provide acceptable

evidence of attendance. Acceptable evidence shall consist of a written record of at least: the date of each meeting; the name of each group attended; and the signature and printed name of the chairperson of each group attended by RESPONDENT. RESPONDENT SHALL submit the required evidence on the forms provided by the Board at the end of every three (3) months. No duplications, copies, third party signatures, or any other substitutions will be accepted as evidence.

(14) RESPONDENT SHALL CAUSE her probation officer to submit written reports on forms provided to the Respondent by the Board. The reports shall indicate the RESPONDENT's compliance with the court ordered probation. The reports shall be furnished each and every three (3) month period until RESPONDENT is released from probation.

(15) IT IS FURTHER AGREED, SHOULD RESPONDENT be convicted for the offense as outlined in Finding of Fact Number Seven (7), said judicial action will result in further disciplinary action including Revocation of Respondent's license to practice vocational nursing in the State of Texas.

IT IS FURTHER AGREED, that upon full compliance with the terms of this Order, RESPONDENT SHALL be issued an unencumbered license and multistate licensure privileges, if any, to practice vocational nursing in the State of Texas.

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RESPONDENT'S CERTIFICATION

I understand that I have the right to legal counsel prior to signing this Agreed Order. I waive representation by counsel. I have reviewed this Order. I neither admit nor deny the violations alleged herein. By my signature on this Order, I agree to the Findings of Fact, Conclusions of Law, Order, and any conditions of said Order, to avoid further disciplinary action in this matter. I waive judicial review of this Order. I understand that this Order is subject to ratification by the Board. When this Order is ratified, the terms of this Order become effective, and a copy will be mailed to me. I understand that if I fail to comply with all terms and conditions of this Order, I will be subject to investigation and disciplinary sanction, including revocation of my license to practice vocational nursing in the State of Texas, as a consequence of my noncompliance.

Signed this 3 day of May, 2005.

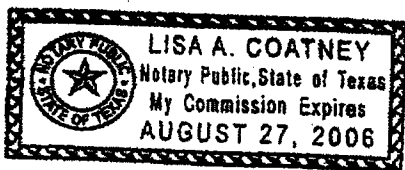
Denise Michelle Martinez  
DENISE MICHELLE MARTINEZ, Respondent

Sworn to and subscribed before me this 3 day of May, 2005.

SEAL

Lisa A. Coatney

Notary Public in and for the State of Texas



WHEREFORE, PREMISES CONSIDERED, the Board of Nurse Examiners for the State of Texas does hereby ratify and adopt the Agreed Order that was signed on the 3rd day of May, 20 05, by DENISE MICHELLE MARTINEZ, Vocational Nurse License Number 116301, and said Order is final.

Effective this 14th day of June, 20 05.

\_\_\_\_\_  
Katherine A. Thomas, MN, RN  
Executive Director on behalf  
of said Board



DOCKET NUMBER 507-08-0836

IN THE MATTER OF  
PERMANENT CERTIFICATE  
NUMBER 116301  
ISSUED TO  
DENISE M. MARTINEZ

§  
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§  
§

BEFORE THE TEXAS  
BOARD OF NURSING

OPINION AND ORDER OF THE BOARD

TO: Denise M. Martinez  
2001 Palm Village Blvd., #639  
Bay City, TX 77414

During open meeting held in Austin, Texas, April 17-18, 2008, the Texas Board of Nursing finds that after proper and timely notice was given, the above-styled case was heard by an Administrative Law Judge who made and filed a proposal for decision containing the Administrative Law Judge's findings of fact and conclusions of law. The proposal for decision was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein.

The Texas Board of Nursing, after review and due consideration of the proposal for decision, and exceptions and replies filed, if any, adopts the findings of fact and conclusions of law of the Administrative Law Judge as if fully set out and separately stated herein with the exception of Conclusion of Law Number 10. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

Conclusion of Law Number 10 is hereby re-designated as a Recommendation because it is a recommendation for a sanction and therefore not a proper conclusion of law. *Chalifoux Jr. v. State Bd. Of Medical Examiners*, 2006 S.W.3d (03-05-00320-CV) (Tex.App. – Austin 2006); *Grotti v. State Bd. Of Medical Examiners*, 2005 LEXIS 8279 (Tex.App. –Austin 2005, no pet.). The Board adopts the Recommended Sanction of REVOCATION.

