## DOCKET NUMBER 507-13-2235

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| IN THE MATTER OF | § | BEFORE THE STATE OFFICE |
| PERMANENT CERTIFICATE | § | |
| NUMBER 228005 | § | OF |
| ISSUED TO | § | |
| CRYSTAL TAMEKIA JOHNSON | § | ADMINISTRATIVE HEARINGS |

### OPINION AND ORDER OF THE BOARD

TO:        CRYSTAL TAMEKIA JOHNSON
9850 MEADOWGLEN LN, #82
HOUSTON, TX 77042

SARAH STARNES
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on October 17-18, 2013, the Texas Board of Nursing (Board) considered the following items: (1) the Proposal for Decision (PFD) regarding the above cited matter; (2) Staff's recommendation that the Board adopt the PFD regarding the vocational nursing license of Crystal Tamekia Johnson without changes; and (3) Respondent's recommendation to the Board regarding the PFD and order, if any.

The Board finds that after proper and timely notice was given, the above styled case was heard by an Administrative Law Judge (ALJ) who made and filed a PFD containing the ALJ's findings of facts and conclusions of law. The PFD was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed by any party.

The Board, after review and due consideration of the PFD; Staff's recommendations; and the presentation by the Respondent during the open meeting, if any, adopts all of the findings of fact and conclusions of law of the ALJ contained in the PFD, as if fully set out and separately stated herein, without modification. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

Recommendation for Sanction

Although the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact or conclusions of law[1], the Board agrees with the ALJ's recommendation that the appropriate

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[1] The Board, not the ALJ, is the final decision maker concerning sanctions. Once it has been determined that a violation of the law has occurred, the sanction is a matter for the agency's discretion. Further, the mere labeling of a recommended sanction as a conclusion of law or as a finding of fact does not change the effect of the ALJ's recommendation. As such, the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact and conclusions of law. The choice of penalty is vested in the agency, not in the courts. An agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency's oversight. The propriety of a particular disciplinary measure is a matter of internal administration with which the courts should not interfere. See *Texas State*

sanction in this matter is revocation of the Respondent's license[2].

The Respondent's conduct, as outlined in adopted Findings of Fact Numbers 3 through 22 and Conclusions of Law Numbers 5 through 15, raises serious concerns about the Respondent's professional character and her propensity to repeat the same misconduct in the workplace[3]. The Respondent's conduct is recent, serious in nature, and caused actual harm to a police officer[4]. Further, the Respondent's conduct reflects poorly on her truthfulness and integrity[5]. Further, there is insufficient evidence that Respondent takes full accountability for her actions or has learned from her past mistakes in a way that would assure the Board that future misconduct will not occur[6].

Therefore, after reviewing the aggravating and mitigating factors in this matter[7], the Board finds that, pursuant to the Board's Disciplinary Matrix, the Board's Disciplinary Guidelines for Criminal Conduct[8], and the Board's rules, including 22 Tex. Admin. Code §§213.27, 213.28, and 213.33(e) and (g), and the Occupations Code Chapter 53, the Respondent's license should be revoked.

IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 228005, previously issued to CRYSTAL TAMEKIA JOHNSON, to practice nursing in the State of Texas be, and the same is hereby, REVOKED.

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

FURTHER, pursuant to the Occupations Code §301.467, RESPONDENT is not eligible to petition for reinstatement of licensure until at least one (1) year has elapsed

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*Board of Dental Examiners vs. Brown*, 281 S.W. 3d 692 (Tex. App. - Corpus Christi 2009, pet. filed); *Sears vs. Tex. State Bd. of Dental Exam'rs*, 759 S.W.2d 748, 751 (Tex.App. - Austin 1988, no pet); *Firemen's & Policemen's Civil Serv. Comm'n vs. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984); *Granek vs. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 781 (Tex.App. - Austin 2005, pet. denied); *Fay-Ray Corp. vs. Tex. Alcoholic Beverage Comm'n*, 959 S.W.2d 362, 369 (Tex.App. - Austin 1998, no pet.).

