



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 R. Thomas
Executive Director of the Board

DOCKET NUMBER 507-11-1721

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 197213
ISSUED TO
RACHEL MARLENE BOYD

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§

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

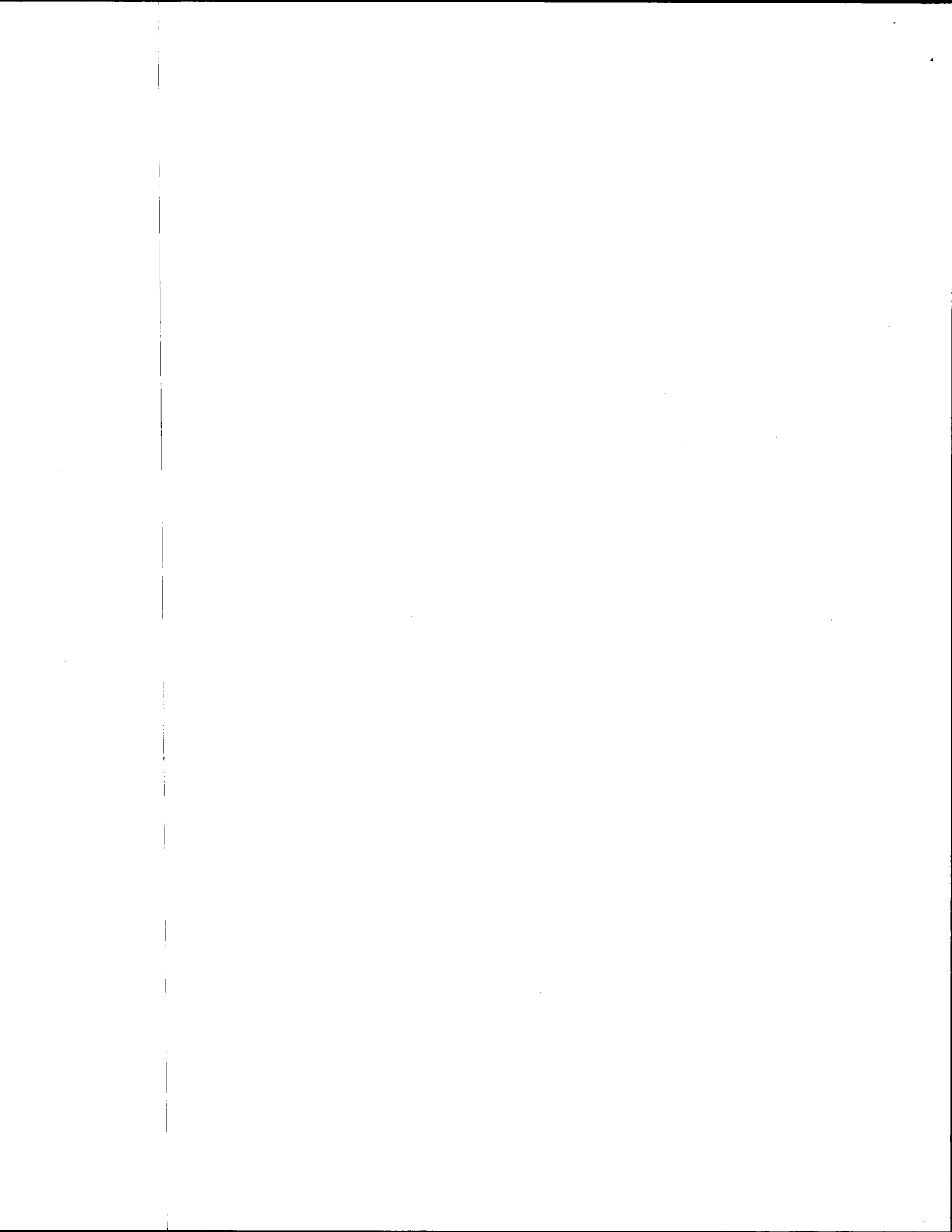
TO: RACHEL MARLENE BOYD
231 RIDGE HARBOR DRIVE
ROCKPORT, TX 78382

THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on July 21-22, 2011, 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 vocational nursing license of Rachel Marlene Boyd with 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, except for Conclusion of Law Number 9, which is not

