



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

DOCKET NUMBER 507-12-5105

**IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 581914
ISSUED TO
JUDITH GRIFFIN COLEMAN**

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

OPINION AND ORDER OF THE BOARD

**TO: JUDITH GRIFFIN COLEMAN
c/o MARC M. MEYER, RN, JD
33300 EGYPT LANE, SUITE B200
MAGNOLIA, TX 77354-2739**

**PRATIBHA J. SHENOY
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 all of the Findings of Fact and Conclusions of Law in the PFD regarding the registered nursing license of Judith Griffin Coleman, without changes; and (3) Respondent's recommendation to the Board regarding the PFD and order, if any.

The Board finds that after proper and timely notice was given, the above styled case was heard by an Administrative Law Judge (ALJ) who made and filed a PFD containing the ALJ's findings of facts and conclusions of law. The PFD was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. Staff filed exceptions to the PFD on August 13, 2012. The Respondent filed a response to Staff's exceptions to the PFD, as well as her own exceptions to the PFD, on August 20, 2012. Staff filed a reply on August 23, 2012 and the Respondent filed replies on August 28, 2012 and August 30, 2012. On September 6, 2012, the ALJ issued her final letter ruling, in which she declined to make any changes to the PFD.

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

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 law², the Board agrees with the ALJ that the appropriate sanction in this matter is revocation. As described in adopted Conclusion of Law Number 5, the Respondent engaged in unprofessional or dishonorable conduct that resulted in harm to the public. The Board agrees with the ALJ that the Respondent is subject to disciplinary action under the Occupations Code §301.452(10) for this conduct. The Board further agrees with the ALJ that Respondent's conduct warrants a third tier, sanction level I sanction for her violation of §301.452(b)(10)³, particularly in light of the fact that Respondent failed to provide any evidence of mitigation or rehabilitation⁴. Further, pursuant to the Board's Disciplinary Matrix, the Board agrees with the ALJ's recommendation that the Respondent should not be eligible for licensure reinstatement until restitution is paid⁵.

Based upon the adopted Findings of Fact and Conclusions of Law, particularly Findings of Fact Numbers 12 through 14 and Conclusions of Law Numbers 5 through 7, the Board's adopted Disciplinary Sanctions for Fraud, Theft, and Deception, the Board's Disciplinary Matrix, and the Board's rules, including 22 Tex. Admin. Code §213.33(e), (f), and (g), the Board finds that the Respondent's license should be revoked.

IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 581914, previously issued to JUDITH GRIFFIN COLEMAN, to practice nursing in the State of Texas be, and the same is hereby, REVOKED.

IT IS FURTHER ORDERED that RESPONDENT SHALL pay an administrative reimbursement in the amount of one hundred thirty dollars and eighty cents (\$130.80). RESPONDENT SHALL pay this administrative reimbursement within forty five days of entry of this Order. Payment is to be made directly to the Texas Board of Nursing in the form of cashier's check or U.S. money order. Partial payments will not be accepted.

IT IS FURTHER ORDERED that this Order SHALL be applicable to

² 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.).

³ The Board's Disciplinary Matrix provides for denial of licensure or licensure revocation for a third tier, sanction level I sanction related to a violation of §301.452(b)(10).

⁴ See adopted Finding of Fact Number 14, which states that Respondent failed to provide evidence of insight or remorse; work status before or after entering into the Pre-Trial Diversion Agreement; the amount of restitution made; whether she is in compliance with the other terms of the Pre-Trial Diversion Agreement; or any other mitigation or rehabilitation.

⁵ For a third tier, sanction level I sanction related to a violation of §301.452(b)(10), the Board's Disciplinary Matrix requires that restitution be paid before an individual may apply for licensure reinstatement. See also ALJ's recommendation, pages 13 and 16 of the PFD.

Respondent's multi-state privileges, if any, to practice nursing in the State of Texas.

IT IS FURTHER ORDERED that Respondent shall not be eligible for licensure reinstatement until Respondent provides evidence of restitution.

Entered this 19th day of October, 2012.

TEXAS BOARD OF NURSING

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

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

Attachment: Proposal for Decision; Docket No. 507-12-5105 (August 3, 2012).

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 3, 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. 507-12-5105; Texas Board of Nursing v. Judith Griffin
Coleman**

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 "Pratibha J. Shenoy".

Pratibha J. Shenoy
Administrative Law Judge

PJS/mle
Enclosures

XC: Nikki R. Hopkins, Staff Attorney, TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – **VIA INTER-AGENCY**
Dina Flores, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – (with 1 CD; Certified Evidentiary Record) – **VIA INTER-AGENCY**
Mark M. Meyer, 33300 Egypt Lane, Suite B-200, Magnolia, TX 77354 – **VIA REGULAR MAIL**

SOAH DOCKET NO. 507-12-5105

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE	§	
	§	
NUMBER 581914 ISSUED TO	§	OF
	§	
JUDITH GRIFFIN COLEMAN	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Texas Board of Nursing (Board) Staff seeks to revoke the nursing license held by Judith Griffin Coleman (Respondent) for alleged violations of the Nursing Practice Act, including submission of false information to the Board and theft of government funds. This proposal for decision recommends license revocation and assessment of \$130.80 in administrative costs.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Matters concerning notice and jurisdiction were undisputed. Those matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing convened June 7, 2012, before Administrative Law Judge (ALJ) Pratibha J. Shenoy in the William P. Clements Building, 300 West 15th Street, Austin, Texas. Assistant General Counsel Nikki R. Hopkins represented Staff. Attorney Mark M. Meyer represented Respondent. The hearing convened at 9:00 a.m. as scheduled. Mr. Meyer stated that Respondent was en route to Austin, but she had stopped due to inclement weather. The parties agreed to recess the hearing until 1:00 p.m. At that time, Mr. Meyer said Respondent had reported that she was too tired to continue her journey and would not be present at the hearing. Both parties then announced ready. The record closed at the conclusion of the hearing the same day.

II. DISCUSSION

A. Staff's Charges

Staff charges that Respondent failed to disclose a July 1983 driving while intoxicated (DWI) conviction on her 1992 application for registration with the Board, thereby providing false, deceptive, and/or misleading information to the Board in violation of then-applicable law. Staff also charges that Respondent engaged in conduct constituting theft of government property (as documented in a 2009 pre-trial diversion agreement) that justifies disciplinary action.

B. Applicable Law

1. Charge 1

Respondent submitted her initial application for registration to the Board in 1992. At the time, the Board's governing statute authorized disciplinary action against any licensee or prospective licensee who, among other things, was "guilty of fraud or deceit in procuring or attempting to procure a license to practice professional nursing" or who engaged in "[u]nprofessional or dishonorable conduct which, in the opinion of the board, is likely to deceive, defraud, or injure patients or the public."¹ The Board's disciplinary rules at the time defined unprofessional conduct as conduct that failed to conform to the accepted standards of the nursing profession, including the provision of "any information that is false, deceptive, or misleading in connection with one's own application for employment or work assignment as a health care provider or failing to disclose any information that could affect the decision to employ or assign any task as a health care provider."²

¹ Tex. Rev. Civ. Stat. Art. 4525(a)(2) and (9) (eff. 9/1/1991).

² 22 Tex. Admin. Code § 217.13(15) (eff. 9/1/1991).

2. Charge 2

As in effect in 2009, the Nursing Practice Act (Act)³ authorized disciplinary action against a licensee or applicant who, among other things, had "a conviction for, or placement on deferred adjudication, community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude" or who engaged in "unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public."⁴ The Board's rules in 2009 defined unprofessional conduct as encompassing criminal conduct "including, but not limited to, conviction or probation, with or without an adjudication of guilt, receipt of a judicial order involving a crime or criminal behavior or conduct that could affect the practice of nursing."⁵

Chapter 53 of the Texas Occupations Code sets out factors to consider in evaluating the consequences of criminal conduct in securing and retaining an occupational license, including in the nursing profession. Prior to disciplining a nurse for having a conviction or deferred adjudication, the Board must determine whether the underlying offense is directly related to the nursing profession. Factors used to determine the existence of a direct relationship between the crime and the licensed occupation are set out in Texas Occupations Code § 53.022,⁶ and have been adopted in Board Rule 213.28(c).⁷

³ Tex. Occ. Code ch. 301 *et seq.*

⁴ Act § 301.452(b)(3) and (10).

⁵ 22 Tex. Admin. Code § 217.12(13).

⁶ Tex. Occ. Code § 53.022 lists the following factors: (1) the nature and seriousness of the crime; (2) the relationship of the crime to the purposes for requiring a license to engage in the occupation; (3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and (4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.

⁷ 22 Tex. Admin. Code § 213.28(c) states that, in considering whether a criminal offense renders an individual ineligible for licensure or renewal of licensure, the Board shall consider: (1) the knowing or intentional practice of nursing without a license issued under the Nursing Practice Act; (2) any felony or misdemeanor involving moral turpitude; (3) the nature and seriousness of the crime; (4) the relationship of the crime to the purposes for requiring a license to engage in nursing practice; (5) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; (6) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of nursing practice; (7) whether imprisonment followed a felony conviction, felony community supervision revocation, revocation of parole or revocation of mandatory supervision; and (8) conduct that results in the revocation of probation imposed because of conviction for a felony or a misdemeanor involving moral turpitude.

The Board has determined that crimes against property, such as robbery, burglary, and theft, relate to the practice of nursing because nurses have access to vulnerable persons who may be easily victimized, and who may bring valuables with them or who may receive treatment in a setting (such as a home) where valuables are present and accessible to the nurse.⁸ Included in the definition of crimes against property is any theft equal to or greater than \$1,500.⁹

If deferred adjudication is ordered for an offense that directly relates to the nursing occupation, the Board must consider the nurse's present fitness for licensure in spite of the criminal conduct. The criteria used to evaluate present fitness are set forth in Texas Occupations Code § 53.023, and have been adopted by Board rule. The factors include the extent and nature of the licensee's past criminal activity; the amount of time that has elapsed since the licensee's last criminal activity; the conduct and work activity of the licensee before and after the criminal activity; evidence of the licensee's rehabilitation or rehabilitative effort; letters of recommendation; and whether the licensee maintained a record of good employment, supported his/her dependents, maintained a record of good conduct, and paid court costs, fines, fees, and restitution.¹⁰

In 2007, the Board adopted a disciplinary matrix that the State Office of Administrative Hearings (SOAH) and the Board "shall utilize...in all disciplinary and eligibility matters."¹¹ The matrix sets forth the disciplinary actions generally applicable to a given offense, classifying the offense as first, second, or third tier, and as sanction level I or level II. Under the matrix, unprofessional or dishonorable conduct prohibited by Act § 301.452(b)(10) is classified as a third tier offense if it involves "[f]inancial exploitation or unethical conduct resulting in a

⁸ See 22 Tex. Admin. Code § 213.28(b)(2)(B).

⁹ 22 Tex. Admin. Code § 213.28(b)(2)(A)(viii).

¹⁰ 22 Tex. Admin. Code § 213.28(e) and (f).

¹¹ 22 Tex. Admin. Code § 213.33(b). The Board first adopted the matrix by rule in October 2007 (see 35 Tex. Reg. 1210 (2010) (discussing history of matrix). The disciplinary matrix in its present graphical form was first adopted to be effective February 12, 2010, and was designated by Staff as applicable to this proceeding. See 35 Tex. Reg. 1220 (2010). Although the February 2010 version of the disciplinary matrix took effect after the execution of the pre-trial diversion agreement referenced in Staff's second charge (and after the underlying conduct was committed), no objection was raised at hearing to its use.

material or financial loss to a patient [or the] public in excess of \$4,999.99.”¹² The only sanction listed for sanction level I is “[d]enial of licensure or revocation of nursing license.”¹³ The disciplinary matrix states that a “[n]urse or individual is not subject to licensure or reinstatement until restitution is paid.”

The Board also has issued policy statements further explaining its approach to disciplinary action with respect to criminal conduct,¹⁴ including crimes involving fraud or theft.¹⁵ The Criminal Conduct Policy provides the Board’s view “of the effect of the *first commission* of certain crimes on nurse licensure.”¹⁶ Crimes listed in the Criminal Conduct Policy are organized by reference to Texas Penal Code provisions, but the Board notes that it will “also consider an offense under the law of another state [or] federal law...that contains elements that are substantially similar to the elements of an offense listed in this guideline.”¹⁷ For a theft crime in an amount equal to or greater than \$1,499.99, and for which a judicial order for conviction or deferred adjudication occurred less than five years earlier, the Criminal Conduct Policy recommends license denial or revocation.¹⁸

The Fraud & Theft Policy notes that the Board may “rely solely on the conviction of a crime or probation for a crime, with or without an adjudication of guilt, to deny, suspend, limit, or revoke a license.”¹⁹ The Board states that “[f]actors such as insight, remorse and

¹² 22 Tex. Admin. Code § 213.33(b).

¹³ 22 Tex. Admin. Code § 213.33(b). Staff indicated its belief that sanction level I would apply in this case. Sanction level II disciplinary action involves emergency suspension, possibly leading to revocation, if the violation indicates that the nurse “may be a continuing and imminent threat to public health and safety.” No continuing or imminent threat to public safety was alleged.

¹⁴ Disciplinary Guidelines for Criminal Conduct (adopted July 26, 2002, as revised) (Criminal Conduct Policy). The ALJ took official notice of the policy. The Criminal Conduct Policy is available on the Board’s website at <http://www.bon.texas.gov/disciplinaryaction/pdfs/Guidelines-CriminalConduct.pdf>.

¹⁵ Disciplinary Sanctions for Fraud, Theft, and Deception (adopted July 26, 2002, as revised) (Fraud & Theft Policy). The ALJ took official notice of the policy. The Fraud & Theft Policy is available on the Board’s website at <http://www.bon.texas.gov/disciplinaryaction/pdfs/fraud.pdf>.

¹⁶ Criminal Conduct Policy at 1 (emphasis added).

¹⁷ Criminal Conduct Policy at 1.

¹⁸ Criminal Conduct Policy at 14.

¹⁹ Fraud & Theft Policy at 2.

premeditation will be considered as to whether a disciplinary sanction is imposed.”²⁰ The sanction for crimes of fraud or theft “may be revocation.”

C. Evidence

1. Stipulated Facts

Each party filed a motion for summary disposition. The ALJ denied both motions in Order No. 3, issued May 15, 2012. However, certain facts were stipulated by the parties in their motions for summary disposition, and deemed stipulated for purposes of hearing. These stipulated facts were memorialized in Order No. 3. Prior to hearing, the parties submitted a joint statement of stipulations that substantially reiterated the facts listed in Order No. 3.²¹ In addition, the parties stipulated to the entry into the record of Staff’s exhibits 1-9. Mr. Meyer did not offer any evidence or call any witnesses on Respondent’s behalf.

Specifically, the parties stipulated that:²²

- Respondent is licensed as a registered nurse in the State of Texas and holds permanent certificate number 581914.
- Respondent’s license was issued by the Board on August 31, 1992.
- On July 25, 1983, Respondent pled guilty/nolo contendere to the misdemeanor charge of Driving While Intoxicated (DWI) in Cause No. 220,153 in the County Court at Law No. 2, Travis County, Texas. Respondent was sentenced to 30 days confinement in the Travis County Jail and ordered to pay a \$500 fine (1983 DWI Order). The sentence was suspended and Respondent was placed on probation for a period of 24 months.

²⁰ Fraud & Theft Policy at 3.

²¹ The joint statement of stipulations was signed by Ms. Hopkins and Mr. Meyer. The document included a line for Respondent’s signature, which was blank, presumably due to Respondent’s absence from the hearing. Mr. Meyer did not object to the use of the statement of stipulations without Respondent’s signature.

²² In addition to the factual matters listed below, the parties stipulated that: formal charges originally were delivered to Respondent’s address of record by certified mail on July 7, 2011, but were returned as undelivered because Respondent had moved; a notice of hearing together with a copy of the formal charges was delivered via certified mail on March 15, 2012 to Mr. Meyer, as Respondent’s attorney of record; and an amended notice of hearing together with the formal charges was delivered via certified mail on May 8, 2012 to Mr. Meyer.

- Respondent successfully completed probation and was released from probation in Cause No. 220,153 on July 25, 1985 (1985 Probation Release Order).
- At the time she committed the offense associated with Cause No. 220,153, Respondent was 27 years old.
- On May 14, 1992, Respondent submitted a Registration by Examination to the Board, on which Question No. 10 asked, "Have you ever been convicted of a crime other than minor traffic violations?" Respondent answered, "No" to Question No. 10.
- On March 4, 2009, Respondent entered into an agreement (Pre-Trial Diversion Agreement) with the United States Attorney's Office, Northern District of Texas, Lubbock Division, under Cause No. DTXN608PT000019, to participate in the Northern District's Pre-Trial Diversion Program for a period of 18 months for Theft of Government Property.
- At the time she entered into the Pre-Trial Diversion Agreement under Cause No. DTXN608PT000019, Respondent was 46 years old.
- Respondent is currently paying \$20,000 in restitution to the United States Department of Veterans Affairs in connection with Cause No. DTXN608PT000019.