[2] The Board agrees with the ALJ that, pursuant to the Board's Disciplinary Matrix, the Respondent's conduct warrants a second tier, sanction level II sanction for her violation of §301.452(b)(10). See page 14 of the PFD. The Board further agrees with the ALJ that, absent sufficient mitigation to warrant departure from the Board's Disciplinary Guidelines for Criminal Conduct, the Respondent's conduct warrants licensure revocation (where judicial order was entered less than five years ago). See pages 10-14 of the PFD.

[3] See pages 10-14 of the PFD and adopted Findings of Fact Numbers 3-12 and 21-22 and adopted Conclusion of Law Numbers 9-11.

[4] See pages 10-14 of the PFD and adopted Findings of Fact Numbers 3-12.

[5] See page 12 of the PFD and adopted Findings of Fact Numbers 21-22.

[6] See pages 10-14 of the PFD and adopted Findings of Fact Numbers 21-22.

[7] The Board has reviewed the aggravating and mitigating factors in this case. However, the Board has determined that the mitigating factors do not outweigh the aggravating factors or the seriousness of the Respondent's conduct nor has the Respondent shown that a deviation from the Board's Disciplinary Guidelines for Criminal Conduct is warranted. See also pages 10-14 of the PFD.

[8] Effective March 9, 2007 to April 18, 2013.

from the date of this Order. Further, upon petitioning for reinstatement, RESPONDENT must satisfy all then existing requirements for relicensure.

Entered this _____ day of October, 2013.

TEXAS BOARD OF NURSING

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

Attachment: Proposal for Decision; Docket No. 507-13-2235 (May 29, 2013).

# State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge
May 29, 2013

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

     **RE:**    **Docket No. 507-13-2235; Texas Board of Nursing v. Crystal Tamekia Johnson**

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,

     *Sarah Starnes*

     SARAH STARNES
     ADMINISTRATIVE LAW JUDGE
     STATE OFFICE OF ADMINISTRATIVE HEARINGS

SS/ad
XC:    R. Kyle Hensley, TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – **VIA INTERAGENCY**
       Dina Flores, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX – **VIA INTERAGENCY**
       Crystal Tamekia Johnson, 9850 Meadowglen Ln. #82, Houston, TX 77042 – **VIA REGULAR MAIL**

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| TEXAS BOARD OF NURSING, Petitioner | § § § | BEFORE THE STATE OFFICE |
| V. | § § | OF |
| CRYSTAL TAMEKIA JOHNSON, CERTIFICATE NO. 228005 (LVN), Respondent | § § § § | ADMINISTRATIVE HEARINGS |

## PROPOSAL FOR DECISION

Staff (Staff) of the Texas Board of Nursing (Board) brought this action against licensed vocational nurse Crystal Tamekia Johnson (Respondent). Staff seeks to revoke her license because Respondent is currently on community supervision after pleading guilty to and receiving deferred adjudication for the offense of felony assault of a police officer. The Administrative Law Judge (ALJ) recommends that Respondent's license be revoked.

## I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

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

On February 28, 2013, Staff filed a motion for summary disposition. Respondent did not file a response. On March 25, 2013, the ALJ issued Order No. 2 granting Staff's motion in part and determining that Respondent was subject to disciplinary action as a result of her deferred adjudication order. The issue of what sanction to impose was reserved for the hearing on the merits.

The hearing convened on April 4, 2013, before ALJ Sarah Starnes in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by Kyle Hensley, Assistant General Counsel. Respondent appeared and represented herself. The record closed at the conclusion of the hearing.

## II. APPLICABLE LAW

Under the Nursing Practice Act, the Board is authorized to take disciplinary action against a nurse who has been convicted of or placed on deferred adjudication probation or community supervision for a felony offense.[1] The Board is also authorized to take disciplinary action against a nurse who has engaged in "unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public."[2] The Board's rules define "unprofessional conduct" to include:

> Criminal Conduct—including, but not limited to, conviction or probation, with or without an adjudication of guilt, or receipt of a judicial order involving a crime or criminal behavior or conduct that could affect the practice of nursing.[3]

When a nurse has violated one of these statutes or rules, the Board is required to impose a disciplinary sanction, which can range from the issuance of a written warning to revocation of the person's license.[4] There are several overlapping, interrelated statutes and rules that inform the decision on the specific sanction to be imposed.

