



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 A. Plummer
Executive Director of the Board

BEFORE THE TEXAS BOARD OF NURSING

In the Matter of §
Registered Nurse License Number 584035 §
& Vocational Nurse License Number 112356 §
issued to VALERIE GALE PORTER §

ORDER OF THE BOARD

On this day, the Texas Board of Nursing, hereinafter referred to as the Board, accepted the voluntary surrender of Registered Nurse License Number 584035 and Vocational Nurse License Number 112356, issued to VALERIE GALE PORTER, hereinafter referred to as Respondent. This action was taken in accordance with Section 301.453(c), Texas Occupations Code.

Respondent waived informal proceedings, notice and hearing.

The Board makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Respondent holds licenses to practice vocational and professional nursing in the State of Texas which are in delinquent status.
2. Respondent waived informal proceedings, notice and hearing.
3. Respondent received a Certificate in Vocational Nursing from Brazosport Community College, Lake Jackson, Texas, on August 15, 1985, and an Associate Degree in Nursing from Alvin Community College, Alvin, Texas, on May 13, 1992. Respondent was licensed to practice vocational nursing in the State of Texas on December 4, 1985, and was licensed to practice professional nursing in the State of Texas on August 31, 1992.
4. Respondent's complete nursing employment history is unknown.
5. On or about October 28, 2011, Respondent was issued the sanction of a Warning with Stipulations through an Order of the Board. A copy of the Finding of Fact, Conclusions of Law and Order dated October 28, 2011, is attached and incorporated herein by reference as part of this Order.

6. Formal Charges were filed on November 21, 2012. A copy of the Formal Charges is attached and incorporated by reference as part of this Order.
7. Formal Charges were mailed to Respondent on November 26, 2012.
8. On December 7, 2012, the Board received a notarized statement from Respondent voluntarily surrendering the right to practice nursing in Texas. A copy of Respondent's notarized statement, dated December 7, 2012, is attached and incorporated herein by reference as part of this Order.

CONCLUSIONS OF LAW

1. Pursuant to Texas Occupations Code, Sections 301.451-301.555, the Board has jurisdiction over this matter.
2. Notice was served in accordance with law.
3. The evidence received is sufficient to prove violation(s) of 22 TEX. ADMIN. CODE §217.12(11)(B)&(13).
4. The evidence received is sufficient cause pursuant to Section 301.452(b)(1),(3)&(10), Texas Occupations Code, to take disciplinary action against Registered Nurse License Number 584035 and Vocational Nurse License Number 112356, heretofore issued to VALERIE GALE PORTER, including revocation of Respondent's license(s) to practice nursing in the State of Texas.
5. Under Section 301.453(c), Texas Occupations Code, the Board has the authority to accept the voluntary surrender of a license.
6. Under Section 301.453(d), Texas Occupations Code, the Board may impose conditions for reinstatement of licensure.
7. Any subsequent reinstatement of this license will be controlled by Section 301.452 (b), Texas Occupations Code, and 22 TAC §§213.26-.29, and any amendments thereof in effect at the time of the reinstatement.

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ORDER

NOW, THEREFORE, IT IS ORDERED that the voluntary surrender of Registered Nurse License Number 584035 and Vocational Nurse License Number 112356, heretofore issued to VALERIE GALE PORTER, to practice nursing in the State of Texas, is accepted by the Executive Director on behalf of the Texas Board of Nursing. In connection with this acceptance, the Board imposes the following conditions:


1. RESPONDENT SHALL NOT practice professional or vocational nursing, use the title of registered nurse or vocational nurse, or the abbreviation "RN" or "LVN" or wear any insignia identifying herself as a registered or vocational nurse or use any designation which, directly or indirectly, would lead any person to believe that RESPONDENT is a registered or vocational nurse during the period in which the license is surrendered.
2. RESPONDENT SHALL NOT petition for reinstatement of licensure until one (1) year has elapsed from the date of this Order.
3. Upon petitioning for reinstatement, RESPONDENT SHALL satisfy all then existing requirements for relicensure.

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

Effective this 13th day of December, 2012.

TEXAS BOARD OF NURSING

By:


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

VALERIE GALE PORTER
1195 County Road 150
Alvin, TX 77511

Registered Nurse License Number 584035 and Vocational Nurse License Number 112356

Voluntary Surrender Statement

Dear Texas Board of Nursing:

I no longer desire to be licensed as a nurse. Accordingly, I voluntarily surrender my license(s) to practice in Texas.

I consent to the entry of an Order which outlines requirements for reinstatement of my license. I understand that I may not petition for reinstatement until one (1) year from the effective date of the Order. I understand that I will be required to comply with the Board's Rules and Regulations in effect at the time I submit any petition for reinstatement.

Signature

Valerie Porter

Date

12-7-12

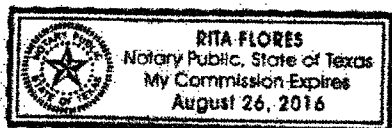
Registered Nurse License Number 584035 and
Vocational Nurse License Number 112356

The State of Texas

Before me, the undersigned authority, on this date personally appeared VALERIE GALE PORTER who, being duly sworn by me, stated that he or she executed the above for the purpose therein contained and that he or she understood same.

Sworn to before me the 7 day of December, 2012.

SEAL



Rita Flores
Notary Public in and for the State of Texas

In the Matter of	§	BEFORE THE TEXAS
Permanent Registered Nurse	§	
License Number 584035 &	§	
Permanent Vocational Nurse	§	
License Number 112356	§	
Issued to VALERIE GALE PORTER,	§	
Respondent	§	BOARD OF NURSING

FORMAL CHARGES

This is a disciplinary proceeding under Section 301.452(b), Texas Occupations Code. Respondent, VALERIE GALE PORTER, is a Registered Nurse holding License Number 584035, which is in delinquent status at the time of this pleading, and is a Vocational Nurse holding License Number 112356, which is in delinquent status at the time of this pleading.

Written notice of the facts and conduct alleged to warrant adverse licensure action was sent to Respondent at Respondent's address of record and Respondent was given opportunity to show compliance with all requirements of the law for retention of the license prior to commencement of this proceeding.

CHARGE I.

On or about September 27, 2011, Respondent was arrested by the Brazoria County Sheriff's Office, Angleton, Texas, for the offense of AGGRAVATED ASSAULT WITH A DEADLY WEAPON, a 2nd Degree Felony. On October 18, 2012, Respondent pled Guilty to ASSAULT CAUSES BODILY INJURY FAMILY MEMBER, a Class A Misdemeanor, in the 149th District Court, Brazoria County, Texas, under cause number 67275. Respondent was sentenced to confinement in the Brazoria County Jail for two (2) days, assessed a fine in the amount of five hundred dollars (\$500) and court costs in the amount of two hundred sixty-two dollars (\$262.00).

The above action constitutes grounds for disciplinary action in accordance with Section 301.452(b)(3)&(10), Texas Occupations Code, and is a violation of 22 TEX. ADMIN. CODE §217.12(13).

CHARGE II.

On or about December 13, 2011, Respondent failed to comply with the Agreed Order issued to her on October 28, 2011, by the Texas Board of Nursing. Noncompliance is the result of her failure to comply with Stipulation Number Three (3) of the Agreed Order which states, in pertinent part that:

- (1) RESPONDENT SHALL pay an administrative reimbursement in the amount of one hundred and one dollars and forty cents (\$101.40). RESPONDENT SHALL pay this administrative reimbursement within forty-five (45) days of entry of this Order

A copy of the October 28, 2011, Opinion and Order of the Board, Findings of Fact, Conclusions of Law and Proposal for Decision is attached and incorporated, by reference, as part of this pleading.

The above action constitutes grounds for disciplinary action in accordance with Section 301.452(b)(1) and (10), Texas Occupations Code, and is a violation of 22 TEX. ADMIN. CODE §217.12(11)(B).

CHARGE III.

On or about October 29, 2012, Respondent failed to comply with the Agreed Order issued to her on October 28, 2011, by the Texas Board of Nursing. Noncompliance is the result of her failure to comply with Stipulation Number One (1) of the Agreed Order which states, in pertinent part:

(1) RESPONDENT SHALL, within one (1) year of entry of this Order, successfully complete a Texas nursing jurisprudence and ethics course. . . .

The above action constitutes grounds for disciplinary action in accordance with Section 301.452(b)(1) and (10), Texas Occupations Code, and is a violation of 22 TEX. ADMIN. CODE §217.12(11)(B).

CHARGE IV.

On or about October 29, 2012, Respondent failed to comply with the Agreed Order issued to her on October 28, 2011, by the Texas Board of Nursing. Noncompliance is the result of her failure to comply with Stipulation Number Two (2) of the Agreed Order which states, in pertinent part:

(2) RESPONDENT SHALL, within one (1) year of entry of this Order, successfully complete the course "Sharpening Critical Thinking Skills," . . .

The above action constitutes grounds for disciplinary action in accordance with Section 301.452(b)(1) and (10), Texas Occupations Code, and is a violation of 22 TEX. ADMIN. CODE §217.12(11)(B).

NOTICE IS GIVEN that staff will present evidence in support of the recommended disposition of up to, and including, revocation of Respondent's license/s to practice nursing in the State of Texas pursuant to the Nursing Practice Act, Chapter 301, Texas Occupations Code and the Board's rules, 22 Tex. Admin. Code §§ 213.27 - 213.33. Additionally, staff will seek to impose on Respondent the administrative costs of the proceeding pursuant to Section 301.461, Texas Occupations Code. The cost of proceedings shall include, but is not limited to, the cost paid by the Board to the State Office of Administrative Hearings and the Office of the Attorney General or other Board counsel for legal and investigative services, the cost of a court reporter and witnesses, reproduction of records, Board staff time, travel, and expenses. These shall be in an amount of at least one thousand two hundred dollars (\$1200.00).

NOTICE IS GIVEN that all statutes and rules cited in these Charges are incorporated as part of this pleading and can be found at the Board's website, www.bon.texas.gov.

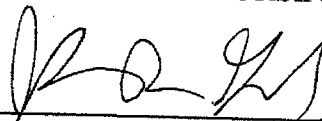
NOTICE IS GIVEN that to the extent applicable, based on the Formal Charges, the Board will rely on Adopted Disciplinary Guidelines for Criminal Conduct, which can be found at the Board's website, www.bon.texas.gov.

NOTICE IS GIVEN that, based on the Formal Charges, the Board will rely on the Disciplinary Matrix, which can be found at www.bon.texas.gov/disciplinaryaction/discp-matrix.html.