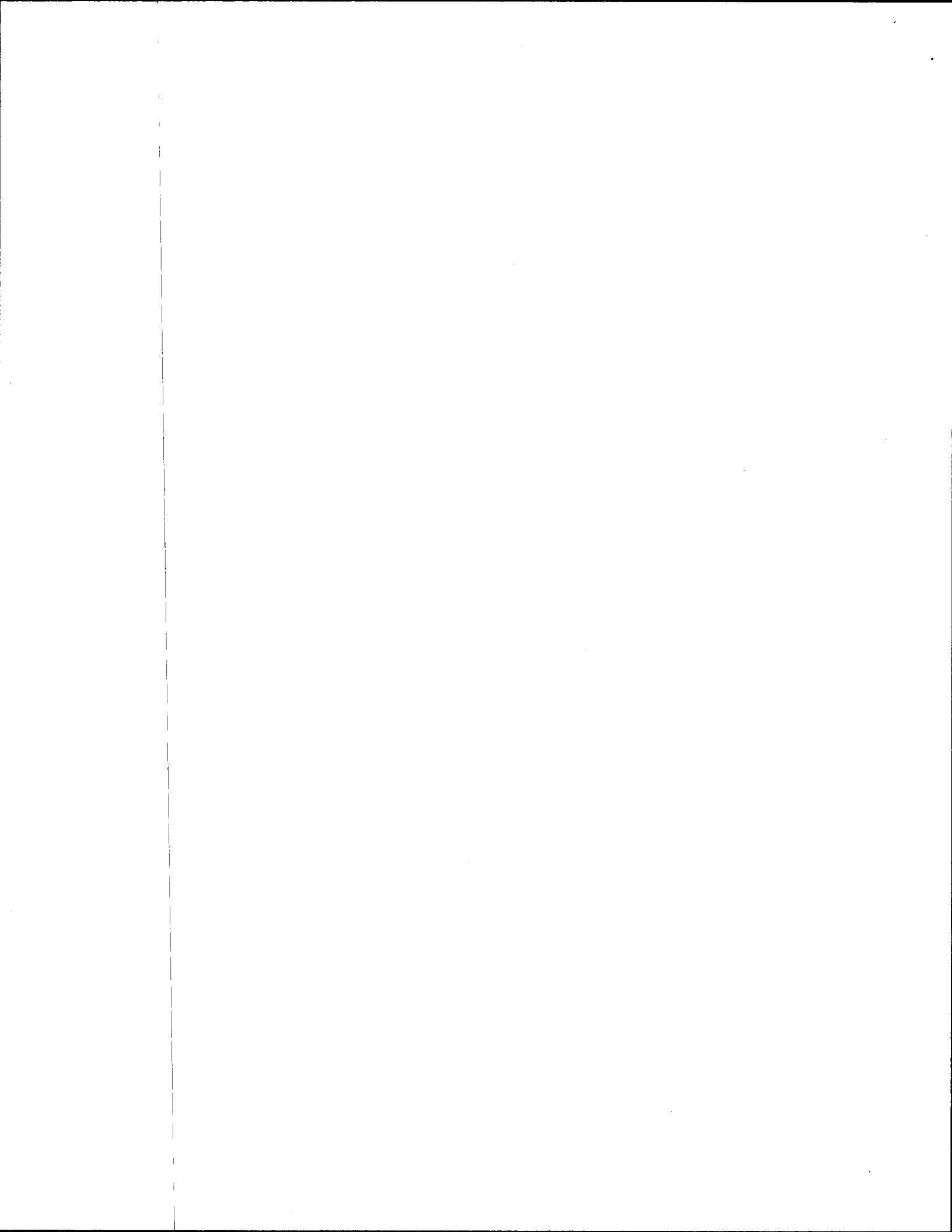


adopted by the Board and is hereby re-designated as a recommendation. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

Conclusion of Law Number 9

The Board declines to adopt Conclusion of Law Number 9 because it is a recommended sanction and not a proper conclusion of law. The Government Code §2001.058(e) authorizes the Board to change a finding of fact or conclusion of law made by the ALJ, or to vacate or modify an order issued by the ALJ if the Board determines that the ALJ did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions. The ALJ did not properly apply or interpret applicable law in this matter when he included his recommended sanction as a conclusion of law.

A recommendation for a sanction is not a proper conclusion of law. While it may be appropriate for the ALJ to recommend a sanction, it is ultimately up to the Board to determine what the appropriate sanction should be. Further, the mere labeling of a recommended sanction as a conclusion of law or as a finding of fact does not change the effect of the ALJ's recommendation. Thus, the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact and conclusions of law. The Board, not the ALJ, is the final decision maker concerning sanctions. Once it has been determined that a violation of the law has occurred, the sanction is a matter for the agency's discretion. The choice of penalty is vested in the agency, not in the courts. Further, an agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency's oversight. The propriety of a particular disciplinary measure is a matter of internal administration with which the courts should not interfere. See *Texas State Board of Dental Examiners vs. Brown*, 281 S.W. 3d 692 (Tex. App. - Corpus Christi 2009, pet. filed); *Sears*



vs. *Tex. State Bd. of Dental Exam'rs*, 759 S.W.2d 748, 751 (Tex.App. - Austin 1988, no pet); *Firemen's & Policemen's Civil Serv. Comm'n vs. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984); *Granek vs. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 781 (Tex.App. - Austin 2005, pet. denied); *Fay-Ray Corp. vs. Tex. Alcoholic Beverage Comm'n*, 959 S.W.2d 362, 369 (Tex.App. - Austin 1998, no pet.).

Based upon adopted Findings of Fact Numbers 2 through 4 and 12 through 17 and Conclusions of Law Numbers 5 through 8, the Board's Disciplinary Matrix for a violation of the Occupations Code §301.452(b)(3) and (10), the Board's adopted Disciplinary Guidelines for Criminal Conduct, and the Board's rules, including 22 Tex. Admin. Code §213.33(b), (c), and (m), the Board agrees that the Respondent's license should be revoked. Thus, pursuant to applicable law, the Board re-designates Conclusion of Law Number 9 as a recommendation and adopts the ALJ's recommended sanction in this matter.

IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 197213, previously issued to RACHEL MARLENE BOYD, 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 2nd day of July, 2011.