2. Testimony of Terry Washington

Terry Washington has worked as a Board investigator for six years, and has participated in hundreds of investigations. He was assigned to review Respondent's application for renewal of her nursing license, filed with the Board on December 29, 2009.²³ Mr. Washington said Respondent filed with her application a copy of the Pre-Trial Diversion Agreement and related documents. Respondent included a handwritten note in which she explained that, without her knowledge, her husband received benefits from the United States Department of Veterans Affairs (USDVA) for a number of years by lying about his disabilities.²⁴ Respondent also attached a document which Mr. Washington said appeared to be a report indicating that Respondent had made \$650.00 in payments to the USDVA as of December 23, 2009.²⁵

²³ Staff Ex. 7.

²⁴ Staff Ex. 7 at 5.

²⁵ Staff Ex. 7 at 10.

Mr. Washington said the Pre-Trial Diversion Agreement requires Respondent to meet certain conditions, including maintaining law-abiding behavior, performing 40 hours of community service, reporting to a probation officer, and repaying \$20,000 to the USDVA.²⁶ The Pre-Trial Diversion Agreement states that if Respondent violates any condition of the agreement, the United States Attorney may revoke or modify the conditions of pre-trial diversion, change the period of supervision (not to exceed 18 months), or "initiate prosecution for this offense [theft of government property]."²⁷

During his investigation, Mr. Washington retrieved a copy of Respondent's 1992 initial application for licensure. He said he did not know the source or current location of the original documents; he obtained the file from the Board's laser film records. Included among the items Mr. Washington retrieved were copies of the 1983 DWI Order²⁸ and the 1985 Probation Release Order.²⁹

Also included in the file was a copy of a Deferred Adjudication and Order of Probation dated November 13, 1981, from the County Court of Tom Green County, Texas.³⁰ According to that order, Respondent pled no contest in Cause No. 59,174 to the Class A misdemeanor charge of Fraudulent Removal of a Writing.³¹ The order required Respondent to pay a fine of \$25.00, attend "Theft Prevention School," and complete a one-year term of probation.³² Included in the file was another order from the same court in Tom Green County, discharging Respondent and other persons from deferred adjudication and probation on August 24, 1982. The discharge order

²⁶ Staff Ex. 7 at 6.

²⁷ Staff Ex. 7 at 6.

²⁸ Staff Ex. 4 at 1.

²⁹ Staff Ex. 5 at 1.

³⁰ Staff Ex. 6 at 1. The ALJ notes that Staff did not base either of its charges on the matters underlying this order. However, as explained in the Analysis section below, this order was relevant to Mr. Meyer's argument on Defendant's behalf and thus is included in this discussion.

³¹ Staff Ex. 6 at 1.

³² Staff Ex. 5 at 2.

lists the same cause number (59,174) and Respondent's name, but states that she is being released from a DWI offense rather than the offense of fraudulent removal of a writing.³³

3. Respondent's Failure to Appear

Mr. Washington said he issued a subpoena on behalf of the Board on May 25, 2012, requiring Respondent's presence at the hearing.³⁴ He testified that an officer from the Sheriff's Office in Tom Green County provided proof to the Board that the subpoena was served on Respondent on June 2, 2012.³⁵

In argument, Staff requested an adverse inference be drawn from Respondent's failure to appear despite a valid subpoena. Staff indicated that it had planned to question Respondent concerning her 1992 application to the Board, and concerning the circumstances of the Pre-Trial Diversion Agreement, in order to establish whether Respondent has the character and fitness to be a practicing nurse. Given Respondent's failure to appear, Staff argued that an inference should be made that Respondent could not prove her character and fitness.

4. Administrative Costs

The Board is entitled to recover, from a person who is found to have violated the Act, the administrative costs of conducting a hearing to determine the violation.³⁶ Mr. Washington testified about costs including copying, certified mail, and service of the subpoena. Staff submitted an affidavit of costs, which was entered into evidence without objection. The administrative costs established by Staff total \$130.80.³⁷

³³ Staff Ex. 6 at 3.

³⁴ Staff Ex. 8.

³⁵ Staff Ex. 8 at 1.

³⁶ Act § 301.461.

³⁷ Staff Ex. 9.

D. Analysis**1. Charge 1: Provision of False or Misleading Information to the Board**

The law in effect in 1992, when Respondent submitted her initial application for registration to the Board, defined unprofessional or dishonorable conduct to include the provision of "any information that is false, deceptive, or misleading in connection with one's own application for employment or work assignment as a health care provider or failing to disclose any information that could affect the decision to employ or assign any task as a health care provider."³⁸ Staff argued that a nursing license is required for employment as a nurse. Thus, Staff extrapolates that the provision of false information on a licensure application to the Board is equivalent to the falsification of an employment or work assignment application, which presumably would be submitted to an employer. The ALJ finds this reading to be strained; Staff did not establish unprofessional or dishonorable conduct under this rule.

However, the governing statute separately authorized disciplinary action against any licensee or prospective licensee who was "guilty of fraud or deceit in procuring or attempting to procure a license to practice professional nursing."³⁹ Thus, if the evidence establishes fraud or deceit on Respondent's part in her license application, it is possible she is subject to discipline for such conduct. The evidence does establish that Respondent answered "no" to the question on her application that asked, "Have you ever been convicted of a crime other than minor traffic violations?" However, by the time she applied for her nursing license in 1992, Respondent had completed and been released from probation for her 1983 DWI offense.

Copies of the 1983 DWI Order and 1985 Probation Release Order were both in the historical file retrieved by Mr. Washington during his investigation, and he did not know the origin of those documents (*i.e.*, whether Respondent had filed those with the Board, or whether a Board investigator had independently obtained them). Mr. Meyer argued that the documents could have been submitted by Respondent, indicating that she felt her answer of "no" was correct

³⁸ 22 Tex. Admin. Code § 217.13(15) (eff. 9/1/1991).

³⁹ Tex. Rev. Civ. Stat. Art. 4525(a)(2) (eff. 9/1/1991).

as to whether she had been convicted of a crime, given that she could show her successful completion of probation. Mr. Meyer said that the presence of the orders from Tom Green County (the 1981 deferred adjudication order for "fraudulent removal of a writing" and the 1982 release from deferred adjudication for a DWI offense) could indicate that Respondent also provided evidence of similar past conduct that was discharged after probation was completed.⁴⁰

Without knowing the source of the documents in the Board's historical file for Respondent, the ALJ cannot discount Mr. Meyer's arguments. Moreover, it appears Staff has repeatedly renewed Respondent's license since 1992 without comment, which supports Mr. Meyer's argument that any misconduct by Respondent in the 1980s was viewed as discharged through probation and was not deemed an impediment to her licensure. Accordingly, the ALJ finds Staff failed to establish that Respondent provided false or deceptive information to the Board in applying for her nursing license in 1992.

2. Charge 2: Criminal Conduct Involving Fraud or Theft

Staff established that Respondent agreed under the Pre-Trial Diversion Agreement to meet certain conditions and to repay \$20,000 to the USDVA. The Pre-Trial Diversion Agreement states that after Respondent "successfully [completes her] diversion program and [fulfills] all the terms and conditions of the Agreement, no prosecution for the offense set out on page 1 of this Agreement [Theft of Government Property] will be instituted in this District, and the charges against you, if any, will be dismissed."⁴¹ Respondent submitted with her application a document indicating that as of the date of the application, she had made \$650 in payments towards the \$20,000 she owed to the USDVA.

The Board has established that theft is a crime directly related to the practice of nursing. Mr. Meyer conceded this point, but argued that pre-trial diversion differs in material respects from deferred adjudication and is a circumstance not contemplated by the Board's disciplinary

⁴⁰ Mr. Meyer could not explain why the 1982 release referenced a DWI offense, while the 1981 offense references fraudulent removal of a writing.

⁴¹ Staff ex. 7 at 6.

matrix or rules. The ALJ disagrees. The Board's rules do not refer solely to deferred adjudication; the Board will consider placement on "deferred adjudication, community supervision, or deferred disposition" for crimes involving moral turpitude.⁴² Pre-trial diversion may be encompassed by those categories. Also, the Board makes clear in its Fraud & Theft Policy that it may "rely solely on...*probation* for a crime, *with or without an adjudication of guilt*, to deny, suspend, limit, or revoke a license."⁴³ The wording of the Pre-Trial Diversion Agreement indicates that it contemplates a form of probation; if Respondent failed to meet the terms of that agreement, she could be prosecuted for the underlying crime, namely theft of government property.

Further, Act § 301.452(b)(10) authorizes discipline for unprofessional *conduct* (no conviction required) that the Board determines is likely to deceive, defraud, or injure a patient or the public. The disciplinary matrix classifies a violation of Act § 301.452(b)(10) as a third tier offense if it involves "[f]inancial exploitation or unethical conduct resulting in a material or financial loss to a patient [or the] public in excess of \$4,999.99."⁴⁴ The only sanction listed for a third tier offense, sanction level I is "[d]enial of licensure or revocation of nursing license."

For criminal conduct that involves deferred adjudication, the Board is to consider the nurse's present fitness for licensure in spite of the criminal conduct, based on the criteria set forth in Texas Occupations Code § 53.023, and in Board Rule 213.28(e) and (f).⁴⁵ These factors include the extent and nature of the licensee's past criminal activity; the amount of time that has elapsed since the licensee's last criminal activity; the conduct and work activity of the licensee before and after the criminal activity; evidence of the licensee's rehabilitation or rehabilitative effort; letters of recommendation; and whether the licensee maintained a record of good

⁴² Act § 301.452(b)(3). Staff cited case law for the proposition that theft is a crime of moral turpitude. However, the ALJ does not need to make a determination on that point, as Staff's argument under Act § 301.452(b)(10) reaches the same result.

⁴³ Fraud & Theft Policy at 2 (emphasis added).

⁴⁴ 22 Tex. Admin. Code § 213.33(b).

⁴⁵ 22 Tex. Admin. Code § 213.28(e) and (f).

employment, supported his/her dependents, maintained a record of good conduct, and paid court costs, fines, fees, and restitution.

Respondent provided no evidence of her conduct or work activity since she entered into the Pre-Trial Diversion Agreement, whether she has made further restitution payments, met the other terms of her probation, or rehabilitated herself in other ways. Respondent wrote on her renewal application that the underlying misconduct was her husband's, and she was unaware that he had lied to obtain benefits from the USDVA. By appearing and testifying, she could have provided evidence that she lacked knowledge of the crime and thus her participation was inadvertent and not premeditated. Notably, the Board's Fraud & Theft Policy states that the Board will consider factors such as "insight, remorse and premeditation" in determining "whether a disciplinary sanction is imposed." However, Respondent provided no evidence of these factors.

Respondent was placed on pre-trial diversion for theft of government property, a crime the Board has deemed directly related to the practice of nursing. Staff established unprofessional conduct on Respondent's part (a financial loss to the public in excess of \$4,999.99), which is classified as a third tier, sanction level I violation under the Board's disciplinary matrix. The appropriate penalty, given the absence of evidence of mitigation or rehabilitation, is revocation of Respondent's nursing license. The disciplinary matrix states that a "[n]urse or individual is not subject to licensure or reinstatement until restitution is paid." Accordingly, the ALJ recommends that Respondent's license be revoked and that she be barred from applying for reinstatement until she provides evidence of restitution. In addition, since Staff proved a violation of the Act, the ALJ recommends that Respondent be assessed \$130.80 in administrative costs established by Staff.

III. FINDINGS OF FACT

1. Judith Griffin Coleman (Respondent) is licensed as a registered nurse in the State of Texas and holds permanent certificate number 581914, issued by the Texas Board of Nursing (Board) on August 31, 1992.

2. Staff of the Board sent formal charges to Respondent's address of record by certified mail on July 7, 2011. The formal charges were returned as undelivered because Respondent had moved.
3. Staff delivered a notice of hearing together with a copy of the formal charges via certified mail on March 15, 2012, to attorney Mark M. Meyer, who is Respondent's attorney of record.
4. Staff delivered an amended notice of hearing together with a copy of the formal charges via certified mail on May 8, 2012, to Mr. Meyer.
5. The notice of hearing and amended 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.
6. The hearing convened June 7, 2012, in the William P. Clements Building, 300 West 15th Street, Austin, Texas. Assistant General Counsel Nikki R. Hopkins represented Staff. Mr. Meyer appeared on behalf of Respondent. The record closed at the conclusion of the hearing on the same day.
7. Staff issued a subpoena on May 25, 2012, requiring Respondent's presence at the hearing. The Sheriff's Office of Tom Green County, Texas, served the subpoena on June 2, 2012. Respondent did not appear at the hearing.
8. On July 25, 1983, Respondent pled guilty/nolo contendere to the misdemeanor charge of Driving While Intoxicated (DWI) in Cause No. 220,153 in the County Court at Law No. 2, Travis County, Texas. Respondent was sentenced to 30 days confinement in the Travis County Jail and ordered to pay a \$500 fine. The sentence was suspended and Respondent was placed on probation for a period of 24 months.
9. Respondent successfully completed probation and was released from probation in Cause No. 220,153 on July 25, 1985.
10. On May 14, 1992, Respondent submitted a Registration by Examination to the Board, on which Question No. 10 asked, "Have you ever been convicted of a crime other than minor traffic violations?" Respondent answered, "No" to Question No. 10.
11. Staff did not establish that Respondent provided false or deceitful information to the Board in her answer to Question No. 10 on her 1992 registration application.
12. On March 4, 2009, Respondent entered into an agreement (Pre-Trial Diversion Agreement) with the United States Attorney's Office, Northern District of Texas, Lubbock Division, under Cause No. DTXN608PT000019, to participate in the Northern District's Pre-Trial Diversion Program for a period of 18 months for Theft of Government Property.

13. Respondent is currently paying \$20,000 in restitution to the United States Department of Veterans Affairs in connection with Cause No. DTXN608PT000019.
14. Respondent did not provide any evidence of: insight or remorse; work status before or after she entered into the Pre-Trial Diversion Agreement; the amount of restitution payments made; whether she is in compliance with other terms of the Pre-Trial Diversion Agreement; or other evidence of mitigation or rehabilitation.
15. Staff established \$130.80 in administrative costs incurred to conduct the hearing in this matter.

IV. CONCLUSIONS OF LAW

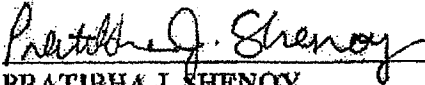
1. The Board has jurisdiction over this matter pursuant to Tex. Occ. Code ch. 301.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Tex. Gov't Code ch. 2003.
3. Notice of the hearing on the merits was provided as required by Tex. Occ. Code § 301.454 and by the Administrative Procedure Act, Tex. Gov't Code §§ 2001.051 and 2001.052.
4. Staff had the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
5. Based on the Findings of Fact and Conclusions of Law, Staff established by a preponderance of the evidence that Respondent engaged in unprofessional or dishonorable conduct subject to disciplinary action by engaging in conduct that resulted in a loss to the public in excess of \$4,999.99. This conduct is subject to discipline under Tex. Occ. Code § 301.452(b)(10).
6. The Board has adopted a disciplinary matrix that must be utilized by the Board and SOAH in all disciplinary and eligibility matter. 22 Tex. Admin. Code § 213.33.
7. Under the Board's disciplinary matrix, Respondent's conduct, as established by the Findings of Fact and Conclusions of Law above, is a third tier offense, sanction level I.

V. RECOMMENDATION

Based on the above Findings of Fact and Conclusions of Law, and applying the Board's disciplinary matrix, the ALJ recommends that Respondent's license be revoked and that she be

barred from applying for reinstatement until she provides evidence of restitution. In addition, the ALJ recommends that Respondent be assessed \$130.80 in administrative costs.

SIGNED August 3, 2012.



PRATIBHA J. SHENOY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NUMBER 507-12-5105

TEXAS BOARD OF NURSING,
Petitioner

v.

JUDITH GRIFFIN COLEMAN,
Respondent

§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

STAFF'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

COMES NOW, Staff of the Texas Board of Nursing, and files exceptions to the Proposal for Decision issued in this matter on August 3, 2012, and would state as follows:

I. Staff excepts to the ALJ's recitation of evidence regarding Staff's Formal Charge One.

A party may argue that the ALJ's findings do not have reasonable support in the evidence adduced at the evidentiary contested hearing at SOAH.¹ Staff excepts to the ALJ's recitation of the evidence on page eight (8) of the Proposal For Decision (PFD), which reads:

During his investigation, Mr. Washington retrieved a copy of Respondent's 1992 initial application for licensure. He said he did not know the source or current location of the original documents; he obtained the file from the Board's laser film records. Included among the items Mr. Washington retrieved were copies of the 1983 DWI Order and the 1985 Probation Release Order.

Also included in the file was a copy of a Deferred Adjudication and Order of Probation dated November 13, 1981, from the County Court of Tom Green County, Texas.