First, Chapter 53 of the Texas Occupations Code provides the general framework for licensing agencies, such as the Board, to use in evaluating licensees with criminal convictions.[5] That chapter authorizes a licensing agency to suspend or revoke a license if the person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation.[6] The Board has enacted both a rule and a separate set of Disciplinary Guidelines for Criminal Conduct (Guidelines) that list certain crimes as being directly related to the nursing profession. Both the rule and the Guidelines conclude that assault is a crime that directly relates

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[1] Tex. Occ. Code § 301.452(b)(3).

[2] *Id.* § 301.452(b)(10).

[3] 22 Tex. Admin. Code § 217.12(13).

[4] Tex. Occ. Code § 301.453(a).

[5] Staff did not specifically invoke Chapter 53 in its pleadings in this case. However, Chapter 53 generally applies to all "licensing authorities" except for those specifically excluded by Texas Occupations Code § 53.002. Therefore, Chapter 53 is addressed in this Proposal for Decision.

[6] Tex. Occ. Code § 53.021(a)(1).

to the practice of nursing.[7] In the Guidelines, the Board has elaborated on its reasoning for this determination:

> 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.

Under Chapter 53, a person who is placed on deferred adjudication can be treated by a licensing authority as having been convicted of an offense if, after considering certain statutory factors, the licensing agency determines that (1) the person poses a continuing threat to public safety or (2) the person's employment in the licensed occupation would create the opportunity for him to repeat his offense.[8] Here again, the Board has enacted Guidelines and another rule that address these statutory factors and conclude that nurses who commit assault crimes raise concern about the nurse's propensity to repeat the same misconduct in the workplace, and/or place patients at risk.[9]

Before suspending or revoking the license of a person who has been convicted (or deemed convicted) of a crime, Chapter 53 requires the Board to first determine whether that person is fit to perform the duties and discharge the responsibilities of the licensed profession. In making this determination, the Board is required to consider the following factors:

(1)     the extent and nature of the person's past criminal activity;

(2)     the age of the person when the crime was committed;

(3)     the amount of time that has elapsed since the person's last criminal activity;

(4)     the conduct and work activity of the person before and after the criminal activity;

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[7]  22 Tex. Admin. Code § 213.28(b)(1)(A)(xxii); Texas Bd. of Nursing, Disciplinary Guidelines for Criminal Conduct (Guidelines), *available at* http://www.bon.texas.gov/disciplinaryaction/pdfs/Guidelines-CriminalConduct.pdf.

[8]  Tex. Occ. Code § 53.021(d).

[9]  *See* Guidelines; 22 Tex. Admin. Code § 213.28(b)(1)(A)(xxii), (b)(1)(B)(v).

(5)    evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and

(6)    other evidence of the person's fitness, including letters of recommendation from:

   (A)   prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;

   (B)   the sheriff or chief of police in the community where the person resides; and

   (C)   any other person in contact with the convicted person.[10]

The nurse has the responsibility, to the extent possible, to obtain and provide these recommendations.[11] Additionally, the nurse is responsible for furnishing proof that she has:

(1)    maintained a record of steady employment;

(2)    supported her dependents;

(3)    maintained a record of good conduct;  and

(4)    paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted.[12]

In addition to the factors enumerated in Chapter 53, the Board's rules also address specific factors to be considered in sanctioning a nurse in a disciplinary proceeding. The Board has adopted a Disciplinary Matrix that the Board and SOAH are required to use in all disciplinary matters.[13] For nurses who are disciplined for being convicted of a felony, or placed on deferred adjudication or community supervision for a felony, the Disciplinary Matrix directs that disciplinary decisions will be reviewed under the Guidelines. The Guidelines provide that "each case is considered on its own merits" and that the determination of the sanction to be entered against a Respondent with a criminal conviction will be determined after a case-by-case analysis of a list of non-exclusive factors. These Guidelines factors largely overlap with the

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[10]  Tex. Occ. Code § 53.023(a). The Board has restated each of these factors in its own rule addressing licensure of persons with criminal offenses.  22 Tex. Admin. Code § 213.28(e)(1)-(6).

[11]  Tex. Occ. Code § 53.023(b); see also 22 Tex. Admin. Code § 231.28(f) (Board rule imposing same requirement set forth in statute).

[12]  Tex Occ. Code § 53.023(c); see also 22 Tex. Admin. Code § 213.28(f).

[13]  22 Tex. Admin. Code § 213.33(a).

Chapter 53 factors, as well as additional factors set forth in the Disciplinary Matrix and a separate Board rule addressing the licensure of persons with criminal offenses.[14] However, the Guidelines also go on to recommend revocation of the license of a license-holder who was placed on deferred adjudication for assault within the last five years.

The Board's Disciplinary Matrix also addresses the discipline to be imposed in cases where a nurse has engaged in unprofessional or dishonorable conduct in violation of the Nursing Practice Act. The Disciplinary Matrix categorizes offenses into three tiers, with two sanction levels each, based upon the seriousness of the offense and risk of harm to patients or the public. The Disciplinary Matrix also lists certain aggravating circumstances that must be considered (such as the actual harm or severity of harm caused by the nurse's conduct, involvement of or impairment by alcohol, and criminal conduct) as well as mitigating circumstances (such as voluntary participation in a remediation or rehabilitation program, demonstrated competency, and payment of restitution).[15] The Disciplinary Matrix goes on to include another list of factors that the Board and SOAH must consider in determining the appropriate disciplinary sanction, including evidence of potential harm to patients or the public, evidence of a lack of truthfulness, evidence of present fitness to practice, previous disciplinary history, and the length of time the person has practiced.[16]

## III. EVIDENCE

### A.    Background

The summary-disposition record conclusively established the following facts:

1.    Respondent is licensed as a vocational nurse in the State of Texas and holds permanent certificate number 228005.

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[14] *See* Guidelines; Tex. Occ. Code § 53.023; 22 Tex. Admin. Code §§ 213.28, 213.33(c).

[15] 22 Tex. Admin. Code § 213.33(b).

[16] *Id.* § 213.33(c).

2.     Respondent's license was issued by the Board on May 6, 2010.

3.     On July 12, 2011, Respondent pleaded guilty to the third-degree felony of Assault-Bodily Injury-Public Servant/Retaliation, in Case No. 130019901010 in the 338th Judicial District Court of Harris County, Texas. Respondent's offense was committed on March 25, 2011.

4.     The court in Case No. 130019901010 deferred adjudication of guilt and placed Respondent on community supervision for a period of four years.

## B.     Evidence Offered at the Hearing

After Staff was granted partial summary disposition, a hearing was held to receive evidence relevant to the determination of the sanction to be imposed.

### 1.     Officer Boxie's Testimony

Staff called Houston police officer Drunzella Boxie to testify about Respondent's March 2011 arrest. Officer Boxie has worked for the Houston Police Department for 22 years, and has been a police officer with the Department for 14 years.

On March 25, 2011, Officer Boxie and other officers were working at Metropolis, a Houston nightclub with a reputation for being "kind of rowdy." According to Officer Boxie, the club hired the officers to help keep the peace, make sure that everyone got in and out of the club safely, and keep patrons from loitering in the neighborhood after the club closed. Though the officers had been hired by Metropolis, the work was approved by the Houston Police Department and Officer Boxie was in her police uniform that night.

Officer Boxie explained that as the club closed at the end of the night, Respondent was standing in the parking lot with a small group of people and was acting as though she was "very upset." It appeared to Officer Boxie that Respondent was arguing with her boyfriend and her friends were trying to calm her down. Officer Boxie said she walked up and told the group that they needed to go to their cars. The rest of Respondent's group started leaving as requested, but Respondent ignored Officer Boxie's instructions and responded angrily and profanely.

Officer Boxie testified that she gently grabbed Respondent's arm to start moving her away, but Respondent swatted the officer's arm away and began violently fighting her.

During the fight, Respondent was swinging her arms and kicking, hitting Officer Boxie. Respondent then grabbed the officer and pulled her down to the ground, causing Officer Boxie to fall hard and painfully onto her knees on the concrete. Two other officers saw the melee and came to help Officer Boxie.[17] By then, Respondent was on her back on the ground and Officer Boxie was on top her, but Respondent had her fingernails embedded in the officer's arm and was holding on tight. The other officers had to separate Respondent from Officer Boxie before they could handcuff her and place her under arrest. Officer Boxie testified that she feared for her safety during the struggle.