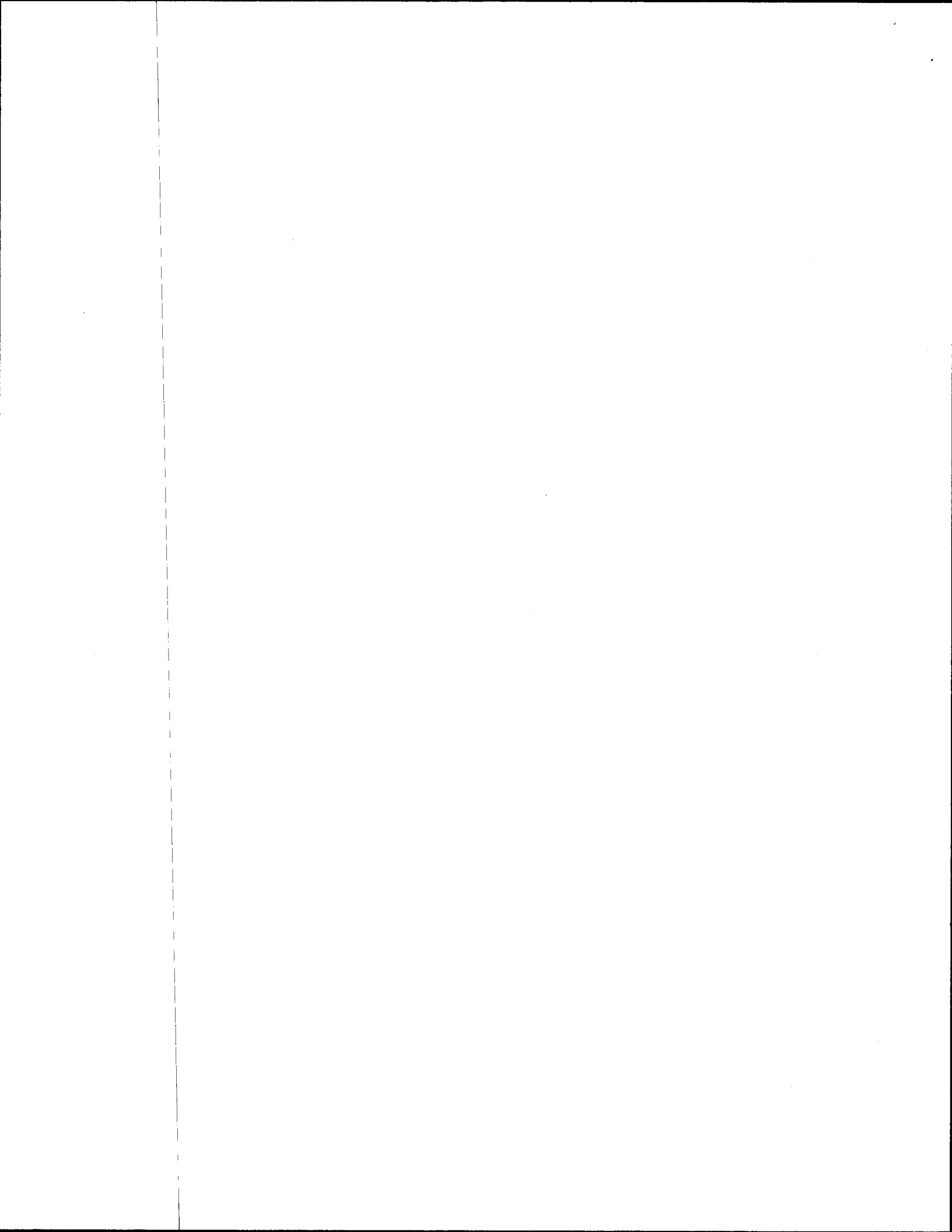
TEXAS BOARD OF NURSING



KATHERINE A. THOMAS, MN, RN

EXECUTIVE DIRECTOR FOR THE BOARD

Attachment: Proposal for Decision; Docket No. 507-11-1721 (April 1, 2011).



State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 1, 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. 507-11-1721, Texas Board of Nursing v. Rachel
Marlene Boyd**

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.