NOW, THEREFORE, IT IS ORDERED that Permanent Certificate Number 116301, previously issued to DENISE M. MARTINEZ, to practice professional nursing in the State of Texas be, and the same is hereby, REVOKED.

IT IS FURTHER ORDERED that Permanent Certificate Number 116301, previously issued to DENISE M. MARTINEZ, upon receipt of this Order, be immediately delivered to the office of the Texas Board of Nursing for the State of Texas.

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

Entered this 17th day of April, 2008.

TEXAS BOARD OF NURSING

BY:



KATHERINE A. THOMAS, MN, RN  
EXECUTIVE DIRECTOR ON BEHALF OF SAID BOARD

**TEXAS BOARD OF NURSING,**  
Petitioner,

V.

**DENISE M. MARTINEZ,**  
Respondent

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§

**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

Staff of the Board of Nursing (Staff/Board) brought disciplinary action against Denise M. Martinez (Respondent) for failing to comply with an Agreed Order issued by the Board on June 14, 2005. Staff alleged that Respondent's violations of the Agreed Order were a basis for disciplinary action under the provisions of TEX. OCC. CODE ANN. § 301.452(b)(1) and (10) and 22 TEX. ADMIN. CODE (TAC) § 217.12(11)(B). Staff also sought to impose against Respondent the administrative costs of the proceeding pursuant to TEX. OCC. CODE ANN. § 301.461. The Administrative Law Judge (ALJ) recommends that Respondent's license be revoked and that administrative costs not be imposed against Respondent.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

The hearing convened January 16, 2008, before the undersigned ALJ. The hearing was held at the State Office of Administrative Hearings, William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. Staff was represented by Victoria Cox, Assistant General Counsel. Respondent represented herself. The record closed on January 16, 2008, at the conclusion of the hearing.

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

## II. BACKGROUND

### A. Terms of the Agreed Order

On November 22, 1986, the Board issued to Respondent Vocational Nurse License No. 116301. On May 3, 2005, Respondent signed an Agreed Order with the Board.<sup>1</sup> As part of the Agreed Order, Respondent was to:

- successfully complete courses in Texas nursing jurisprudence and nursing ethics within one year of the entry of the Agreed Order; and
- submit to random periodic screens for controlled substances, tramadol hydrochloride, and alcohol.

The drug screens were to be conducted at least once a week for the first three months, at least once a month for the second three months, and at least once every three months for the remainder of the two year probation.<sup>2</sup> The Agreed Order became effective on June 14, 2005.

### B. Compliance issues

On August 8, 2005, Respondent registered with the Board's drug testing services contractor, National Confederation of Professional Services (NCPS).<sup>3</sup> On the form, Respondent acknowledged her agreement to comply with NCPS' drug screening requirements. The program required Respondent to purchase from NCPS two chain of custody specimen forms. Respondent was to call NCPS every day. If she was instructed by NCPS, Respondent was to provide a specimen using one

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<sup>1</sup> Staff's Ex. 6.

<sup>2</sup> Staff's Ex. 4.

<sup>3</sup> Staff's Ex. 9.

of the chain of custody specimen forms.<sup>4</sup> As Respondent used the forms, she was required to buy new ones with a credit card or money order.

Approximately one year later, Staff sent Respondent a letter dated August 25, 2006, informing Respondent that she had failed to comply with the Agreed Order.<sup>5</sup> Specifically, Respondent had failed to complete her course work by the one-year deadline, and Respondent had failed to contact NCPS daily.<sup>6</sup> Staff directed Respondent to respond to the allegations in writing within 30 days.