NOTICE IS ALSO GIVEN that Respondent's past disciplinary history, as set out below and described in the Order(s) which is/are attached and incorporated by reference as part of these charges, will be offered in support of the disposition recommended by staff: Opinion and Order of the Board dated October 28, 2011.

Filed this 21 day of November, 2012.

TEXAS BOARD OF NURSING



James W. Johnston, General Counsel
Board Certified - Administrative Law
Texas Board of Legal Specialization
State Bar No. 10838300

Jena Abel, Assistant General Counsel
State Bar No. 24036103

Lance Robert Brenton, Assistant General Counsel
State Bar No. 24066924

John R. Griffith, Assistant General Counsel
State Bar No. 24079751

Robert Kyle Hensley, Assistant General Counsel
State Bar No. 50511847

Nikki Hopkins, Assistant General Counsel
State Bar No. 24052269

John F. Legris, Assistant General Counsel
State Bar No. 00785533

TEXAS BOARD OF NURSING
333 Guadalupe, Tower III, Suite 460
Austin, Texas 78701
P: (512) 305-6811
F: (512) 305-8101 or (512)305-7401

Attachments: Opinion and Order of the Board dated October 28, 2011.

DOCKET NUMBER 507-11-2456

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBERS 584035 and 112356
ISSUED TO
VALERIE GALE PORTER

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

OPINION AND ORDER OF THE BOARD

TO: VALERIE GALE PORTER
C/O LOUIS LEICHTER, ATTORNEY
1602 E. 7TH STREET
AUSTIN, TX 78702

WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on October 27-28, 2011, the Texas Board of Nursing (Board) considered the following items: (1) The Proposal for Decision (PFD) regarding the above cited matter; (2) Staff's recommendation that the Board adopt the PFD regarding the registered and vocational nursing licenses of Valerie Gale Porter with changes; and (3) Respondent's recommendation to the Board regarding the PFD and order, if any.

The Board finds that after proper and timely notice was given, the above styled case was heard by an Administrative Law Judge (ALJ) who made and filed a PFD containing the ALJ's findings of facts and conclusions of law. The PFD was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. Staff filed exceptions to the PFD on July 5, 2011. The Respondent filed a response to Staff's exceptions to the PFD on July 19, 2011. On July 21, 2011, the ALJ issued a letter ruling in which she declined to make any changes to the PFD.

The Board has authority to review and modify the PFD in accordance with the Government Code §2001.058(e). The Board, after review and due consideration of the

PFD, Staff's exceptions, Respondent's response to Staff's exceptions, Staff's recommendations, and the presentation by the Respondent during the open meeting, if any, has determined that Findings of Fact Numbers 1 and 19 should be modified under the authority of the Government Code §2001.058(e). Further, the Board declines to adopt Conclusion of Law Number 7.

Finding of Fact Number 1

The Board is authorized under §2001.058(e)(3) to modify a finding of fact in order to correct a technical error. Finding of Fact Number 1 contains a technical error. Finding of Fact Number 1 states that the Respondent's vocational nursing license number is '112365'. This is incorrect. Respondent's vocational nursing license number is '112356'. Finding of Fact Number 1 should be modified to correct this technical error under the authority of §2001.058(e)(3).

Finding of Fact Number 19

Section 2001.058(e)(1) authorizes the Board to modify a finding of fact if the ALJ does not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions. The Board finds that the ALJ improperly applied and interpreted the Board's rules and policies when making Finding of Fact Number 19. The Board has adopted rules that enumerate criminal offenses that relate to and affect the practice of nursing¹. Further, the Board has specifically determined that the criminal offense of 'Terroristic Threat' relates to the practice of nursing². The Board has also adopted Disciplinary Guidelines for Criminal Conduct that further explain how the criminal offense of 'Terroristic Threat' relates to the practice of nursing. With regard to a misdemeanor conviction for 'Terroristic Threat', the Board's Guidelines state the following:

¹ 22 Tex. Admin. Code §213.28.

² 22 Tex. Admin. Code §213.28(b)(1)(xxxvi).

"Offense Against Persons that involves threatening violence to persons or property. Stress inherent in the practice of nursing, and possible combativeness of patients in vulnerable states, requires the control of impulses that lead to an assaultive offense. A person who has committed assaultive offenses raises serious question regarding ability to provide safe patient care. Patients could be vulnerable to similar acts involving intent to injure or reckless behavior that would risk injury."

Despite the fact that the ALJ recognizes the Board's rule and Guidelines with respect to a conviction for a terroristic threat, the ALJ states that the Respondent's conduct is not related to the practice of nursing in Finding of Fact Number 19³. This finding is directly contradictory to the Board's properly adopted rules and Guidelines. Therefore, the Board finds that Finding of Fact Number 19 should be modified under the authority of §2001.058(e)(1) to correct this contradiction.

IT IS, THEREFORE, ORDERED THAT the PFD signed on June 20, 2011, is hereby MODIFIED under the authority of §2001.058(e)(1) and (3) for the reasons outlined above.

IT IS FURTHER ORDERED THAT FINDINGS OF FACT NUMBERS 1 and 19 are AMENDED and ADOPTED as follows:

Amended Findings of Fact

1. Valerie Porter holds permanent license numbers 112356 and 584035 issued by the Texas Board of Nursing (Board).
19. Ms. Porter's conduct was related to the practice of nursing.

³ See ALJ's discussion on Page 10 of the PFD. It is possible, given the ALJ's recognition that the Board may properly take action against the crime of 'Terroristic Threat' under Chapter 53, that inclusion of the word "not" in Finding of Fact Number 19 is a typographical error.

IT IS FURTHER ORDERED THAT Findings of Fact Numbers 1 through 18 and 20 through 22 and Conclusions of Law Numbers 1 through 6 contained in the PFD of June 20, 2011, are ADOPTED without modification. All proposed findings of fact and conclusions of law filed by any party or the ALJ not specifically adopted herein are hereby DENIED.

Conclusion of Law Number 7

Further, the Board declines to adopt Conclusion of Law Number 7 because it is a recommended sanction and not a proper conclusion of law. The Government Code §2001.058(e) authorizes the Board to change a finding of fact or conclusion of law made by the ALJ, or to vacate or modify an order issued by the ALJ if the Board determines that the ALJ did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions. The ALJ did not properly apply or interpret applicable law in this matter when she included her recommended sanction as a conclusion of law.

A recommendation for a sanction is not a proper conclusion of law. While it may be appropriate for the ALJ to recommend a sanction, it is ultimately up to the Board to determine what the appropriate sanction should be. Further, the mere labeling of a recommended sanction as a conclusion of law or as a finding of fact does not change the effect of the ALJ's recommendation. Thus, the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact and conclusions of law. The Board, not the ALJ, is the final decision maker concerning sanctions. Once it has been determined that a violation of the law has occurred, the sanction is a matter for the agency's discretion. The choice of penalty is vested in the agency, not in the courts. Further, an agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency's oversight. The propriety of a particular disciplinary measure is a matter of internal

administration with which the courts should not interfere. See *Texas State Board of Dental Examiners vs. Brown*, 281 S.W. 3d 692 (Tex. App. - Corpus Christi 2009, pet. filed); *Sears vs. Tex. State Bd. of Dental Exam'rs*, 759 S.W.2d 748, 751 (Tex.App. - Austin 1988, no pet.); *Firemen's & Policemen's Civil Serv. Comm'n vs. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984); *Granek vs. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 781 (Tex.App. - Austin 2005, pet. denied); *Fay-Ray Corp. vs. Tex. Alcoholic Beverage Comm'n*, 959 S.W.2d 362, 369 (Tex.App. - Austin 1998, no pet.).

The Board agrees with the ALJ that the Respondent violated the Occupations Code §301.452(b)(3) and that the Respondent should receive a Warning with Stipulations. Findings of Fact Numbers 8, 9, 10, 12, 13, 15, 16, and 19, as amended, and Conclusions of Law Numbers 4 through 6, the Board's Disciplinary Guidelines for Criminal Conduct, and the Board's rules, including 22 Tex. Admin. Code §213.28 and §213.33(e)(3), all support this sanction level. However, the Board disagrees with the ALJ that the Respondent should only be required to take a critical thinking remedial education course.

First, the Board's rules, located at 22 Tex. Admin. Code §213.33(f), require every disciplinary order issued by the Board to include a course in nursing jurisprudence and ethics. The ALJ failed to properly apply the Board's rules when she omitted this requirement from her recommended sanction. Second, the Board finds that the repetitive and serious nature of the Respondent's past assaultive behaviors warrant stipulations designed to monitor the Respondent's nursing practice. The PFD contains several examples of stressful situations where the Respondent reacted in an impulsive, threatening, and assaultive manner. First, on page 5 of the PFD, the ALJ notes that the Respondent was arrested for making a terroristic threat (for threatening to harm her children). During the arrest, the Respondent testified that she was angry and that she bit

one of the arresting officers on his leg, for which she was charged with assault. Although the assault charge was later dropped, the Respondent was required to write a letter of apology to the officer⁴. The Respondent was later convicted of making the terrorist threat and served two days in jail for the offense⁵. In a separate incident, the Respondent exhibited threatening and assaultive behavior at her place of employment⁶. As summarized on page 4 of the PFD, the Respondent testified that she was upset and yelled at employees of PS Fabricators because she believed that money and assets were being hidden from her while she was facing a divorce from her husband. Further, because she believed a particular employee may have been stealing money from the company, she got into an argument with him and ripped his shirt⁷. The Respondent was arrested for assault for this altercation⁸.

The Board has adopted rules that set forth its concerns regarding nurses who have displayed assaultive or threatening behavior against other individuals. As specified in 22 Tex. Admin. Code §213.28(b)(1)(B), and in its adopted Disciplinary Guidelines for Criminal Conduct, assaultive or threatening behavior outside the workplace raises concerns about a nurse's propensity to repeat the same misconduct in the workplace and to provide safe, competent care to patients, especially in situations involving combative or difficult patients and stressful conditions. It is clear from the PFD and the ALJ's findings that the Respondent has reacted violently when faced with stressful situations and/or difficult people in the past. The Board's mission is to protect the health and safety of the public.

⁴ See page 5 of the PFD.

⁵ See page 5 of the PFD and Findings of Fact Numbers 12, 13, 15, and 16.

⁶ PS Fabricators, her undersea drilling family business.

⁷ See page 4 of the PFD and Findings of Fact Numbers 8 and 9.

⁸ See Finding of Fact Number 10.