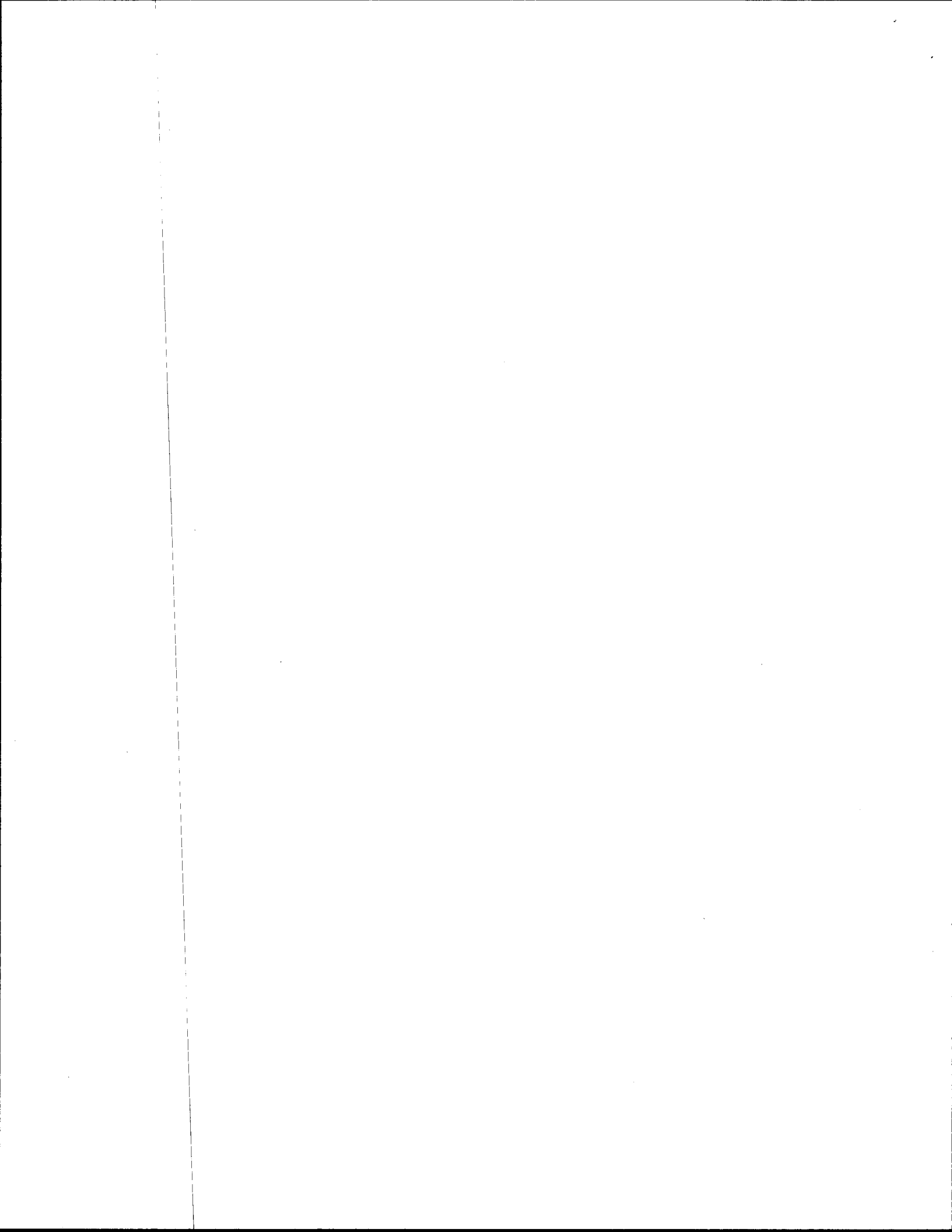
Sincerely,

A handwritten signature in cursive script that reads "Thomas H. Walston".

Thomas H. Walston
Administrative Law Judge

THW/nl
Enclosures

XC: Jena Abel, Assistant General Counsel, 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 1 CD; Certified Evidentiary Record) - **VIA INTER-AGENCY**
Rachel Marlene Boyd, 231 Ridge Harbor Drive, Rockport, TX 78382 - **VIA REGULAR MAIL**



SOAH DOCKET NO. 507-11-1721

IN THE MATTER OF PERMANENT § BEFORE THE STATE OFFICE
CERTIFICATE NO. 197213 § OF
ISSUED TO RACHEL MARLENE BOYD § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