On Respondent's postmarked answer of October 3, 2006, Respondent stated that she had scheduled herself to take the two required courses.<sup>7</sup> She also informed Staff that she had begun "taking my drug tests."<sup>8</sup> However, by the time of the postmark of the letter, Respondent's satisfaction of her drug testing compliance duties was seriously in arrears. In the 421 days between the date on which Respondent registered with NCPS and the date on which Respondent's response to Staff was postmarked, Respondent had failed to contact NCPS on 71 days, or about 17% of the time.<sup>9</sup>

On November 17, 2006, Staff sent a second letter to Respondent, this time informing her that Staff was initiating an investigation based on Respondent's continuing non-compliance with the drug

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<sup>4</sup> Staff's Ex. 9.

<sup>5</sup> Staff's Ex. 2.

<sup>6</sup> Staff obtained from NCPS a report on the number of days on which Respondent had failed to call, had failed to submit a specimen when instructed, and had failed to pass the drug screening. Although Respondent repeatedly failed to contact NCPS, she never failed a drug screening during her participation in the program.

<sup>7</sup> Staff's Ex. 5. None of Respondent's letters to Staff were dated. This letter was received by Staff on October 6, 2006.

<sup>8</sup> *Id.*

<sup>9</sup> Staff's Ex. 13.

screen program.<sup>10</sup> Staff gave Respondent 30 days in which to respond, and Respondent answered in a letter postmarked December 22, 2006. Respondent explained that she had failed to contact NCPS daily because

I honestly forgot that I was suppose[d] to until I was Reminded by my employer that my evaluation was due. . . . I know that forgetfulness is not an excuse[,] and I am so sorry[.] I have been keeping up With calling everyday and when I am called I go and test."<sup>11</sup>

In the 80 days between the dates of the postmarks of Respondent's first and second letters, Respondent failed to contact NCPS on 13 of those days, again about 17% of the time.<sup>12</sup>

On April 10, 2007, Staff sent Respondent a third letter, this one formally charging Respondent with violating the Agreed Order.<sup>13</sup> Staff alleged that Respondent had failed to timely complete her courses and had failed to comply with the drug testing program. Staff gave Respondent three weeks in which to respond, and Respondent answered in a letter received by Staff on May 1, 2007.<sup>14</sup> Respondent explained that she had completed her course work in January 2007 and that she had been compliant with her drug testing obligations since her receipt of Staff's letter of November 17, 2006.

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<sup>10</sup> Staff's Ex. 2a.

<sup>11</sup> Staff's Ex. 5a.

<sup>12</sup> Staff's Ex. No. 13.

<sup>13</sup> Staff's Ex. No. 3.

<sup>14</sup> Staff's Ex. No. 5b.

In the 165 days between the date of Staff's letter of November 17, 2006, and May 1, 2007, the date of Staff's receipt of Respondent's letter, Respondent failed to contact NCPS on 29 of those days, or about 18% of the time.<sup>15</sup>

Staff's three letters gave Respondent the opportunity to address her non-compliance with the Agreed Order. The letter of August 25, 2006, informed Respondent that Staff was aware of Respondent's failure to comply with the deadline for completion of her course work and her failure to comply with her daily drug testing requirements. Her response did not address any reasons for her delays or failures.

Staff's letter of November 17, 2006, informed Respondent that Staff was aware of her failure to comply with the daily drug testing requirements between June 30 and September 27, 2006. Respondent's explanation that she simply forgot about her obligations for several months appeared to reflect her lack of priority in complying with the Agreed Order. Further, Respondent's continued failure to comply with her agreement to contact NCPS daily between September and the end of November 2006 appeared to have confirmed that lack of priority.

When Staff sent its third letter on April 10, 2007, Respondent had the opportunity to understand clearly that Staff was not treating Respondent's failure to abide by the terms of the Agreed Order as a dismissible error. Staff clearly related its concern about Respondent's failures and clearly communicated Staff's intention to take responsive action. Despite Staff's communications, Respondent continued to fail to meet her daily drug testing obligations at about the same rate had she had since August 2005.

On November 27, 2007, Staff gave Respondent notice that a hearing on the merits would be held at SOAH in this docket. In the 230 days between the dates on which Respondent received

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<sup>15</sup> Staff's Ex. No. 13.