Based upon the PFD, the Board has no assurance that the Respondent will not react violently when faced with stressful situations in the future, including situations involving patients and other members of the public, such as patient family members or other nursing staff. In order to appropriately guard against these concerns, the Board finds it necessary to impose supervisory stipulations upon the Respondent's practice for a period of one year. During this time, the Board believes it is necessary to require the Respondent to notify her present and future employers of this Order, to be indirectly supervised by another nurse while on duty, and to submit quarterly employer reports to the Board indicating her ability to consistently meet the standards of the Nursing Practice Act and the Board's rules. The Board retains the authority to issue the final sanction in a disciplinary matter. The Board believes these additional stipulations are necessary to ensure the safety of patients and the public. Further, these additional stipulations are consistent with Board precedent in other cases involving similar violations and are authorized under 22 Tex. Admin. Code §213.33(e)(3).

IT IS THEREFORE ORDERED that RESPONDENT SHALL receive the sanction of a WARNING WITH STIPULATIONS, and RESPONDENT SHALL comply in all respects with the Nursing Practice Act, Texas Occupations Code, §§301.001 *et seq.*, the Rules and Regulations Relating to Nurse Education, Licensure and Practice, 22 TEX. ADMIN. CODE §211.1 *et seq.* and this Order.

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

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

of Texas.

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

IT IS FURTHER ORDERED that:

(1) RESPONDENT SHALL, within one (1) year of entry of this Order, successfully complete a course in Texas nursing jurisprudence and ethics. RESPONDENT SHALL obtain Board approval of the course prior to enrollment only if the course is not being offered by a pre-approved provider. Home study courses and video programs will not be approved. In order for the course to be approved, the target audience shall include nurses. It shall be a minimum of six (6) hours in length. The course's content shall include the Nursing Practice Act, standards of practice, documentation of care, principles of nursing ethics, confidentiality, professional boundaries, and the Board's Disciplinary Sanction Policies regarding: Sexual Misconduct; Fraud, Theft and Deception; Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder; and Lying and Falsification. Courses focusing on malpractice issues will not be accepted. RESPONDENT SHALL CAUSE the sponsoring institution to submit a Verification of Course Completion form, provided by the Board, to the Office of the Board to verify RESPONDENT'S successful completion of the course. This course shall be taken in addition to any other courses stipulated in this Order, if any, and in addition to any continuing education requirements the Board has for relicensure. *Board-approved courses may be found at the following Board website address:*
<http://www.bon.state.tx.us/disciplinaryaction/stipscourses.html>

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

(3) RESPONDENT SHALL pay an administrative reimbursement in the amount of one hundred and one dollars and forty cents (\$101.40). 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, SHOULD RESPONDENT PRACTICE AS A NURSE IN THE STATE OF TEXAS, RESPONDENT WILL PROVIDE DIRECT PATIENT CARE AND PRACTICE IN A HOSPITAL, NURSING HOME, OR OTHER CLINICAL SETTING AND RESPONDENT MUST WORK IN SUCH SETTING A MINIMUM OF SIXTY-FOUR (64) HOURS PER MONTH UNDER THE FOLLOWING STIPULATIONS FOR ONE (1) YEAR(S) OF EMPLOYMENT. THE LENGTH OF THE STIPULATION PERIOD WILL BE EXTENDED UNTIL SUCH TWELVE (12) MONTHS HAVE ELAPSED. PERIODS OF UNEMPLOYMENT OR OF EMPLOYMENT THAT DO NOT REQUIRE THE USE OF A REGISTERED NURSE (RN) OR A VOCATIONAL NURSE (LVN) LICENSE, AS APPROPRIATE, WILL NOT APPLY TO THIS STIPULATION PERIOD:

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

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

(6) For the duration of the stipulation period, the RESPONDENT SHALL be supervised by a Registered Nurse, if licensed as a Registered Nurse, or by a Licensed Vocational Nurse or a Registered Nurse, if licensed as a Licensed Vocational Nurse, who is on the premises. The supervising nurse is not required to be on the same unit or ward as RESPONDENT, but should be on the facility grounds and readily available to provide assistance and intervention if necessary. The supervising nurse shall have a minimum of two (2) years experience in the same or similar practice setting to which the Respondent is currently working. RESPONDENT SHALL work only regularly assigned, identified and predetermined unit(s). RESPONDENT SHALL NOT be employed by a nurse registry,

temporary nurse employment agency, hospice, or home health agency. RESPONDENT SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

(7) RESPONDENT SHALL CAUSE each employer to submit, on forms provided to the Respondent by the Board, periodic reports as to RESPONDENT'S capability to practice nursing. These reports shall be completed by the nurse who supervises the RESPONDENT. These reports shall be submitted by the supervising nurse to the office of the Board at the end of each three (3) month period for ONE (1) year(s) of employment as a nurse.

Entered this 20th day of October, 2011.

TEXAS BOARD OF NURSING

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

Attachment: Proposal for Decision; Docket No. 507-11-2456 (June 20, 2011).

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 20, 2011

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

VIA INTER-AGENCY

RE: Docket No. 507-11-2456; In the Matter of Permanent License
Nos. 112365 and 584035 Issued to Valerie Gale Porter

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 black ink, appearing to read "Wendy K. L. Harvel".

Wendy K. L. Harvel
Administrative Law Judge

WKLH/ls
Enclosures

xc: Nikki R. Hopkins, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Suite 460, Austin, TX 78701 - VIA INTER-AGENCY
Dina Flores, Legal Assistant Texas Board of Nursing, 333 Guadalupe, Tower III, Suite 460, Austin, TX 78701 - (with 1 - CD; Certified Evidentiary Record) - VIA INTER-AGENCY
Louis Leichter, Law Office of Louis Leichter, 1602 E. 7th Street, Austin, TX 78702 - VIA REGULAR MAIL

SOAH DOCKET NO. 507-11-2456

IN THE MATTER OF PERMANENT
LICENSE NOS. 112365 AND 584035
ISSUED TO VALERIE GALE PORTER

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Board of Nursing (Board) seeks disciplinary action against Valerie Porter, a registered nurse (RN) licensed by the Board. Staff alleges that Ms. Porter lacked fitness to practice nursing on July 9 and 10, 2007, because she assaulted someone; was arrested, and threatened to harm herself. Staff further alleges that Ms. Porter lacked fitness because she made homicidal and suicidal threats in September 2007. Finally, Staff alleges that Ms. Porter should be subject to disciplinary action because she pled guilty to a Class A misdemeanor of terroristic threat of her family. Staff seeks a warning with numerous stipulations. Staff also asks for costs in the amount of \$1,281.40. The Administrative Law Judge (ALJ) finds that due to the lack of guidance in the Board's disciplinary guidelines, and because she has received a positive psychological evaluation, Ms Porter should receive a warning with a requirement to take a course entitled "Sharpening Critical Thinking Skills". The ALJ further finds that the Board is entitled to administrative costs in the amount of \$101.40.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Jurisdiction and notice were not contested, and those matters are addressed only in the Findings of Fact and Conclusions of Law. The hearing convened February 23, 2011. Assistant General Counsel Nikki Hopkins represented Staff. Attorney Louis Leichter represented Ms. Porter. The record closed on April 22, 2011, with the filing of written closing arguments.

II. STAFF'S CHARGE AND APPLICABLE LAW

A. Staff's Charges

Staff alleges that on specific dates in July and September 2007, Ms. Porter engaged in unprofessional conduct and lacked the fitness to practice nursing. Staff also alleges that based on a misdemeanor conviction for a crime of moral turpitude, action should be taken against Ms. Porter's license.

B. Applicable Law

Staff asserts that Ms. Porter's conduct constitutes grounds for disciplinary action under the Texas Occupations Code and the Board's rules, which authorize sanctions for:

- Unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public. TEX. OCC. CODE § 301.452(b)(10).
- Lack of fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public. TEX. OCC. CODE § 301.452(b)(12), and 22 TEX. ADMIN. CODE § 217.12(5) & 6(C).
- A conviction for a misdemeanor involving moral turpitude. TEX. OCC. CODE § 307.402(b)(3), 22 TEX. ADMIN. CODE § 217.12(13).

III. EVIDENCE AND ANALYSIS

A. Evidence of Ms. Porter's Conduct

Ms. Porter is both a vocational and a registered nurse, but she has not practiced nursing for over five years. At the time of the events that form the basis of this case, she was not working as a nurse and had not been for several years. The evidence focused on three specific days in 2007 where Staff alleges she engaged in behavior that indicated she was not fit to practice nursing on those days. On July 9 and 10, 2007, Staff asserts that Ms. Porter assaulted a family friend and was arrested. Staff further alleges she tried to harm herself and made suicidal threats when in jail. On September 11, 2007, Staff alleges that Respondent made homicidal threats about her children and threatened to kill herself.

July 2007

As evidence of the events of July 9 and 10, 2007, Staff presented the testimony of Aaron Bell. Mr. Bell was the captain of the City of Manvel police department in July 2007. He is also the officer who went to the location of the alleged assault. Mr. Bell testified that he received a call to respond to a disturbance at PS Fabricators (Ms. Porter's undersea drilling family business). When he arrived, he testified that several people at PS Fabricators told him that Ms. Porter had been on the premises cussing at people. Then dispatch contacted him indicating there was an assault victim from PS Fabricators who was at the police station. He went to the police department to interview the alleged victim, John Clark. He noticed that Mr. Clark had a torn shirt. Based on Mr. Clark's statements, he arrested Ms. Porter.

Mr. Bell arrested Ms. Porter. She was later arraigned at the police department. During the arraignment, Mr. Bell testified Ms. Porter became agitated and argued with the judge. She also refused to sign the arraignment paperwork. Once she returned to the holding cell, Mr. Bell noticed that Ms. Porter had taken a bandage off her arm. She was crying. At the time, Ms. Porter had 20 stitches in her arm, which were sewn the day before. Mr. Bell noticed that Ms. Porter was holding something against the stitches and asked her for it. She refused to give it to him and put it in her mouth. He further testified that she said she was going to rip out her stitches so she could die in the jail because it would look bad for the police department. He then called for EMS to check the stitches. When EMS arrived, Mr. Bell testified that one of the medics made some rude comments to Ms. Porter, and they began arguing. Mr. Bell asked the medic to leave because he did not want the argument to escalate. He admitted that he did not take any pictures of Mr. Clark or any pictures of the scene of the alleged assault.

Mr. Bell has known Ms. Porter for several years and is aware that her husband has been arrested several times for domestic violence against Ms. Porter. He also testified that Mr. Clark is approximately six feet three inches tall and weighs about 280 pounds. Mr. Bell also knows Ms. Porter because he worked for PS Fabricators, providing on-site security. He was responsible for scheduling himself and other officers to provide security when the company was working on one particular contract. He along with other law enforcement officers worked at PS Fabricators

during the term of the contract. He left the job when the contract was over. He did not indicate that he left on bad terms.