It is true that the Board's investigator, Mr. Washington, retrieved the 1992 application from the Board's laser film; however, the ALJ is mistaken that the 1983 DWI Order, 1985 Probation Release Order, and 1981 Deferred Adjudication and Order of Probation were included

¹ *Southwestern Pub. Serv. Co. v. Public Util. Comm'n*, 962 S.W.2d 207, 215 (Tex. App.—Austin 1998, pet. denied).

in the documents he obtained in the Board's laser film records. Mr. Washington never testified that these documents were included in his laser film retrieval. Staff reviewed the entire record for any statement that would support the ALJ's finding, and found no such statement. In fact, he testified that the Respondent's 1992 application consisted of exactly three pages. Staff transcribed Mr. Washington's testimony from the hearing,² which shows:

Mr. Meyer: Staff's Exhibit number Three um that's the 1992 application that Ms. Coleman filed for registration by examination, correct? Is that correct?

Witness: It appears to be, correct.

Mr. Meyer: It appears to be... um these are... This is a total of three pages of documents. uh are those the only documents that you've ever had at the time I mean have that are related to her original application by for registration by examination?

Witness: For Judith Coleman? To my knowledge, that is correct.³

...

Mr. Meyer: If any other documents were provided by Ms. Coleman at any time, would they have been included with these documents on this uh laserfilm?

Witness: For the 1992?

Mr. Meyer: For 1992.

Witness: They would have been um I would guess they would have been included with the '92 application.⁴

Furthermore, the ALJ states that "without knowing the source of the documents in the Board's historical file for Respondent, the ALJ cannot discount Mr. Meyer's arguments."⁵ However, the records themselves clearly show their origin and the time they were retrieved by Board Staff. Staff's Exhibit Four is stamped in the lower left corner by deputy Tina McKinney

² A complete transcript of Mr. Washington's testimony is attached and incorporated by reference herein as Attachment A.

³ Record, 12-5105_HOM_2.wma at 35:20 (35 minutes and 20 seconds) through 35:55.

⁴ Record, 12-5105_HOM_2.wma at 36:31 through 36:41.

⁵ PFD, p. 11.

for Dana DeBeauvoir, County Clerk for Travis County, Texas. Ms. McKenny clearly wrote "12/7/10" indicating that these records were certified for the Board's records in 2010, not in 1992. A similar stamp appears at the bottom of Staff's Exhibit Five. Staff's Exhibit Six was admitted under an affidavit (page four) that was executed on December 3, 2010, by deputy Jennifer Brumfield for Elizabeth McGill, County Clerk for Tom Green County. Mr. Washington testified to, and the written evidence shows that the Board did not receive notice of Ms. Coleman's crime(s) until well after she submitted her application in 1992. Any subsequent renewals of Respondent's license after 1992 were also made without knowledge of Respondent's crimes. Until the Board conducted a criminal background check⁶ after Respondent disclosed her pretrial diversion agreement in 2009, the Board was not aware of Respondent's previous criminal history. Indeed, Staff can provide the original letters wherein Mr. Washington requested the certified criminal documents from the 1980s, which are dated June 14, 2010.⁷ Staff reiterated that the Board had no knowledge of Ms. Coleman's crimes in 1981 and 1983 at the time she filed her 1992 application in its Motion for Summary Disposition. Had Staff been aware of the ALJ's misunderstanding, those documents would have been presented on rebuttal and nonetheless are a matter of public record.

II. Staff excepts to the ALJ's analysis regarding Staff's Formal Charge One.

The ALJ's mistaken assumption in her recitation of evidence contributed to a mistaken legal analysis, and, Staff believes, an erroneous conclusion regarding Formal Charge One. The PFD states, "Copies of the 1983 DWI Order and 1985 Probation Release Order were both in the historical file retrieved by Mr. Washington during his investigation, and he did not know the origin of those documents (i.e., whether Respondent had filed those with the Board, or whether a Board investigator had independently obtained them.)". There is no evidence in the Board's files or presented at hearing that Ms. Coleman disclosed or that the Board had independent knowledge of her criminal history. As the ALJ states, the evidence does establish that Respondent answered "no" to the question on her application that asked, "Have you ever been convicted of a crime other than minor traffic violations?" Staff's witness testified that the 1992 application file

⁶ The Board of Nursing did not receive legislative approval or funding for Criminal Background Checks (CBC) associated with renewals and until 2005.

⁷ See Attachment B, Board's letters requesting certified criminal documents.

consisted of only three pages – the three pages of the application itself.⁸ Respondent put on no evidence to contradict this evidence in her defense. She did not even make an appearance, so there is no “he-said-she-said” evidence to contradict the Board’s evidence. Respondent’s counsel resorted to rank speculation that Respondent *could have* provided information on her criminal history, but he had no facts—and no client—to support this. Staff has proven by a preponderance of evidence that Respondent lied on her 1992 application. That is a violation of TEX. REV. CIV. STAT., ART. 4525(a)(2) (eff. 9/1/1991).

Respondent’s lie is also a violation of TEX. REV. CIV. STAT., ART. 4525(a)(9)(unprofessional or dishonorable conduct). The ALJ concludes that Staff did not establish that Respondent engaged in unprofessional or dishonorable conduct, reasoning that there is a legal gulf between falsification of an employment or work application and dishonesty on a licensure application. This is not supported by the Board’s policies. In 2002, the Board issued a policy titled Disciplinary Sanctions for Lying and Falsification wherein the Board states that, “The Texas Board of Nursing (Board), in keeping with its mission to protect the public health, safety, and welfare, believes it is important to take a strong position regarding the licensure of individuals who have engaged in deception in the provision of health care. This deception includes falsifying documents related to patient care, falsifying documents related to employment, and falsifying documents related to licensure.”⁹ The Board goes into great detail describing how dishonesty affects the practice of nursing and the Board’s decision to license an applicant. Although this policy was not written in 1992, the Board’s policy was based on its entire history of disciplinary cases and experience. Although the ALJ found Staff’s reading of this statute strained, Staff would argue that it is unreasonable to call a lie to a nursing employer unprofessional and a lie to the Nursing Board acceptable.

III. Staff Excepts to the ALJ’s finding of fact regarding Staff’s Formal Charge One.

Staff excepts to finding of fact number 11, which states: “Staff did not establish that Respondent provided false or deceitful information to the Board in her answer to Question No. 10 on her 1992 registration application.” Staff respectfully requests that the finding of fact

⁸ See Staff’s Exhibit 3.

⁹ See Attachment C, Texas Board of Nursing *Disciplinary Sanctions for Lying and Falsification*.

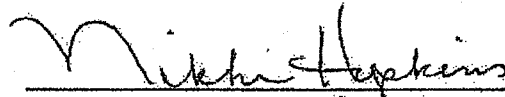
number 11 be amended to state "Staff established that Respondent provided false or deceitful information to the Board in her answer to Question No. 10 on her 1992 registration application."

IV. Staff Excepts to the ALJ's conclusion of law regarding Staff's Formal Charge One.

Staff excepts to conclusion of law number five (5), which states: "Based on the Findings of Fact and Conclusions of Law, Staff established by a preponderance of the evidence that Respondent engaged in unprofessional or dishonorable conduct subject to disciplinary action by engaging in conduct that resulted in a loss to the public in excess of \$4,999.99. This conduct is subject to discipline under Tex. Occ. Code § 301.452(b)(10)." Staff requests that conclusion of law number five (5) be amended to state "Based on the Findings of Fact and Conclusions of Law, Staff established by a preponderance of the evidence that Respondent provided false or deceitful information to the Board and engaged in unprofessional or dishonorable conduct subject to disciplinary action by engaging in conduct that resulted in a loss to the public in excess of \$4,999.99. This conduct is subject to discipline under TEX. REV. CIV. STAT., ART. 4525(a)(2)&(10) (eff. 9/1/1991) and TEX. OCC. CODE § 301.452(b)(10)(eff. 9/1/2009)."

Respectfully submitted,

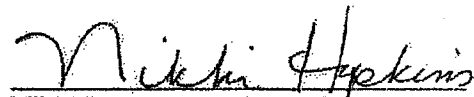
TEXAS BOARD OF NURSING



Nikki Hopkins, Assistant General Counsel
State Bar No. 24052269
333 Guadalupe, Tower III, Suite 460
Austin, Texas 78701
P: (512) 305-6879 F: (512) 305-8101

CERTIFICATE OF SERVICE

I hereby certify that a true copy of *Staff's Exceptions* was sent on this, the 13th day of August, 2012, to Respondent, Judith Griffin Coleman, via Facsimile (866) 839-6920 and mail c/o attorney Marc Meyer, 33300 Egypt Ln., Suite B200, Magnolia, TX 77354-2739.



Nikki Hopkins, Assistant General Counsel

Line	Time	Speaker	Testimony
1	20:41	Staff	The next witness that the Board would call is Terry Washington.
2	20:45	ALJ	Okay, Mr. Washington, I'm going to have you sit up there so you
3			can bring any materials that you need for your reference. And, if
4			you could, raise your right hand. Do you swear or affirm that the
5			testimony you are about to give in this proceeding is the truth, the
6			whole truth and nothing but the truth?
7	20:58	Witness	I do
8	21:00	ALJ	Okay, please be seated. Go ahead Ms. Hopkins.
9	21:05	Staff	Mr. Washington, what do you do for a living?
10	21:07	Witness	I am an investigator with the Board of Nursing
11	21:10	Staff	And, can you describe your duties & responsibilities in that position?
12	21:12	Witness	I work in the eligibility division. I do investigations in regards to
13			renewal questions and applications of Respondents.
14	21:21	Staff	Okay, and how long have you been an investigator?
15	21:23	Witness	Six years
16	21:24	Staff	Okay. Approximately how many investigations have you performed?
17			Give us a ballpark.
18	21:28	Witness	Um, hundreds plus.
19	21:32	Staff	Okay. Possibly thousands?
20	21:34	Witness	Even thousands.
21	21:35	Staff	Okay. And how did you first hear about the Respondent and the
22			allegations underlying this matter?
23	21:39	Witness	The Respondent submitted a renewal application to the Board and
24			with the renewal application, she provided the documents.
25	21:48	Staff	Okay. And which...ah... renewal application are you referring to
26			specifically, because I think with these pages I think you're referring
27			to the Staff's Exhibit 7, correct?
28	21:55	Witness	That is correct.
29	21:57	Staff	Okay. So um as an employee and investigator for the Board, are you
30			authorized to testify regarding the investigatory file created as a
31			result of this investigation?
32	22:06	Witness	That is correct.
33	22:07	Staff	And, ah, I'm going to ask you briefly to describe the investigation you
34			performed. You said that um you got, you became aware of this case
35			through her renewal. So let's talk about that. We're on Staff's
36			Exhibit Seven. I'm on page one. Um can you identify this document:
37			page one of Staff's Exhibit Seven?
38	22:27	Witness	Page one is an affidavit um which ah shows that the current licensure
39			and I'm trying...of the Respondent...

Testimony of Terry Washington

1	22:38	Staff	Staff's Exhibit Seven
2	22:39	Witness	Oh sorry
3	22:40	Staff	That's okay, you're on Staff's Exhibit One
4	22:41	Witness	Ah, Exhibit Seven is the renewal application provided to the Board by
5			the um by Judith Coleman.
6	22:47	Staff	Okay. It's a little bit obscured by our Staff's Exhibit Seven sticker, but
7			can you tell approximately when this was received by the Board?
8	22:55	Witness	This was received on December 29 th of 2009.
9	23:00	Staff	Okay. Um, And let's go ahead and turn to page two of the same
10			document. Do you see the signature at the bottom of the page?
11	23:07	Witness	I do
12	23:08	Staff	And what does that signature read?
13	23:11	Witness	Judith, Judith G. Coleman
14	23:12	Staff	All right thank you. Um, let's go ahead and turn to page three of the
15			same exhibit, Staff's Exhibit Seven. Can you explain ah what this
16			document is and your understanding when you [obscured] with the
17			original packet?
18	23:28	Witness	At the time of her renewal, when the Respondent was giving a
19			response.
20	23:31	Mr. Meyer	Objection. Hearsay. He is testifying to this document. This
21			document's already in has already been admitted. It's part of the
22			stipulations.
23	23:41	ALJ	Okay that's that's overruled. I'll allow him to testify um as to what
24			his understanding of the document.
25	23:46	Staff	Okay
26	23:47	Witness	At the time of the renewal, the Respondent provided um a written
27			response of the allegations that she disclosed on her renewal.
28	23:56	Staff	Okay. And let's turn to page four. in the middle of the page on page
29			four, do you see a signature?
30	24:03	Witness	I do.
31	24:04	Staff	And can you read what that signature is on page four?
32	24:06	Witness	Judith Coleman
33	24:07	Staff	All right. Now let's go ahead and turn the page to page five. And,
34			what is your understanding of what this document purports to be?
35	24:14	Witness	It is uh a description of the offense that the Respondent was
36			disclosing to the Board that was provided by the United States
37			Department of Justice.
38	24:27	Staff	All right. And at the top of the page, that's where you're getting the
39			United States Department of Justice; it appears to be some kind of
40			letterhead right?
41	24:33	Witness	That's correct.

Testimony of Terry Washington

1	24:34	Staff	All right. And, what is the address that this letter was purportedly
2			sent to?
3	24:40	Witness	It was sent to 215 Loch Ness Road in San Angelo, Texas.
4	24:44	Staff	All right. Now I would like you to go to Staff's Exhibit One now um
5			and go ahead and identify this document if you can starting at page
6			two.
7	24:55	Witness	Page two is the the licensure um licensure page of the Respondent
8			that shows the current status of the the personal info.
9	25:09	Staff	Okay and let's turn to page three, please, and can you explain what
10			these addresses are on page three
11	25:19	Witness	Page three is a list of all the addresses which were provided to the
12			Board and they were updated by the ah, by the Board.
13	25:27	Staff	All right and will you tell us what address Ms. Coleman resided at
14			between 2005 and January fifth of 2010.
15	25:40	Witness	In November of 2005 she was at 301 E. 39 th St. In January fifth of
16			2010, she was at 215 Loch Ness in San Angelo, Texas.
17	25:50	Staff	All right. So it appears that she changed her address on January fifth
18			of 2010?
19	25:55	Witness	That is correct.
20	25:56	Staff	And is that 215 Loch Ness the same address that we saw in Staff's
21			Exhibit Seven on the letter that was sent by the U.S. Department of
22			Justice?
23	26:06	Witness	That's correct.
24	26:07	Staff	All right. And what conclusion as an investigator do you draw from
25			that?
26	26:11	Witness	That it's the same individual.
27	26:14	Staff	Okay. Let's go back to Staff's Exhibit Seven, Mr. Washington, and
28			take a look at page eight. I guess we should start on page six and
29			then we'll look at page eight.
30	26:31	Witness	Page six?
31	26:32	Staff	Yes.
32	26:33	Witness	Okay. Page six is a copy of the agreement for pretrial diversion.
33	26:36	Staff	All right and who was that issued by?
34	26:38	Witness	It was issued by the um the United States of America versus Judy
35			Coleman.
36	26:42	Staff	Okay. And that appears also to be issued by the United States
37			Department of Justice, correct?
38	26:47	Witness	Correct?
39	26:47	Staff	All right. Now let's turn to page eight. Um the first signature on the
40			page can you read for the record what that signature states?
41	26:55	Witness	The first signature is Judy Coleman.