Staff's third and fourth letters, Respondent failed to call NCPS on 33 of those days—or about 14% of the total.<sup>16</sup>

For the complete data set from NCPS, Respondent failed to contact on 138 of the 818 days between August 29, 2005, and November 25, 2007—or about 17% of the time.<sup>17</sup> Between August 15, 2005, and May 22, 2007, Respondent failed to respond to 20 of NCPS' random drug tests because she failed to call NCPS' office.<sup>18</sup> On the six dates on which Respondent submitted to drug testing after being instructed by NCPS, Respondent tested negative on every occasion.<sup>19</sup>

For Respondent's failures to comply, Staff sought the revocation of Respondent's license.

### III. DISCUSSION

#### A. Violation

Staff relied on the provisions of TEX. OCC. CODE ANN. § 301.452(b)(1) and (10) and 22 TAC § 217.12(11)(B) in alleging that Respondent's violations of the Agreed Order was also a violation of law. In brief, TEX. OCC. CODE ANN. § 301.452(b)(1) provides that the Board may discipline a license holder for a violation of the statute, the Board's rules, or the Board's orders. The provisions of TEX. OCC. CODE ANN. § 301.452(b)(10) authorize the Board to discipline a license holder for unprofessional conduct.

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<sup>16</sup> The two dates were April 14 and November 30, 2007.

<sup>17</sup> Staff's Ex. No. 13.

<sup>18</sup> State's Ex. No. 7.

<sup>19</sup> State's Ex. No. 12.



The Board has adopted 22 TAC § 217.12(11)(B) to implement the Board's authority to govern licensees who engage in unprofessional conduct. The purpose of the rules is to: (1) protect clients and the public from incompetent, unethical, or illegal conduct of licensees, and (2) identify unprofessional or dishonorable behaviors of a nurse "which the board believes are likely to deceive, defraud, or injure clients or the public." The rule makes clear that actual injury to a client need not be established for a violation to be found. The rule lists one of the prohibited behaviors as "[v]iolating an order of the board."

The combination of the rules and the statute may reasonably be read to authorize the Board to discipline a licensee for the unprofessional conduct of violation of a Board order.

Respondent's failure to complete her course work within the one-year period was a violation of the Agreed Order, as was Respondent's failure to comply with the requirement of contacting NCPS on a daily basis.

In her defense, Respondent could offer little explanation of her reasons for failing to comply with the Agreed Order. She asserted that she had no drug problems, that she was out of work for an extended period, that she was experiencing financially difficult circumstances, and that she simply forgot about her obligations under the Agreed Order. She did not explain why the letters from the Board did not cause her to be more diligent in contacting NCPS daily, why she did not contact the Staff to seek advice on dealing with these issues, or why she simply allowed this matter to escalate to the point of the scheduling of a contested case.

Respondent cried during the hearing and explained that she had been a nurse for most of her adult life and that she held the position of assistant director of nurses at her place of employment, Matagorda Nursing & Rehabilitation Center in Bay City. She asserted that she did not know what she would do if she were no longer licensed as a nurse. Respondent offered letters of support from

Donna Winebrenner, R.N., her director of nurses,<sup>20</sup> and from Sue Goslin, a physical therapist.<sup>21</sup> The letters describe Respondent as a well-rounded employee, professional, compassionate, caring with the residents and their families, level-headed, friendly, cheerful, and forthright in her dealings with her co-workers and physicians.

#### B. Punishment

In the notice of hearing, Staff gave notice of its intention to seek revocation of Respondent's license. The basis of Staff's action was listed as 22 TAC §§ 213.27-213.33.<sup>22</sup>

In considering revocation, the Board is required to consider whether the person has been the subject of past disciplinary action by the Board and whether the person complied with the Board's rules and enabling statutes.<sup>23</sup> In this case, Respondent has been the subject of past disciplinary action and has not complied with the Board's rules through her failure to comply with the Agreed Order.

In addition, the Board is also required to consider the seriousness of the violation, the person's threat to public safety, and any mitigating factors.<sup>24</sup> More on point, SOAH is to consider the following when recommending a sanction in disciplinary cases:

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<sup>20</sup> Respondent's Ex. No. 2.

<sup>21</sup> Respondent's Ex. No. 1.