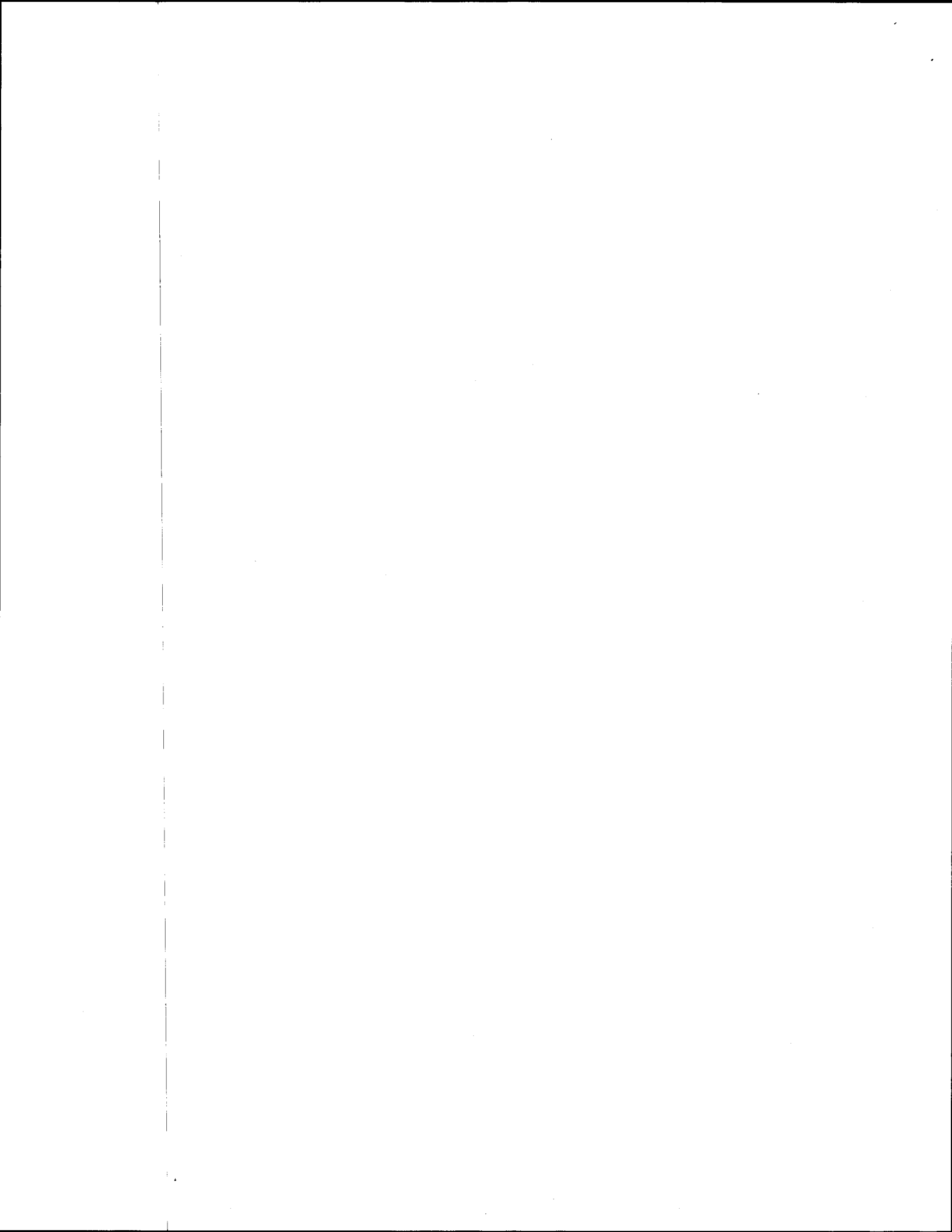
The Staff of the Texas Board of Nursing (Board) brought this action against the respondent, Rachel Marlene Boyd, seeking to revoke her license as a vocational nurse. Staff alleged that Ms. Boyd violated the Nursing Practice Act¹ and various Board rules based on her deferred adjudication community supervision for two felony counts of controlled substance fraud. Ms. Boyd failed to appear at the hearing; therefore, the Administrative Law Judge (ALJ) granted Staff's motion for default and recommends that Ms. Boyd's license be revoked.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing convened on March 30, 2011, before ALJ Thomas H. Walston, at the hearing facilities of the State Office of Administrative Hearings (SOAH) in Austin, Texas. Jena Abel, Assistant General Counsel, appeared for Staff. Neither Respondent nor anyone acting on her behalf appeared at the hearing.

Staff introduced various documents into evidence, establishing that Staff had sent Ms. Boyd proper and timely notice of the hearing and of the allegations against her. The details of jurisdiction and notice are set out in the Findings of Fact and Conclusions of Law. Staff also introduced documents into evidence concerning the details of Ms. Boyd's criminal proceeding. Staff made an oral motion for default due to Respondent's failure to attend the hearing. The motion was granted, resulting in all of Staff's allegations contained in the Formal Charges being deemed admitted, pursuant to 1 TEX. ADMIN. CODE § 155.501(a).

¹ Tex. Occ. Code ch. 301.



II. APPLICABLE LAW

The Board may take disciplinary action against a licensee who has been placed on deferred adjudication community supervision for a felony, and for unprofessional or dishonorable conduct that is likely to deceive, defraud, or injure a patient or the public. TEX. OCC. CODE § 301.452 (b)(3) and (10) state:

(b) A person is subject to denial of a license or to disciplinary action under this subchapter for: . . .

(3) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude; [or] . . .

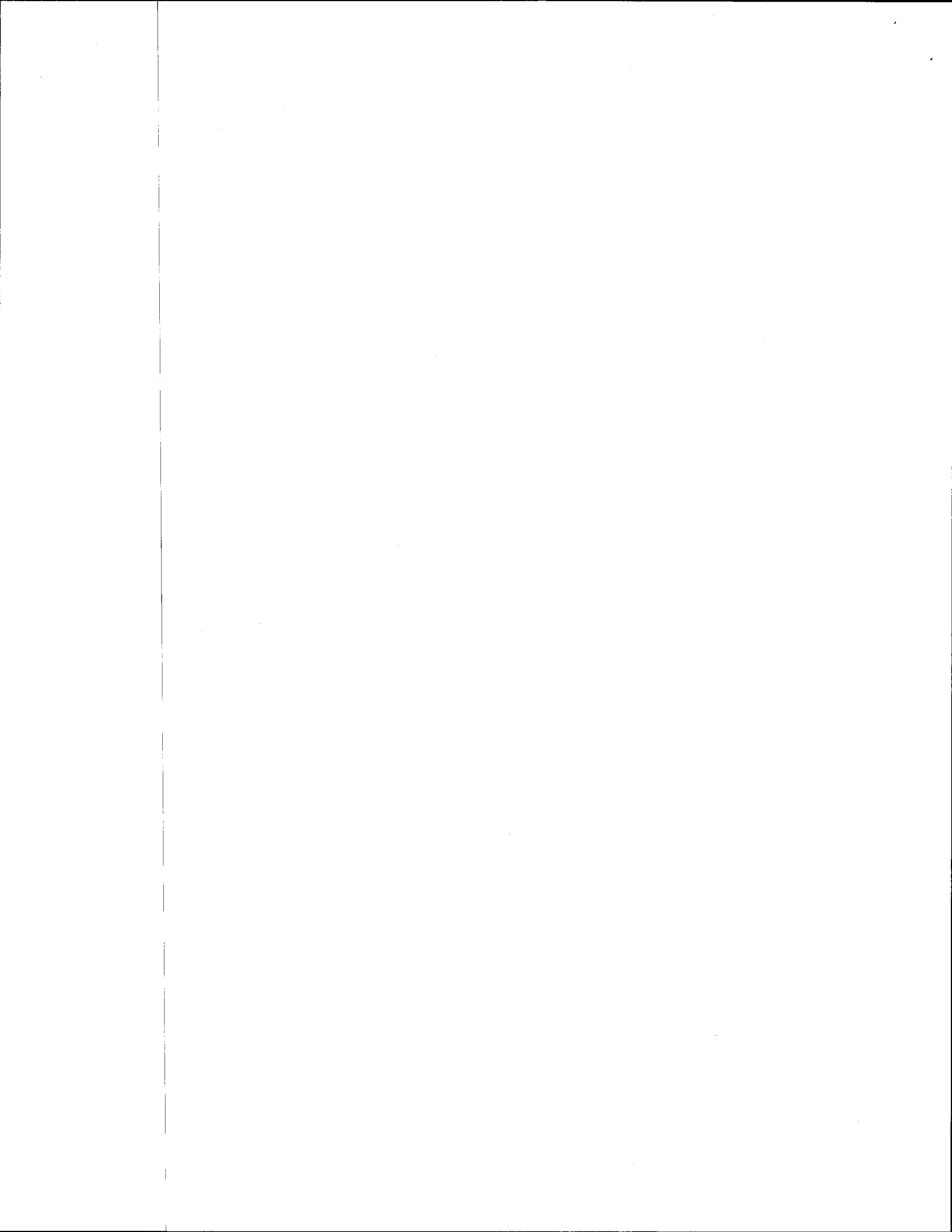
(10) unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public;”