Testimony of Terry Washington

1	26:56	Staff	Okay. And, um as an investigator, was there any question in your
2			mind after getting this document that Ms. Coleman was the same
3			person that executed uh the pretrial diversion ah agreement and the
4			licensee, meaning were they the same person?
5	27:13	Witness	There was no question that it is the same person.
6	27:15	Staff	All right. One more page on Staff's Exhibit Seven. Will you turn to
7			page 10 and, in basically the first line of real text in the far right
8			margin, um can you sort of explain what what this number is and
9			state what that number is for the Board?
10	27:37	Witness	I'm sorry. Can you say that again?
11	27:38	Staff	Yes. On page ten we're basically looking at the "Summary Party
12			Information" and what I'd like you to do is explain um as an
13			investigator what your opinion is uh the meaning of this very first
14			line starting with "Judy Coleman" um "Victim Restitution" um and
15			explain kind of what that means and what those numbers mean on
16			the far right.
17	27:56	Witness	It means that that this person in question was responsible for
18			\$20,000 dollars owed to the state um the United States of America.
19	28:06	Staff	Right. Okay, thank you. And, um let's talk a little bit about uh what
20			you did to ensure the Respondent appeared on at this hearing
21			today. Let's turn to Staff's Exhibit Eight. Did you issue a subpoena for
22			Ms. Coleman's uh presence here today?
23	28:28	Witness	I did.
24	28:29	Staff	And can you tell me kind of how that came about and what this
25			document is?
26	28:32	Witness	Um, I was requested to um...as of... send the subpoena witness to
27			the Respondent, Judy Coleman, um as I and I generated that and
28			mailed it to the Tom Green County Sheriff's Office, who has
29			Mailed to the letter on record and um and um to appear today, June
30			seventh, for hearing.
31	29:01	Staff	And to your knowledge, was that subpoena served successfully?
32	29:03	Witness	Yes, it was.
33	29:04	Staff	And how do you know that?
34	29:05	Witness	I spoke with the clerk at Tom Green County Sheriff's Office and they
35			verified, in addition to faxing over a copy of their receipt.
36	29:14	Staff	Okay, so when you say receipt, I believe you're referring -- and I'm
37			sorry it appears that I forgot to put page numbers, so I apologize for
38			that your honor--um, were if you go to the third page titled
39			"Evidence of Service," is that the receipt you're referring to?
40	29:29	Witness	That is correct.
41	29:30	Staff	And, can you tell me approximately when this uh subpoena was

Testimony of Terry Washington

1			served?
2	29:34	Witness	It was served on May 31 st .
3	29:37	Staff	Okay. Um, and if when you spoke to the clerk, uh, did she submit
4			any information in terms of um the Board's costs in sending in
5			having this subpoena served?
6	29:52	Witness	She did provide a copy of their um, their fees for serving the
7			subpoena.
8	29:57	Staff	Okay. And what was that fee?
9	29:59	Witness	That fee was \$65.00.
10	30:00	Staff	All right. We're on the second to last page of Staff's Exhibit Eight,
11			your honor, um and you can see that it's uh \$65.00. What I'd like to
12			do uh at this point your honor is the Staff has prepared an affidavit of
13			estimated administrative costs um related to uh this proceeding and
14			also our photocopies, our preparation, [obscured]. I'd like to talk to
15			Mr. Washington at little bit about what that entails. I'm going to go
16			ahead and distribute that now.
17	30:29	ALJ	Okay.
18	30:34	Staff	May I approach, your honor?
19	30:35	ALJ	Yes. Thank you. And just so I can clarify for the record, um this is your
20			evidence pursuant to section 301. 461 of the Occupations Code, Ms.
21			Hopkins?
22	30:52	Staff	Yes, it is.
23	30:53	ALJ	That would be to substantiate Staff's costs in bringing an
24			administrative proceeding.
25	30:57	Staff	Yes. Exactly right, and to read that into the record, it says, "The
26			Board may assess a person who is found to have violated this
27			chapter the administrative costs of conducting a hearing to
28			determine the violation."
29			So, Mr. Washington, um, when you send out uh official Board
30			documents, how do you generally send those documents?
31	31:14	Witness	By certified mail.
32	31:15	Staff	Okay. And um when we uh if you if you take a look at your if
33			you can look at your table of exhibits here, so let's talk in general
34			about which documents would have gone out certified mail um...are
35			you familiar with the Board's term "902(10)"?
36	31:33	Witness	Yes, I am.
37	31:34	Staff	What does that mean to you?
38	31:35	Witness	That is a complete ah record of the allegations that we were
39			providing to the um to the State Office of Administrative Hearings.
40	31:44	Staff	And, and what do we do with those exhibits and that complete
41			record?

SOAH Docket No. 507-12-5105

Testimony of Terry Washington

1	31:49	Witness	We use those to um to provi to show proof and [obscured].
2	31:54	Staff	All right. And just for the record, your honor, we have pre-filed our
3			exhibits that we call our "902(10)". And is that "902(10)" sent by
4			certified mail to the Respondent?
5	32:02	Witness	It is.
6	32:03	Staff	And what about the Notice of Hearing and First Amended Notice of
7			Hearing? Is that a document that you would send via certified mail?
8	32:11	Witness	It is.
9	32:12	Staff	And the Formal Charges? Is that a document you would send via
10			certified mail?
10	32:16	Witness	Yes, that is so.
11	32:17	Staff	All right. So, I think that pretty much covers our affidavit of costs,
12			your honor, um, I have attested to the other costs in terms of our
13			copy fees which my assistant put together ah for the litigation packet
14			and my signature appears there at the end. Um one more thing, um
15			Mr. Washington about Staff's Exhibit Seven. Um you said that you
16			believe that it was the same person that that executed the pretrial
17			diversion agreement um and the person that was also licensed with
18			the Board of Nursing. Is there any other evidence that it was Ms.
19			Coleman that executed the pretrial diversion agreement? How did
20			this agreement even come into the Board's possession?
21	33:02	Witness	Because at the time that the that Mrs. Coleman was due to renew
22			her license, she provided the application and the statement and the
23			printouts.
24	33:11	Staff	All right, so she provided that document to the Board?
25	33:13	Witness	That's correct.
26	33:14	Staff	All right. Thank you, Pass the witness.
27	33:15	ALJ	Before...before we do that, how do you spell your first name, Mr.
28			Washington?
29	33:19	Witness	T-E-R-R-Y
30	33:20	ALJ	Okay, thank you. Mr. Meyer, do you have any questions?
31	33:24	Mr. Meyer	[obscured] just a few questions
32		ALJ	Okay.
33	33:28	Mr. Meyer	Mr. Washington, um, you may have just answered my first question
34			actually. I was going to ask who provided these documents uh
35			[obscured] I think you just answered that - that Ms. Coleman did. Is
36			that correct?
37		Witness	That's correct.
38	33:41	Mr. Meyer	Okay. Um, based on these documents, did Ms. Coleman properly
39			disclose the pretrial diversion?
40	33:50	Witness	That's correct.

1	33:51	Mr. Meyer	Uh, and you contacted the officer that she listed uh I think it was on
2			page four of this exhibit, um, Javier Sanchez? He is the pretrial
3			diversion officer that the uh is the uh pretrial services department
4			with the uh United States Attorney's office?
5	34:17	Witness	I did.
6	34:18	Mr. Meyer	When was the last time you contacted him?
7	34:20	Witness	Um, I don't remember the specific date.
8	34:21	Mr. Meyer	Uh, to your knowledge, has Ms. Coleman been prosecuted by the
9			United States Attorney for theft of government property in relation
10			to this matter?
11	34:37	Witness	To my knowledge, Mrs. Colman received pretrial diversion.
12	34:40	Mr. Meyer	But you don't know if she's been prosecuted since that a long time
13			ago.
14	34:44	Staff	Objection. Asked and answered.
15		ALJ	I'll allow it.
16	34:49	Witness	To my knowledge, she has received pretrial diversion.
17	34:53	Mr. Meyer	Objection. Non-responsive. Ah, the question I asked...
18	34:55	Witness	That's the best answer I can give
19	34:58	Staff	I mean he doesn't know, so he's saying what his knowledge is and
20			that is the best that he can do.
21	35:01	ALJ	Okay, if that's as much as you know
22		Mr. Meyer	He hasn't said that he doesn't know
23		ALJ	And so you're not aware of any further prosecution?
24	35:09	Witness	No.
25	35:10	ALJ	Okay
26	35:20	Mr. Meyer	Staff's Exhibit number Three um that's the 1992 application that Ms.
27			Coleman filed for registration by examination, correct? Is that
28			correct?
29	35:32	Witness	It appears to be, correct.
30	35:34	Mr. Meyer	It appears to be... um these are... This is a total of three pages of
31			documents. uh are those the only documents that you've ever had
32			at the time I mean have that are related to her original application
33			by for registration by examination?
34	35:55	Witness	For Judith Coleman? To my knowledge, that is correct.
35	35:58	Mr. Meyer	Uh, where are these documents kept?
36	36:01	Witness	These documents are kept on laserfilm.
37	36:05	Mr. Meyer	What's. Okay. You'd have to. It's not someplace in the office that
38			that you keep these documents?
39	36:13	Witness	They're kept on laserfilm in a filing cabinet.
40	36:14	Mr. Meyer	Oh they're kept in the Board of Nursing office?
41	36:16	Witness	That's correct.

Testimony of Terry Washington

1	36:21	Mr. Meyer	Uh, if there were any other documents that were provided by Ms.
2			uh Coleman, would they be included also with that in with this
3			letter?
4	36:29	Witness	I'm sorry. Can you repeat that please?
5	36:31	Mr. Meyer	If any other documents were provided by Ms. Coleman at any time,
6			would they have been included with these documents on this uh
7			laserfilm?
8	36:39	Witness	For the 1992?
9	36:40	Mr. Meyer	For 1992.
10	36:41	Witness	They would have been um I would guess they would have been
11			included with the '92 application.
12	36:48	Mr. Meyer	Are all files from 1992 complete to your knowledge?
13	36:52	Staff	Objection. How can he possibly comment on whether all files in 1992
14			are complete? That's not a specific question about a specific uh
15			licensee specific to the Respondent.
16	37:03	ALJ	Okay. Would you like to rephrase the question, Mr. Meyer?
17	37:12	Mr. Meyer	How do you know that these three documents are the only
18			documents that are contained in the file for Ms. Coleman for 1992?
19	37:22	Witness	Because at the time I was the person that actually pulled and
20			retrieved these documents and I retrieved all documents
21			associated with um Judith Coleman.
22	37:29	Mr. Meyer	Are the original documents kept uh in that location or are they
23			discarded after a certain period of time?
24	37:37	Witness	I do I am not aware of that policy on document retention
25	37:53	Mr. Meyer	Staff's Exhibit Five, Staff's Exhibit Six, I'm sorry. Um, Staff's Exhibit
26			Six uh [obscured] is a deferred adjudication order of probation from
27			Tom Green County. Did you obtain these documents?
28	38:25	Witness	Staff's? I'm sorry say that again please?
29	38:26	Mr. Meyer	Staff's Exhibit Six, I'm sorry page we're on one and two. The
30			documents labeled deferred adjudication and order of probation.
31			Okay. Did you uh obtain this document?
32	38:43	Witness	I don't remember.
33	38:46	Mr. Meyer	But this was part of the investigative file?
34	38:47	Witness	Yes, sir.
35	38:52	Mr. Meyer	Uh page three of that is also part of the investigative file?
36	39:03	Witness	That is correct.
37	39:04	Mr. Meyer	Um. So, I want you to read part of this for the record if you don't
38			mind, starting with the capitalized portion of that paragraph that
39			starts with "IT IS THEREFORE."
40	39:17	Witness	It is therefore considered, ordered and adjudicated? Adjudged? Is that
			the paragraph you want me to read?

Testimony of Terry Washington

1	39:24	Mr. Meyer	Yes. Yes, sir.
2	39:25	Witness	It is therefore considered, ordered and adjudged that the plea of
3			guilty heretofore here in each of the following causes, be and the
4			same is hereby set aside, and charged is changed to not guilty, that
5			the complainant and information in each of said cause be, and the
6			same is hereby dismissed, and that each Defendant there therein be,
7			and is hereby and is hereby discharged as of the day and year set
8			after his his name.
9	39:59	Mr. Meyer	And that document has Ms. Coleman's name on it?
10	40:02	Witness	Yes, it does
11	40:04	Mr. Meyer	Um and it's your understanding that that document relates back to
12			the uh deferred adjudication or probation that are contained in
13			pages one and two? To that specific case?
14	40:13	Witness	I'm sorry I
15	40:13	Staff	Objection. Assumes facts not in evidence.
16	40:19	ALJ	I'll allow the question.
17	40:22	Witness	Ah, can you repeat the question?
18	40:23	Mr. Meyer	Uh is it your understanding that this document - Staff's Exhibit Six,
19			page Three - relates to uh the deferred adjudication order of
20			probation uh Staff's Exhibit Six, pages one and two?
21	40:37	Witness	Ah, yes.
22	40:40	Mr. Meyer	Okay. Let's move back to Staff's Exhibit ah Four um this is a uh
23			charge of driving while intoxicated in Travis County in 1983, I believe.
24			Is that uh does this document relate to that?
25	41:11	Witness	I'm sorry.
26	41:14	Mr. Meyer	Uh Staff's Exhibit. The document that I'm in is Staff's Exhibit Four,
27			page one relate to the driving while intoxicated charge contained in
28			the uh Formal Charges?
29	41:36	Witness	Yes, it does.
30	41:42	Mr. Meyer	Uh the Staff's Exhibit Five uh the order releasing defendant from
31			probation [obscured] that relates to that charge contained in Staff's
32			Exhibit Four?
33	42:20	Witness	No it does not.
34	42:45	Mr. Meyer	It doesn't? This is the order... What does Staff's Exhibit Five relate to
35			then?
36	43:04	Witness	Oh, I'm sorry it it's the order releasing the defendant from probation,
37			so yes.
38	43:09	Mr. Meyer	Okay. Um. I'm gonna I hate for you to read this again but I'd like you
39			to compare uh before I start "It is therefore considered" ah in page
40			uh one of Staff's Exhibit Five with the same sentence starting with "It
41			is therefore considered" that you read a lot earlier in Staff's Exhibit

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Testimony of Terry Washington

1			Six, page three. Do those two uh have the same exact words?
2	43:38	Staff	Your honor, I think we're going to need to pull out those two pages
3			and compare them side-by-side [obscured] Marc, what was the page
4			[obscured]
5	43:58	Mr. Meyer	Page three
6	44:10	ALJ	And Mr. Meyer, your question is whether they are substantially the
7			same?
8	44:12	Mr. Meyer	Yes. I think...Um they're... Yeah. Substantially the same.
9	44:17	Staff	Your honor, I'm gonna... I'm going to object to this question as as
10			being an inappropriate conclusion from the witness. I think this is a
11			legal conclusion. You yourself can certainly read the document and
12			compare the differences between the documents.
13	44:31	ALJ	Well, and Mr. Washington, I understand you're not a lawyer and I'm
14			not going to be taking this as a legal opinion. To the extent that Mr.
15			Meyer is setting this as a foundation for some further question, I'll
16			allow it. So, um, can you answer that question, Mr. Washington? As
17			you read it, are those two substantially the same?
18	45:01	Witness	They...they look similar.
19	45:03	ALJ	Okay.
20	45:50	Mr. Meyer	Um Staff's Exhibit Eight [obscured] pages one, and I think it's four of
21			the document, look like fax cover sheets from the Tom Green County
22			Sheriff's Department. Is that your understanding of of those?
23	46:12	Witness	They are. Correct.
24	46:14	Mr. Meyer	Um. When did those when did those pages say that the subpoena
25			was served?
26	46:20	Witness	Uh, the subpoena was served on June 2nd of 2012.
27	46:27	Mr. Meyer	On page three, um, entitled Evidence of Service, uh, when does this
28			document state that the service was basically, uh, completed?
29	46:41	Staff	Objection, Your Honor. Um, that that mischaracterizes this exhibit.
30			The evidence is going to be when we received the subpoena. The
31			date stamp, which you can't really see that well, um, is at the top
32			left, uh, is when they actually serve it. But we did get confirmation
33			on that fax cover page that it was served on the 2 nd . May 31 st is
34			when they received... "This came to hand on..."
35	47:08	ALJ	Okay, I'm going to allow the question. And the witness can clarify it
36			to the extent that he has knowledge. You might need to ask that
37			again, Mr. Meyer.
38	47:22	Mr. Meyer	I'll ask the question straight up, and Ms. Hopkins objected to it.
39			Where do you see evidence in this uh in this exhibit that the
40			subpoena was served?
41	47:35	Witness	The evidence is the faxed copy from, that was served on June 2 nd of

Testimony of Terry Washington

1			2012, and it was received on May 31 st , 2012, by Tom Green County
2			Sheriff's Office.
3	47:54	Mr. Meyer	Is there a signature from Ms. Coleman evidencing that she received
4			this?
5	48:00	Witness	Yes, there was... I'm sorry, can you repeat that?
6	48:06	Mr. Meyer	Is there a signature from Ms. Coleman on any of these documents
7			evidencing that she received service of the subpoena?
8	48:25	Witness	Yes. [Obscured] Ms. Coleman, uh, signed it.
9	48:57	Mr. Meyer	Your honor, at this time, based on that, I'm going to move to quash
10			the subpoena. There's no evidence that this was served.
11	49:05	ALJ	The the issue with the subpoena, in this administrative form, the
12			subpoena is issued by the Nurse Board. Um, I actually don't have
13			authority to to rule on the execution of that subpoena. That would
14			Be something you could take up in district court.
15	49:25	Staff	Your Honor, may I respond to that?
16	49:26	ALJ	Yes.
17	49:27	Staff	Um, Subpoenas — I don't know if Mr. Meyer has any experience with
18			subpoenas— but subpoenas are served they're not requiring a
19			signature. In fact, I would be amazed if a a witness was willing to
20			stand there and sign their name when they're being served a
21			subpoena that they don't want. Um, it is a completely acceptable
22			practice to throw the paperwork, um, you know, into an open car
23			window and leave it and say, "You have been served." There's no
24			requirement for a signature. And I think that the argument that Mr.
25			Meyer is trying to make as a basis for this quash is that somehow the
26			subpoena requires a signature. It certainly doesn't. Um, I am I am
27			prepared to call Orlando Cortez, who I spoke with last night. And
28			he said he would be willing to testify via telephone. He is the deputy
29			that served this subpoena and we could certainly give him a call by
30			telephone and he can confirm that, this same question about this
31			whole quashing issue.
32	50:19	ALJ	I'm ...I'm not going to tell you how to present your case, Ms. Hopkins.
33			If you choose to call him, you certainly can. Um, however, I'm going
34			to note a couple things. One is that, Mr. Meyer, you already
35			stipulated to this exhibit. You're ...you're now attempting to object
36			to it, purportedly, I suppose, based on what this witness has said,
37			and I don't see any grounds for that.
38	50:40	Mr. Meyer	Okay.
39	50:41	ALJ	Okay. Do you have more questions for Mr. Washington?
40	50:43	Mr. Meyer	None, Your Honor.
41	50:44	ALJ	Okay. Thank you, Mr. Washington. Oh, you have redirect?