<sup>22</sup> These rules govern a broad range of the Board's authority to implement its statutory powers. The rules include the Board's definition of good professional character, the licensing of persons with criminal offenses, criteria and procedures to be used in cases involving "intemperate use and lack of fitness," a schedule of administrative fines, and factors to be considered in imposing penalties, sanctions, or fines. The language of 22 TAC § 213.33(g)(2)(H), as authorized by TEX. OCC. CODE ANN. § 301.453(a)(6), provides the Board the specific authority to seek revocation.

<sup>23</sup> TEX. OCC. CODE ANN. § 301.4531(b)(1)(B); 22 TAC § 213.33(g)(1)(B).

<sup>24</sup> TEX. OCC. CODE ANN. § 301.4531(b)(2)-(4); 22 TAC § 213.33(g)(1)(C)-(E).

1. **Evidence of actual or potential harm to patients, clients, or the public.<sup>25</sup>**

There was no evidence of Respondent's having caused any actual harm to any patient, client, or the public. The harm arose through Respondent's failure to comply with the Agreed Order. The Agreed Order was the product of Staff's agreeing to forego more stringent action against Respondent in exchange for Respondent's agreeing to abide by the terms of the Agreed Order. By failing to uphold her duties under the Agreed Order, Respondent showed herself unable to comply with the terms of an agreement with the Board. As the representative of the public, the Board is justified in regarding Respondent's action as potentially harmful.

2. **Evidence of a lack of truthfulness or trustworthiness.<sup>26</sup>**

Respondent's failure to comply with Agreed Order reflected a lack of trustworthiness. Respondent testified at the hearing that she intended to comply with the Agreed Order and that she tried to comply. However, poor judgment and bad memory prevented her from performing as she agreed.

3. **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.<sup>27</sup>**

None of these were factors in this case.

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<sup>25</sup> 22 TAC § 213.33(a)(1).

<sup>26</sup> 22 TAC § 213.33(a)(2).

<sup>27</sup> 22 TAC § 213.33(a)(3).

4. Evidence of practice history.<sup>28</sup>

This was not a factor in this case.

5. Evidence of present fitness to practice.<sup>29</sup>

Fitness to practice is a function of good professional character.<sup>30</sup> Elements include the ability to: distinguish right from wrong; think and act rationally; keep promises and honor obligations; and be accountable for her own behavior.<sup>31</sup>

In this proceeding, the evidence showed that Respondent had difficulty in keeping her promises and honoring her obligations. In her defense, Respondent showed that she was out of work from August 2005 to April 2006.<sup>32</sup> During that time, she had no money to pay for testing. However, Respondent did not try to account to Staff for her behavior. She failed to contact Staff to tell them about her financial problems or other impediments to her ability to comply with the Agreed Order. Further, by her own admission, when she went back to work, she did not resume her daily contacts with NCPS.<sup>33</sup>

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<sup>28</sup> 22 TAC § 213.33(a)(4).

<sup>29</sup> 22 TAC § 213.33(a)(5).

<sup>30</sup> The Board's rules frequently treat them as part of the same set of criteria. See, 22 TAC § 213.27(e)(2).

<sup>31</sup> 22 TAC § 213.27(b)(2).

<sup>32</sup> Staff's Ex. 5b.

<sup>33</sup> *Id.*

6. **Evidence of prior disciplinary history by the Board.**<sup>34</sup>

Staff presented uncontradicted evidence of Respondent's prior disciplinary history by the Board.

7. **The length of time the licensee has practiced.**<sup>35</sup>

The evidence was that Respondent has held a nursing license since 1986. Although she was out of work for part of that period, Respondent's practice as a nurse has spanned most of her adult life.

8. **The actual damages, physical, economic, or otherwise, resulting from the violation.**<sup>36</sup>

No actual damages were shown to have resulted from Respondent's violations.

9. **The deterrent effect of the penalty imposed.**<sup>37</sup>

The deterrent effect of the past penalty was ineffective with regard to gaining priority in Respondent's behavior. The deterrent effect of the proposed penalty will prevent Respondent from practicing her profession for at least a year.