In addition, the Board's rules at 22 TEX. ADMIN. CODE § 213.27(c)(1) and (2) provide that an order of deferred adjudication community supervision is conclusive evidence of guilt, and a licensee guilty of a felony is conclusively deemed to have committed unprofessional or dishonorable conduct that is likely to deceive, defraud, or injure a patient or the public, as provided in TEX. OCC. CODE § 301.452 (b)(10).

Concerning the extent of disciplinary action, TEX. OCC. CODE § 301.453(a)(6) provides that the Board may revoke the license of a person who committed an act listed in section 301.452(b). Further, 22 TEX. ADMIN. CODE § 213.28(b)(3) and (5) states that criminal behavior related to fraud and controlled substances is highly relevant to an individual's fitness to practice nursing, and such criminal conduct directly relates to and affects the practice of nursing.

III. ALJ'S ANALYSIS / RECOMMENDATION

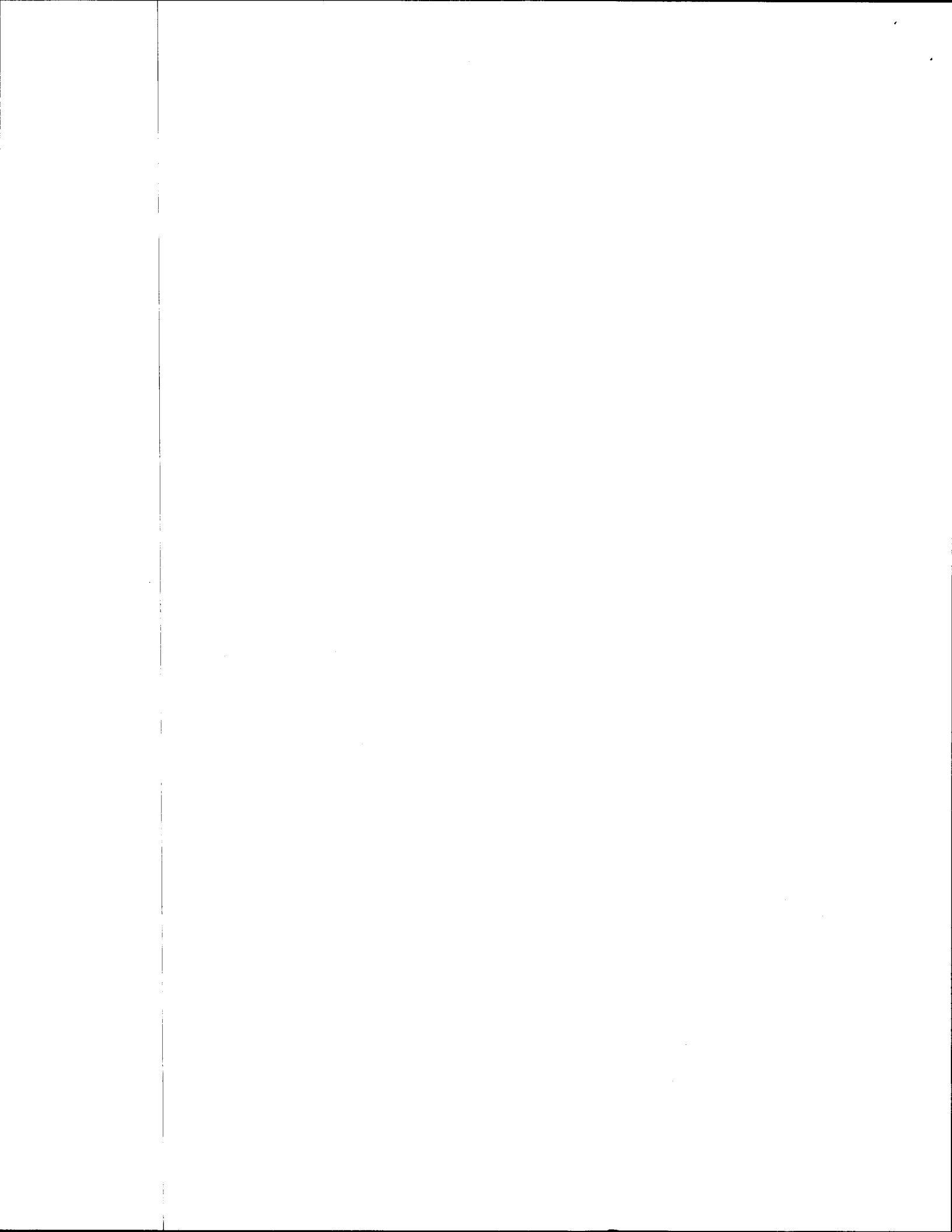
Staff's exhibits and Staff's allegations, which have been deemed admitted, establish that Ms. Boyd stole controlled-substance medications from two patients by fraudulent means. These actions are directly related to Ms. Boyd's fitness to practice nursing, and they constituted unprofessional or dishonorable conduct that is likely to deceive, defraud, or injure a patient or the public. Further, they resulted in Ms. Boyd receiving an order of deferred adjudication



community supervision for two felony counts of controlled substance fraud, in violation of TEX. HEALTH & SAFETY CODE § 481.129. Ms. Boyd's criminal activity occurred less than two years ago; her order of deferred adjudication community supervision was issued only fourteen months ago; and allowing Ms. Boyd to retain her license would afford her the opportunity to engage in further criminal activity of the same type. In addition, Ms. Boyd failed to attend the hearing or offer any evidence concerning mitigating factors. Therefore, based upon the following Findings of Fact and Conclusions of Law, the ALJ recommends that the Board revoke Ms. Boyd's vocational nursing license.

IV. FINDINGS OF FACT

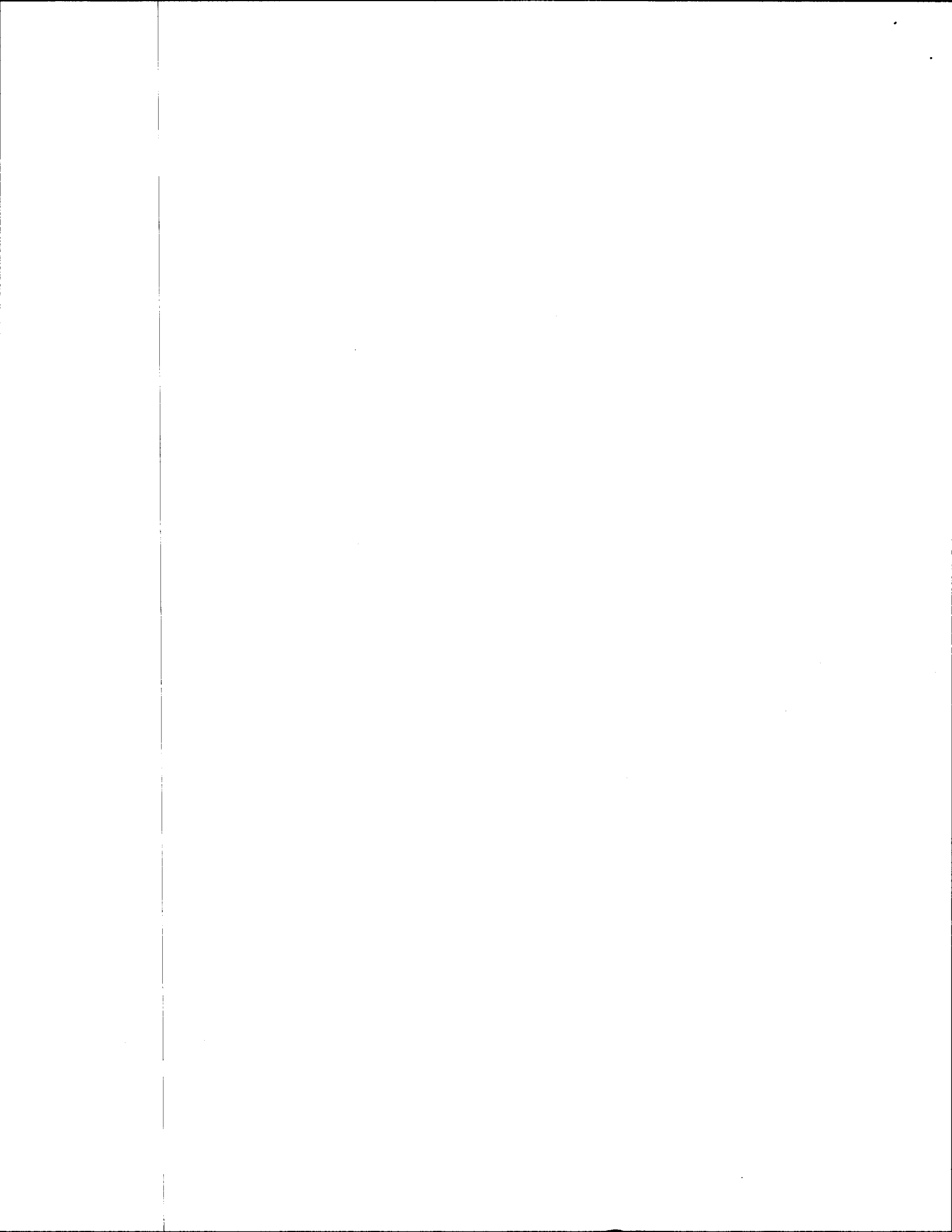
1. Rachel Marlene Boyd (Respondent) holds a vocational nurse license (Certificate Number 197213) issued by the Texas Board of Nursing (the Board).
2. On February 18, 2010, in Cause No. A-10-5014-CR, pending in the District Court of Aransas County, Texas, 36th Judicial District, Respondent pled guilty to two counts of Controlled Substance Fraud. Both counts were third degree felonies, and Respondent committed both offenses on September 12, 2009.
3. On February 18, 2010, the presiding judge in Cause No. A-10-5014-CR entered an Order of Deferred Adjudication Community Supervision against Respondent.
4. The Deferred Adjudication Judgment and Order: (1) deferred further proceedings without entering an adjudication of guilt; (2) placed Respondent on Community Supervision and probation for a period of five years; and (3) provided that Respondent is not to have access, administer, or dispense any medications while employed in the medical profession.
5. On April 9, 2009, and February 11, 2010, the Board's Staff notified Ms. Boyd that it was initiating investigations of charges against her.
6. On July 9, 2010, Staff notified Ms. Boyd that Formal Charges had been filed against her.
7. On December 16, 2010, Staff mailed its Notice of Hearing by certified mail, return receipt requested, to Ms. Boyd's address of record with the Board. The notice was delivered to Ms. Boyd on December 21, 2010.
8. 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. The Notice of Hearing stated the hearing would convene on March 30, 2011, at 9:00 a.m.



9. The Notice of Hearing contained the following language in capital letters in at least 12-point boldface type: "FAILURE TO APPEAR AT THE HEARING IN PERSON OR BY LEGAL REPRESENTATIVE, REGARDLESS OF WHETHER AN APPEARANCE HAS BEEN ENTERED, WILL RESULT IN THE ALLEGATIONS CONTAINED IN THE FORMAL CHARGES BEING ADMITTED AS TRUE AND THE PROPOSED RECOMMENDATION OF STAFF SHALL BE GRANTED BY DEFAULT."
10. The hearing convened on March 30, 2011, before ALJ Thomas H. Walston, at SOAH's hearing facilities in Austin, Texas. Jena Abel, Assistant General Counsel, appeared for Staff. Neither Ms. Boyd nor anyone acting on her behalf appeared at the hearing.
11. Because Ms. Boyd did not appear and was not represented at the hearing, Staff's oral motion for default was granted, and the allegations in Staff's Formal Charges were deemed admitted.
12. Respondent stole controlled-substance medications from two patients by fraudulent means.
13. Respondent's actions were directly related to her fitness to practice nursing.
14. Respondent's actions constituted unprofessional or dishonorable conduct that is likely to deceive, defraud, or injure a patient or the public.
15. Respondent's criminal activity occurred eighteen months ago.
16. Respondent's order of deferred adjudication community supervision was issued fourteen months ago.
17. Allowing Respondent to retain her license would afford her the opportunity to engage in further criminal activity of the same type.

IV. CONCLUSIONS OF LAW

1. The Texas State Board of Nursing (Board) has jurisdiction to discipline its licensees under TEX. OCC. CODE, Chapter 301.
2. The State Office of Administrative Hearings has jurisdiction to conduct this contested case hearing and issue a proposal for decision under TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper notice of the hearing as required by TEX. GOV'T CODE ANN. § 2001.052 and 22 TEX. ADMIN. CODE § 213.10.
4. The facts alleged in Staff's Formal Charges, which were attached to and incorporated by reference in the Notice of Hearing, were properly deemed admitted due to Ms. Boyd's failure to appear at the hearing. 1 TEX. ADMIN. CODE § 155.501.



5. Respondent is subject to discipline by the Board for having pled guilty to and having received Deferred Adjudication and Community Supervision for two counts of the felony offense of Controlled Substance Fraud. TEX. OCC. CODE § 301.453(b).
6. Respondent's Deferred Adjudication and Community Supervision for two counts of the felony offense of Controlled Substance Fraud constituted unprofessional or dishonorable conduct likely to deceive, defraud, or injure a patient or the public. 22 TEX. ADMIN. CODE § 213.27(c)(1) and (2).
7. Respondent's criminal behavior involving fraud and controlled substances is highly relevant to an individual's fitness to practice nursing, and such criminal conduct directly relates to and affects the practice of nursing. 22 TEX. ADMIN. CODE § 213.28(b)(3) and (5).
8. Respondent is subject to discipline by the Board for violating TEX. OCC. CODE §§ 301.452(b)(3) and (10) and 22 TEX. ADMIN. CODE § 217.12(13).
9. The Board should revoke Respondent's vocational nurse license, Certificate Number 197213.

SIGNED April 1, 2011.



THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