SOAH Docket No. 507-12-5105

Testimony of Terry Washington

1	50:47	Staff	I do.
2	50:48	ALJ	You do. Oh, sorry. Trying to cut you off. Go ahead.
3	50:52	Staff	Just a couple things. Um, Mr. Washington, the first thing that I want
4			to talk about is Staff's Exhibit Six. Mr. Meyer has been pointing out
5			issues. Um, let's go to page one of Staff's Exhibit Six. And can you
6			tell from the this document what the crime was for this Deferred
7			Adjudication Order? About midway down the page?
8	51:23	Witness	Uh, yes, I'm just kind of reading it. Yes, I can.
9	51:26	Staff	And what was the crime?
10	51:28	Witness	Fraudulent Removal of Writing.
11	51:30	Staff	And what class of crime was this?
12	51:33	Witness	This is a, it is a misdemeanor.
13	51:37	Staff	Okay. So it's a Class A, correct?
14	51:39	Witness	Correct.
15	51:40	Staff	Alright. And if you turn ah to Staff's Six, page three. And when you
16			look at the place where uh Ms. Coleman's name appears, what does
17			it appear that the crime is?
18	51:58	Witness	Driving While Intoxicated.
19	51:59	Staff	Okay. And is that the subject of your confusion of whether or not
20			this relates to the prior documents?
21	52:04	Witness	That is correct.
22	52:05	Staff	Okay. Thank you. Um, let's go back to, and if you would keep that
23			page flat, I'm going to have you look at Staff's Five, as well as page
24			three of Staff's Six. Um, if you look at Staff's Five, page one, what is
25			the title of this document?
26	52:25	Witness	Can you repeat that?
27	52:26	Staff	Yes. Can you tell me on Staff's Exhibit Five, page one, what the title
28			of the document is?
29	52:31	Witness	It's the Order Releasing Defendant From Probation.
30	52:34	Staff	Yes. Does it mention deferred adjudication?
31	52:36	Witness	No, it does not.
32	52:37	Staff	Alright. Let's look at Staff's Six, page three again. And at the very
33			top of the page, kind of where that decorative border is, can you
34			read at the top of that decorative border what it says?
35	52:54	Witness	Can you say that again?
36	52:56	Staff	Yeah. There's sort of a square, a decorative border around the
37			document. Do ...do you see that?
38	53:00	Witness	Yes.
39	53:01	Staff	And if you go to just above the top horizontal border, can you read
40			that small line there at the top, starting with "End of Term?"
41	53:10	Witness	End of Term Discharging Defendants Under Deferred Adjudication.

SOAH Docket No. 507-12-5105

Testimony of Terry Washington


1	53:13	Staff	Alright. So is it clear to you that Staff's Exhibit Six is referring to a
2			Deferred Adjudication?
3	53:18	Witness	Yes.
4	53:19	Staff	And is it, on Staff's Exhibit Five—I'm sorry to make you back up
5			Again—is there anything on this uh Order Releasing Defendant from
6			Probation that mentions Deferred Adjudication?
7	53:39	Witness	No.
8	53:40	Staff	And let's go into the last paragraph on page one of Staff's Five.
9			This is the language that you said was similar to the language on
10			Staff's Six, page three. But there are some key differences here. Um,
11			can you read the last line starting with, I guess it's, uh "herein be?"
12	54:00	Witness	Um, that's gonna be on Exhibit...?
13	54:03	Staff	Oh, I'm sorry. Staff's Exhibit Five, page one, the very last line starting
14			with "herein be." Just above the signature line.
15	54:15	Witness	"Herein be, and he is hereby discharged from probation."
16	54:20	Staff	So this doesn't say, um, that the crime has been dismissed, this
17			doesn't mean that the complaint or information has been dismissed.
18			Uh, it has not changed the, uh, plea of guilty uh to a 'no contest' or
19			'not guilty'. Ah, isn't that true?
20	54:38	Witness	That's correct.
21	54:38	Staff	And so there would be significant differences between this release
22			from probation and what we've read on Staff's Exhibit Six, page
23			three?
24	54:46	Witness	That is correct.
25	54:47	Staff	All right. Pass.
26	54:55	ALL	Anything else Mr. Meyer?
27	54:56	Mr. Meyer	Yes. You're on Staff's Exhibit Five?
28	54:59	Witness	Yes
29	55:00	Mr. Meyer	Okay. I was trying to be easy on this before but let's read the whole
30			paragraph
31	55:09	Witness	I'm sorry...
32	55:10	Mr. Meyer	Starting with "It is therefore considered."
33	55:12	Witness	It is, therefore, considered, ordered and adjudged, that the finding of
34			guilty there therefore entered in said cause be, and the said the
35			same is hereby set aside, and that the complainant and information
36			in said cause be, and the same is hereby dismissed and stricken from
37			the docket of of this Court and that said Defendant herein be, and he
38			is hereby discharged from probation.
39	55:38	Mr. Meyer	So in fact, this does say that the complaint and information are
40			dismissed?
41	55:44	Witness	Yes, it does say that.

Testimony of Terry Washington

1	55:45	Mr. Meyer	Nothing further.
2	55:47	Staff	One question:
3	55:48	ALJ	All right.
4	55:49	Staff	Mr. Washington does it say that the conviction has been set aside?
5	55:52	Witness	No, it does not.
6	55:53	Staff	Thank you.
7	55:55	ALJ	Okay and we're getting further into legal interpretation than we
8			should allow Mr. Washington to go. Uh, so that's that's fine. You can
9			step down now. Thanks. Anything else Ms. Hopkins?

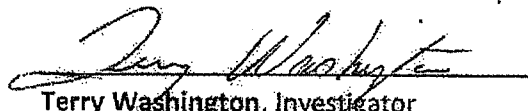
CERTIFICATE OF AUTHENTICITY

I, Nikki Hopkins, Assistant General Counsel for the Texas Board of Nursing, and an officer of the Court, hereby certify that the foregoing transcript of the witness testimony taken on June 7, 2012 at the State Office of Administrative Hearings is a true and accurate record of the testimony except as noted "obscured" above. This transcript was created from a copy of the audio recording provided to the Board of Nursing by the State Office of Administrative Hearings. Any omissions or obscured portions of the testimony are clearly marked.



Nikki Hopkins, Assistant General Counsel
for the Texas Board of Nursing

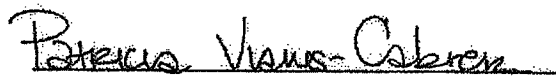
I, Terry Washington, have listened to the audio recording provided to the Board of Nursing by the State Office of Administrative Hearings and read the foregoing transcribed testimony and hereby affix my signature that same is true and correct, except as noted "obscured" above.



Terry Washington, Investigator
for the Texas Board of Nursing

Give under my hand and seal of office this 13th day of August, 2012.




NOTARY PUBLIC in and for the state of Texas



Attachment B

Texas Board of Nursing

June 14, 2010

333 Guadalupe Street, Ste. 3-460, Austin, Texas 78701
Phone: (512) 305-7400 Fax: (512) 305-7401 www.tbn.state.tx.us

Katherine A. Thomas, MN, RN
Executive Director

County Clerk
Austin, Texas 78701
Fax: (512) 854-4220

RE: Judith Griffin Coleman
Judith Gayle Coleman
Judith G. Coleman

Judith Coleman
Judith Gayle Griffin

Date of Birth: 12/25/1955

Name:

Arrest Date: 01/16/1983

Agency ID:

Offense Date:

Cause #:

Offense: DRIVING UNDER INFLUENCE LIQUOR

Dear Sir/Madam:

Please provide this Agency with certified copies of the above-referenced individual's Complaint, Information or Indictment, Judgment of Conviction, Sentence, Order of Probation, Probation Revocation Order (if applicable), and Dismissal or Discharge (if applicable) in the above-referenced Case(s).

Since our office is a State Regulatory Agency, it has been customary for your office to waive any required copy fees. However, if it is necessary to charge any fee(s), please submit your bill and provide your State Vendor Identification or Federal Identification Number to assist us in the reimbursement process.

All documents can be sent to: Texas Board of Nursing, Attention: Terry Washington, Investigator, Enforcement Division, 333 Guadalupe, Suite 3-460, Austin, Texas 78701.

If you should have questions, please contact me directly at (512)305-6852.

Thank you for your assistance and prompt response.

Sincerely,

Terry Washington

Terry Washington, Investigator

Members of the Board

Linda Rounts, PhD, FNP, RN
Galveston, President

Deborah Bell, CLU, ChFC Arlene	Kristle Bowton, MSN, RN Austin	Patricia Clapp, BA Dallas	Towana Cowan, MN, RN Barthugen	Sheri Crosby, JD, SPHR Dallas	Marilyn Davis, BSN, RN, MPA Sugar Land
Blanca Rosa Guredo, PhD, RN Corpus Christi	Richard Gibbs, LVN Mesquite	Kathy Leader-Horn, LVN Granbury	Josefina Lujan, PhD, RN El Paso	Beverley Jean Nutall, LVN Bryon	Mary Jane Salgado, MEd Eagle Pass

TRANSMISSION VERIFICATION REPORT

Attachment B

TIME : 12/03/2010 10:00
NAME : BNE
FAX : 5123056870
TEL : 5123056857
SER.# : BROH9J962575

DATE, TIME
FAX NO./NAME
DURATION
PAGE(S)
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12/03 10:00
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Texas Board of Nursing

June 14, 2010

333 Guadalupe Street, Ste. 2-460, Austin, Texas 78701
Phone: (512) 305-7400 Fax: (512) 305-7401 www.tbn.state.tx.us
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Attachment B

Texas Board of Nursing

June 14, 2010

333 Guadalupe Street, Ste. 3-460, Austin, Texas 78701
 Phone: (512) 305-7400 Fax: (512) 305-7401 www.tbn.state.tx.us
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Cause #:

Offense: DRIVING UNDER INFLUENCE LIQUOR

Dear Sir/Madam:

Please provide this Agency with certified copies of the above-referenced individual's Complaint, Information or Indictment, Judgment of Conviction, Sentence, Order of Probation, Probation Revocation Order (if applicable), and Dismissal or Discharge (if applicable) in the above-referenced Case(s).

Since our office is a State Regulatory Agency, it has been customary for your office to waive any required copy fees. However, if it is necessary to charge any fee(s), please submit your bill and provide your State Vendor Identification or Federal Identification Number to assist us in the reimbursement process.

All documents can be sent to: Texas Board of Nursing, Attention: Terry Washington, Investigator, Enforcement Division, 333 Guadalupe, Suite 3-460, Austin, Texas 78701.

If you should have questions, please contact me directly at (512)305-6852.

Thank you for your assistance and prompt response.

Sincerely,

Terry Washington

Terry Washington, Investigator

Members of the Board

Linda Rouse, PhD, RN, FAAN
 Galveston, President

Deborah Rott, CEO, CNCC Arlene	Kristin Baxton, MSN, RN Austin	Patricia Clepp, BA Dallas	Tamara Cowan, MN, RN Harris	Shari Crosby, JD, STEER Dallas	Marilyn Dierks, BSN, RN, MPA Sugar Land
Wanda Ryan Greville, PhD, RN Corpus Christi	Richard Gibbs, LVN Houston	Kathy Lender-Horn, LVN Grandbury	Jacqueline Lujan, PhD, RN El Paso	Beverly Jean Nottoli, LVN Bryan	Mary Jane Rodriguez, MEd Rifle Point



Attachment B

Texas Board of Nursing

June 14, 2010

333 Guadalupe Street, Ste. 3-460, Austin, Texas 78701
Phone: (512) 305-7400 Fax: (512) 305-7401 www.tbn.state.tx.usKatherine A. Thomas, MN, RN
Executive DirectorCounty Clerk
San Angelo, TX 76903
Fax: 325-659-3251RE: Judith Griffin Coleman
Judith Gayle Coleman
Judith G. ColemanJudith Coleman
Judith Gayle Griffin

Date of Birth: 12/25/1955

Name:

Arrest Date: 11/06/1981

Agency ID:

Offense Date:

Cause #:

Offense: PROPERTY CRIMES-FRAUD REMOVAL OF PRINTED MATERIAL

Dear Sir/Madam:

Please provide this Agency with certified copies of the above-referenced individual's Complaint, Information or Indictment, Judgment of Conviction, Sentence, Order of Probation, Probation Revocation Order (if applicable), and Dismissal or Discharge (if applicable) in the above-referenced Case(s).

Since our office is a State Regulatory Agency, it has been customary for your office to waive any required copy fees. However, if it is necessary to charge any fee(s), please submit your bill and provide your State Vendor Identification or Federal Identification Number to assist us in the reimbursement process.

All documents can be sent to: Texas Board of Nursing, Attention: Terry Washington, Investigator, Enforcement Division, 333 Guadalupe, Suite 3-460, Austin, Texas 78701.

If you should have questions, please contact me directly at (512)305-6852.

Thank you for your assistance and prompt response.

Sincerely,

Terry Washington

Terry Washington, Investigator

Members of the BoardLinda Rounds, PhD, FNP, RN
Galveston, President

Deborah Bell, CLU, ChFC Arlene	Kristin Benton, MSN, RN Austin	Patricia Clapp, BA Dallas	Tamaru Cowen, MN, RN Harrington	Sheri Crosby, JD, SPHR Dallas	Marilyn Davis, BSN, RN, MPA Sugar Land
Blanca Rosa Garcia, PhD, RN Corpus Christi	Richard Gibbs, LVN Mesquite	Kathy Leander-Horn, LVN Granbury	Joseline Lujan, PhD, RN El Paso	Beverly Jean Nutall, LVN Bryan	Mary Jane Salgado, MEd Regie Pass

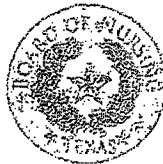
TRANSMISSION VERIFICATION REPORT

Attachment B

TIME : 12/03/2010 10:01
NAME : BNE
FAX : 5123056870
TEL : 5123056857
SER.# : BROH9J962575

DATE, TIME
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DURATION
PAGE(S)
RESULT
MODE

12/03 10:01
5123056870
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STANDARD
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Texas Board of Nursing

June 14, 2010

325 Goodwine Street, Ste. 3-400, Austin, Texas 78701
Phone: (512) 305-7400 Fax: (512) 305-7501 www.bon.state.tx.us
Katherine A. Thomas, MN, RN
Executive Director

County Clerk
San Angelo, TX 76903
Fax: 325-659-3251

RE: Judith Griffin Coleman
Judith Gayle Coleman
Judith G. Coleman

Judith Coleman
Judith Gayle Griffin

Date of Birth: 12/25/1955

Name:

Arrest Date: 11/06/1981

Agency ID:

Offense Date:

Cause #:

Offense: PROPERTY CRIMES-FRAUD REMOVAL OF PRINTED MATERIAL

Dear Sir/Madam:

Please provide this Agency with certified copies of the above-referenced individual's Complaint, Information or Indictment, Judgment of Conviction, Sentence, Order of Probation, Probation Revocation Order (if applicable), and Dismissal or Discharge (if applicable) in the above-referenced Case(s).



Disciplinary Sanctions for Lying and Falsification

The Texas Board of Nursing (Board), in keeping with its mission to protect the public health, safety, and welfare, believes it is important to take a strong position regarding the licensure of individuals who have engaged in deception in the provision of health care. This deception includes falsifying documents related to patient care, falsifying documents related to employment, and falsifying documents related to licensure. The Board is also concerned about persons who have been convicted of a crime involving deception to the extent that such conduct may affect the ability to safely care for patients.

The Board's position applies to all nurse license holders and applicants for licensure.

The Board adopts the following assumptions as the basis for its position:

1. Patients* under the care of a nurse are vulnerable by virtue of illness or injury, and the dependent nature of the nurse-patient relationship.
2. Persons who are especially vulnerable include the elderly, children, the mentally ill, sedated and anesthetized patients, those whose mental or cognitive ability is compromised and patients who are disabled or immobilized.
3. Critical care, pediatric, and geriatric patients are particularly vulnerable given the level of vigilance demanded under the circumstances of their health condition.
4. Nurses are frequently in situations where they must report patient condition, record objective/subjective information, provide patients with information, and report errors in the nurse's own practice or conduct.
5. Honesty, accuracy and integrity are personal traits valued by the nursing profession, and considered imperative for the provision of safe and effective nursing care (Section 213.27 of 22 Texas Administrative Code).
6. Patients have the right to expect that the nurse will always accurately report patient conditions, signs and symptoms, and the care the nurse provided.

The Board considers the following behaviors important in evaluating whether an individual possesses the integrity and honesty to practice nursing:

1. Falsification of documents regarding patient care, incomplete or inaccurate documentation of patient care, failure to provide the care documented, or other acts of deception raise serious concerns whether the nurse will continue such behavior and jeopardize the effectiveness of patient care in the future.
2. Falsification of employment applications and failing to answer specific questions that would have affected the decision to employ, certify, or otherwise utilize a nurse raises concerns about a nurse's propensity to lie and whether the nurse possesses the qualities of honesty and integrity (Sections 217.12(6)(H), (6)(I), and 213.27 of 22 Texas Administrative Code).
3. Falsification of an application for licensure to the Board raises concerns about the person's propensity to lie, and the likelihood that such conduct will continue in the practice of nursing.