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<sup>34</sup> 22 TAC § 213.33(a)(6).

<sup>35</sup> 22 TAC § 213.33(a)(7).

<sup>36</sup> 22 TAC § 213.33(a)(8).

<sup>37</sup> 22 TAC § 213.33(a)(9).

10. **Attempts by the licensee to correct or stop the violation.**<sup>38</sup>

Staff's letters to Respondent were multiple opportunities for Respondent to address her failure to comply with her drug testing obligations. Respondent's violations continued for periods of months and weeks, even after Staff sought explanation from Respondent for her behavior.

11. **Any mitigating or aggravating circumstances.**<sup>39</sup>

Respondent presented mitigating evidence in the form of the support of her director of nurses and of a co-worker.<sup>40</sup> Respondent explained that her lack of a job and money created great difficulties in her life. Nothing in the evidence suggested that Respondent failed to discharge her duties as a nurse to her patients, employer, or colleagues. Respondent's only failure was to protect her right to practice nursing.

12. **The extent to which system dynamics in the practice setting contributed to the problem; and any other matter that justice may require.**<sup>41</sup>

Neither of these were factors in this case.

**C. Board policy**

Staff called as a witness Carol Marshall, a consultant to the Board. Ms. Marshall is a registered nurse with almost 30 years of experience in a variety of practical and administrative fields

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<sup>38</sup> 22 TAC § 213.33(a)(10).

<sup>39</sup> 22 TAC § 213.33(a)(11).

<sup>40</sup> Respondent's Ex. Nos. 1 and 2.

<sup>41</sup> 22 TAC § 213.33(a)(12) and (13).

within the profession. Ms. Marshall assists the Enforcement and Legal Divisions with case reviews and testifies as an expert witness in SOAH hearings. Ms. Marshall testified that the Board's policy in reviewing violations of the type described in this case is to revoke the license and to consider a re-application after one year.

#### D. Administrative costs

The provisions of TEX. OCC. CODE ANN. § 301.461 authorize the Board to assess against a person who is found to have violated the statute the administrative costs of conducting a hearing to determine the violation. Staff alleged that the administrative costs included the cost paid by the Board to SOAH and the Office of the Attorney General, as well as amounts paid for Board legal and investigative services, court reporting, witnesses, reproduction of records, Staff time, travel, and expenses of at least \$1,200.00. Proof of these administrative costs was not made in the hearing.

### IV. ANALYSIS AND RECOMMENDATION

Respondent's actions violated two of the elements of the Agreed Order over a period of time sufficient to demonstrate her unwillingness or inability to come into compliance. Respondent's explanation was that financial circumstances and other issues in her life presented a hardship. This hardship prevented her from recognizing the possibility that she might lose her license as a nurse and her privilege to earn a livelihood through nursing. Respondent asserted that the loss of her license would render her even less able to maintain the priorities in her life.

Staff urged that Respondent presented a threat to the public on the basis of her failure to comply with the Agreed Order and the facts that caused the entry of the Agreed Order. These circumstances included some history of drug abuse. Staff introduced evidence about the importance of a nurse's ability to make fine distinctions in performing her duties.

The ALJ's conclusion in this case is that Respondent's only threat to the public is that she has demonstrated an inability to establish healthy priorities in her own life. The cause of that inability was never explained by Respondent or by the evidence presented by Staff. However, what was clear was that Staff was unable to get Respondent's attention through Staff's issuance of a series of increasingly sharp letters of warning. When none of these worked over a period of more than a year, Staff resorted to the last choice available under the law – a contested hearing.

The function of a contested hearing is to give the parties the opportunity to explain themselves through the introduction of evidence. Staff, through the guidance of counsel, presented the evidence necessary to prove a case that Respondent's license should be revoked. Respondent, without counsel, presented a case that: (1) she had made inescapably bad decisions with respect to her actions in response to Staff's warnings, and (2) she had the support of her colleagues.

The task of the ALJ is to weigh the evidence. In doing that, the ALJ must first determine whether the Staff sustained its burden of proving that Respondent violated the law.<sup>42</sup> In this case, Staff sustained that burden. Next, the ALJ had to determine whether Respondent presented sufficient mitigating evidence to overcome Staff's evidence. The ALJ had determined that Respondent's evidence did not meet that standard.