Staff also called Haley Porter, Ms. Porter's daughter. Haley Porter is a student at Texas State University. She testified that she does not remember the assault in 2007 and does not remember the officer. She was 15 or 16 in 2007. She confirmed that Mr. Clark is a large man. She also indicated that the family sold PS Fabricators.

Ms. Porter also testified about the events on those days. She admits to being upset and yelling at employees at PS Fabricators. She believed that money and assets were being hidden from her while she was facing a possible divorce from her husband. She also believed that Mr. Clark may have been stealing money from the company. She admits to ripping Mr. Clark's shirt.

She testified that Mr. Bell left his employment with PS Fabricators on bad terms. She contends that he was upset the contract was over and that his services would not be needed. She also testified that he was upset that his contract wages had been reported to the IRS and he received a 1099 form, requiring him to disclose the income. She further believes that based on her history of domestic violence and the police department's repeated involvement in disputes at her house, that Mr. Bell is a biased witness who was not being entirely truthful.

She denies making a suicidal threat at the jail. She testified that she was in pain because of her stitches but was not permitted to take any pain medication. She asserts she was attempting to re-bandage the stitches on her arm and was not attempting to pull them out as Mr. Bell contends. She indicated that the medic was rude to her, made mistakes about her prescription medications, and made inappropriate comments.

September 2007

In September 2007, Ms. Porter was arrested and subsequently pled guilty to making a terroristic threat.¹ Ms. Porter testified that at the time of the threat she was in the process of ending her marriage. She and her husband were fighting and he was threatening to take custody of the children. She testified that she said, "I brought the children into this world, and I can take them out." Staff alleges in its notice of hearing that she also threatened to kill herself, but there was no evidence admitted during the hearing that she made such a threat.² She further testified that she was afraid of being on probation during a custody dispute, so she pled guilty and accepted a fine and two-day jail sentence for the charge of making a terroristic threat, a Class A misdemeanor.

She testified that during her arrest, the police pulled her out of her house in the middle of the night wearing a robe that fell open. She was angry and she admitted that she bit one of the arresting officers. She testified that she bit him because his leg was across her throat, she was having trouble breathing, and she needed to get his leg off of her throat. The assault charges against her were dismissed, and she wrote a letter of apology regarding the incident.

B. Unprofessional Conduct

The Board may discipline nurses for engaging in unprofessional conduct.³ In the formal charges, the Board cited to two definitions of unprofessional conduct: the inability to practice safely because of illness, use of drugs or alcohol, or as the result of a mental or physical condition; and causing or permitting physical, emotional, or verbal abuse or injury or neglect to the client or the public.⁴

¹ Staff Ex. 6.

² In its closing arguments, Staff makes reference to evidence in Staff's Exhibit 6, page 8 to support the allegation of suicidal threats. That page was not admitted into the record and is not evidence.

³ TEX. OCC. CODE § 301.452(b)(10).

⁴ 22 TEX. ADMIN. CODE 217.12(5) & 6(C), and Staff Ex. 3.

1. Mental or Physical Condition

The only evidence that relates Ms. Porter's mental condition to her ability to safely practice nursing indicates that she can safely practice. There has never been an allegation that Ms. Porter used drugs or alcohol. The evidence presented related to Ms. Porter's condition indicates that she was diagnosed with anxiety and panic attacks in 2006-2007. Although Staff relies on a statement from Dr. Bourne, who was the Porters' marriage counselor, that Ms. Porter's behavior was erratic, she had out of control anxiety, and had symptoms of agitated depression, there was no testimony that her behavior, anxiety, and symptoms of agitated depression meant that she was unfit to practice nursing at that time.⁵

Furthermore, at the time of the events in 2007, Ms. Porter was not practicing nursing. All of the allegations relate to her behavior outside of the practice. The only testimony regarding the relationship between her behavior and her potential practice as a nurse was speculative at best.

The only current diagnosis of Ms. Porter's mental state is from Dr. Joyce Gayles, a clinical psychologist, who found that Ms. Porter is capable of conducting herself in accordance with Board rules. The psychologist also found that Ms. Porter presents as emotionally stable. Importantly, the Board requested that Ms. Porter obtain a psychological evaluation and provided her with a list of approved clinical psychologists from whom she could receive the evaluation.⁶ Ms. Porter chose Dr. Gayles, a Board-approved psychologist. Dr. Gayles' report is the only expert report in the record that details Ms. Porter's psychological condition and fitness to practice. Dr. Gayles is unequivocal in stating that Ms. Porter is fit to practice nursing in conformance with Board rules. Dr. Gayles also found that Ms. Porter should receive therapy as needed to maintain stability in her family life, but that recommendation is not listed as a requirement to ensure that Ms. Porter complies with Board rules. In the entire report, Dr. Gayles makes no finding of a mental health condition either at the time of these events or in the present. Her report is the only evidence that relates Ms. Porter's mental condition to the ability to safely practice nursing and indicates that Ms. Porter can safely practice nursing and conform with

⁵ Staff Ex. 10, at 2.

⁶ Resp. Ex. 1.

Board rules. Therefore, Staff failed to prove that Ms. Porter engaged in unprofessional conduct because she lacked the ability to practice safely due to an illness or condition.

2. Abuse or Neglect

The second allegation of unprofessional conduct is causing or permitting physical, emotional, or verbal abuse or injury or neglect to the client or the public.⁷ This allegation is based on the alleged assault and making the alleged homicidal threats.⁸ Ms. Porter admitted that she ripped Mr. Clark's shirt. The ALJ finds that ripping Mr. Clark's shirt is not physical abuse or injury or neglect. It does not rise to that level. Staff argues that Ms. Porter also injured Mr. Clark and that his ear was swollen. Staff attempted to introduce evidence, and argues in closing argument, that Mr. Clark had some physical injuries. But the police report on which Staff purports to rely was not admitted at the hearing for the truth of the matters in it. It was admitted only to show what the Board's investigator used as part of his investigation. Because Mr. Clark did not testify, there is simply no admitted evidence that Mr. Clark suffered any injury. Ms. Porter's behavior, including yelling and ripping Mr. Clark's shirt was certainly ill-advised and not the best way to handle her concerns of theft. Nevertheless, it does not rise to the level of unprofessional conduct, as that term is defined.

As discussed above, there is no evidence that Ms. Porter made any suicidal threats at the time she stated that "she could take the children out of this world." Therefore, that issue will not be addressed. The remaining issue is whether her statement about the children rises to the level of unprofessional conduct. Her statement was made during a custody dispute. It was clear from her testimony that she never intended to kill or harm her children. Such a statement, given the circumstances of how and when it was made, does not rise to the level of unprofessional conduct, as that term is defined.

⁷ Staff Ex. 4, Charge II.

⁸ Staff also alleges that Ms. Porter made suicidal threats at the same time she made the homicidal threats. There is no evidence of suicidal threats in the record. In its closing arguments, Staff also alleges that Ms. Porter should be found to have engaged in unprofessional conduct because she spit on the medic at the jail and because she bit a police officer. Staff's charges do not indicate that they are seeking a finding of unprofessional conduct for those two allegations, Staff did not seek an amendment of its charges at the hearing, and, therefore, the ALJ cannot consider those two allegations as evidence of unprofessional conduct.

The Board's unprofessional conduct statute leaves much to the determination of the Board when deciding whether an action is unprofessional conduct.⁹ Most important to the issue of whether, in the Board's opinion, Ms. Porter's conduct is likely to deceive, defraud, or injure a patient or the public, is the Board's expert witness' testimony. In this case, the Board's expert, Denise Benbow, was unable to testify that Ms. Porter would not behave professionally in a nursing environment. She testified that she was concerned that *maybe* Ms. Porter would not behave professionally as a nurse because she did not act professionally in her business. She also testified that patients in vulnerable states *might* not be able to express to Ms. Porter any concerns they had. She never testified that in her opinion, Ms. Porter's conduct was likely to deceive, defraud, or injure a patient or the public. Her testimony was simply speculation about things that might happen. Her speculation is not sufficient to support Staff's allegation that "in the Board's opinion" the conduct is likely to deceive, defraud, or injure the public. Therefore, Staff failed to prove that Ms. Porter engaged in unprofessional conduct under Counts I and II in the Formal Charges.

C. Lack of Fitness to Practice

Staff alleges that Ms. Porter lacked fitness to practice under TEX. OCC. CODE § 301.452(b)(12) and 22 TEX. ADMIN. CODE § 217.12(5). The Occupations Code states that a person may be subject to disciplinary action if they lack fitness to practice "because of a mental or physical health condition that could result in injury to the patient or the public." The Board's rule requires the "demonstration of actual or potential inability to practice nursing with reasonable skill and safety to clients by reason of illness, use of alcohol, drugs, . . . or as a result of any mental or physical condition."¹⁰ There are no allegations that Ms. Porter used alcohol or drugs. Thus, to prove that Ms. Porter lacks fitness to practice nursing, Staff would have to show that she had a mental or physical health condition that made it potentially unsafe for her to practice.

⁹ "[U]nprofessional or dishonorable conduct that, *in the board's opinion*, is likely to deceive, defraud, or injure a patient or the public." TEX. OCC. CODE § 301.452(b)(10) (emphasis added).

¹⁰ 22 TEX. ADMIN. CODE § 217.12(5).

Staff's witness, Ms. Benbow, testified about her concerns should Ms. Porter practice nursing. However, Ms. Benbow is a nurse. She is not a doctor, psychologist, or other professional who can make a diagnosis that Ms. Porter was suffering from a mental or physical health condition.

Staff's Notice of Hearing is clear that the allegations relate only to the three days in July and September 2007. There is no allegation in Staff's notice that Ms. Porter is currently unfit to practice nursing. Rather, each allegation in the notice of hearing relating to her fitness to practice is limited to those three particular days. To prove that she was unfit on those dates, Staff needed to show that she suffered from a mental or physical health condition on those dates that could result in injury to the public or a patient. As discussed in detail above, the only evidence that discusses the relationship between any alleged mental condition and Ms. Porter's ability to practice nursing indicates that she can safely practice. Therefore, Staff failed to prove any violations of TEX. OCC. CODE § 301.452(b)(12) and 22 TEX. ADMIN. CODE § 217.12(5).

D. Conviction

As a result of making the comment that she had brought her children into the world and could take them out, Ms. Porter pled guilty to a Class A misdemeanor of making a terroristic threat to family member. She was confined to jail for two days. Staff seeks to discipline her based on the conviction for a crime of moral turpitude. Staff argues that making a terroristic threat to harm one's children is a crime of moral turpitude. Although there is no case law that has determined that making a terroristic threat is a crime of moral turpitude, family violence is considered a crime of moral turpitude. Ms. Porter argues that her crime was not a crime of moral turpitude. She argues that the underlying statement was at best a future threat and, according to Ms. Porter, was meant sarcastically. Furthermore, she argues it was made to her husband during a custody battle, in the heat of the moment, and that her children did not hear her. Regardless of the underlying facts, Ms. Porter pled guilty to making a terroristic threat toward a family member. An element of terroristic threat is placing a family member in fear of imminent bodily

injury. Such an action is a crime of moral turpitude as that term has been developed in case law.¹¹

Because the terroristic threat against a family member is a crime of moral turpitude, the Board has the authority to discipline Ms. Porter under chapter 53 of the Occupations Code. Ms. Porter argues that the terroristic threat does not relate to the practice of nursing under chapter 53 because it was unrelated to the practice of nursing, her license would not offer Ms. Porter the opportunity to engage in similar criminal activity, and there is no relationship of the crime to the ability to discharge her duties as a nurse. However, the Board has determined by rule that a terroristic threat relates to the practice of nursing.¹² Given that the Board has a properly enacted rule establishing that a terroristic threat relates to the practice of nursing, the Board is permitted under chapter 53 of the Occupations Code to discipline Ms. Porter.

The Board's Disciplinary Guidelines for Criminal Conduct indicate that each case is considered on its own merits and use several factors for determining the appropriate discipline. Those factors include: the nature and seriousness of the crime; the actual damages; the extent and nature of past criminal activity; whether the conduct evidences a lack of truthfulness; the age of the person at the time of the crime; the amount of time elapsed since the person's last criminal activity; evidence of rehabilitation; record of steady employment; letters of recommendation, and payment of all fees and court costs. Most of these factors weigh in favor of Ms. Porter. Her crime of making a terroristic threat against a family member is a serious crime, but it was made in the middle of a custody dispute and no one was harmed. Her daughter, Haley Porter, testified that she has a good relationship with her mother and that she did not hear the threat. Therefore, the seriousness of the crime is reduced. There were no actual damages. Ms. Porter has not been convicted of any other crimes. The crime does not indicate a lack of truthfulness because the crime did not involve fraud or deceit. Ms. Porter was an adult when she made the threat, which indicates she should have been mature and responsible enough not to do it. It has been almost four years since Ms. Porter made the threat, and over three years since she was convicted. She

¹¹ See *Ludwig v. State*, 969 S.W.2d 22 (Tex. App. - Fort Worth 1998, pet. ref'd) (conduct that is base, vile, or depraved; something inherently immoral or dishonest).

¹² 22 TEX. ADMIN. CODE § 213.28(b)(1)(A)(xxxvi).

paid all fees and court costs. As evidence of her rehabilitation, her psychologist indicated that she is presently fit to practice nursing consistently with Board rules.

The Board's Disciplinary Guidelines provide for issuing a license with sanctions if the judicial order for conviction of terroristic threat is three years old or less. If the order is greater than four years old, the guidelines provide for issuing the license without sanctions. Ms. Porter's judgment was signed January 14, 2008, more than three years ago but less than four. She is in a gray area with respect to the guidelines. However, she has numerous mitigating factors in her favor and no serious aggravating factors against her.

Staff seeks a warning with stipulations including completion of a course in nursing jurisprudence and ethics, a course entitled "Sharpening Critical Thinking Skills", a requirement that Ms. Porter practice direct patient care in a clinical setting at least 64 hours per month for one year. Any time she is not working, the order will be tolled. Staff also requests provisions that Ms. Porter must notify each employer of the order and stipulations, provide Notification of Employment forms, submit any incident reports to the Board, submit reports regarding her capability to practice, participate in therapy with a professional counselor approved by the board and require the therapist to provide periodic written reports to the Board.¹³

The ALJ finds that it is appropriate for Ms. Porter to receive a warning with education. Ms. Porter has had no incidents of criminal conduct since 2007. In 2007, she was going through a difficult time with her marriage and family business failing. She received a psychological evaluation slightly over one year ago, which shows that she is emotionally stable and able to function within the boundaries of the Nursing Practice Act and Board Rules. Therefore, given that she has been cleared by a mental health professional as being capable of practicing nursing in compliance with Board rules, has separated from her husband, and has sold the family business, she has demonstrated that she has rehabilitated and is capable of practicing nursing without restriction. Ms. Porter is currently not practicing, so the requirement that tolls the order when she is not practicing effectively makes the Staff's proposal a lifetime order for Ms. Porter,

¹³ Staff Ex. 11. Staff Ex. 11 is an agreed order that was developed during mediation. Ms. Porter determined that she no longer agreed to the terms in the order and withdrew her approval.

which the ALJ finds in not appropriate. But Staff's recommendation that Ms. Porter complete a course on "Sharpening Critical Thinking Skills" is appropriate.

E. Costs

Staff provided an affidavit of estimated administrative costs asking for costs in the amount of \$1,281.40.¹⁴ Staff seeks costs for copying, redaction, postage, paralegal time, investigator's time, and attorney's fees. Staff is entitled to administrative costs against Ms. Porter because she was found to have violated the Nursing Practice Act due to her conviction for a crime of moral turpitude. However, the Board is entitled only to administrative costs, not attorney's fees. Attorney's fees are not administrative costs.¹⁵ Attorney's fees are allowed only when permitted by statute, and the term "administrative costs" does not include attorney's fees. Therefore, the \$850.00 of attorney's time is disallowed. Additionally, other requested amounts for time are costs, because billing for professional time is analogous to billing for attorney's fees, and is not a direct administrative cost. Therefore, the paralegal's time in the amount of \$105.00, the investigator's fee in the amount of \$195.00, and the time billed for redaction of exhibits in the amount of \$30.00 are all disallowed. The allowed administrative costs that may be assessed against Ms. Porter are \$101.40.

IV. FINDINGS OF FACT

1. Valerie Porter holds permanent license numbers 112365 and 584035 issued by the Texas Board of Nursing (Board).
2. On January 12, 2011, Board staff (Staff) sent its Notice of Hearing to Ms. Porter by certified mail.
3. The Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the matters asserted.

¹⁴ Staff Ex. 12.

¹⁵ *Rogers v. Texas State Bd. of Pub. Accountancy*, 310, S.W.3d 1, 7-8 (Tex. App. – Austin 2008, no pet.).


4. The hearing convened on February 23, 2011, at the State Office of Administrative Hearings (SOAH).
5. Assistant General Counsel Nikki Hopkins represented Staff. Attorney Louis Leichter represented Ms. Porter.
6. The record closed on April 22, 2011, with the filing of written closing statements.
7. Ms. Porter is both a vocational and a registered nurse, but she has not practiced nursing for over five years.
8. On July 9, 2007, Ms. Porter went to PS Fabricators, an undersea drilling business owned by her family.
9. While at PS Fabricators, Ms. Porter got in an argument with John Clark, whom she believed may have stolen money from the business. During the argument, she ripped his shirt.
10. Based on her argument with Mr. Clark, Ms. Porter was arrested for assault. While in the holding cell, she took a large bandage off her arm, which was covering 20 stitches she had received the day before.
11. She made sarcastic comments about removing her stitches but did not intend to kill or harm herself.
12. In January 2008, Ms. Porter pled guilty to making a terroristic threat against a family member.
13. The terroristic threat occurred during an argument with her husband while they were engaged in a custody dispute. Ms. Porter stated, "I brought the children into this world, and I can take them out."
14. None of the children heard the threat.
15. Ms. Porter was convicted of terroristic threat against a family member, a Class A misdemeanor.
16. She was sentenced to two days in jail for the terroristic threat.
17. At the time of these events, Ms. Porter's marriage and family business were failing. She has since separated from her husband and sold the business.
18. Ms. Porter's conduct was not likely to deceive, defraud, or injure a patient.
19. Ms. Porter's conduct was not related to the practice of nursing.

20. Ms. Porter's conduct does not indicate that she would behave unprofessionally in a nursing environment.
21. Ms. Porter was evaluated by a Board-approved psychologist in February 2010. She was found to be presently capable of conducting herself in accordance with Board rules.
22. The Board is entitled to receive \$101.40 in administrative costs.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. TEX. OCC. CODE ch. 301.
2. SOAH has jurisdiction over the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE ch. 2003.
3. Proper and timely notice of the hearing was provided. TEX. GOV'T CODE ch. 2001; 22 TEX. ADMIN. CODE § 213.10.
4. A terroristic threat against a family member is a crime of moral turpitude. *Ludwig v. State*, 969 S.W.2d 22 (Tex. App. - Fort Worth 1998, pet. ref'd).
5. Based on the findings of fact and conclusions of law, Ms. Porter violated Tex. Occ. Code §301.402(b)(3).
6. Under the Board's penalty matrix, a terroristic threat made over three years ago but less than four years warrants a warning.
7. Based on the findings of fact and conclusions of law, the ALJ recommends that Ms. Porter receive a warning with a requirement to take the course entitled "Sharpening Critical Thinking Skills."

SIGNED June 20, 2011.


WENDY L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



Texas Board of Nursing

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Katherine A. Thomas, MN, RN
Executive Director

July 5, 2011

Administrative Law Judge Harvel
State Office of Administrative Hearings
300 W. 15th St., suite 502
Austin, Texas 78701

Re: In the Matter of Permanent Certificate No. 112356
Issued to: VALERIE PORTER
Docket No. 507-11-2456

Dear Judge Harvel:

Enclosed please find *Staff's Exceptions to Proposal for Decision*, regarding the above-entitled matter.

By copy of this letter I am forwarding a copy of this document to Respondent.

Thank you in advance for your time and assistance with this matter.

Sincerely,

Nikki Hopkins
Assistant General Counsel

NRH/rm

cc: Valerie Porter, c/o Louis Leichter, Facsimile (512) 482-0164, Louis@leichterlaw.com

Members of the Board

Linda Rownd, PhD, FNP, RN Galveston, <i>President</i>		Patricia Clapp, BA Dallas		Tamera Cowan, MN, RN Harrison		Shari Crosby, JD, SPHR Dallas		Marilyn Davis, BSN, RN, MPA Sugar Land	
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Blanca Rosa Garcia, PhD, RN Corpus Christi		Richard Gibbs, LVN Mesquite		Kathy Leuder-Horn, LVN Granbury					

DOCKET NO. 507-11-2456

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 112356 & 584035
ISSUED TO
VALERIE GAYLE PORTER

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

STAFF'S EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE JUDGE OF SAID COURT:

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

I. Finding of Fact No. 9

Staff takes exception to the omission of the fact that Respondent also physically assaulted John Clark and caused physical injuries to John Clark's face.

In her analysis, the ALJ "finds that ripping Mr. Clark's shirt is not physical abuse or injury or neglect."¹ The ALJ reasoned that Staff provided no evidence that Respondent assaulted Mr. Clark and caused physical injury to him. This is directly contrary to the evidence on the record. Staff presented the testimony of Aaron Bell, who stated that his offense report (Staff's Exhibit 8) is an accurate reflection of his observations on July 9, 2007.² Furthermore, Aaron Bell also testified that he observed John Clark immediately after the events at issue on July 9, 2007 and that he observed injuries to John Clark while obtaining Mr. Clark's statement pursuant to an assault complaint filed by John Clark against Respondent.³ The ALJ states that she did not admit the offense report for the truth of the matters asserted in the report, but the ALJ cannot simply ignore the live testimony of the reporting police officer and his personal observations of the injuries caused to the side of John Clark's face. Likewise, Staff presented evidence that Respondent was involved in several other physically violent encounters within a short period of time of the assault against John Clark, namely threatening to shoot her daughter, biting an arresting police officer and spitting on an emergency medical professional assigned to

¹ See PFD, page 7.

² See Audio Recording of Aaron Bell's testimony found at 2 hours 16 minutes, 16 seconds (2:16:16) on the record.

³ See Aaron Bell's testimony found at (2:18:33) on the record.

Respondent's care while she was incarcerated.⁴ All of these facts, taken together, tend to support Officer Bell's testimony and the fact that John Clark filed an offense report *for assault* against Respondent, and tend to make it more likely than not that Staff's evidence is the credible evidence rather than Respondent's self-serving denial. However, the ALJ goes on to write, "Because Mr. Clark did not testify, there is simply *no admitted evidence* that Mr. Clark suffered any injury." This is not true because Officer Bell submitted live testimony into the record; thus Staff takes exception to this statement.

II. Finding of Fact No. 11

Staff takes exception to the words, "but did not intend to kill or harm herself."

Staff introduced the City of Manvel Police Department Supplemental Incident Report, wherein then-Captain Aaron Bell made written record of his personal observations of Respondent while she was in custody at the Manvel Police Department, reporting that, "I saw that Valerie was visibly upset, crying and that she had in fact taken the bandage off of her arm and was holding something against the stitches in her left arm. Valerie said that she was going to rip out all of her stitches to cause some arterial bleeding so that she could die in the Manvel jail and asked me how that would look on the police department. . . . At that time I noticed that the object she had been holding was a small metal clip that was holding her Ace bandage over her stitched wound. . . . I asked Valerie to hand me the clip and she said no. I asked her for it the second time and she put it in her mouth and said she would swallow it before she gave it to me[.]"⁵ Aaron Bell testified to these facts and statements, and added that it appeared Respondent was trying to harm herself.⁶ The ALJ seems to ignore this evidence in favor of Respondent's denial of these facts. However, Officer Bell was simply doing his job, and has no reason to lie, whereas the Respondent has demonstrated repeatedly that she lacks the character and credibility that Officer Bell demonstrated on the witness stand.

⁴ See Valerie Porter's testimony at 5:43:40 on the record stating she made the comment, "I brought the children into this world, and I can take them out" and later plead guilty to Terroristic Threat for the same conduct; Valerie Porter's testimony at 5:26:14 on the record stating she bit the officer who arrested her for Terroristic Threat; Valerie Porter's testimony at 6:17:40 on the record stating she "spat" on EMS Medic Wendell Wiley; and Staff's Exhibit 8, page 7, wherein then-Captain Aaron Bell reported that while EMS Medic, Wendell Wiley, was re-bandaging Respondent's arm, Respondent engaged in a confrontation with Mr. Wiley and ultimately "spit saliva from her mouth at Medic Wendell, hitting him on the back of his leg."

⁵ See Staff's Exhibit 8, page 6.

⁶ See Audio Recording of Aaron Bell's testimony found at (2:20:10 to 2:22:40) on the record.

III. Finding of Fact No. 14

Staff takes exception to this entire finding. There is no credible evidence on the record that none of Ms. Porter's children heard the threat. First, no evidence was presented to discuss Respondent's two sons. Second, Respondent plead guilty to the facts contained in the criminal information of her Terroristic Threat conviction, which states, "Valerie Gates Porter, the defendant did then and there threaten to commit an offense involving violence to a person, namely assault, with intent to place Haley Porter in fear of imminent serious bodily injury."⁷ If, as Respondent claims, her daughter did not hear the threat, why would Haley Porter be in fear? Respondent admitted to this fact. Furthermore, this evidence is supported by the arresting officer's report, which states that he interviewed Respondent's daughter, Haley Porter, who stated to him "that her and her mother were arguing when her mother called her dad in front of her and told him that she was going to put a bullet in the children's heads and then her own."⁸ The ALJ did not admit this entire report for the truth of the matter asserted, but the exhibit was admitted as part of the investigatory file and tends to make it more likely than not that Respondent's daughter did hear the threat.

IV. Finding of Fact No. 18

Staff takes exception to this entire finding. TEX OCC. CODE §§ 301.452(b)(10) states, "A person is subject to denial of a license or to disciplinary action under this subchapter for: . . . unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public." Rule 217.12(6)(C) defines unprofessional conduct as causing or permitting physical, emotional or verbal abuse or injury or neglect to the public. Under this Rule, actual injury to the public need not be established; however, Respondent caused physical and verbal harm to John Clark. Respondent also arguably caused physical and verbal harm to the medical professional caring for her while she was in custody by spitting on him. Additionally, in 2007 it was likely to cause harm to any patients under Respondent's nursing care because Respondent demonstrated very clearly her inability to respect and/or wield her position of power responsibly, which could harm her patients. Denise Benbow testified that Respondent

⁷ See Staff's Exhibit 6, Certified Criminal Record, Cause No. 163048, page 3.

⁸ See Staff's Exhibit 6, Certified Criminal Record, Cause No. 163048, page 8 (narrative report).

was in a position of power over John Clark, an employee of her husband's company, and abused that position of power by losing control and assaulting Mr. Clark in a work environment.⁹ Ms. Benbow further testified that this behavior could affect patients, because nurses are in a position of power with their patients and must be trusted to control themselves and advocate for the patient.¹⁰ Thus, Staff has proven that Respondent's conduct was unprofessional and likely to injure the public and/or patients pursuant to TEX. OCC. CODE §301.452(b)(10) and Rule 217.12(6)(C).

V. Findings of Fact Nos. 19 and 20

Staff takes exception to these entire findings for the reasons stated in its exception to finding of fact number 18. Expert Denise Benbow testified that Respondent's conduct was related to the practice of nursing and was unprofessional, and Respondent offered no evidence contrary to her statement.

VI. Conclusions of Law

A. First, Staff takes exception to the absence of a conclusion of law that Respondent violated TEX. OCC. CODE §301.452(b)(10) and Rule 217.12(6)(C), as alleged in Formal Charge Two and TEX. OCC. CODE §301.452(b)(10) as alleged in Formal Charge Three.

The ALJ writes that Respondent's admitted statement, "I brought the children into this world, and I can take them out" and her admitted plea of guilty and subsequent conviction for Terroristic Threat based on the same conduct "does not rise to the level of unprofessional conduct."¹¹ The ALJ reasons that this is because the statement was made "during a custody dispute" and that it was somehow clear from Respondent's testimony "that she never intended to kill or harm her children." Staff takes exception to this finding and its reasoning because Respondent admitted to making these statements and furthermore, *plead guilty to a Terroristic Threat*.¹² This is an adjudicated fact. The ALJ cannot retry or undo the adjudicated fact that

⁹ See Audio Recording of Denise Benbow's testimony found at (3:23:01 to 3:24:48) on the record.

¹⁰ *Id.* at 3:21:24.

¹¹ See PFD p. 7.

¹² See Staff's Exhibit 6, Certified Criminal Record, Cause No. 163048, page 3 (criminal information), which states, "Valerie Gates Porter, the defendant did then and there threaten to commit an offense involving violence to a person,

Respondent plead guilty to the "intent to place Haley Porter in fear of imminent serious bodily injury." Furthermore, in her analysis, the ALJ states, "the Board's expert, Denise Benbow, was unable to testify that Ms. Porter would not behave professionally in a nursing environment. She testified that she was concerned that maybe Ms. Porter would not behave professionally as a nurse because she did not act professionally in her business. She also testified that patients in vulnerable states might not be able to express to Ms. Porter any concerns they had. She never testified that in her opinion, Ms. Porter's conduct was likely to deceive, defraud, or injure a patient or the public."¹³(emphasis added.) This is not true. The record actually reflects the following:

Ms. Benbow: It is my opinion that if that assault occurred, *that would be a risk of danger to the public; injury to the public.* (emphasis added)

Ms Hopkins: Why is that?

Ms. Benbow: Because if you physically assault somebody, then you can cause injury to them. A nurse in a position...with a patient, is in a position of power and needs to be in control of their own reactions and how they are conducting themselves so that they can advocate for the patient and put the patient needs first.¹⁴

Ms. Benbow testified that she considered Respondent's pattern of abusing her positions of power as a factor in determining whether Respondent engaged in unprofessional conduct that could affect the practice of nursing. Ms. Benbow supported her conclusion that there is a pattern of abusive behavior with two facts: (1) Respondent assaulted an employee of her husband's company and (2) Respondent threatened violence against her child.¹⁵ In both situations, Respondent was in a position of power either as the victim's boss/boss's wife or as the victim's parental figure. Ms. Benbow pointed out that this type of abuse is disturbing considering that

namely assault, with intent to place Haley Porter in fear of imminent serious bodily injury, and the said Haley Porter was then and there a member of the defendant's family."

¹³ See PFD p. 8.

¹⁴ See audio recording of the record at 3:21:24.

¹⁵ See Audio Recording of Denise Benbow's testimony found at (3:23:01 to 3:24:48) on the record.

nurses are in a position of power over their patients and must be trusted to exert their power benignly and to help her subordinates, not injure them.¹⁶ Ms. Benbow went on to say that a nurse who cannot control herself and act in a professional manner in a business setting calls into question her ability to control herself with patients.¹⁷ Ms. Benbow is a nurse, and as an expert witness, her testimony should carry greater weight than the Respondent, who is a convicted criminal and has a reason to be untruthful in defending herself. Thus, Staff takes exception to the ALJ's analysis, findings and the lack of a conclusion of law on this issue.

B. Second. Staff takes exception to the absence of a conclusion of law that Respondent violated TEX. OCC. CODE §301.452(b)(12) and Rule 217.12(5) as alleged in Formal Charge One and in Formal Charge Three.

1. In particular, Staff takes exception to the ALJ's finding that only a doctor, psychologist, or other professional who is not a nurse can make a diagnosis that Respondent was suffering from a mental or physical health condition.¹⁸ This is not supported by law. A medical license is not the litmus test for qualification as an expert witness.¹⁹ And, while a nurse may not make a medical diagnosis, she may make a nursing diagnosis.²⁰ The ALJ's finding is also contrary to the Board's statutes, rules, policies, and precedent.

TEX OCC. CODE §§ 301.452(b)(12) states that, "[a] person is subject to denial of a license or to disciplinary action under this subchapter for: . . . lack of fitness to practice because of a mental . . . health condition that could result in injury to a patient or the public[.]"

Rule 217.12(5) states that an inability to practice safely is the demonstration of actual or potential inability to practice nursing with reasonable skill and safety to clients as a result of any mental or physical condition."

¹⁶ *Id.*

¹⁷ See Audio Recording of Denise Benbow's testimony found at (3:23:01 to 3:24:48) on the record.

¹⁸ See PFD p. 8.

¹⁹ See *Gregory v. State*, 53 S.W.3d 164 at 179-180 9Tex. App. 2001).

²⁰ *Id.* at 186.

Furthermore, TEX. OCC. CODE §§301.401 (defining conduct subject to reporting), and 301.401(b)(reporting requirements) require nurses to report whether they suspect a colleague is unfit to practice. Additionally, the Board specifically requires nurses to report when they suspect another nurse is impaired or suspected of being impaired by chemical dependency or mental illness.²¹ There are many cases where a nurse reported another nurse for exhibiting symptoms such as irrational or odd behavior, slurred speech patterns, stumbling, repetitive speech, or an inability to respond to or answer questions. All of these behaviors indicate a mental condition which could be caused by drugs, alcohol, bi-polar disorder, depression, or schizophrenia. The board relies upon and trusts nurses to be the first in the field to report conduct which would place the public at risk. So, to state that the Board's expert is not qualified to make such a determination is counter to the Board's statute and rules. On or about July 17, 2006, ALJ Carol Wood issued a proposal for decision *In The Matter of Permanent Certificates Numbers 155860 and 667391 Issued to Angela Kay O'Brien*, wherein the judge found that the Board's nursing expert could not diagnose a mental condition because she was not a "psychiatrist or psychologist attesting that Respondent's written statements and testimony at the hearing are evidence of a mental illness or a mental condition that could result in injury to a patient or the public."²² The Board issued an order modifying this PFD, stating that nurses are qualified to give expert testimony on a Respondent's mental condition.²³ Thus, Staff takes exception to the ALJ's finding, which is contrary to the Board's legal standards and policies.

2. Additionally, Staff takes exception to the ALJ's finding that Staff failed to prove that Respondent was unfit to practice on the three dates in question, that is July 9-10, 2007 and September 11, 2007. Aside from Ms. Benbow's testimony, the record reflects additional evidence that Respondent suffered from a mental condition at the time of the conduct at issue. At the hearing, Respondent introduced a psychological evaluation submitted by licensed clinical psychologist, Joyce Gayles, Ph.D. that was conducted in February of 2010. In that evaluation, Dr. Gayles provides a summary of treatment obtained by Dr. Thomas Bourne, who diagnosed and treated Respondent for anxiety and panic attacks in 2006-2007. Dr. Gayles reports that

²¹ See TEX. OCC. CODE §301.410

²² See PFD, *In The Matter of Permanent Certificates Nos. 155860 and 667391 Issued to Angela Kay O'Brien*, p.8.

²³ See Opinion and Order of the Board, *In The Matter of Permanent Certificates Nos. 155860 and 667391 Issued to Angela Kay O'Brien*, p.5-6.

Respondent was also referred to a psychiatrist, who placed the Respondent on medication. Dr. Gayles reports through Dr. Bourne's summary of treatment that Respondent's behavior during the events at issue "was erratic" and "that her anxiety was out of control" and that "she presented with symptoms of an agitated depression."²⁴ The ALJ states correctly, "To prove that [Respondent] was unfit on those dates, Staff needed to show that she suffered from a mental or physical health condition on those dates that could result in injury to the public or a patient."²⁵ Staff met the legal standard and proved that Respondent violated TEX. OCC. CODE § 301.452(b)(12) and TEX. ADMIN. CODE § 217.12(5). Staff proved that Respondent suffered from a mental condition: Dr. Bourne diagnosed Respondent with depression and anxiety attacks. Furthermore, Staff proved that Respondent actually injured the public: she assaulted John Clark, causing injuries to his face as well as tearing his shirt, and Respondent bit one of the police officers who arrested her for threatening the life of her daughter. It is noteworthy that the ALJ states, "the only evidence that discusses the relationship between any alleged mental condition and Ms. Porter's ability to practice nursing indicates that she can safely practice." This obviously excludes the testimony of Denise Benbow and ignores Dr. Bourne's report. Staff objected repeatedly during the hearing and in written closing arguments to the ALJ's ruling disallowing the Board from introducing testimony by Ms. Benbow on the lack of fitness issue. It is improper for the ALJ to prevent Staff from putting on its evidence and then find no evidence of a lack of fitness in part because Staff did not provide evidence on this issue.

VI. The ALJ's Analysis and Recommendation

Staff excepts to the Administrative Law Judge's inclusion of the ALJ's recommended sanction as a conclusion of law. An agency is the final decision maker regarding the imposition of sanctions. Once it has been determined that a violation of the law has occurred, the sanction is a matter for the agency's discretion. The choice of penalty is vested in the agency, not in the courts. The agency is charged by law with discretion to fix the penalty when it determines that the statute has been violated. Thus, the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact and conclusions of law. Further, the mere labeling of a recommended sanction

²⁴ See Staff's Exhibit 10, page 2, 2nd paragraph under "Other Relevant History".

²⁵ See PFD p. 8.

as a conclusion of law or finding of fact does not change the effect of the ALJ's recommendation... the Board, not the ALJ, is the decision maker concerning sanctions.²⁶ Staff requests that the ALJ's recommended sanction be reclassified as a *recommendation* and not a conclusion of law.

Further, Staff also excepts to the ALJ's analysis of the evidence and recommendation that Respondent be issued a Warning with Stipulations that only include the remedial education course "Sharpening Critical Thinking." The ALJ bases her recommendation on her own analysis of the aggravating and mitigating factors involved in the case, without giving due weight to expert Denise Benbow's testimony. Ms. Benbow discussed her recommendation for the appropriate disciplinary sanction in this matter on the record.²⁷ Ms. Benbow relied on the Board's rules and disciplinary matrix, and recommended a Warning with Stipulations based on the following analysis.

For the violations of 301.452(b)(10) and (12) as alleged in Formal Charges One and Two, Ms. Benbow determined that the disciplinary matrix supported a Tier Two, Sanction Level One sanction for 301.452(b)(10) and a Tier One, Sanction Level I sanction for 301.452(b)(12), both of which recommend a Warning with Stipulations or Reprimand. Ms. Benbow recommended specific appropriate stipulations to include in the recommended Warning with Stipulations.²⁸ Those recommended stipulations can be found in Staff's Exhibit 11, and included education (jurisprudence and critical thinking); notification of employers; submission of employer notification forms; submission of incident reports; and ongoing therapy with monthly reports until Respondent was released from therapy.²⁹

Ms. Benbow considered both aggravating and mitigating factors pursuant to the Board's Rule 213.33. She discussed the following aggravating circumstances:³⁰

- 1) Respondent demonstrated a pattern of unethical behavior, not an isolated incident;
- 2) Respondent demonstrated behavior that placed the public at risk of harm;

²⁶ See *Tex. State Bd. of Dental Exam'rs vs. Brown*, 281 S.W. 3d 692 (Tex.App. - Corpus Christi 2009, pet. filed); *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).

²⁷ See Audio Recording of Denise Benbow's testimony found at 3:54:30 on the record.

²⁸ *Id* at 4:00:30 on the record.

²⁹ *Id* at 4:00:27 on the record.

³⁰ *Id* at 3:56:57 and 4:05:55 on the record.

- 3) Respondent has not practiced in five years, which would tend to indicate the need for a refresher course.

Ms. Benbow pointed out that the Respondent did not provide much mitigating evidence at the hearing pursuant to Respondent's burden under rule 213.27. Ms. Benbow pointed out that Respondent offered no letters of recommendation, character references, employment history, or other evidence to show that Respondent knows right from wrong, can think and act rationally, is able to honor obligations, is accountable, or is able to promptly and fully disclose errors and omissions.³¹ Nevertheless, Ms. Benbow stated that she based her recommendation in part on the psychological evaluation submitted by Dr. Gayles, which stated that Respondent seemed to be capable of practicing safely today, but made a recommendation of continued therapy.³² Ms. Benbow further stated that Dr. Gayles' report affected her recommendation of a Warning rather than the higher sanction of a Reprimand, and stated that the Board gave Respondent a great deal of leeway in that the proposed stipulations included incident reports rather than direct or indirect supervision.³³

Next, Ms. Benbow considered the Respondent's violation of 301.452(b)(3) as alleged in Formal Charge Three. Ms. Benbow determined that the disciplinary matrix directed the Board to the Disciplinary Guidelines for Criminal Conduct, which recommends that the board issue a license with sanctions if the judicial order of conviction occurred between zero and three years before the Board's action.³⁴ Ms. Benbow pointed out the Board's policy regarding the crime of Terroristic Threat, reading that policy into the record, i.e.: "Offense Against Persons that involves threatening violence to persons or property. Stress inherent in the practice of nursing, and possible combativeness of patients in vulnerable states requires the control of impulses that lead to an assaultive offense. A person who has committed assaultive offenses raises serious question regarding ability to provide safe patient care. Patients could be vulnerable to similar acts involving intent to injure or reckless behavior that would risk injury."³⁵ Ms. Benbow stated

³¹ *Id* at 3:57:37 on the record.

³² *Id* at 3:59:16 on the record.

³³ *Id* at 4:02:10 on the record.

³⁴ *Id* at 4:07:40 on the record.

³⁵ *Id* at 4:08:27 on the record.

that, given this rationale and the Respondent's conduct, the Board's recommendation of a Warning with the recommended stipulations is appropriate.

Finally, the ALJ reasons that because Respondent was convicted of Terroristic Threat sometime between three and four years ago, that this is "a gray area" in the Board's Disciplinary Guidelines for Criminal Conduct. However, Staff takes exception to this analysis. It is true that Respondent plead guilty to terroristic threat on January 11, 2008, and the criminal judge signed the order on January 14, 2008. When the action came before the Board, Respondent reaped the benefits of due process in a lengthy litigation process, then signed an Agreed Order resolving this case on October 15, 2010, exactly two years and nine months after Respondent's conviction. The case was dismissed from the SOAH docket on October 18, 2010, only to have Respondent renege on her signed agreement on November 17, 2010 before the Board had the opportunity to ratify the order. Thus began a second lengthy litigation process, which was docketed before the three-year guideline expired.³⁶ The Respondent should not get the benefit of renegeing on her signed order by claiming that this criminal conviction is more than three years old. To rule otherwise is to eviscerate an administrative agency's practice of settling cases, then submitting the signed Agreed Orders to the Board for ratification at the next scheduled Board or Committee meeting. To allow the Respondent to receive these under-the-table continuances without tolling the deadlines is not in the interest of efficiency or justice. Otherwise, every Respondent could do this again and until any statutes of limitation, guideline or deadlines are moot. Furthermore, the ALJ states in her analysis that because the Respondent is currently not practicing, "the requirement that tolls the order when she is not practicing effectively makes Staff's proposal a lifetime order for Ms. Porter," thus the ALJ found the Board's proposed sanction inappropriate. Staff takes exception to this reasoning and result. If Respondent has no wish to practice nursing, one should ask why she needs a license in the first place. The Board is not charged with monitoring people who choose not to practice nursing. The Board must treat all nurses under its jurisdiction *as nurses*. It is improper for the ALJ to make allowances for the Respondent in the disciplinary sanction just because the Respondent claims she has no desire to practice nursing. Respondent has an active license, which means she *can* practice nursing and should be

³⁶ Respondent was notified of the second hearing on January 12, 2011.

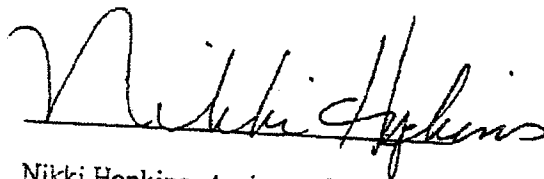
sanctioned for the violative behavior, not for whether or not the respondent likes or can fulfill the requirements of the appropriate order.

Based on the credible evidence that Respondent violated the Formal Charges as alleged, Staff recommends that Respondent be issued the proposed Order is set forth in Staff's Exhibit 11; the Order Respondent previously executed on October 15, 2010.

VII. Prayer

WHEREFORE PREMISES CONSIDERED, Staff prays that the Administrative Law Judge will reconsider Findings of Fact Numbers 9, 11, 14, 18, 19 and 20 and her Conclusions of Law in this case and modify the language of the Proposal for Decision to reflect Staff's specific exceptions outlined above. Furthermore, and in light of the exceptions made above, Staff prays that the Administrative Law Judge will reconsider her recommended sanction and issue a modified Proposal For Decision.

TEXAS BOARD OF NURSING



Nikki Hopkins, Assistant General Counsel
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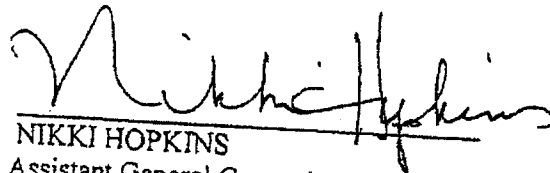
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent facsimile, on this, the 5^h day of July, 2011 to:

Valerie Porter
c/o Louis Leichter
Facsimile (512) 482-0164

via email: Louis@leichterlaw.com

SOAH Docketing



NIKKI HOPKINS
Assistant General Counsel



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FACSIMILE TRANSMITTAL SHEET

TO: Nikki Hopkins - BON
Docket Clerk -SOAH

FROM: Dan Lype

COMPANY: Texas Board of Nursing
SOAH

DATE: July 19, 2011

FAX NUMBER: (512) 305-8101
(512) 322-2061

TOTAL NO. OF PAGES INCLUDING COVER: 5

PHONE NUMBER:

SENDER'S REFERENCE NUMBER:

RE: SOAH Docket No. 507-11-2456
In the Matter of the Permanent Certificate
Numbers 112356 and 584035
Issued to Valerie Porter

YOUR REFERENCE NUMBER:

- URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

Respondent's Reply to Staff's Exceptions to Proposal for Decision

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employer or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the United States Postal Service. Thank you for your attention to this matter.



LEICHTER
LAW FIRM

Louis Leichter
Dan Lype

Robert Simpson
Of Counsel

July 19, 2011

Via Facsimile (512) 322-2061

Docket Clerk
State Office of Administrative Hearings
300 West 15th Street
Austin, TX 78701

Via Facsimile (512) 305-8101

Nikki Hopkins
Texas Board of Nursing
333 Guadalupe Street
Suite 3-460
Austin, TX 78701

Re: SOAH Docket No. 507-11-2456
In the Matter of Permanent Certificate
Numbers 112356 and 584035
Issued to Valerie Gale Porter

Dear Docket Clerk and Ms. Hopkins:

Attached please find the following in the above reference proceeding:

- 1) Respondent's Reply to Staff's Exception to Proposal for Decision

Thank you for your careful attention to this matter.

Sincerely,

Dan Lype

DL/ed

EC: Valerie Gale Porter

DOCKET NO. 507-11-2456

IN THE MATTER OF PERMANENT LICENSE
NUMBER 112356 AND 584035 ISSUED TO
VALERIE GALE PORTER

§
§
§
§
§

BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

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

COMES NOW, Valerie Porter, RN, LVN(Respondent) and hereby files her Reply to Staff's Exceptions to the Administrative Law Judge and would submit the following:

I.

STAFF'S EXCEPTIONS LACK MERIT

The Respondent contends that Staff's Exceptions to the Court's Proposal for Decision lack merit and should be denied. Much of Staff's Exceptions concern evidentiary and admissibility issues already decided at trial and briefed extensively following the hearing. These include Staff's continued attempts to impermissibly use evidence admitted for a limited purpose to establish a violation of the Nursing Practice Act. Additionally, Staff continues to assert their expert witness, Denise Benbow, RN, is somehow qualified to render an expert opinion on the Respondent's mental status and ability to conform with the Board's statutes and rules. This again, has already been litigated extensively and correctly decided by the Court. Moreover, the Respondent contends that under normal circumstances an RN who purported to render a psychological or psychiatric diagnosis on a patient would be subject to Board discipline for grossly exceeding their scope of practice. How Ms. Benbow is not subject to this same standard is unclear. Finally, Ms. Benbow's purported testimony that the Respondent may abuse her position of power over her patients is non-credible and lacks any evidentiary basis given that the

only admitted expert evidence on Ms. Porter's mental health and ability to safely work found her fit to practice.

As stated above, the exceptions raised by the Petitioner have already been argued before the Court numerous times and ruled on in the negative. The Respondent rests on her responses provided at trial and in post-hearing briefing. Staff's Exceptions should be denied.

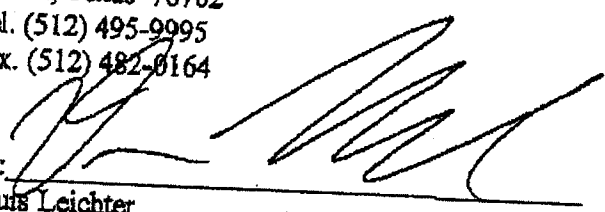
II.

PRAYER

WHEREFORE PREMISES CONSIDERED, the Respondent respectfully prays that the honorable Administrative Law Judge enter an Order denying Staff's Exceptions to the Court's Proposal for Decision.

Respectfully submitted,

LEICHTER LAW FIRM
1602 East 7th Street
Austin, Texas 78702
Tel. (512) 495-9995
Fax. (512) 482-0164

By: 
Louis Leichter
State Bar No. 24000243
Dan Lype
State Bar No. 24065658

ATTORNEY FOR RESPONDENT
VALERIE GALE PORTER

CERTIFICATE OF SERVICE

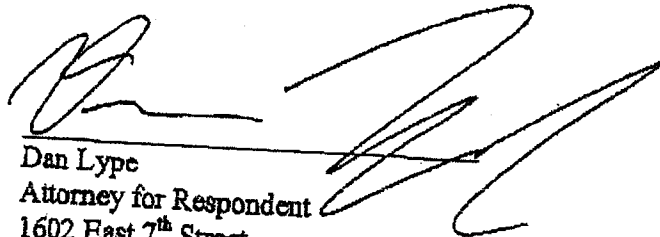
This is to certify that on July 19, 2011, a true and correct copy of the foregoing instrument (Respondent's Reply to Staff's Exceptions to PFD) was forwarded to the following individuals in the manner indicated below:

Nikki Hopkins
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Texas Board of Nursing
333 Guadalupe Street, Suite 3-460
Austin, TX 78701

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SBN 24065658

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 21, 2011

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

VIA FACSIMILE (512) 305-8101

RE: Docket No. 507-11-2456; In the Matter of Permanent
Certificate Nos. 112356 & 584035 Issued to Valerie Gale Porter

Dear Ms. Thomas:

On July 5, 2011, Staff filed exceptions to the proposal for decision. Counsel for Ms. Porter timely filed replies. In its exceptions, Staff urges reconsideration of several findings based on documents that were not admitted for the truth of what the document contained. Rather, they were admitted only to show that the investigator undertook an investigation of the Respondent. The text of the documents is not part of the evidentiary record and cannot be relied on to form the basis of a decision. Staff did not make an offer of proof at the hearing to permit the documents to be reconsidered or reoffered at a later time. After reviewing the exceptions and replies, I recommend no changes to the Proposal for Decision

Sincerely,

Wendy K. L. Harvel
Administrative Law Judge

WKLH/lc

xc: Nikki Hopkins, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Suite 460, Austin, TX 78701 - VIA FACSIMILE (512) 305-8101
Dina Flores, Legal Assistant Texas Board of Nursing, 333 Guadalupe, Tower III, Suite 460, Austin, TX 78701 - VIA FACSIMILE (512) 305-8101
Louis Leichter, Law Office of Louis Leichter, 1602 E. 7th Street, Austin, TX 78702 - VIA FACSIMILE (512) 482-0164