4. A conviction or judicial order involving a crime of lying or falsification raises concern that the person may engage in similar conduct while practicing nursing and place patients at risk.

* The terms "resident" or "client" are often substituted for the term "patient" in health care facilities. For the purposes of this document "patient" includes all of these terms.

Crimes Related to Lying and Falsification

The Board may rely solely on the conviction of a crime or probation for a crime, with or without an adjudication of guilt, to deny, suspend, or revoke a license. A crime involving dishonesty is a crime of moral turpitude. Reliance on judicial orders is designed to avoid subsequent collateral attacks by nurses when the nurse has already been convicted or has admitted to the criminal conduct.

The Board has adopted a policy on fraud, theft, and deception that, in part, addresses the issues of lying and falsification. The crime of lying or falsification is a concern to the Board if the conduct involved defrauding a vulnerable person; if the occurrence was within a short period of time prior to the application for initial licensure; if there is a demonstration of a pattern of lying or falsification; or if the act was obviously premeditated and the individual demonstrates a lack of insight or remorse related to the conduct. The presence of these factors is evidence to the Board that the same behavior is likely to be repeated towards patients and may place their well-being at risk. Crimes involving lying and falsification will be evaluated on an individual basis considering the above factors.

It should be noted that if a nurse is imprisoned following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision for a crime involving lying or falsification, the Board shall revoke the nurse's license, regardless of the conduct associated with or the circumstances surrounding the crime. Chapter 53 of the Texas Occupations Code and 22 Texas Administrative Code § 213.28 governs the consequences of criminal convictions and requires revocation of a nurse's license if there is imprisonment as stated above. Section 213.27 of 22 Texas Administrative Code is also applicable to criminal conduct.

Lying on or Falsification of Licensing Documents to the Board

Each licensure form or document, whether it is an initial application, application by endorsement, or a renewal application, contains questions that require a "yes" or "no" answer. These forms contain several questions that might affect the ability of an individual to function safely as a nurse. In addition, the Board asks the applicant, petitioner, or licensee to provide information to determine if he/she meets the practice requirements for nursing licensure. Answers to these questions are used by the Board to determine the applicant's fitness for initial licensure/recognition in regards to conviction history, physical or mental condition, chemical dependency, and eligibility to renew licensure or gain initial licensure/recognition by endorsement related to meeting the continuing education (CE) and practice requirements. The Board can understand that an applicant may mark a "yes" or "no" answer in error, or misunderstand the question being asked. The Board believes, however, that supplying false information in regards to eligibility requirements for licensure is a serious matter, not only because of the lying or falsification itself, but because those

false answers would allow an otherwise disqualified applicant to be licensed. Proof of falsification on initial licensure is enough to establish the Board's right to revocation or denial of licensure. It should not be the Board's burden to answer or overcome Respondent's claims of current character or current practice once it is established an applicant or petitioner has knowingly falsified information upon which licensure was based. If Respondent believes he/she has good professional character, they should be required to start the application process over anew under non-deceptive means without the benefit of consideration of the intervening practice as a nurse.

The Board also asks questions on its applications for licensure to verify the individual's identity and provide the Board with demographic information. Falsification of that information is considered serious by the Board, but not as critical as information that directly relates to eligibility for licensure unless the falsification of this information was intended to hide relevant background information of the applicant.

Each case of falsifying an application for licensure will be considered on an individual basis. The investigative process will be used to determine whether the question was answered in error, misunderstood, or purposely answered falsely to deceive the Board. Intentional falsification may result in denial of licensure or revocation of a license. The Board may show leniency towards an applicant for initial licensure because that person may be more likely to misunderstand the questions on the application. The Board believes that an applicant for renewal of licensure should understand the questions and the importance of answering them honestly. A pattern of falsification of information on an application for licensure will not be tolerated and is grounds for revocation.

Failure to cooperate during the course of a Board investigation by supplying false documents or failing to disclose information is grounds for denial or revocation of the license. Reckless disregard for the Nursing Practice Act, the Board's rules and regulations, and/or a Board Order is also grounds for denial or revocation and will require at a minimum, the imposition of a punitive fine in addition to other stipulations.

Nurse Imposter

The Board has no jurisdiction over a person who does not have a license to practice nursing in the State of Texas yet holds him or herself out to be a nurse. The Board does have jurisdiction over an individual who has a nursing license or has had one in the past and represents him or herself as licensed for a broader scope of practice, e.g., LVN to RN, RN to APN. The Board has no tolerance for any form of impostering and will impose the maximum dollar amount of fine allowed under Board rules and may impose a disciplinary sanction. The following factors will be considered in deliberating the level of discipline from remedial education with fine through revocation: intent, potential or actual harm to patients, length of time as an imposter, and insight/remorse.

The Board believes that employers of nurses should verify licensure utilizing the Board's website and thereby avoid hiring a nurse imposter or allowing a nurse to practice beyond his/her scope. The Board may impose a disciplinary sanction to the nurse employer found responsible for hiring a nurse imposter.

Lying or Falsification within the Practice of Nursing

The safe and effective practice of nursing as a licensed vocational nurse, registered nurse, or advanced practice nurse requires integrity, accuracy, and honesty in the provision of nursing care, including:

- performing nursing assessments;
- applying the nursing process;
- reporting changes in patient condition;
- acknowledging errors in practice and reporting them promptly;
- accurate charting and reporting, whether verbal or written;
- implementing care as ordered;
- compliance with all laws and rules affecting the practice of nursing; and
- compliance with minimum nursing standards.

Failure to be accurate and honest while providing patient care and keeping accurate records related to care, is potentially harmful to the overall care patients receive because nurses who provide subsequent care do not have a complete and accurate picture of the client's care and/or condition.

Each case of lying and falsification will be considered on an individual basis. The Board will consider the following factors:

- actual harm to the patient as a result of the lying or falsification;
- the potential for harm to patients;
- the past performance record of the nurse;
- prior complaints;
- accountability for the act of falsification;
- insight;
- remorse; and
- other mitigating or aggravating factors.

The Board will also consider whether or not the nurse was unduly influenced by a more experienced or supervising licensed nurse to falsify patient records or care, in which case that nurse's conduct will be investigated by the Board. The investigative process will be used as an opportunity to educate and reinforce acceptable standards of care. Disciplinary sanctions may range from remedial education with fine to revocation. The level of sanction may be directly proportionate to the harm caused to the patient. If a nurse falsifies, alters, fabricates, back-dates records, or any other form of lying in the home health setting, the nurse will be sanctioned with stipulations, and fined. During the stipulation period, home health and any other form of independent employment settings will be prohibited. Supervision in home health will be required where circumstances do not warrant removal from that practice setting.

Lying/Falsification to an Employer, Nursing Education Program, or other Nursing Training Program

The Board believes that falsification of an application to an employer, school of nursing, or other nursing training program is generally the responsibility of the employer, school, or

training program to resolve, unless the falsification involves misrepresentation of credentials, competencies or work experience. Misrepresentation of credentials to an employer will be investigated and viewed by the Board in the same way that lying or falsification within the practice is viewed. A student nurse who falsifies patient records or engages in other dishonesty in patient care gives the Board reason to suspect that he or she will continue the same dishonest acts after licensure. If the Board is made aware of acts committed as a student, an investigation will be conducted once the student makes application for licensure. The Board will consider the same factors as described above for lying and falsification within the practice of nursing.

Petition for Reconsideration or Reinstatement of License

A person who has been denied licensure, or whose license has been surrendered, suspended, or revoked has the right to petition the Board for reconsideration or reinstatement. The burden of proof that the person no longer poses a danger for deception, lying or falsification regarding patient care, record keeping related to nursing practice, or other acts of deception remains with the petitioner.

(Portions of this policy adapted from the Oregon Board of Nursing Policy, 1999, with additions, deletions, and modifications.)

Approved and adopted on July 26, 2002, modified on April 23, 2004 and January 18, 2008 (based on recommendations adopted by the Eligibility and Disciplinary Task Force on November 30, 2007).

DOCKET NO. 507-12-5105

IN THE MATTER OF	§	
PERMANENT CERTIFICATE	§	BEFORE THE TEXAS STATE
NUMBER 581914	§	
ISSUED TO JUDITH GRIFFIN COLEMAN,	§	OFFICE OF ADMINISTRATIVE HEARINGS
RESPONDENT	§	

RESPONDENT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES Respondent, Judith Griffin Coleman, pursuant to 1 TEXAS ADMINISTRATIVE CODE §155.505, and files these Exceptions to the Proposal for Decision, and shows the Court:

EXCEPTIONS

A Conclusion of Law Not Contained in the Proposal for Decision: Respondent excepts to the failure of the ALJ to include a Conclusion of Law related to Charge I in the Formal Charges brought by the Texas Board of Nursing. In the PFD, the ALJ asserted several Findings of fact related to Charge I, most notably Finding of Fact No. (11) Eleven, which reads "Staff did not establish that Respondent provided false or deceitful information to the Board in her answer to Question No. 10 on her 1992 registration application."¹ A Conclusion of Law, supported by these Findings of Fact, should have been part of the Proposal for Decision. Respondent respectfully requests that the ALJ add an additional Conclusion of Law to read as follows: "Based on the Findings of Fact No. 8-11, Respondent did not violate 22 TEX. ADMIN. CODE §217013(15)(eff. date 9/1/1991) or TEX. REV. CIV. STAT. ART. 4525(a)(2)&(9)(eff. date 9/1/1991) as charged in Charge I."

Discussion Section (D)(2) – Charge 2: Criminal Conduct involving Fraud or Theft:

Respondent excepts to the Administrative Law Judge's ("ALJ") analysis of the law surrounding Charge II. The facts, as recited by the ALJ, are not in dispute. Respondent has admitted that she entered a Pre-Trial Diversion Agreement with the United States Attorney's Office for the Northern District of Texas on March 4, 2009 in response to an allegation of Theft of Government

¹ Proposal for Decision ("PFD"), at 14.

complete certain conditions as required by the prosecutor and then the prosecutor uses their discretion to dismiss the case in the same manner as cases are dismissed for other reasons, such as lack of evidence.

More recently, differences between the ways Texas counties may assess fees to participants in pretrial intervention programs were examined by the Texas Attorney General in an opinion related to fees charged by Community Supervision departments.⁷ In the opinion, the Attorney General discusses the statutory provisions that have created pretrial intervention programs under TEX. GOV'T CODE § 76.011(a), which authorizes Community Supervision departments to "operate programs for the supervision and rehabilitation of persons in pretrial intervention programs, . . ."⁸ The Attorney General notes that there are several references to pretrial intervention and pretrial diversion in the statutes, but that Chapter 76 of the Government Code does not provide a definition of either term.⁹ The Attorney General goes on to assert that these terms do not refer to a "placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court," which is the definition of community supervision under Texas law.¹⁰ The Attorney General follows by citing the *Fisher* case, cited above, concluding that "community supervision and pretrial intervention involve different classes of people."¹¹

The Respondent's pre-trial diversion agreement was a result of charges brought under federal law, not Texas law, but the legal effects of pre-trial diversion are substantially the same as under Texas law. Federal pre-trial diversion is authorized under the Pre-Trial Services Act of 1982.¹² Any Pre-Trial Diversion program is a result of an agreement between the Pre-Trial

⁷ Tex. Att'y Gen. Op. No. GA-0114 (2003), at 1.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.*, citing the definition of "community supervision" from TEX. CODE CRIM PROC. Art. 42.12, §2 (Vernon Supp. 2003).

¹¹ Tex. Att'y Gen. Op. No. GA-0114, at 2.

¹² 18 U.S.C. § 3152, et. seq.

Services division of the Federal Courts and the United States Attorney for each district.¹³ The rules governing the Pre-Trial Diversion program are contained in the United States Attorney Resources Manual, including the statement that “[t]he U.S. Attorney will formally decline prosecution upon satisfactory completion of program requirements.”¹⁴ Thus, when the Respondent completes the pre-trial diversion agreement, the charges are dismissed, which is the same result as in a Texas pre-trial diversion agreement.

The Board’s rules also authorize disciplinary action for “deferred disposition” related to crimes of moral turpitude. And in the hearing (and in the motion for partial summary disposition filed prior to the hearing by the Respondent), Staff argued that this included matters that result in a Pre-trial diversion agreement.¹⁵ However, Staff can point to no statutory or case law supporting this contention. A search of Texas case law finds no reference to any agreements before trial within the references to “deferred disposition.”¹⁶

Finally, the ALJ mistakes the effect of a failure to meet the terms of a pre-trial diversion agreement compared to the effect of a failure to meet the terms of probation, either regular or deferred adjudication. The ALJ rightfully describes the effect of a failure to meet the terms of a pre-trial diversion agreement, namely that the Respondent could be prosecuted for theft of government property.¹⁷ However, as the Court pointed out in the *Fisher* case, proceeding against a person on probation is a different procedure:

¹³ § 3154 (10).

¹⁴ U.S. Attorney’s Criminal Resource Manual (USAM) title 9 § 712, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00712.htm.

¹⁵ Record, at 1:07:40.

¹⁶ Respondent’s counsel searched for the term “deferred disposition” on the Casemaker 2.2 databases maintained for members of the State Bar of Texas. A total of 11 cases were returned and it appears that 10 of the 11 cases are regarding either juvenile criminal matters or deferred adjudications. The only matter that appears related to administrative law matters is the case, *Sanchez v. Texas State Board of Medical Examiners*, 229 S.W.3d 498 (Tex.App.—Austin 2007). The only reference in this case to “deferred disposition” is reference to the Medical Practice Act provisions that correspond to the Nursing Practice Act provisions.

¹⁷ PFD, at 12.

A trial court which hears a motion to proceed to final adjudication or to revoke probation is asked to find a violation of one of the terms of probation. If the defendant fails to comply with the pre-trial diversion agreement, the trial court is not asked to find a violation of the agreement. That court, or the jury, is asked to find that the defendant committed the original charged offense.¹⁸

If the Respondent had pled to the charges and received probation or the federal equivalent of deferred adjudication, then the Respondent would have not been adjudicated on the original action, but on a secondary violation of a probation violation.

Based on the foregoing arguments, Respondent asserts that in the Proposal for Decision, the ALJ mischaracterized the Respondent's Pre-trial diversion agreement as a form of probation, when, as a matter of law, a Pre-trial diversion agreement is not a form of probation. The effect of a Pre-trial diversion is to delay the dismissal of charges until a party completes certain requirements. In final effect, a Pre-trial diversion agreement simply ends in a dismissal of the charges against the Respondent. Therefore, Respondent respectfully requests that the ALJ withdraw Discussion section (D)(2) and replace it with a Discussion reflecting the foregoing arguments.

Finding of Fact No. (14) Fourteen: Respondent excepts to Finding of Fact No. (14) Fourteen as irrelevant. As noted in Conclusion of Law No. (4) Four, Staff has the burden of proof by Preponderance of Evidence pursuant to 1 TEX. ADMIN. CODE § 155.427.¹⁹ It is a simple matter of law whether or not the Pre-trial diversion agreement triggers the authority of the Board of Nursing to discipline the license of the Respondent. Based on the foregoing arguments related to Discussion section (D)(2), *supra*, Respondent asserts that if she is found to have not engaged in unprofessional conduct, then the presence or absence of mitigating evidence is a moot point and therefore irrelevant. In the alternative, if the ALJ does not accept the argument regarding Discussion section (D)(2), *supra*, then the fact the Respondent did not provide any evidence regarding mitigating factors is also irrelevant. Therefore, Respondent respectfully requests that the ALJ withdraw Finding of Fact No. (14) Fourteen.

¹⁸ *Fisher*, 832 S.W.2d at 644.

¹⁹ PFD, at 15.

Conclusion of Law No. (5) Five: Respondent excepts to Conclusion of Law No. (5) Five as not the proper Conclusion to be drawn from the Findings of Fact and Conclusions of Law. As noted in Conclusion of Law No. (4) Four, Staff has the burden of proof by Preponderance of Evidence pursuant to 1 TEX. ADMIN. CODE § 155.427. In Charge II, staff pled violations of TEXAS OCCUPATIONS CODE § 301.452(b)(3) & (10) and 22 TEX. ADMIN CODE § 217.12(13). Because Staff has the burden of proof, Staff must provide evidence of violations of these sections to sustain this conclusion of law and based on the foregoing argument related to Discussion section (d)(2), Staff has failed to do so and this conclusion of law must be withdrawn.

While the ALJ does not reference TEX. OCC. CODE § 301.452(b)(3) in Conclusion of Law No. (5) Five, it is clear that a violation of this section would lead to disciplinary action somehow if violated. Section (b)(3) reads as follows:

(b) A person is subject to denial of a license or to disciplinary action under this subchapter for: . . . (3) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude;

However, based on the arguments made *supra*, Respondent asserts her Pre-trial diversion agreement does not fall within the parameters of Section (b)(3) as it is not a conviction nor is it placement on deferred adjudication community supervision or deferred disposition. Therefore, Respondent did not violate TEX. OCC. CODE § 301.452(b)(3) when she entered into the Pre-trial diversion agreement.

The ALJ also does reference TEX. OCC. CODE § 301.452(b)(10) in Conclusion of Law No. (5) Five, but in order to sustain a violation under this section, Staff must provide evidence of a violation of unprofessional conduct rules contained in 22 TEX. ADMIN CODE § 217.12.²⁰ In this matter, staff pled a violation of Rules section 217.12(13) of the unprofessional conduct rules, which reads as follows:

²⁰ Tex. Occ. Code § 301.452(b)(10) reads as follows:

(b) A person is subject to denial of a license or to disciplinary action under this subchapter for: . . . (10) unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public;

(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.

While this section does not track the language of the Nursing Practice Act exactly, this rule is a restatement of TEX. OCC. CODE § 301.452(b)(3). For the ALJ to find a violation under this section of the Board's rules, the ALJ would need to find that the Respondent was 1) convicted, 2) placed on probation of some form, with or without the adjudication of guilt, or 3) received a judicial order involving criminal behavior or conduct related to nursing. As discussed *supra* in relation to Discussion section (D)(2), Respondent was neither convicted nor placed on any form of probation when she agreed to the Pre-trial diversion agreement.

Also discussed *supra* was the nature of the Pre-trial diversion agreement – since a Pre-trial diversion agreement is between a party charged with a crime and the prosecutor and occurs without the involvement of a judge, it may not be characterized as a judicial order involving a crime or criminal behavior. Since there can be no finding that the Respondent violated section 217.12(13), there can also be no finding that the Respondent violated TEX. OCC. CODE § 301.452(b)(10). Therefore, the Respondent respectfully requests that the ALJ withdraw Conclusion of Law No. (5) Five.

Conclusion of Law No. (7) Seven: Respondent excepts to Conclusion of Law No. (7) Seven as not a proper Conclusion to be drawn from the Findings of Fact and Conclusions of Law. In the PFD, the ALJ clearly finds that the Respondent did not violate the Nursing Practice Act in 1992 as alleged in Charge I.²¹ Pursuant to the arguments and discussion above, Respondents has requested that the ALJ make changes the PFD that, in effect, find that the Respondent did not violate the Nursing Practice Act in 2009 as alleged in Charge II. The effect of making these changes would clear the Respondent of these charges and would not support the imposition of disciplinary action against the Respondent by the Board of Nursing. Therefore, Respondent respectfully requests that the ALJ withdraw Conclusion of Law No. (7) Seven.

Finding of Fact No. (15) Fifteen: Respondent excepts to Finding of Fact No. (15) Fifteen,

²¹ PFD, at 11. Also see Finding of Fact No. (11) Eleven. PFD, at 14.

which contains an assessment of administrative costs in the amount of \$130.80.²² Respondent does not dispute that the Board may attempt to recover administrative costs pursuant to TEX. OCC. CODE §301.461. However, Respondent asserts that certain costs assessed are inappropriate, no supported by the evidence presented or not authorized by statute or rule. In order for the Board to recover administrative costs, the ALJ must find that the Respondent was in violation of the Nursing Practice Act. However, if the ALJ upholds these exceptions and does not find a violation of the Nursing Practice Act, then the Respondent should not be assessed the costs of the hearing. Therefore, Respondent respectfully requests the ALJ withdraw Finding of Fact No. (15) Fifteen.

Notwithstanding any ruling on the previous exceptions, the Respondent generally excepts to the imposition of 100% of the administrative costs in this matter. Initially, there were two charges contained in the Formal Charges. In the Proposal for Decision, Respondent was found to have not violated the Nursing Practice Act with regards to Charge I as contained in the Formal Charges.²³ Therefore, if Respondent was only found to have violated the Nursing Practice Act in one of the two charges, or 50% of the matters brought in the hearing. Therefore it would be the equitable resolution to this matter for the Respondent to be liable for no more than 50% of the administrative costs taxed in this matter.

Recommendation for Sanction: Respondent excepts to the Recommendation of the ALJ, which recommended Revocation of the Respondent's nursing license.²⁴ The Respondent has argued, *supra*, that the Pre-trial diversion is not the same as probation and that Finding of Fact No. (14) Fourteen and Conclusion of Law No. (5) Five should be withdrawn or replaced. If the ALJ finds that these exceptions should be granted, then the Recommendation is no longer supported by a preponderance of the evidence. Therefore, if the ALJ withdraws Finding of Fact No. (14) Fourteen and Conclusion of Law No. (5), then the ALJ should also withdraw the Recommendation and replace it with a recommendation that no action be taken against Respondent's nursing license and that no costs be assessed against the Respondent.

²² *Id.*, at 15.

²³ *Id.*, at 14.

²⁴ *Id.*, at 15-16.

PRAYER

Respondent, Judith Griffin Coleman prays that the honorable Administrative Law Judge:

1. Issue a Conclusion of Law for Charge I to read as follows: "Based on the Findings of Fact No. 8-11, Respondent did not violate 22 TEX. ADMIN CODE §217.13(15)(eff. date 9/1/1991) or TEX. REV. CIV. STAT. ART. 4525(a)(2)&(9)(eff. date 9/1/1991) as charged in Charge I.";
2. Withdraw Discussion section (D)(2), to be replaced with a new section (D)(2) reflecting the arguments contained herein;
3. Withdraw Finding of Fact No. (14) Fourteen;
4. Withdraw Conclusion of Law No. (5) Five;
5. Withdraw Conclusion of Law No. (7) Seven;
6. Issue a Conclusion of Law related to Charge II to read as follows: "Based on the Findings of Fact No. 12-13, Respondent did not violate TEX. OCC. CODE § 301.452(b)(3) & (10) or 22 TEX. ADMIN CODE §217.12(13) as charged in Charge II.";
7. Withdraw Finding of Fact No. (15);
8. Withdraw the Recommendation, to be replaced with a new Recommendation that proposes no action be taken against Respondents nursing license and that no costs be assessed against the Respondent; AND
9. Propose to the Texas Board of Nursing in a Decision all relief at law or in equity to which Respondent is entitled.

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Respectfully submitted,



By: _____

Marc M. Meyer

Texas Bar No. 24070266

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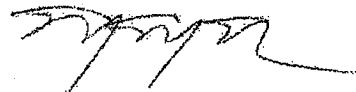
Attorney for Respondent Judith Griffin Coleman

CERTIFICATE OF SERVICE

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Nikki Hopkins, 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 NUMBER 507-12-5105

TEXAS BOARD OF NURSING,
Petitioner

v.

JUDITH GRIFFIN COLEMAN,
Respondent

§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

STAFF'S REPLY TO
RESPONDENT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

COMES NOW, Staff of the Texas Board of Nursing, and files its Reply to Respondent's Exceptions to the Proposal for Decision issued in this matter on August 3, 2012, and would state as follows:

I. Formal Charge II.

Respondent mischaracterizes Attorney General Opinion No. GA-0114 and the court's holding in *Fisher v. State*, 832 S.W.2d 641 (Tex.App.—Corpus Christi 1992). Neither opinion relates to a determination of whether the underlying criminal conduct resulting in a pretrial diversion agreement is sanctionable conduct for purposes of licensure.

Attorney General Opinion No. GA-0114 opines on whether a county supervision and corrections department may assess a fee to a participant in a pretrial intervention program. The county wished to establish a fee of \$25 to \$40 for pretrial diversion participants, in addition to the fee specifically authorized for pretrial intervention programs under TEX. CODE CRIM. PROC. §102.012. The county sought to authorize the additional fee under TEX. GOV'T CODE §76.015, which applies to participants in court-ordered supervision programs. The court's differentiation between pretrial diversion and community supervision or probation was made because pretrial intervention participation fees are specifically authorized under TEX. CODE CRIM. PROC. §102.012, but not TEX. GOV'T CODE §76.015, which was intended to apply only to court-ordered probationers. Respondent quotes the Attorney General as saying "community supervision and pretrial intervention involve different classes of people," but this was said in the context of

whether a county had legal authority to impose an additional fee on pretrial diversion participants. It was not said to imply that the underlying criminal conduct should be viewed differently by licensing agencies depending on whether a licensee participates in pretrial diversion rather than court-ordered community supervision, as Respondent implies.

Likewise, *Fisher* is a bail bond forfeiture case, where a participant in a pretrial diversion program failed to meet the terms of his pretrial diversion agreement and failed to appear at the final court setting. In *Fisher*, the court found that the bail bond service was not discharged from bail bond liability when the defendant entered into a pretrial diversion agreement with the state. Other than the explanation of how a pretrial diversion program works, which is not in dispute in this matter, Staff is unsure what insight the *Fisher* case offers on the instant matter. It was cited in the foregoing Attorney General's opinion only for its definition of pretrial diversion. Respondent states repeatedly that pretrial diversion is *not the same* as probation or deferred adjudication. This is not in dispute. However, as the ALJ states in the PFD, conviction, deferred adjudication, probation and pretrial diversion are all sanctionable criminal conduct under the Board's statute, rules, and policies. Thus, Staff agrees with the ALJ that pretrial diversion is anticipated by TEX. OCC. CODE §301.452(b) and the Board's rules, matrix and policies as a type of criminal conduct that could and does result in the disciplinary sanction of revocation.

II. Costs

Respondent's argument that the costs awarded to the Board in this matter should be apportioned is not supported by law or evidence. Texas Occupations Code §301.461 provides that a person may be assessed costs who is found to have violated Chapter 301 (the Nursing Practice Act). Section 301.461 does not anticipate doubling the costs if Staff proves that the allegations in two formal charges are true. Likewise, it makes no sense to apportion the costs by half if the ALJ finds that Staff proved one out of two formal charges. Staff provided an affidavit attesting to the actual Board costs in this matter. Those costs, which consist solely of postage, copy charges, and subpoena services, would have been the same regardless of the number of formal charges.

III. Prayer

Staff prays that the ALJ disregard Respondent's exceptions and amend the PFD consistent with Staff's Exceptions.

Respectfully submitted,

TEXAS BOARD OF NURSING



Nikki Hopkins

Assistant General Counsel

State Bar No. 24052269

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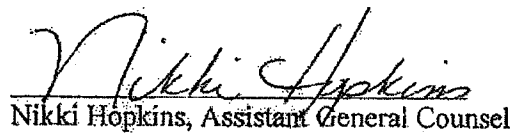
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of *Staff's Reply to Respondent's Exceptions* was sent on this, the 23rd day of August, 2012, to Respondent, Judith Griffin Coleman, via Facsimile (866) 839-6920 and mail c/o attorney Marc Meyer, 33300 Egypt Ln., Suite B200, Magnolia, TX 77354-2739.



Nikki Hopkins, Assistant General Counsel

DOCKET NO. 507-12-5105

IN THE MATTER OF	§	
PERMANENT CERTIFICATE	§	BEFORE THE TEXAS STATE
NUMBER 581914	§	
ISSUED TO JUDITH GRIFFIN COLEMAN,	§	OFFICE OF ADMINISTRATIVE HEARINGS
RESPONDENT	§	

**RESPONDENT'S REPLY TO STAFF'S
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES Respondent, Judith Griffin Coleman, pursuant to 1 TEXAS ADMINISTRATIVE CODE §155.505, and files this Reply to Staff's Exceptions to the Proposal for Decision, and shows the Court:

REPLY TO THE EXCEPTIONS

Staff of the Texas Board of Nursing ("Staff"), in an attempt to put a nail in the coffin of the Respondent's nursing career, excepts to the ALJ's finding of fact and conclusions of law. Unfortunately for Staff in this matter, the Board has the burden of proof and to prove Formal Charge One, it must prove that the Respondent did not disclose a matter in 1992 that was required to be disclosed in the Respondent's original Application for Registration by Examination ("Application"). Staff even stoops to call the Respondent a liar in painting her in the worst possible light.¹

In order to determine if the Respondent was a "liar," as Staff likes to call her, we must first determine exactly what the Respondent was required to disclose in 1992. According to Application, which Staff asserted is the Respondent's original application, the wording of question no. (10) Ten reads as follows: "Have you ever been convicted of a crime other than minor traffic violations?"² The key to the answer here is the definition of the term "convicted," for if the Respondent was not actually convicted of a crime, then Staff has not proven that the Respondent was dishonest when she filled out the Application.

¹ Staff's Exceptions to the Proposal for Decision, at 2.

² Staff's Exhibit 3, at 1.

In 1992, the Respondent had two prior interactions with the criminal justice system. The first brush with the law resulted in a 1981 charge of Fraudulent Removal of a Writing/DWI in Tom Green County, for which the Respondent was placed on Deferred Adjudication.³ This matter is not at issue as this was not pled by Staff in the First Amended Formal Charges. The second brush with the law was the July 1983 charge of DWI, which was pled by Staff and was found by the ALJ to be true in Finding of Fact No. (8) Eight.⁴ The Respondent pled guilty/nolo contendere to the misdemeanor charge and was placed on probation for 24 months.⁵ As the ALJ notes in Finding of Fact No. (9) Nine, the Respondent was released from probation in July, 1985.⁶

There was a significant amount of discussion at the hearing regarding the nature of the probation associated with the 1983 charge and I won't rehash that discussion here, except to note that it was probably discussing the wrong law. In reviewing Staff's Exhibit 4, it should be noted that the judgment issued by the Court in Travis County included the following verbiage:

[a]nd it further appearing to the Court that the Defendant satisfies the requirements of the Misdemeanor Probation Law of Texas and that the ends of justice and the best interest of the public as well as the Defendant will be subserved by suspending imposition of sentence and placing the Defendant on probation.⁷

This wording tracks the working of the Misdemeanor Probation Act, which was still in force at the time of this judgment.⁸

The term "conviction" was not defined in either the Texas Constitution or the Texas Code of Criminal Procedure as late as the 1980's. In 1978, the Court of Criminal Appeals discussed

³ Stipulations, No. 3, at 1. See also Staff Ex. 6.

⁴ Proposal for Decision, at 14. See also Staff Ex. 4.

⁵ PFD, at 14.

⁶ *id.* See also, Staff Ex. 5.

⁷ Staff Ex. 5, at 1.

⁸ TEX. CODE CRIM. PROC. ART. 42.13 § 3d(a). This section of the Code of Criminal Procedure was repealed in 1985 by the legislature and all aspects of the probation/community supervision system were brought under TEX. CODE CRIM. PROC. ART. 42.12.

the definition of the word "conviction" as it related to a deferred adjudication pursuant to Article 42.12, the Adult Probation Statute in force at the time, holding that "'conviction,' regardless of the context in which it is used, always involves an adjudication of guilt."⁹ In *McNew*, an appellant was challenged the Constitutionality of Article 42.12, Section 3d, arguing that his placement on deferred adjudication probation under Section 3d was unconstitutional because he was never "convicted."¹⁰ While the Court in *McNew* found that argument "facially meritorious,"¹¹ the argument was overruled on different grounds.¹² What was left, though, was that a deferred adjudication under Article 42.12 was not a "conviction", a holding that has been reaffirmed as recently as 2008 by the Court of Criminal Appeals.¹³

While *McNew* addresses deferred adjudication under Article 42.12, it does not address the Misdemeanor Probation Law as cited in the 1983 judgment from Travis County. However, in 1980, Attorney General Mark White addressed the issue in relation to the suspension of a driver's license in DWI cases.¹⁴ In this opinion, a County Attorney was requesting an opinion if a defendant who was convicted of misdemeanor DWI and was placed on probation under Article 42.13 had a "final conviction" under the license suspension provisions under the DWI laws of the time.¹⁵ Without addressing the other sections of Article 42.13, which are not relevant to the

⁹ *McNew v. State*, 608 S.W.2d 166, 172 (Tex.Crim.App. 1978).

¹⁰ *Id.*, at 171. The relevant part of Article 42.12, Section 3d (a), reads as follows:

"Sec. 3d. (a) When in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation on reasonable terms and conditions as the court may require and for a period as the court may prescribe not to exceed 10 years. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the court shall proceed to final adjudication as in all other cases.

¹¹ *Id.*

¹² *Id.*, at 172.

¹³ *Beedy v. State*, 250 S.W.3d 107, 114 ((Tex. Crim. App. 2008).

¹⁴ OP. TEX. ATT'Y GEN. NO. MW-0133 (1980).

¹⁵ *Id.*, at 425.

discussion of this case, the Attorney General found that if a defendant pleads guilty or nolo contendere under Section 3d(a), there is no final conviction requiring the suspension of the driver's license.¹⁶ In essence, as the Attorney General pointed out, "[s]ection 3d of new article 42.13 is the same as that in section 3d of article 42.12 in all pertinent respects."¹⁷

The suggestion that Section 3d(a) of Article 42.13 does not convey a final conviction has been upheld by the Court of Criminal Appeals as recently as 2010.¹⁸ In *Wilson*, a defendant pled guilty to felony DWI, which was enhanced by two prior DWI "convictions," resulting in a third-degree-felony DWI. After the defendant's probation was revoked, he filed a writ of habeas corpus, challenging the convictions used to enhance the penalty, which the trial court granted.¹⁹ The appeals Court affirmed, finding specifically that the 1983 "conviction" was a grant of probation and since the record did not reflect if the probation was revoked, there was not a final conviction.²⁰ The Court of Criminal Appeals upheld the Court of Appeals, noting that "until January 1, 1984, a DWI conviction on which the sentence was probated and the probation was never revoked was not deemed final."²¹

In our case, the Respondent was given probation for a misdemeanor DWI that occurred prior to 1984, and pursuant to the Misdemeanor Probation Law, the sentence was probated. Two

¹⁶ *Id.*, at 428. Section 3d(a) reads as follows:

Section 3d.(a) When in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or a plea of nolo-contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt and place the defendant on probation on reasonable terms and conditions as the court may require and for a period as the court may subscribe not to exceed the maximum period of imprisonment prescribed for the offense for which the defendant is charged. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the court shall proceed to final adjudication as in all other cases.

¹⁷ *Id.*

¹⁸ *State v. Wilson*, 324 S.W.3d 595 (Tex. Crim. App. 2010).

¹⁹ *State v. Wilson*, 288 S.W.3d 13, 15 (Tex. App.—Houston [1st Dist.], 2008).

²⁰ *Id.*, at 16.

²¹ *Wilson*, 324 S.W.3d, at 599.

years later, when she completed the requirements of the probation, the order releasing the defendant from probation reads as follows:

IT IS THEREFORE, CONSIDERED, ORDERED AND ADJUDGED, that the finding of guilty heretofore entered in said cause be, and the same is hereby set aside, and that the complaint and information in said cause be, and the same is hereby dismissed and stricken from the docket of this Court and that said Defendant herein be, and is hereby discharged from probation.²²

A plain reading of this document, as was also argued at the hearing, shows that the Respondent was discharged from probation, the guilty plea set aside and the charges dismissed. This language also tracks the language of the other charge that was not at issue here, but was clearly a deferred adjudication.²³ Therefore, while the judgment and the order dismissing the probation does not use the term "deferred adjudication," the probation is clearly the form of probation authorized under Section 3d, Article 42.13. And as argued extensively above, a plea of guilty or nolo contendere for which a defendant is granted probation under Section 3d is not a conviction.

Since question no. (10) Ten clearly asks about convictions and not about probation, deferred adjudications, arrests or other interactions with the criminal justice system. If the Respondent did not have a conviction, then an answer of no to that question would not be a lie, as Staff so eloquently put it in their exceptions. And since there was no lie on the Application, there can be no finding of unprofessional or dishonorable conduct and the rest of Respondent's arguments are therefore moot. Aside from the issues raised in Respondent's Exceptions to the Proposal for Decision, the Respondent has no issues with the ALJ's analysis related to Charge I. Therefore, Respondent urges the ALJ to deny all relief requested by Staff in Staff's Exceptions to the Proposal for Decision.

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²² Staff Ex. 5, at 1.

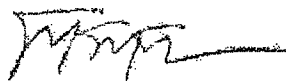
²³ See Staff Ex. 6, at 3.

PRAYER

Respondent, Judith Griffin Coleman prays that the honorable Administrative Law Judge:

1. Deny all relief requested by Staff in Staff's Exception to the Proposal for Decision; AND
2. 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

Texas Bar No. 24070266

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Fax. (866) 839-6920

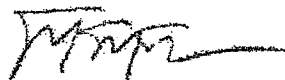
Attorney for Respondent Judith Griffin Coleman

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Nikki Hopkins, Assistant General Counsel
Texas Board of Nursing
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Austin, TX 78701
VIA FASCIMILE AT 512-305-8101



Marc M. Meyer

DOCKET NO. 507-12-5105

IN THE MATTER OF	§	
PERMANENT CERTIFICATE	§	BEFORE THE TEXAS STATE
NUMBER 581914	§	
ISSUED TO JUDITH GRIFFIN COLEMAN,	§	OFFICE OF ADMINISTRATIVE HEARINGS
RESPONDENT	§	

**RESPONDENT'S REPLY TO STAFF'S RESPONSE TO
RESPONDENT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES Respondent, Judith Griffin Coleman, pursuant to 1 TEXAS ADMINISTRATIVE CODE §155.505, and files this Reply to Staff's Response to Respondent's Exceptions to the Proposal for Decision, and shows the Court:

REPLY TO THE RESPONSETO THE EXCEPTIONS

Staff of the Texas Board of Nursing ("Staff") state in Staff's Reply to Respondent's Exceptions to the Proposal for Decision ("Staff's Reply") that the Respondent mischaracterized case law and an Attorney General Opinion because the opinions don't relate to the underlying case. That the opinions don't relate directly to the underlying matter should not be surprising because there are no cases that are directly on point that address the relationship between a pre-trial diversion agreement and TEXAS OCCUPATIONS CODE § 301.452(b)(3) or 22 TEXAS ADMINISTRATIVE CODE 217.12(13). Respondent argues that the *Fisher* case¹ and Attorney General Abbot's opinion² constitute persuasive authority that a pre-trial diversion agreement does not constitute proof of criminal conduct sanctionable under Sections 301.452 (b)(3) & (10) in the absence of controlling case law that answers the question directly on point.

In arguing that the ALJ's opinion in the Proposal for Decision is correct, Staff simply asserts that the ALJ is right to consider a pre-trial diversion agreements as anticipated by Section 301.452(b)(3). Leaving aside for the moment that Staff's assertion that a conviction, deferred adjudication, probation and pre-trial diversion are criminal conduct, which is patently absurd,

¹ *Fisher v. State*, 832 S.W.2d 641 (Tex.App.-Corpus Christi 1992, no pet.)

² Tex. Att'y Gen. Op. No. GA-0114 (2003).

Staff offers absolutely no authority at all that a pre-trial diversion is in any way the same as probation or deferred adjudications, much less that it is like a conviction. In fact, Staff explicitly agrees that a Pre-trial diversion agreement is not the same as deferred adjudication or probation.³

It is the rule of statutory interpretation that courts seek to determine and give effect to the Legislature's intent.⁴ Section 301.452(b)(3) clearly include convictions, deferred adjudications and probation when indicating the types of criminal sanctions that give rise to a presumption the underlying conduct.⁵ However, in construing legislative intent, courts should not insert additional words into a statute absent a need to do so to give effect to clear legislative intent.⁶ What the ALJ has proposed, and Staff agrees to, is the insertion of the words pre-trial diversion into Section 301.452 (b)(3) (and by extension, Rules Section 217.12(13)) when the Legislature did not insert that term. This violates the rules of statutory interpretation because, as the Texas Supreme Court indicated in *Cameron*, every word excluded from a statute must also be presumed to have been excluded for a purpose. If the Legislature had intended for a pre-trial diversion agreement to have supported a presumption the alleged underlying conduct was true, it would have included the term in Section 301.452 (b)(3). And since Rules Section 217.12(13) tracks the same language, and a violation of that rule is required to sustain disciplinary action under Section 301.452 (b)(10), a pre-trial diversion does not support a finding of unprofessional conduct and should not support disciplinary action under that section.

Staff has the burden of proof in matters before the State Office of Administrative Hearings. With regards to Charge II in this matter, if a pre-trial diversion does not give rise to a presumption of sanctionable criminal activity, then there is no basis for disciplinary action under

³ Staff's Reply to Respondent's Exceptions to the Proposal for Decision, at 2.

⁴ *In the Interest of MN*, 262 S.W.3d 799, 802 (Tex. 2008).

⁵ The text of Tex. Occ. Code § 301.452(b)(3) is as follows: (b) A person is subject to denial of a license or to disciplinary action under this subchapter for: . . . (3) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude;

⁶ *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981). "Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose. Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision. See *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570, 572 (Tex.1971); see *Texas & N. O. R. Co. v. Texas Railroad Comm.*, 145 Tex. 541, 200 S.W.2d 626, 629 (1947)."

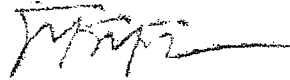
Sections 301.452 (b)(3) & (10), Therefore, Respondent requests that the ALJ amend the Proposal for Decision in a manner consistent with the Respondent's Exceptions to the Proposal for Decision and this Reply to Staff's Response to Respondent's Exceptions to the Proposal for Decision.

PRAYER

Respondent, Judith Griffin Coleman prays that the honorable Administrative Law Judge:

1. Amend the Proposal for Decision consistent with Respondent's Exceptions to the Proposal for Decision; AND
2. 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: _____

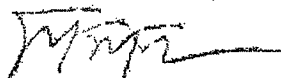
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Attorney for Respondent Judith Griffin Coleman

CERTIFICATE OF SERVICE

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VIA FASCIMILE AT 512-305-8101



Marc M. Meyer

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 6, 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 NO. 512/305-8101

RE: Docket No. 507-12-5105; Texas Board of Nursing v. Judith Griffin
Coleman

Dear Ms. Thomas:

On August 3, 2012, I issued a Proposal for Decision (PFD) in this case. Texas Board of Nursing (Board) Staff filed exceptions on August 13, 2012. Respondent Judith Griffin Coleman filed a response to Staff's exceptions, as well as her own exceptions, on August 20, 2012. Staff filed a reply on August 23, 2012, and Respondent filed replies on August 28 and 30, 2012. I have reviewed all of these filings and the arguments contained therein, and wish to provide my responses for the Board's consideration.

I do not recommend adoption of any of the changes requested by either Staff or Respondent. More specifically, please note the following.

1. Staff's Exceptions to Recitation of Evidence Regarding Formal Charge 1, Finding of Fact No. 11, and Conclusion of Law No. 5

Staff asserts that I misunderstood the testimony of Board Investigator Terry Washington concerning the documents contained in the Board's historical files with respect to Respondent's 1992 initial application for licensure. No transcript was prepared for this hearing. Accordingly, the Administrative Law Judge's (ALJ) audiotape is the official record of the case. 1 Tex. Admin. Code § 155.423(c)-(d). Staff has prepared and attached to its exceptions a transcript of Mr. Washington's testimony. Both Staff and Mr. Washington signed notarized statements attesting to the transcript's accuracy, except where the recording is noted to be obscured and incapable of transcription. I recognize the effort put forth by Staff to prepare this document. However, a transcript prepared by Staff cannot be given the same weight as a transcript prepared by a certified court reporter.

Setting aside the question of how much weight can be given to the accuracy of this informal transcript, Staff's exceptions fail to demonstrate the need to change the relevant finding of fact and conclusion of law, for the following reasons.

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Exceptions Letter
September 6, 2012
Page 2

Staff's assertion is that the ALJ mistakenly believed that Mr. Washington retrieved from the Board's laser film files: (a) a 1983 order related to a driving while intoxicated charge, (b) a 1985 probation release order, (c) a 1981 deferred adjudication order and (d) a 1982 order of discharge from deferred adjudication along with (e) Respondent's 1992 application for licensure. Based on this mistake, Staff asserts, the ALJ incorrectly concluded that Respondent may have disclosed, and the Board may have been aware of, Respondent's criminal involvement from the 1980s when Respondent applied for a license in 1992.¹

Staff correctly notes that the county clerks of the respective jurisdictions stamped and certified documents (a), (b), (c), and (d) on dates in 2010, suggesting that those documents would not have been in the Board's file prior to 2010. However, the provenance of documents (a)-(d) remains uncertain.

Mr. Washington said that he was the investigator assigned to review Respondent's 2009 license renewal application. He said he retrieved the 1992 application (document (e)) from the Board's laser film records. He also said that document (e) consisted of three pages. He said that if Respondent had provided other documents for 1992, "I would guess they would have been included with the '92 application."² However, when asked by Respondent's counsel, "How do you know that *these three documents* are the only documents that are contained in the file for [Respondent] for 1992," Mr. Washington replied, "Because at the time I was the person that actually pulled and retrieved these documents and *I retrieved all documents associated with [Respondent]*."³ Mr. Washington was later asked by Respondent's counsel, with respect to documents (c) and (d), "Did you obtain these documents?" Mr. Washington replied, "I don't remember." However, he agreed that documents (c) and (d) were "part of the investigative file."

From these statements, I continue to find that I cannot determine the source of documents (a)-(d). The origin of documents (c) and (d) is less pertinent, since those documents are not part of Staff's Charge 1. However, Mr. Washington responded to counsel's question regarding three "documents" from the file for 1992 by saying that he "pulled and retrieved these documents." The statements may refer to the three *pages* of the 1992 application (document (e)), but the term used and repeated by counsel and Mr. Washington is *documents* (which appears to refer to documents (a), (b), and (c)).

As noted earlier, documents (a)-(d) all contain 2010 certification stamps from the respective county clerks. It is possible Mr. Washington obtained all four documents in 2010, when investigating Respondent's 2009 renewal application. Though he easily could have clarified that point in his testimony, he did not. Staff attached to its exceptions an exhibit

¹ The parties stipulated that: Respondent submitted her initial application to the Board on May 14, 1992; Question No. 10 on the application asked, "Have you ever been convicted of a crime other than minor traffic violations?"; and Respondent answered, "No" to Question No. 10.

² The ALJ notes above the concerns raised in relying on an uncertified, informal transcript. However, for purposes of simplicity, the ALJ will refer to Staff's transcript.

³ Emphasis added

SOAH Docket No. 507-12-5105

Exceptions Letter

September 6, 2012

Page 3

containing letters from Mr. Washington to various county clerks, requesting certified copies of documents related to the matters addressed in documents (a)-(d). However, the evidentiary record in this case closed at the conclusion of the hearing, on June 7, 2012. The letters from Mr. Washington may clarify the evidence, but I am bound by the evidence as it was presented at hearing, before the record closed.

What I am permitted to consider is what Mr. Washington actually said. He said that he retrieved *three documents* from the 1992 file, and then averred that he could not remember if he obtained (c) and (d), though he agreed that (c) and (d) were part of the investigative file. He also noted his "guess" that documents provided by Respondent would have been in the laser film files if she had provided them with her 1992 application.

As the finder of fact, I cannot infer from the evidence in the record that Respondent did in fact disclose relevant information to the Board about the matters contained in documents (a) and (b) with her 1992 application. At the same time, I cannot make the inference Staff requests, which is that the Board had no knowledge prior to 1992 about such matters. As I noted in the PFD, "without knowing the source of the documents in the Board's historical file for Respondent, the ALJ cannot discount [Respondent's counsel's] arguments."

For these reasons, I recommend no change to Finding of Fact No. 11⁴ or to Conclusion of Law No. 5.⁵

2. Respondent's Request for a Conclusion of Law Related to Finding of Fact No. 11

Respondent argues that - given Finding of Fact No. 11 - a conclusion of law should be added to state that Respondent did not violate the applicable law as alleged in Charge 1. I disagree that Staff's failure to establish a fact requires a legal conclusion that Respondent did not violate applicable law. Accordingly, I do not recommend this change.

3. Respondent's Exceptions to Discussion of Formal Charge 2, Finding of Fact No. 14, Conclusions of Law Nos. 5 and 7, and Recommended Sanction

Respondent objects that I treated Respondent's 2009 pre-trial diversion agreement as equivalent to a form of probation, such that Respondent could be deemed to have been placed on "deferred adjudication, community supervision, or deferred disposition" for a crime involving moral turpitude. Staff's reply to Respondent's exceptions and both of Respondent's subsequent

⁴ Finding of Fact No. 11 states: "Staff did not establish that Respondent provided false or deceitful information to the Board in her answer to Question No. 10 on her 1992 registration application."

⁵ Conclusion of Law No. 5 states: "Based on the Findings of Fact and Conclusions of Law, Staff established by a preponderance of the evidence that Respondent engaged in unprofessional or dishonorable conduct subject to disciplinary action by engaging in conduct that resulted in a loss to the public in excess of \$4,999.99. This conduct is subject to discipline under Tex. Occ. Code § 301.452(b)(10)." Staff requested that this Conclusion of Law be amended to include a finding that Respondent provided false or deceitful information to the Board on her 1992 registration application.

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replies address this argument and the cited authorities at length. The PFD contains a detailed analysis of the reasons for my conclusion that Respondent's pre-trial diversion for theft of government property is unprofessional conduct justifying revocation of Respondent's license. For the reasons set forth in the PFD, I recommend no changes to the analysis related to Staff's Charge 2, Finding of Fact No. 14, Conclusions of Law Nos. 5 and 7, and the recommended sanction.

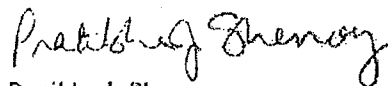
4. Respondent's Exception to Finding of Fact No. 15

Respondent objects that the administrative costs of the proceeding as established by Staff (\$130.80) should be withdrawn if the ALJ agrees to Respondent's exceptions and finds that Respondent did not violate the Nursing Practice Act. In the alternative, Respondent argues that if the PFD is unchanged, Staff prevailed only on one of its two charges, so Respondent should only be assessed only one-half of the costs.

I decline to amend the PFD as requested by Respondent. In addition, I note that there is no apportionment requirement in the applicable rule.⁶ I continue to recommend that the Board assess the full administrative costs established by Staff against Respondent.

Thank you for considering my comments. Please let me know if I may be of further assistance.

Sincerely,



Pratibha J. Shenoy
Administrative Law Judge

PJS/mic

Enclosures

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⁶ Section 301.461 of the Nursing Practice Act states in its entirety: "ASSESSMENT OF COSTS. The board may assess a person who is found to have violated this chapter the administrative costs of conducting a hearing to determine the violation."