Although the ALJ recommends revocation of Respondent's license, the ALJ also urges the Board and Respondent to confer further. The purpose of that conference would be to provide Respondent with a clear understanding of the elements with which she would need to comply before she would be eligible to regain her license.

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<sup>42</sup> 1 TAC § 155.41(b).



## VI. FINDINGS OF FACT

1. Denise M. Martinez, Respondent, holds License Number 116301 issued by the Texas Board of Nursing (Board).
2. On May 3, 2005, Respondent signed an Agreed Order with the Board.
3. The Agreed Order required Respondent to: (1) successfully complete courses in Texas nursing jurisprudence and nursing ethics within one year of the entry of the Agreed Order; and (2) submit to random periodic screens for controlled substances, tramadol hydrochloride, and alcohol.
4. On August 8, 2005, Respondent registered with the Board's drug testing services contractor, National Confederation of Professional Services (NCPS).
5. Respondent was to call NCPS every day to determine whether she was required to provide a urine specimen on that day.
6. On August 25, 2006, staff of the Board (Staff) informed Respondent by letter that she had failed to complete her course work by the one-year deadline and had failed to contact NCPS daily.
7. On November 17, 2006, Staff sent a second letter to Respondent, informing her that Staff was initiating an investigation based on Respondent's continuing non-compliance with the drug screen program.
8. Respondent failed to contact NCPS daily because she had forgotten her obligation to comply with the Agreed Order until she was reminded by her employer.
9. On April 10, 2007, Staff sent Respondent a third letter, formally charging Respondent with violating the Agreed Order by failing to timely complete her courses and failing to comply with the drug testing program.
10. Respondent completed her course work in January 2007, approximately six months past the date required under the terms of the Agreed Order.
11. Respondent failed to contact NCPS on 138 of the 818 days between August 29, 2005, and November 25, 2007—or about 17% of the time.
12. Between August 15, 2005, and May 22, 2007, Respondent failed to respond to 20 of NCPS' random drug tests because she failed to call NCPS' office.


13. On November 27, 2007, Staff gave Respondent notice that a hearing on the merits would be held at SOAH in this docket.
14. 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.
15. The hearing on the merits was held on January 16, 2008, in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas. All parties appeared and participated in the hearing. The record closed on that date.
16. Factors that mitigate Respondent's failure to comply with the Agreed Order include letters of support from her director of nurses and professional colleagues, describing her as a well-rounded employee, professional, compassionate, caring with clients and families, level-headed, friendly, cheerful, and forthright in her dealings with her coworkers and physicians.

#### VII. CONCLUSIONS OF LAW

1. The State Board of Nursing (Board) has jurisdiction over this matter pursuant to TEX. OCC. CODE ANN. ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the formal charges and of the hearing on the merits was provided by staff of the Board (Staff). TEX. OCC. CODE ANN. § 301.454 and by the Administrative Procedure Act. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Staff had the burden of proving the case by a preponderance of the evidence. 1 TEX. ADMIN. CODE (TAC) § 155.41(b).
5. The Board may discipline a license holder for a violation of the statute, the Board's rules, or the Board's orders. TEX. OCC. CODE ANN. § 301.452(b)(1).
6. The Board has the authority to discipline a license holder for unprofessional conduct. TEX. OCC. CODE ANN. § 301.452(b)(10).
7. The Board has the authority to govern licensees who engage in unprofessional conduct. 22 TAC § 217.12(11)(B).

8. The Board has the authority to revoke a license for violations of the Board's enabling statutes and rules. 22 TAC § 213.33(g)(2)(H); TEX. OCC. CODE ANN. § 301.453(a)(6).
9. Respondent's failure to complete her course work within the one-year period and to comply with the requirement of contacting NCPS on a daily basis was a violation of the Agreed Order and with the Board's enabling statutes and rules.
10. Respondent's license should be revoked.

SIGNED February 25, 2008.

  
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PAUL D. KEEPER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS