



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.
William G. Newchurch
Executive Director of the Board

DOCKET NUMBER 507-12-2187

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 149249
ISSUED TO
ADELAIDE V. OCHOA

§ BEFORE THE STATE OFFICE
§ OF
§ ADMINISTRATIVE HEARINGS
§

OPINION AND ORDER OF THE BOARD

TO: ADELAIDE V. OCHOA
c/o MARC M. MEYER, RN, JD
33300 EGYPT LANE, SUITE B-200
MAGNOLIA, TX 77354-2739

WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on October 18-19, 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 vocational nursing license of Adelaide V. Ochoa 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. Staff filed exceptions to the PFD on July 6, 2012. The Respondent filed exceptions to the PFD on July 6, 2012. The Respondent also filed a response to Staff's exceptions to the PFD on July 20, 2012. On July 24, 2012, the ALJ issued his final letter ruling, in which he declined to make any changes to the PFD or his recommended sanction.

The Board, after review and due consideration of the PFD, Staff's exceptions to the PFD, Respondent's exceptions to the PFD, Respondent's response to Staff's exceptions to the PFD, Staff's recommendations, and Respondent's presentation during the open meeting and recommendations, 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 Conclusions of Law Numbers 34, 38, 40, and 41, which are hereby re-designated as recommendations. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied

Recommendation for Sanction

Although 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 or conclusions of law¹, the Board agrees with the ALJ's recommendation that the most appropriate sanction in this matter is a two year probated suspension with probationary conditions. The Board further agrees with the ALJ that the Respondent's conduct, as described in the adopted Findings of Fact and Conclusions of Law, collectively warrants a second tier, sanction level II sanction for her violations of the Occupations Code §301.452(b)(10). Further, after reviewing the aggravating and mitigating factors discussed by the ALJ in the PFD, the Board agrees with the ALJ that licensure suspension is more appropriate in this matter than licensure revocation².

The Respondent's conduct, as outlined in adopted Findings of Fact Numbers 2, 3, 4, 6, 8, 10, 18, 21, 22 and Conclusions of Law Numbers 10, 11, 12, 13, 14, 15, 16, 17, 24, 30, and 31, was serious in nature and resulted in serious risk to the public safety³. Further, the Respondent engaged in several instances of unprofessional conduct: two criminal offenses against property and fraud; providing false answers to the Board on two occasions; and a 2008 felony deferred adjudication⁴. Additionally, alcohol was involved in the Respondent's 2008 felony offense⁵.

The Board recognizes, however, that there are mitigating factors that should be considered in this case. First, the Respondent successfully completed the conditions of her deferred adjudication, including the completion of a relapse and anger management program and a DWI education program⁶. Further, Respondent's current employer, along with two registered nurse co-workers submitted letters of recommendation, praising the Respondent's nursing skills, reliability, knowledge, and care of patients⁷. The Respondent

¹ 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. 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. As such, 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 choice of penalty is vested in the agency, not in the courts. 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.).

² The Board's Disciplinary Matrix authorizes either denial of licensure or licensure suspension or revocation for a second tier, sanction level II sanction related to a violation of §301.452(b)(10).

³ See page 13 of PFD and adopted Conclusions of Law Numbers 23, 31, and 32.

⁴ See page 14 of PFD and adopted Conclusions of Law Numbers 10 through 17.

⁵ See page 14 of the PFD and the Board's Disciplinary Matrix, located at 22 Tex. Admin. Code §213.33(b), which specifically denotes that the involvement of or impairment by alcohol is an aggravating factor.

⁶ See page 14 of PFD and adopted Findings of Fact Numbers 19 and 20.

⁷ See page 14 of PFD and adopted Finding of Fact Number 24.

also paid restitution for her prior bad checks⁸. Finally, there is no evidence that Respondent has an alcohol abuse problem or has drunk alcohol more than once in many years⁹.

After reviewing the aggravating and mitigating factors in this matter, the Board finds that, pursuant to the Board's Disciplinary Matrix, and the Board's rules, including 22 Tex. Admin. Code §213.33(e) and (f), the Respondent's conduct warrants a two year probated suspension, with probationary conditions to include remedial education courses, employment restrictions, supervised practice, employer reporting, and random drug and alcohol testing¹⁰. These probationary conditions are designed to remediate the Respondent's conduct and monitor her practice to ensure that she is capable of practicing nursing safely. Further, these conditions are consistent with Board policy and precedent in cases involving a probated suspension of an individual's license¹¹.

IT IS THEREFORE ORDERED, that Vocational Nurse License Number 149249, previously issued to ADELAIDE V. OCHOA, to practice 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 terms of probation:

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

IT IS FURTHER ORDERED that while Respondent's license(s) is/are encumbered by this order, the Respondent may not work outside the State of Texas pursuant to a nurse licensure compact privilege without the written permission of the Texas Board of Nursing 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, 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 this Order.

(2) RESPONDENT SHALL, within one (1) year of entry of this Order,

⁸ See page 14 of the PFD and adopted Finding of Fact Number 5.

⁹ See pages 15 and 16 of the PFD and adopted Conclusion of Law Number 37.

¹⁰ The Board agrees with the ALJ's recommended ordering provisions. See pages 26 through 29 of the PFD.

¹¹ The Respondent failed to produce any evidence or argument that supervised practice conditions or employment restrictions are contrary to Board policy or are excessive. The Board agrees with the ALJ's conclusion in this regard. See page 17 of the PFD.

successfully complete a course in Texas nursing jurisprudence and 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. In order for the course to be approved, the target audience shall include nurses. It shall be a minimum of six (6) 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. 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 at the following Board website address: <http://www.bon.texas.gov/disciplinaryaction/stipscourses.html>*

(3) RESPONDENT SHALL, within one (1) year of entry of this Order, 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, RESPONDENT 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. *Board-approved courses may be found at the following Board website address: <http://www.bon.texas.gov/disciplinaryaction/stipscourses.html>*

IT IS FURTHER ORDERED, SHOULD RESPONDENT PRACTICE AS A NURSE IN THE STATE OF TEXAS, RESPONDENT WILL PROVIDE DIRECT PATIENT CARE AND PRACTICE IN A HOSPITAL, NURSING HOME, OR OTHER CLINICAL SETTING AND RESPONDENT MUST WORK IN SUCH SETTING A MINIMUM OF SIXTY-FOUR (64) HOURS PER MONTH UNDER THE FOLLOWING PROBATION CONDITIONS FOR TWO (2) YEAR(S) OF EMPLOYMENT. THE LENGTH OF THE PROBATIONARY PERIOD WILL BE EXTENDED UNTIL TWENTY FOUR (24) MONTHS HAVE ELAPSED. PERIODS OF UNEMPLOYMENT OR OF EMPLOYMENT THAT DO NOT REQUIRE THE USE OF A REGISTERED NURSE (RN) OR A VOCATIONAL NURSE (LVN) LICENSE, AS APPROPRIATE, WILL NOT APPLY TO THIS STIPULATION PERIOD:

(4) RESPONDENT SHALL notify each present employer in nursing of this Order of the Board and the probation conditions on RESPONDENT'S license(s). 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 nursing of this Order of the Board and the probation conditions on RESPONDENT'S license(s). 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.

(5) RESPONDENT SHALL CAUSE each present employer in 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 nurse.

(6) For the duration of the probation period, RESPONDENT SHALL be supervised by a Registered Nurse, if licensed as a Registered Nurse, or by a Licensed Vocational Nurse or a Registered Nurse, if licensed as 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, **with the sole exception that Respondent may continue to work for Meridian Professional Staffing at Sweeny Community Hospital and at the ALCOA plant in Point Comfort, Texas.** Should Respondent's employment or assignments with Meridian Professional Staffing cease or change for any reason, this stipulation has full force and effect. RESPONDENT SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

(7) 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 nursing. These reports shall be completed by the 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) month period for two (2) year(s) of employment as a nurse.

(8) 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 a pain management and/or chemical dependency evaluation by a Board approved evaluator. The performing evaluator must submit a written report meeting the Board's requirements to the Board's office within thirty (30) days from the Board's request.**

(9) 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 next 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 probation 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 are 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 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.

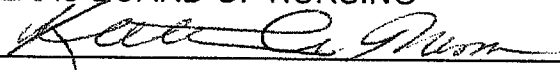
Any positive result for which the nurse does not have a valid prescription or failure to report for a drug screen, which may be considered the same as a positive result, will be regarded as non-compliance with the terms of this Order and may subject the nurse to further disciplinary action including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

IT IS FURTHER ORDERED that if during the period of probation, an additional allegation, accusation, or petition is reported or filed against the Respondent's license(s), the probationary period shall not expire and shall automatically be extended until the allegation, accusation, or petition has been acted upon by the Board.

IT IS FURTHER ORDERED, that upon full compliance with the terms of this Order, all encumbrances will be removed from RESPONDENT'S license(s) to practice nursing in the State of Texas and RESPONDENT shall be eligible for nurse licensure compact privileges, if any.

Entered this 19th day of October, 2012.

TEXAS BOARD OF NURSING


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

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 21, 2012

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. 507-12-2187; In the Matter of Permanent Certificate
Number 149249 Issued to Adelaide V. Ochoa**

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 "William G. Newchurch".

William G. Newchurch
Administrative Law Judge

WGN:nl

Enclosures

XC: R. Kyle Hensley, 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
Marc M. Meyer, RN, JD, Law Office of Marc Meyer, P.L.L.C., 33300 Egypt Lane, Suite B-200, Magnolia,
TX 77354-2739-VIA REGULAR MAIL

SOAH DOCKET NO. 507-12-2187

IN THE MATTER OF PERMANENT § BEFORE THE STATE OFFICE
CERTIFICATE NUMBER 149249 §
§ OF
ISSUED TO ADELAIDE V. OCHOA § ADMINISTRATIVE HEARINGS

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SOAH DOCKET NO. 507-12-2187

IN THE MATTER OF PERMANENT
CERTIFICATE NUMBER 149249

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BEFORE THE STATE OFFICE

OF

ISSUED TO ADELAIDE V. OCHOA

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The staff (Staff) of the Texas Board of Nursing (Board) asks the Board to discipline Adelaide V. Ochoa (Respondent), a licensed vocational nurse (LVN). The Staff alleges that the Respondent:

- was convicted of a misdemeanor in 1989 for failure to display a valid driver's license;
- was convicted of misdemeanors in 2000 and 2001 for issuing bad checks;
- was arrested in 2007 for the driving while intoxicated (DWI);
- failed to disclose the above convictions and arrest as required when she applied to renew her nursing license in 2007;
- pleaded guilty in 2008 to DWI with a child passenger, which was a felony that stemmed from her 2007 DWI arrest, was deferred for adjudication, and was dismissed after she complied with all conditions; and
- failed to disclose her 2008 DWI with a child passenger as required when she applied to renew her nursing license in 2009.

The Staff contends that each of the above, except the DWI arrest, is grounds for the Board's taking disciplinary action against the Respondent. The Staff recommends that the Board suspend the Respondent's license for two years, probate that suspension, and require her to comply with several conditions during that probation.

The Respondent does not deny the above allegations. Nor does she question that the Board may discipline her based on them. However, the Respondent asks the Board to issue a

warning to her, rather than suspend her license with probation as the Staff proposes. She also objects to some, but not all, of the conditions that the Staff proposes.

The Administrative Law Judge (ALJ) recommends that the Board:

- suspend the Respondent's license for two years;
- probate that suspension so that she may continue to work as a nurse during that 2-year period;
- not require the Respondent to attend two support group meetings each week during the suspension period, including one concerning substance abuse, as proposed by the Staff; and
- require her to comply during the probated suspension period with the other conditions proposed by the Staff.

II. JURISDICTION

There is no dispute about the jurisdiction of the Board or the State Office of Administrative Hearing (SOAH). The supporting findings of fact and conclusions of law are proposed below without further discussion. There is also no dispute that the Staff has the burden of proof in this case.

III. FACTS

On or about June 26, 1989, Respondent entered a plea of Guilty and was convicted of FAILURE TO DISPLAY A VALID DRIVER'S LICENSE (a misdemeanor offense committed on March 28, 1989), in the County Court at Law, Victoria County, Texas, under Cause No. 1-51,631.¹

On or about May 15, 2000, Respondent entered a plea of Guilty and was convicted of ISSUANCE OF A BAD CHECK (a misdemeanor offense committed on December 24, 1998), in

¹ State's Ex. 6.

the County Court at Law No. 2 of Victoria County, Texas, under Cause No. 2-01,696. As a result of the conviction, Respondent was ordered to pay a fine and court costs.²

On or about April 25, 2001, Respondent entered a plea of Guilty and was convicted of the LESSER BUT INCLUDED OFFENSE OF ISSUANCE OF A BAD CHECK (a misdemeanor offense committed on December 30, 1999), in the County Court at Law No. 1 of Victoria County, Texas, under Cause No. 1-74,583. As a result of the conviction, Respondent was ordered to pay a fine and court costs.³

On or about May 13, 2007, Respondent was arrested by the Texas Highway Patrol, Victoria County, Texas, for DRIVING WHILE INTOXICATED (a Class B misdemeanor offense).⁴

On or about June 3, 2007, Respondent submitted an on-line document to the Board to renew her nursing license.⁵ Despite her prior convictions and arrest, the Respondent answered "No" to the following question in the application:

Have you ever been convicted, placed on community supervision whether or not adjudicated guilty, sentenced to serve jail or prison time or granted pre-trial diversion, or plead guilty, no contest or nolo contendere to any crime in any state, territory or country, or received a court order whether or not a sentence was imposed, including any pending criminal charges or unresolved arrests whether or not on appeal (excluding minor Class C traffic violations)? This includes expunged offenses and deterred adjudications with or without a finding of guilt. Please note that DUIs, DWIs, and PIs must be reported and are not considered minor traffic violations. One time minor in possession [MIP] or minor in consumption [MIC] does not need to be disclosed; therefore, you may answer "No." If you have two or more MIPs or MICs, you must answer "Yes." You may answer "No" if you have previously disclosed a criminal matter otherwise responsive to this question in a renewal and/or licensure form.

² State's Ex. 7.

³ State's Ex. 8.

⁴ State's Ex. 9.

⁵ State's Ex. 10.

On or about January 17, 2008, Respondent entered a plea of Guilty to DRIVING WHILE INTOXICATED WITH CHILD PASSENGER (a State Jail felony offense committed on May 13, 2007), in the 24th Judicial District Court, Victoria County, Texas, under Cause No. 07-9-23,419A. As a result of the plea, the proceedings against Respondent were deferred without entering an adjudication of guilt, and Respondent was placed on probation for a period of three years.⁶ The child passenger was the Respondent's grandson.

On or about June 22, 2009, Respondent again submitted a document to the Board to renew her license on-line.⁷ This time she was asked:

- Have you, within the past 24 months or since your last renewal, for any criminal offense, including those pending appeal:
- A. been convicted of a misdemeanor?
 - B. been convicted of a felony?
 - C. pled nolo contendere, no contest, or guilty?
 - D. received deferred adjudication?
 - E. been placed on community supervision or court-ordered probation, whether or not adjudicated guilty?
 - F. been sentenced to serve jail or prison time? court-ordered confinement?
 - G. been granted pre-trial diversion?
 - H. been arrested or have any pending criminal charges?
 - I. been cited or charged with any violation of the law?
 - J. been subject of a court-martial; Article 15 violation; or received any form of military judgment/punishment/action?

The Respondent responded "No" to the above questions, despite her 2008 plea of guilty to DWI with a child passenger.

IV. UNPROFESSIONAL CONDUCT

Prior to September 28, 2004, the Board's predecessor agency had an unprofessional conduct rule, 22 Tex. Admin. Code (TAC) § 239.11(29)(A), which provided:

Unprofessional or dishonorable conduct, likely to deceive, defraud or injure the public, may include the following described acts or omissions:

⁶ State's Ex. 9.

⁷ State's Ex. 11.

...
(29) being convicted of a crime that relates to the practice of vocational nursing.

(A) Those crimes which the board considers to be directly related to the duties and responsibilities of a licensed vocational nurse shall include, but are not limited to:

- ...
(ii) Offenses against property;
(iii) Offenses involving fraud, dishonesty or deceit;
...

The Respondent's May 15, 2000 and April 25, 2001 bad check convictions were both offenses against property and forms of fraud.⁸ Thus, they were also unprofessional conduct at that time for a vocational nurse under 22 TAC § 239.11(29)(A). The Respondent does not dispute that point.

Since September 28, 2004,⁹ the Board's unprofessional conduct rule has been 22 TAC § 217.12, which provides:

The unprofessional conduct rules are intended to protect clients and the public from incompetent, unethical, or illegal conduct of licensees. The purpose of these rules is to identify unprofessional or dishonorable behaviors of a nurse which the board believes are likely to deceive, defraud, or injure clients or the public. Actual injury to a client need not be established. These behaviors include but are not limited to:

...
(6) Misconduct--actions or conduct that include, but are not limited to:

...
(I) Failing to answer specific questions or providing false or misleading answers that would have affected the decision to license, employ, certify or otherwise utilize a nurse; or

...
(13) Criminal Conduct--including, but not limited to, conviction or probation, with or without an adjudication of guilt, or receipt of a judicial order involving a crime or criminal behavior or conduct that could affect the practice of nursing.

The Respondent acted unprofessionally, under 22 TAC § 217.12(6)(I), when she submitted her on-line license renewal application on June 3, 2007, but failed to disclose her

⁸ See Tex. Penal Code § 32.42, which is included in Chapter 32, concerning Fraud, and Title 7, concerning Offenses Against Property.

⁹ See 29 TexReg 9192.

June 26, 1989 driver's license offense, her May 15, 2000 and April 25, 2001 bad-check offenses, and her May 13, 2007 DWI arrest when asked about her criminal past. Under the same rule, she also acted unprofessionally when she submitted her June 22, 2009 on-line nursing license renewal application but failed to disclose that she had pleaded guilty to DWI with a Child Passenger on January 17, 2008, when asked about her criminal offenses in the previous 24 months.

Moreover, without regard to disclosures, the Respondent's January 17, 2008 DWI with a Child Passenger was criminal conduct; hence, it was also unprofessional conduct, as defined by 22 TAC § 217.12(13). Given the "including, but not limited to" language in § 217.12(13), all criminal conduct is unprofessional.

However, the Staff goes a step further and argues that the Respondent's DWI with a Child Passenger was "conduct that could affect the practice of nursing." This is an important point for purposes of determining the appropriate sanction to impose on the Respondent. The Respondent does not agree with the Staff on this point. That disagreement is considered below in the discussion on the appropriate sanction.

V. SANCTION AUTHORITY

Occupations Code § 301.452(b)(2), (3), and (10) went into effect on September 1, 1999,¹⁰ and currently provides:

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

...

(2) fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing;

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

...

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

¹⁰ Acts 1999, 76th Leg., ch. 388 (H.B. 3155), § 1, eff. Sep. 1, 1999.

The Staff correctly alleged in its Formal Charges against the Respondent,¹¹ which were incorporated into the Notice of Hearing,¹² that:

- the Respondent's failure to disclose her prior crimes when she applied to renew her nursing license in 2007 and 2009 provides grounds for the Board to take disciplinary action against her under Occupations Code § 301.452(b)(2); and
- the Respondent's 2008 DWI with a Child Passenger, a felony, provides grounds for the Board to take disciplinary action against her under Occupations Code § 301.452(b)(3) and (10).

Occupations Code § 302.402(a)(10) also took effect on September 1, 1999,¹³ but was later repealed, effective February 1, 2004.¹⁴ However, it was in effect when the Respondent was convicted of issuing bad checks on May 15, 2000, and April 25, 2001. Occupations Code § 302.402(a)(10) provided:

A person is subject to disciplinary action under Section 302.403 for:

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

The Respondent's issuing bad checks in 2000 and 2001 was fraudulent, and under Occupations Code § 302.402(a)(10), as it existed at the time, the Board had authority to take disciplinary action against her for that fraudulent behavior.¹⁵ Moreover, that conduct is also fraudulent under current Occupations Code § 301.452(b)(10), and the Board currently has authority to take disciplinary action against her for that fraudulent behavior.¹⁶

¹¹ State's Ex. 3.

¹² State's Ex. 4.

¹³ Acts 1999, 76th Leg., ch. 388 (H.B. 3155), § 1, eff. Sep. 1, 1999.

¹⁴ Act 2003, 78th Leg. ch. 553 (H.B. No. 1483), § 3.001(1), eff. Feb. 1, 2004

¹⁵ The Staff included that assertion in the Formal Charges and the Notice of Hearing. The Staff also claimed in those documents that the Board could take disciplinary action under Occupations Code § 302.402(a)(3)(B) based on those bad check crimes, but Staff conceded at the hearing that was incorrect because those are not crimes of moral turpitude.

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The Respondent does not dispute the Board's authority to discipline her for her actions described above.

VI. APPROPRIATE SANCTIONS

In this case, there are multiple grounds for disciplining the Respondent. Taking all of them into consideration, the Staff recommends that the Board suspend the Respondent's license for two years and probate that suspension so that the Respondent could continue to work as an LVN during that suspension. The Staff also recommends that during the suspension, the Board require the Respondent to work under the direct supervision of another nurse in specified settings and participate in two group support meetings per week, including one meeting concerning substance abuse.

The Staff bases its recommended sanction on the Board's Nursing Disciplinary Matrix (Matrix).¹⁷ For each ground for taking disciplinary action, the Matrix prescribes appropriate sanctions based on the severity of the offense and mitigating and aggravating circumstances. The Staff contends that its recommendation is a blend of sanctions prescribed by the Matrix. For the conditions, the Staff relies on 22 TAC § 213.33, which included the Matrix.

The Respondent acknowledges that a sanction will be imposed against her, but argues for a lesser sanction than that the Staff proposes. She asks the Board to issue a formal warning to her, rather than suspend her license. She also objects to being required to work under direct supervision in only certain settings and to participate in group-support meetings.

The Staff also proposes that the Board place other conditions on the Respondent during the suspension period, and the Respondent does not object to those. Without further discussion, the ALJ recommends imposing those undisputed conditions on the Respondent.

¹⁷ 22 TAC § 213.33(b). See State's Ex, 14.

A. DWI with a Child Passenger Relates to the Practice of Nursing

For purposes of determining the appropriate sanction, it is important to determine if the Respondent's DWI with a Child Passenger relates to the practice of nursing. If it does, that unprofessional conduct could result in a more severe sanction under the Matrix, as it implements Occupations Code § 301.452(b)(10).

Occupations Code § 301.4535 sets out a list of crimes and directs the Board to suspend the license of a nurse who has been initially convicted of any of them. None of the crimes that the Respondent committed is listed in that statute. The Board has adopted Disciplinary Guidelines for Criminal Conduct (Guidelines).¹⁸ The Guidelines refer to the crimes listed in Occupations Code § 301.4535 as, "Offenses against the person that the Nursing Practice Act has specifically identified as relating to nursing." Beyond that statutory list, the Guidelines list other crimes under the heading "Rationale for How Crimes Relate to the Practice of Nursing." For each crime they list, the Guidelines specify the sanction that should be imposed.

The Respondent's most serious crime, DWI with a Child Passenger, is not listed in the Guidelines as a crime related to the practice of nursing. Nor is a first-time DWI listed. Second and third-offense DWIs are included. However, the Guidelines state that its list of crimes that relate to the practice of nursing is not exhaustive. They note that each case is considered on its own merits and set out factors the Board will use in a case-by-case analysis.¹⁹

The Respondent acknowledges that she committed a serious crime, but questions how it relates to the practice of nursing. On the night that the Respondent committed the DWI with a Child Passenger, she was not acting as a nurse, scheduled to work as a nurse within 12 hours, or on call to come to work as a nurse. No passenger in the vehicle was a patient.

Denise A. Benbow is licensed in Texas as a Registered Nurse (RN) and holds bachelor and master degrees in nursing. Since 1983, she has worked in several positions as an RN and

¹⁸ State's Ex. 13. See also <<http://www.bon.texas.gov/disciplinaryaction/discp-guide.html>>.

¹⁹ State's Ex. 13 at 1.

supervisor and trainer of nurses. Currently, she is a fulltime nursing practice consultant for the Board. She also spends a smaller percentage of her time working shifts as an RN at a hospital in Austin.²⁰ Ms. Benbow presented and explained the sanctions and probationary conditions that the Staff recommends in this case.

The Guidelines list factors that will be considered in conducting a case-specific analysis of a particular crime. Ms. Benbow mostly focused on two of the listed factors: (1) the nature and seriousness of the crime and (2) the relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of nursing practice.²¹ DWI with a Child Passenger is a felony,²² hence, it is a serious crime. There is no dispute about that.

The Guidelines include a rationale for each crime listed. The Guidelines do not include only crimes engaged in while a person is acting as a nurse. Instead, the rationales explain that committing the crimes indicates either that a person lacks a character trait that a nurse must have or that a person has engaged in conduct similar to that which a nurse must avoid in her practice. For example, forgery is listed because it indicates that the person is not honest and trustworthy, and patients must be able to trust nurses when they have access to patients' possessions.²³ Assault is listed because a nurse must not intentionally cause bodily injury to a patient, even when provoked by a combative patient.²⁴ Thus, the crimes are listed because they relate to the practice of nursing, not because they are actions in which a person engages while nursing.

Ms. Benbow reasoned that DWI with a Child Passenger relates to the ability, capacity, and fitness required to perform the duties of a nurse. She noted that nurses care for patients when they are vulnerable due to health problems. Similarly, children are vulnerable due to their age, immaturity, and dependence on adults. Ms. Benbow testified that a nurse must advocate for

²⁰ State's Ex. 12.

²¹ The Criminal Guidelines mention other factors to be considered, but these factors relate more to the sanction to be imposed for a crime and less on whether the crime relates to the practice of nursing. The appropriate sanctions are considered later in the PFD.

²² Tex. Penal Code § 49.045.

²³ State's Ex. 8.

²⁴ State's Ex. 13 at 15.

her patients and ensure that they receive appropriate care. She noted that the Respondent failed to advocate her grandson's best interest when she directed him to enter a vehicle that she then drove while intoxicated. According to Ms. Benbow, the Respondent demonstrated a disturbing lack of concern for the welfare of a vulnerable person, her own grandson, when she committed the crime. Ms. Benbow questioned whether one who is reckless in caring for her own grandson could be counted on to consistently act in the best interests of her patients.

The ALJ agrees with Ms. Benbow's analysis. He concludes that the Respondent's DWI with a Child Passenger relates to the practice of nursing.

B. More Than a Warning Is Called For

The Staff seeks a probated suspension of the Respondent's license, but the Respondent asks the Board to issue only a warning to her. Under the Matrix, the appropriate sanction is determined by the grounds for the discipline, the gravity of the offense (which determines its tier), and the aggravating and mitigating circumstances (which determine its sanction level). As already discussed, the Board has three grounds for disciplining the Respondent.

Because the Respondent twice attempted to procure a license by fraud or deceit, when she filed renewal applications that failed to disclose her crimes, the Board has grounds for taking disciplinary action under Occupations Code § 301.452(b)(2). If her failure to disclose her criminal history was intentional, that would be a Second Tier Offense for which the Matrix calls for a suspension or revocation.²⁵

The Respondent argues that her failure to disclose her prior crimes was not intentional. She admits that she now knows that she should have disclosed them. However, she claims to have relied in 2007 on the advice of her prior lawyer. According to the Respondent, that lawyer told her that she did not need to report her prior crimes when she applied to renew her license.²⁶ Even in 2007, the Respondent did not think that was correct, but she claims to have followed her

²⁵ State's Ex. 14 at 3-4.

²⁶ State's Ex. 5.

lawyer's advice. Before she again applied to renew her license in 2009, she did not again seek legal advice, even though she had been convicted of a DWI with a Child Passenger within the last 24 months. Nor did she contact the Board's Staff in 2007 or 2009 to verify that she did not need to disclose her crimes. Nevertheless, Ms. Benbow agreed that the failure to disclose was not wholly intentional because the Respondent relied, at least in part, on the incorrect advice of her prior lawyer.

An unintentional failure to disclose is a First Tier Offense under the Matrix.²⁷ If there are aggravating circumstances, the Board may impose a denial or revocation, referred to as Sanction Level II. However, Ms. Benbow agreed those Sanction Level II factors are not present in this case. Thus, under Sanction Level I, the prescribed sanctions for the failures to disclose her crimes are remedial education, a fine of \$250 or more for each violation, or both.

Thus, if the only grounds for disciplining the Respondent were her failures to disclose her prior crimes, issuing a warning to the Respondent would be sufficient under the Matrix. However, there are other grounds for disciplining her, and they render a warning inadequate.

The Respondent engaged in several instance of unprofessional conduct that relate to the practice of nursing. One instance was her DWI with a Child Passenger, which has been discussed at length above. Additionally, on May 15, 2000, and April 25, 2001, she was convicted of issuing bad checks. Under 22 TAC § 239.11 (29)(A), the bad-check crimes were unprofessional conduct related to the practice of nursing because they were offenses against property and forms of fraud. Thus, the Board may take disciplinary action against the Respondent under Occupations Code § 301.452(b)(10) for the Respondent's unprofessional conduct.

The Matrix categorizes an isolated act of unprofessional conduct that result in unsafe practices but no adverse patient effects as a First Tier Offense. That is not applicable in this case because the Respondent engaged in unprofessional conduct several times. Unprofessional

²⁷ State's Ex. 14 at 3.

conduct that results in serious patient harm is categorized by the Matrix as a Third Tier Offense. That is not applicable either, since no patient suffered harm due to the Respondent's conduct.

According to Ms. Benbow, the Respondent's unprofessional conduct was, collectively, a Second Tier Offense under the Matrix because it was unprofessional conduct that resulted in a serious risk to public safety.²⁸ The Respondent's grandson, a member of the public, was at serious risk when he was a passenger in the vehicle driven by the intoxicated Respondent. The ALJ agrees with Ms. Benbow's analysis. He finds that the Respondent's unprofessional conduct in committing those crimes was a Second Tier Offense under the Matrix.

Depending on a weighing of aggravating and mitigating circumstances, a Second Tier unprofessional conduct offense can be the subject of two sanction levels under the Matrix. Sanction Level I would include a warning and other conditions, but not a suspension or revocation. Sanction Level II would include a revocation or suspension that could be probated for two years.²⁹

Seeking a Level I sanction, the Respondent contends that there were mitigating circumstances concerning her DWI with a Child Passenger. She testified that her husband had driven the Respondent and their grandson to hear music at a club. She had not intended to drink alcohol that night and had not for several years before. When her friends encouraged her to drink, however, she drank three beers. Later it became obvious to the Respondent that her husband was too intoxicated to drive home safely. She could think of no one to call to drive them home. Under the circumstance, the Respondent concluded that her best option was to drive the three of them 45 miles to their home. When arrested, she readily admitted to the police officer that she had been drinking alcohol.

The ALJ does not agree that committing a felony that endangers another is mitigated because the alternative, not being able to get home soon, was inconvenient. He recommends that the Board attach no weight to this argument.

²⁸ State's Ex. 14 at 11-12.

²⁹ State's Ex. 14 at 12.

However, the Respondent also notes mitigating circumstances that should be considered. She satisfied the conditions of her deferred adjudication for the DWI with a Child Passenger, the matter was dismissed, and she was discharged without an adjudication of guilt.³⁰ Among those satisfied conditions were her completion of a relapse and anger management program and a DWI education program.³¹ Additionally, the professional staffing business for which she is currently working and two RN charge nurses with whom she has worked at Matagorda Regional Medical Center in Bay City wrote letters of recommendation. They praised the Respondent's nursing skills, reliability, knowledge, and care of patients.³² As to her earlier bad-check crimes, the Respondent testified that she paid restitution.

On the other hand, the Staff argues that there are aggravating circumstances that justify a Level II sanction. The Respondent engaged in several instances of unprofessional conduct: two offenses against property and fraud, providing false answers to the Board on two occasions that could have affected its decision to license her, and the felony DWI with a Child Passenger. Additionally, alcohol was involved in the most serious of those. The Matrix specifically lists the number of events and the involvement of alcohol as aggravating circumstances.³³

Given the above mitigating and aggravating factors, Ms. Benbow testified, and the ALJ agrees, that the Board should impose a sanction from Level II, not a warning from Sanction Level I as the Respondent seeks. The Staff proposes the mildest Level II sanction, a license suspension for two years that would be probated. The ALJ agrees with that recommendation.

³⁰ State's Ex. 9 at 8.

³¹ Respondent's Exs. 1 & 2.

³² Respondent's Exs. 3, 4 & 5.

³³ State's Ex. 14 at 13.

C. Support Group Meetings Requirement

The Staff recommends that the Respondent be required to attend at least two support group meetings each week during the period her license is suspended. One of those must be for substance abuse. The Respondent objects to this condition.

Board rule 22 TAC § 213.33(e)(6)(C) provides that when the Board probates a suspension it may require the nurse to participate in a program of education or counseling prescribed by the Board. Additionally, for a Second Tier unprofessional conduct offense, Sanction Level II states, in part:

If violation involves . . . criminal conduct involving alcohol . . . then suspension will be enforced until individual has completed treatment and one year verifiable sobriety before suspension is stayed . . .

The Respondent does not object to having her sobriety verified. The Staff proposes, and the Respondent does not object, to being required to submit to random periodic screens for controlled substances, tramadol hydrochloride (Ultram), and alcohol.

However, the Respondent argues that requiring her to attend support group meetings, including one for substance abuse, twice each week is excessive, not warranted, and overly burdensome. Aside from the May 13, 2007 DWI, there is no evidence that the Respondent has drunk alcohol at all in several years, much less that she uses alcohol intemperately or has an alcohol abuse problem. The Respondent denies having an alcohol abuse problem. She testified that, prior to her arrest on May 13, 2007, she had not drunk alcohol since her wedding several years earlier. She also testified that she has not drunk alcohol since that arrest. The Respondent also notes that she has already received education related to alcohol consumption. As conditions of her probation for her DWI offense, she completed a relapse and anger management program and a DWI education program.³⁴

³⁴ Respondent's Ex. 1 & 2.

The Guidelines note that *repetitive* DWIs indicate a possible issue with substance abuse or chemical dependency which may affect a nurse's ability to safely perform her duties and/or threaten public safety.³⁵ But the Respondent has only one DWI, albeit a more serious type of offense due to her child passenger. Ms. Benbow testified that most people who are arrested for DWI typically have driven under alcohol's influence before. However, the Staff offered no statistical evidence to show that is generally true, or that this Respondent even has a history of drinking alcohol, aside from the one time in 2007.

While 22 TAC § 213.33(e)(6)(C) provides that a nurse "may" be required to participate in education and counseling when she receives a probated suspension, it does not require that in all cases. Nor does that rule or the Matrix specify that when the Board requires education and counseling, it will always require attending a support group meeting twice a week, including one meeting for substance abuse. Further, the Guidelines note that each case is considered on its own merits.³⁶ The Board has clearly left itself room to include other education and counseling conditions or none at all, depending on the evidence in a specific case.

Based on the evidence, the ALJ does not conclude that the Respondent has an alcohol abuse problem or has consumed alcohol more than once in many years. Given those gaps, the ALJ concludes that the Staff's proposal that the Respondent be required to attend twice-weekly support group meetings, including one for substance abuse, is excessive and unwarranted. The ALJ recommends that the Board not include that requirement in the sanctions that it imposes on the Respondent.

D. Supervised Practice Conditions

The Staff proposes that the Respondent's practice of nursing be supervised during the 2-year period that her license would be subject to a probated suspension. She would be limited to providing direct patient care and practice in a hospital, nursing home, or other clinical setting and for not less than 64 hours per month. She would not be allowed to work for multiple employers.

³⁵ State's Ex. 13 at 15-16.

³⁶ State's Ex. 13 at 1.

Additionally, she would have to be supervised by an LVN or RN on the premises who has at least two years' experience in the same or a similar setting and is readily available to provide assistance and intervention if necessary. The supervising nurse would be required to complete and submit reports to the Board every three months concerning the Respondent's capability to practice nursing. The Respondent would also be limited to working in regularly assigned, identified, and predetermined units. The ALJ refers to these conditions collectively as "supervised practice conditions."

The Respondent objects to these conditions that would limit her places and hours of work and require her to be supervised. She currently works for a nursing staffing agency and is sent to different hospitals to work shifts on a non-continuing basis. She could no longer work in that way and comply with the proposed conditions.

When Sanction Level II is applied to a Second Tier unprofessional practice offense and the suspension is probated, the Matrix provides "Probated suspension will be . . . with Board monitored and supervised practice depending on applicable Board policy."³⁷ Additionally, 22 TAC § 213.33(e)(6)(E) provides that such supervised practice conditions may be imposed. The Respondent offered no evidence or argument to show that the supervised practice conditions proposed by the Staff are contrary to Board policy or excessive. The ALJ recommends that the Board require the Respondent to comply with the supervised practice conditions proposed by the Staff.

VII. ALJ'S RECOMMENDATION

Based on the above, the ALJ recommends that the Board:

- adopt the following proposed findings of fact, conclusions of law, and ordering provisions;
- suspend the Respondent's license for two years;
- probate that suspension so that the Respondent may continue to work as an LVN during that 2-year period;

³⁷ State's Ex. 14 at 12.

- not require the Respondent to attend two support-group meetings each week during the suspension period, including one concerning substance abuse, as proposed by the Staff; and
- require the Respondent during the probated suspension period to comply with the other conditions proposed by the Staff.

VIII. PROPOSED FINDINGS OF FACT

1. Adelaide V. Ochoa (Respondent) is a vocational nurse, holding license number 149249 issued by the Texas Board of Nursing (Board).
2. On or about June 26, 1989, Respondent entered a plea of Guilty and was convicted of FAILURE TO DISPLAY A VALID DRIVER'S LICENSE (a misdemeanor offense committed on March 28, 1989), in the County Court at Law, Victoria County, Texas, under Cause No. 1-51,631.
3. On or about May 15, 2000, Respondent entered a plea of Guilty and was convicted of ISSUANCE OF A BAD CHECK (a misdemeanor offense committed on December 24, 1998), in the County Court at Law No. 2 of Victoria County, Texas, under Cause No. 2-01,696. As a result of the conviction, Respondent was ordered to pay a fine and court costs.
4. On or about April 25, 2001, Respondent entered a plea of Guilty and was convicted of the LESSER BUT INCLUDED OFFENSE OF ISSUANCE OF A BAD CHECK (a misdemeanor offense committed on December 30, 1999), in the County Court at Law No. 1 of Victoria County, Texas, under Cause No. 1-74,583. As a result of the conviction, Respondent was ordered to pay a fine and court costs.
5. The Respondent paid restitution for her 2000 and 2001 bad-check crimes.
6. On or about May 13, 2007, Respondent was arrested by the Texas Highway Patrol, Victoria County, Texas, for DRIVING WHILE INTOXICATED (DWI) (a Class B misdemeanor offense).
7. When the Respondent was arrested on May 13, 2007, she was not acting as a nurse, scheduled to work as a nurse within 12 hours, or on call to come to work as a nurse. No passenger in the vehicle was a patient.
8. On or about June 3, 2007, Respondent submitted an on-line document to the Board to renew her nursing license. Despite her prior convictions and arrest, the Respondent answered "No" to the following question in the application:

Have you ever been convicted, placed on community supervision whether or not adjudicated guilty, sentenced to serve jail or prison time or granted

pre-trial diversion, or plead guilty, no contest or nolo contendere to any crime in any state, territory or country, or received a court order whether or not a sentence was imposed, including any pending criminal charges or unresolved arrests whether or not on appeal (excluding minor Class C traffic violations)? This includes expunged offenses and deterred adjudications with or without a finding of guilt. Please note that DUIs, DWIs, and PIs must be reported and are not considered minor traffic violations. One time minor in possession [MIP] or minor in consumption [MIC] does not need to be disclosed; therefore, you may answer "No." If you have two or more MIPs or MICs, you must answer "Yes." You may answer "No" if you have previously disclosed a criminal matter otherwise responsive to this question in a renewal and/or licensure form.

9. Before submitting the answer on June 3, 2007, the Respondent had consulted an attorney, who advised her that she did not need to report her prior crimes when she applied to renew her license.
10. On or about January 17, 2008, Respondent entered a plea of Guilty to DRIVING WHILE INTOXICATED WITH CHILD PASSENGER (DWI with a Child Passenger) (a State Jail felony offense committed on May 13, 2007), in the 24th Judicial District Court, Victoria County, Texas, under Cause No. 07-9-23,419A.
11. Aside from the incident on May 13, 2007, that led to the Respondent pleading guilty to DWI with a Child Passenger, there is no evidence that the Respondent has drunk alcohol at all in several years, much less that she uses alcohol intemperately or has an alcohol abuse problem.
12. The child passenger in the vehicle driven by the Respondent on May 13, 2007, when she was intoxicated, was the Respondent's grandson.
13. Nurses care for patients when they are vulnerable due to health problems.
14. Children are vulnerable due to their age, immaturity, and dependence on adults.
15. A nurse must advocate for her patients and ensure that they receive appropriate care.
16. The Respondent failed to advocate her grandson's best interest when she directed him to enter a vehicle that she then drove while intoxicated.
17. Based on the above Findings of Fact, DWI with a Child Passenger relates to the ability, capacity, and fitness required to perform the duties of a nurse.
18. As a result of her pleading guilty to DWI with a Child Passenger, the proceedings against Respondent were deferred without entering an adjudication of guilt, and Respondent was placed on probation for a period of three years.

19. The Respondent satisfied the conditions of her deferred adjudication for the DWI with a Child Passenger, the matter was dismissed, and she was discharged without an adjudication of guilt.
20. Among those satisfied conditions were her completion of a relapse and anger management program and a DWI education program.
21. On or about June 22, 2009, Respondent again submitted a document to the Board to renew her license on-line. This time she was asked:

Have you, within the past 24 months or since your last renewal, for any criminal offense, including those pending appeal:

- A. been convicted of a misdemeanor?
- B. been convicted of a felony?
- C. pled nolo contendere, no contest, or guilty?
- D. received deferred adjudication?
- E. been placed on community supervision or court-ordered probation, whether or not adjudicated guilty?
- F. been sentenced to serve jail or prison time? court-ordered confinement?
- G. been granted pre-trial diversion?
- H. been arrested or have any pending criminal charges?
- I. been cited or charged with any violation of the law?
- J. been subject of a court-martial; Article 15 violation; or received any form of military judgment/punishment/action?

22. The Respondent responded "No" to the above questions, despite her 2008 plea of guilty to DWI with a Child Passenger.
23. The Respondent's failure to disclose her prior crimes when she applied to renew her license in 2007 and 2009 was not wholly intentional because the Respondent relied, at least in part, on the incorrect advice of a lawyer.
24. The professional staffing business for which she is currently working and two RN charge nurses with whom she has worked at Matagorda Regional Medical Center in Bay City have written letters of recommendation praising the Respondent's nursing skills, reliability, knowledge, and care of patients.
25. On November 14, 2011, the Board's staff (Staff) mailed its Notice of Hearing to the Respondent.
26. 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.

27. On the motion of the Respondent to which the Staff filed no objection, the hearing was continued to May 15, 2012, as agreed by the Parties.
28. State Office of Administrative Hearing (SOAH) Administrative Law Judge (ALJ) William G. Newchurch convened the hearing on May 15, 2012, in the William P. Clements Building, 300 West 15th Street, Austin, Texas.
29. Staff was represented at the hearing by R. Kyle Hensley, Assistant General Counsel.
30. The Respondent appeared at the hearing and was represented by Marc M. Meyer, attorney.
31. The record closed on May 17, 2012, when the Parties filed written supplements to their closing arguments.

IX. PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. Tex. Occ. Code ch. 301 (Occupations Code).
2. SOAH 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.
4. In this case, the Staff has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code (TAC) § 155.427.
5. Occupations Code § 301.452(b)(2), (3), and (10) went into effect on September 1, 1999. Acts 1999, 76th Leg., ch. 388 (H.B. 3155), § 1, eff. Sep. 1, 1999. It currently provides:
 - (b) A person is subject to denial of a license or to disciplinary action under this subchapter for:
 - ...
 - (2) fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing;
 - (3) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude;
 - ...
 - (10) unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public;
6. Occupations Code § 302.402(a)(10) also took effect on September 1, 1999--Acts 1999, 76th Leg., ch. 388 (H.B. 3155), § 1, eff. Sep. 1, 1999--but was later repealed, effective

February 1, 2004--Act 2003, 78th Leg. ch. 553 (H.B. No. 1483), § 3.001(1), eff. Feb. 1, 2004. However, it was in effect when the Respondent was convicted of issuing bad checks on May 15, 2000, and April 25, 2001.

7. Occupations Code § 302.402(a)(10) provided:

A person is subject to disciplinary action under Section 302.403 for:

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

8. Prior to September 28, 2004, the Board's predecessor agency had an unprofessional conduct rule, 22 TAC § 239.11(29)(A), which provided:

Unprofessional or dishonorable conduct, likely to deceive, defraud or injure the public, may include the following described acts or omissions:

...
(29) being convicted of a crime that relates to the practice of vocational nursing.

(A) Those crimes which the board considers to be directly related to the duties and responsibilities of a licensed vocational nurse shall include, but are not limited to:

- ...
(ii) Offenses against property;
(iii) Offenses involving fraud, dishonesty or deceit;
...

9. Since September 28, 2004, the Board's unprofessional conduct rule has been 22 TAC § 217.12, which provides:

The unprofessional conduct rules are intended to protect clients and the public from incompetent, unethical, or illegal conduct of licensees. The purpose of these rules is to identify unprofessional or dishonorable behaviors of a nurse which the board believes are likely to deceive, defraud, or injure clients or the public. Actual injury to a client need not be established. These behaviors include but are not limited to:

...
(6) Misconduct--actions or conduct that include, but are not limited to:

...
(I) Failing to answer specific questions or providing false or misleading answers that would have affected the decision to license, employ, certify or otherwise utilize a nurse; or

...
(13) Criminal Conduct--including, but not limited to, conviction or probation, with or without an adjudication of guilt, or receipt of a judicial order

involving a crime or criminal behavior or conduct that could affect the practice of nursing.

10. The Respondent's May 15, 2000 and April 25, 2001 bad check convictions were both offenses against property and forms of fraud. Tex. Penal Code § 32.42. Thus, they were also unprofessional conduct for a vocational nurse under former 22 TAC § 239.11(29)(A).
11. The Respondent's issuance of bad checks in 2000 and 2001 was fraudulent and unprofessional and under Occupations Code § 302.402(a)(10), as it existed at the time, the Board had authority to take disciplinary action against her for that fraudulent behavior.
12. The Respondent's issuance of bad checks in 2000 and 2001 was fraudulent and unprofessional and under current Occupations Code § 301.452(b)(2) and (10) the Board currently has authority to take disciplinary action against her for that fraudulent behavior.
13. The Respondent acted unprofessionally, under 22 TAC § 217.12(6)(I), when she submitted her on-line license renewal application on June 3, 2007, but failed to disclose her June 26, 1989 driver's license offense, her May 15, 2000 and April 25, 2001 bad check offenses, and her May 13, 2007 DWI arrest when asked about her criminal past.
14. The Respondent's failure to disclose her prior crimes when she applied to renew her nursing license in 2007 and 2009 provides grounds for the Board to take disciplinary action against her under Occupations Code § 301.452(b)(2).
15. The Respondent acted unprofessionally, under 22 TAC § 217.12(6)(I), when she submitted her June 22, 2009 on-line nursing license renewal application but failed to disclose that she had pleaded guilty to DWI with a Child Passenger on January 17, 2008, when asked about her criminal offenses in the previous 24 months.
16. Moreover, without regard to disclosures, the Respondent's January 17, 2008 DWI with a Child Passenger was criminal conduct; hence, it was also unprofessional conduct, as defined by 22 TAC § 217.12(13).
17. The Respondent's 2008 DWI with a Child Passenger provides grounds for the Board to take disciplinary action against her under Occupations Code § 301.452(b)(3) and (10).
18. The Board has adopted Disciplinary Guidelines for Criminal Conduct (Guidelines). The Guidelines list crimes under the heading "Rationale for How Crimes Relate to the Practice of Nursing." The Guidelines include a rationale for each crime listed.
19. DWI with a Child Passenger is not listed in the Guidelines as a crime related to the practice of nursing.

20. The Guidelines state that its list of crimes that relate to the practice of nursing is not exhaustive and each case is considered on its own merits and set out factors the Board will use in a case-by-case analysis.
21. The Guidelines do not include only crimes engaged in while acting as a nurse. Instead, the rationales explain that committing the crime indicates that a person lacks a character trait a nurse must have or has engaged in conduct similar to what a nurse must avoid in her practice.
22. The Guidelines list factors that will be considered in conducting a case-specific analysis of a particular crime, including (1) the nature and seriousness of the crime and (2) the relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of nursing practice.
23. DWI with a Child Passenger is a felony; hence, it is a serious crime. Tex. Penal Code § 49.045.
24. Based on the above Findings of Fact and Conclusions of Law, DWI with a Child Passenger is unprofessional conduct that relates to the practice of nursing.
25. Board rule 22 TAC § 213.33 specifies factors that the Board will consider for imposition of penalties and sanctions and includes the Nursing Disciplinary Matrix (Matrix).
26. For each ground for taking disciplinary action, the Matrix prescribes appropriate sanctions based on the severity of the offense and mitigating and aggravating circumstances.
27. Under the Matrix, the appropriate sanction is determined by the grounds for the discipline, the gravity of the offense (which determines its tier), and the aggravating and mitigating circumstances (which determine its sanction level).
28. The Matrix specifically lists the number of events and the involvement of alcohol as aggravating circumstances.
29. An unintentional failure to disclose prior crimes is a First Tier Offense under the Matrix. Under Sanction Level I, the prescribed sanctions for the failures to disclose one's crimes are remedial education, a fine of \$250 or more for each violation, or both; however, a greater sanction is appropriate due to the other grounds that exist for disciplining the Respondent.
30. The Respondent engaged in several instance of unprofessional conduct that relate to the practice of nursing.
31. The Respondent's unprofessional conduct was, collectively, a Second Tier Offense under the Matrix because it was unprofessional conduct that resulted in a serious risk to public safety.

32. The Respondent's grandson, a member of the public, was at serious risk when he was a passenger in the vehicle driven by the intoxicated Respondent.
33. Depending on a weighing of aggravating and mitigating circumstances, a Second Tier unprofessional conduct offense can be the subject of either of two sanction levels under the Matrix. Sanction Level II would include a revocation or suspension that could be probated for two years.
34. Based on the above Findings of Fact and Conclusions of Law, the Board should impose a sanction from Level II: a license suspension for two years that would be probated.
35. Board rule 22 TAC § 213.33(e)(6)(C) provides that when the Board probates a suspension it may require the nurse to participate in a program of education or counseling prescribed by the Board. Additionally, for a Second Tier unprofessional conduct offense, Sanction Level II states, in part:

If violation involves . . . criminal conduct involving alcohol . . . then suspension will be enforced until individual has completed treatment and one year verifiable sobriety before suspension is stayed . . .
36. While 22 TAC § 213.33(e)(6)(C) provides that a nurse "may" be required to participate in education and counseling when she receives a probated suspension, it does not require that in all cases. Nor does that rule or the Matrix specify that when the Board requires education and counseling, it will always require attending a support group meeting twice a week, including one meeting for substance abuse.
37. The evidence does not show that the Respondent has an alcohol abuse problem or has drunk alcohol more than once in many years.
38. Based on the above Findings of Fact and Conclusions of Law, the Respondent should not be required to attend twice-weekly support group meetings, including one for substance abuse, as proposed by the Staff.
39. When Sanction Level II is applied to a Second Tier unprofessional practice offense and the suspension is probated, the Matrix provides "Probated suspension will be . . . with Board monitored and supervised practice depending on applicable Board policy." Additionally, 22 TAC § 213.33(e)(6)(E) provides that such supervised practice conditions may be imposed.
40. Based on the above Findings of Fact and Conclusions of Law, the Respondent should be required to comply with the Staff's proposed supervised practice conditions.
41. Based on the above Findings of Fact and Conclusions of Law, the Respondent should be required to comply with other conditions set out below in this order during the period when her license is suspended and the suspension is probated.

X. PROPOSED ORDERING PROVISIONS

IT IS THEREFORE ORDERED that Adelaide V. Ochoa shall receive the sanction of SUSPENSION OF HER VOCATIONAL NURSE LICENSE FOR TWO YEARS for the grounds set out above in this Order, which suspension shall be probated subject to her compliance with the conditions set out below:

1. RESPONDENT SHALL comply 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 this Order.
2. RESPONDENT SHALL, within one (1) year of entry of this Order, successfully complete a course in Texas nursing jurisprudence and 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. In order for the course to be approved, the target audience shall include nurses. It shall be a minimum of six (6) 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. RESPONDENT SHALL request 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 at the following Board website address: <http://www.bon.texas.gov/disciplinaryaction/stipscourses.html>.*
3. RESPONDENT SHALL, within one (1) year of entry of this Order, 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, RESPONDENT 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. *Board-approved courses may be found at the following Board website address: <http://www.bon.texas.gov/disciplinaryaction/stipscourses.html>.*
4. Should RESPONDENT practice as a nurse in the State of Texas, RESPONDENT will provide direct patient care and practice in a hospital, nursing home, or other clinical setting and RESPONDENT must work in such setting a minimum of sixty-four (64) hours per month under the following probation conditions for two (2) years of

employment. The length of the probationary period will be extended until such twenty-four (24) months have elapsed. Periods of unemployment or of employment that do not require the use of a registered nurse (RN) or a vocational nurse (LVN) license, as appropriate, will not apply to this stipulation period:

5. RESPONDENT SHALL notify each present employer in nursing of this Order of the Board and the probation conditions on RESPONDENT'S license(s). 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 nursing of this Order of the Board and the probation conditions on RESPONDENT'S license(s). 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.
6. RESPONDENT SHALL request each present employer in 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 nurse.
7. RESPONDENT SHALL be supervised by a Registered Nurse, if licensed as a Registered Nurse, or by a Licensed Vocational Nurse or a Registered Nurse, if licensed as 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.
8. RESPONDENT SHALL request each employer to submit, on forms provided to the Respondent by the Board, periodic reports as to RESPONDENT'S capability to practice nursing. These reports shall be completed by the 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) month period for two (2) year of employment as a nurse.
9. 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 a pain management and/or chemical dependency evaluation by a Board approved evaluator. The performing evaluator must submit a written report meeting the Board's requirements to the Board's office within thirty (30) days from the Board's request.

10. 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 next 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 probation 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 are 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 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 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 Respondent's license(s) and nurse licensure compact privileges, if any, to practice nursing in the State of Texas.

11. IT IS FURTHER ORDERED that if during the period of probation, an additional allegation, accusation, or petition is reported or filed against the Respondent's license(s),

the probationary period shall not expire and shall automatically be extended until the allegation, accusation, or petition has been acted upon by the Board.

12. IT IS FURTHER ORDERED, that upon full compliance with the terms of this Order, all encumbrances will be removed from RESPONDENT'S license(s) to practice nursing in the State of Texas and RESPONDENT shall be eligible for nurse licensure compact privileges, if any.

SIGNED on June 21, 2012.



WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 507-12-2187

IN THE MATTER OF	§	BEFORE THE
PERMANENT CERTIFICATE	§	
NUMBER 149249	§	STATE OFFICE OF
ISSUED TO	§	
ADELAIDE V. OCHOA	§	ADMINISTRATIVE HEARINGS

STAFF'S EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Staff of the Texas Board of Nursing and files this, Staff's Exceptions to Proposal for Decision, and would show the Administrative Law Judge as follows:

I.

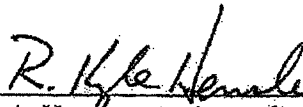
Proposed Conclusion of Law Number 38 should be amended to require that the Respondent attend support group meetings for substance abuse. As reflected in the testimony of the Board's expert in nursing practice, Denise A. Benbow, RN, required attendance at Alcoholics Anonymous, or a similar 12 step program, would equip the Respondent with the tools that would reassure the citizens of Texas that she would not repeat the alcohol related criminal behavior at the heart of this case.

Prayer:

WHEREFORE PREMISES CONSIDERED, Staff prays the Administrative Law Judge make the foregoing requested modifications to the Proposal For Decision.

Respectfully submitted,

TEXAS BOARD OF NURSING



R. Kyle Hensley, Assistant General Counsel
State Bar No. 50511847
333 Guadalupe, Tower III, Suite 450
Austin, Texas 78701
P: (512) 305-7659
F: (512) 305-8101

CERTIFICATE OF SERVICE

I hereby certify that a true copy of *Staff's Exceptions to Proposal for Decision* was sent via Email, on this, the 6th day of July, 2012, to:

Adelaide Ochoa
c/o Attorney Marc M. Meyer, RN, JD
Law Office of Marc Meyer, PLLC
33300 Egypt Lane, Suite B200
Magnolia, TX 77354-2739

Via Email



R. Kyle Hensley, Assistant General Counsel

DOCKET NO. 507-12-2187

IN THE MATTER OF	§	
PERMANENT CERTIFICATE	§	BEFORE THE TEXAS STATE
NUMBER 149249	§	
ISSUED TO ADELAIDE V. OCHOA,	§	OFFICE OF ADMINISTRATIVE HEARINGS
RESPONDENT	§	

RESPONDENTS EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES the Respondent, Adelaide V. Ochoa, through his attorney, to file these Exceptions to the Proposal for Decision.

EXCEPTIONS

Section VI. Appropriate Sanctions; Subsection B. More than a Warning is Called For: The Administrative Law Judge (ALJ), in analyzing the mitigating circumstances that Respondent asserted would have supported a Level I sanction, mischaracterized the Respondent's actions the night the DWI with a Child Passenger offense occurred. The ALJ states in the Proposal for Decision that the Respondent "could think of no one to call to drive them home. Under the circumstances, the Respondent concluded that her best option was to drive the three of them 45 miles to their home."¹ However, this statement does not correspond to the testimony that the Respondent offered at the hearing.

In the Respondent's testimony in response to questioning by the Board Attorney, the Respondent asserted that she knew she should not drive, but she had called her daughter, who lived five blocks away, but didn't have a car.² The next question the Board Attorney asked was if she knew that she couldn't drive the forty-five minutes to her house, which the Respondent replied in the affirmative.³ Later in the hearing, the Board Attorney directly asked "five blocks,

¹ Proposal for Decision ("PFD"), at 13.

² Hearing Record, at 22:26.

³ *id.*, at 22:46.

you didn't make it, did you?"⁴ No evidence was offered by either the Respondent or Board Staff to indicate that the Respondent was actually driving to her residence rather than her daughter's house.

Respondent asserts that the ALJ mischaracterized the nature of the Respondent's choice that evening. The Respondent admitted that her actions were wrong, but does not agree that the decision was made out of convenience. And at no time during the hearing did the Respondent or her counsel make the argument that the distance the Respondent was travelling was a mitigating factor, therefore the Respondent requests that the two paragraphs on page 13, starting with "Seeking a Level I sanction," and ending with "the Board attach no weight to this argument." should be struck from the Proposal for Decision.

Section VI. Appropriate Sanctions; Subsection D. Supervised Practice Conditions:

Respondent excepts to the ALJ's characterization that supervised practice conditions as not excessive and that the Respondent offered no evidence to that effect.⁵ Respondent offered three letters of recommendation from supervisors and co-workers attesting to her skills, reliability, knowledge and care of patients.⁶ In addition, the ALJ proposed Findings of Fact indicate that there was no patient contact implicated in any of the Respondent's actions.⁷ The Board offered no evidence of subsequent criminal conduct since the DWI charge in 2007 or evidence of any problems with the Respondent's nursing practice at any time, despite the nature of the charges and the Board's assertion that because of the DWI charges that the Respondent is a greater risk to the public because of her actions. Therefore, Respondent asserts that considering the lack of evidence of issues with the Respondent's nursing practice, the ALJ should have considered the mitigating factors as noted above and found that the supervised practice conditions as recommended are excessive and that the public could be adequately protected with less restrictive supervision requirements rather than the indirect supervision contemplated by this

⁴ *id.*, at 25:06.

⁵ PFD, at 17.

⁶ See Respondent's Exhibits 3, 4 & 5.

⁷ PFD, at 18. See Finding of Facts No. 7.

order, such as employer notification and quarterly reporting.⁸ In the alternative, Respondent suggests that limiting the period of indirect supervision to one year would be adequate considering the mitigating factors.

Conclusion of Law No. 40: Based on the above discussion regarding the Supervised Practice Conditions, Respondent excepts to Conclusion of Law Number Forty (40), which currently reads "Based on the above Findings of Fact and Conclusions of Law, the Respondent should be required to comply with the Staff's proposed supervised practice conditions." If the ALJ changes the recommended sanction for supervised practice to reflect the discussion above, then the Respondent proposes the following changes to Conclusion of Law No. 40: "Based on the above Findings of Fact and Conclusions of Law, Respondent shall be required to notify employers and comply with employer reporting requirements as set out in the Proposed Ordering Provisions No. Five, Six and Seven (5, 6 & 7);"⁹ OR in the alternative, revise Conclusion of Law No. 40 by adding "for a period not to exceed one year."

PRAYER FOR RELIEF

Respondent, Adelaide V. Ochoa, prays that the honorable Administrative Law Judge:

1. Strike the two paragraphs on page 13, starting with "Seeking a Level I sanction," and ending with "the Board attach no weight to this argument.";
2. Recommend that supervised practice consist of employer reporting rather than indirect supervision and therefore delete Proposed Ordering Provisions No. Seven (7), or in the alternative, recommend limiting the indirect supervised practice to one year;
3. Revise Conclusion of Law No. 40 to read as follows: "Based on the above Findings of Fact and Conclusions of Law, Respondent shall be required to notify employers and

⁸ Essentially the Respondent is asking that clause number seven of the Proposed Ordering Provisions be deleted from the Recommended Sanctions. The Respondent asserts that by having the employer report on a quarterly basis would be more than adequate to protect the public in this case.

⁹ This would encompass the current Proposed Ordering Provisions No. Five, Six and Eight. Proposed Ordering Provision No. Eight would be renumbered as No. Seven if the current Provision No. Seven is deleted.

comply with employer reporting requirements as set out in the Proposed Ordering Provisions No. Five, Six and Seven (5, 6 & 7); OR in the alternative, revise Conclusion of Law No. 40 by adding "for a period not to exceed one year; AND

4. Propose to the Texas Board of Nursing in a Decision all relief at law or in equity to which Respondent is entitled.

Respectfully submitted,

By: 

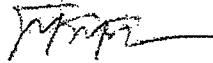
Marc M. Meyer
State Bar No. 24070266
Attorney for Adelaide V. Ochoa
33300 Egypt Lane, Suite B-200
Magnolia, TX 77354-2878
Tel: 281.259.7575
Fax: 866.839.6920

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of July, 2012, a true and correct copy of the above and foregoing document was served on the following individual(s) at the location(s) and in the manner indicated below:

Docketing Division
State Office of Administrative Hearings
William P. Clements Building
300 W. 15th Street, Suite 504
Austin, TX 78701-1649
VIA FACSIMILE AT 512-322-2061

R. Kyle Hensley, Assistant General Counsel
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, TX 78701
VIA FACSIMILE AT 512-305-8101



Marc M. Meyer

DOCKET NO. 507-12-2187

IN THE MATTER OF	§	
PERMANENT CERTIFICATE	§	BEFORE THE TEXAS STATE
NUMBER 149249	§	
ISSUED TO ADELAIDE V. OCHOA,	§	OFFICE OF ADMINISTRATIVE HEARINGS
RESPONDENT	§	

RESPONDENT'S REPLY TO STAFF'S EXCEPTIONS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Respondent, Adelaide V. Ochoa, and files this Reply to Staff's Exceptions:

Regarding Conclusion of Law No. 38

Staff of the Texas Board of Nursing filed an exception to Conclusion of Law No. 38, stating, in essence, that because Staff's expert testified that the Respondent needed to be equipped with tools to avoid alcohol so as to reassure the citizens of Texas, that the Respondent must be required to attend 12 step meetings.¹ It is instructive to note, however, that Staff did not except to Finding of Fact No. 11, which states that "[a]side from the incident . . . , there is no evidence that the Respondent has drunk alcohol at all in several years, much less that she uses alcohol intemperately or has an alcohol abuse problem."² As a conclusion to the section analyzing the suggested requirement for support group meeting attendance, the Administrative Law Judge ("ALJ") concludes that "Staff's proposal that the Respondent be required to attend twice-weekly support group meetings, including one for substance abuse, is excessive and unwarranted."³ Respondent agrees with the ALJ in that this requirement is unwarranted and excessive and therefore believes that Staff's Exceptions to the Proposal for Decision should be overruled and no changes be made to the Proposal for Decision based on these Exceptions.

WHEREFORE, PREMISES CONSIDERED, Respondent request the honorable Administrative Law Judge find the following:

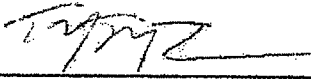
¹ Staff's Exceptions to Proposal for Decision, at 1.

² Proposal for Decision ("PFD"), at 21.

³ PFD, at 18.

1. Make no changes based on Staff's Exceptions to Proposal for Decision, and
2. For such other and further relief that may be awarded at law or in equity.

Respectfully submitted,

By: 

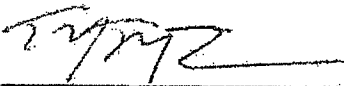
Marc M. Meyer
Texas Bar No. 24070266
33300 Egypt Lane, Suite B200
Magnolia, TX 77354
Tel. (281) 259-7575
Fax. (866) 839-6920
Attorney for Respondent Adelaide V. Ochoa

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of July, 2012, a true and correct copy of the above and foregoing document was served on the following individual(s) at the location(s) and in the manner indicated below:

Docketing Division
State Office of Administrative Hearings
William P. Clements Building
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Austin, TX 78701-1649
VIA FACSIMILE AT 512-322-2061

R. Kyle Hensley, Assistant General Counsel
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, TX 78701
VIA FASCIMILE AT 512-305-8101



Marc M. Meyer

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 24, 2012

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

VIA FACSIMILE 512/305-8101

**RE: Docket No. 507-12-2187; In the Matter of Permanent Certificate
Number 149249 Issued to Adelaide V. Ochoa**

Dear Ms. Thomas:

This is my recommendation concerning the exceptions to my Proposal for Decision (PFD) in the above case. Both the staff (Staff) of the Texas Board of Nursing (Board) and Adelaide V. Ochoa (Respondent) filed exceptions. The Respondent also filed a response to the Staff's exceptions.

The Staff objects to proposed Conclusion of Law (COL) No. 38, which states that the Respondent should not be required to attend twice-weekly support group meetings, including one for substance abuse, as proposed by the Staff. As explained in the PFD, I did not find that the support group meeting requirement was warranted. The evidence does not show that the Respondent has an alcohol abuse problem, or has even drunk alcohol more than once in many years. I have nothing more to add. I recommend that the Staff's exception to COL 38 be overruled.

The Respondent objects to proposed COL 40 and Ordering Provision No. 7, which concern the Staff's proposal to impose supervised practice conditions on the Respondent. I recommend overruling this exception as well. The Respondent argues that three letters of recommendation in evidence show that there are no issues with the Respondent's nursing practices and the Staff failed to show that there were such issues. However, as explained in the PFD, I focused on the Matrix provision stating that "Probated suspension will be . . . with Board monitored and supervised practice depending on applicable Board policy." Absent a showing by the Respondent that imposing a supervised practice requirement is excessive, I see no reason to recommend a deviation from that Board policy of requiring supervised practice when a suspension is probated. In my judgment, the three letters of recommendation do not show that requiring supervised practice is excessive.

SOAH DOCKET 507-12-2187
JULY 24, 2012

EXCEPTIONS LETTER

PAGE 2

The Respondent also objects to a section of the PFD, but not to any related Finding of Fact (FOF), COL, or Ordering Provision. The objection concerns the part of the PFD where I discuss why a warning, as the Respondent proposes, is an insufficient sanction for the Respondent's violations and why a probated suspension, as the Staff proposes, should instead be imposed. As Respondent points out, I misunderstood the evidence concerning the distance and location to which Respondent was driving when she was arrested for driving while intoxicated (DWI) with a Child Passenger. After reviewing her testimony, I agree that the Respondent indicated that she was driving five miles to her daughter's home, rather than 45 miles to her own home.

The Respondent also states that I misunderstood her position, and she was not attempting to argue that her lack of other transportation mitigated her crime of DWI with a Child Passenger. To the extent I misunderstood her position on this point, I apologize. However, I see no need to change any FOF, COL, or Ordering Provision due to my misunderstandings, and certainly no reason to recommend a lesser sanction than I proposed in the PFD.

Sincerely,

William G. Newchurch
Administrative Law Judge

WGN:nl

XC: R. Kyle Hensley, Assistant General Counsel, TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701
-- VIA FACSIMILE 512/305-8101
Dina Flores, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 -- VIA FACSIMILE 512-305-8101
Marc M. Meyer, RN, JD, Law Office of Marc Meyer, P.L.L.C., 33300 Egypt Lane, Suite B-200, Magnolia, TX 77354-2739 - VIA FACSIMILE 866/839-6920