According to Officer Boxie, the confrontation—from when she first approached Respondent until Respondent was secured in handcuffs—took about ten minutes. Then, when the officers attempted to get Respondent out of the street and back into the club to await transport to jail, Respondent refused to get up and walk. Officer Boxie testified that Respondent kept "flopping down on the concrete" making it difficult to get her back inside. Once they finally got her back to the club, because Respondent continued kicking, spitting, and cursing at the officers, they had to put a spit mask over her face. Officer Boxie said Respondent was extremely intoxicated that evening and Respondent's language and behavior were "out of control."

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[17] According to Officer Boxie, the other officers told her afterwards that they saw Respondent's boyfriend aggressively start to come at Officer Boxie from behind, and that is what prompted them to run up and help. The boyfriend was arrested on a Class C Misdemeanor; according to Respondent, he was charged with use of abusive language, not assault.

### 2.    Respondent's Testimony

Respondent recalls her confrontation with Officer Boxie differently.  She denied that she was arguing or fighting with anyone as her group left Metropolis,[18] but insisted that they were in a good mood as they headed to their cars.

According to Respondent, when Officer Boxie approached her, she demanded, aggressively and profanely, that the group clear the parking lot or she would take them to jail. Respondent said that the Officer's tone seemed out of line to her, but she did not respond and continued walking to her car.  However, Officer Boxie came over again and continued to aggressively threaten to arrest them.  This time, Respondent admits turning to her boyfriend and saying, "f**k the police."   Respondent insists that she made the comment only after Officer Boxie had followed the group and repeatedly threatened to lock them up for no reason, and that the comment was directed to her boyfriend and not to the officer.

Respondent believes Officer Boxie must have overheard this comment, and this prompted the officer to attack her.  Respondent said that the next thing she knew, Officer Boxie and her partner had grabbed her hair from behind, slammed her to the ground, and put her in handcuffs. Respondent denies hitting, kicking, or struggling with the officers as she was arrested.  Instead, she asserts that the officers laughed at her and beat her for no reason, choking and scratching her neck and banging her head into the ground.  Respondent also said that, after she was handcuffed and taken into the club, the officers continued to beat and kick her for over an hour.[19]

Respondent insists that throughout the beating, she never fought back.  However, she did tell the officers that her father was a policeman, that she was a nurse, that she knew she did not deserve what they were doing, and that she was going to sue them and "have their badges."  She testified that one of the officers responded (with profanity) that Houston police could do

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[18]  Respondent testified that she was at Metropolis with her boyfriend, her sister, and her sister's boyfriend.

[19]  Respondent cross-examined Officer Boxie and asked her about this version of events; Officer Boxie testified that Respondent was "totally wrong" about what happened.

whatever they wanted and she would lose her nursing license before any of them lost their badges.

When Respondent was released after her arrest, she visited West Houston Medical Center for treatment, and took photographs of the injuries she contends she received in the police beating.[20] The photographs indicate she received a black eye and scratches and bruises on her neck, shoulder, arms, and wrists. Respondent also filed a complaint with the Houston Police Department's Internal Affairs Division.[21] However, Respondent testified that no action was taken on the complaint.[22]

Respondent was charged with felony assault and a court-appointed attorney was assigned to defend her.[23] She said that she adamantly denied her guilt in her preliminary court appearances. However, when prosecutors offered a plea deal with deferred adjudication, her attorney advised her to accept the deal and plead guilty because if she did not accept the plea deal then she would be convicted and would serve at least thirty days in jail, and possibly as much as two to ten years. Respondent explained that, as the sole source of care and support for her five young children, she could not risk such a sentence. Based on her attorney's assurance that the deferred adjudication would not affect her nursing license, Respondent agreed to plead guilty. Respondent was sentenced to four years of probation, and remains on probation today.

Respondent also testified that she has been a licensed vocational nurse for nearly eight years,[24] that she loves what she does and loves her patients, and she has never harmed a patient. She maintains that she is a peaceful person who gets along with everyone and that it is not in her character to assault anyone, especially not a police officer. From 2009 until January of this year,

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[20] Resp. Exs. 1, 4.

[21] Resp. Ex. 3.

[22] Officer Boxie testified that she was exonerated by the Department of all the allegations in Respondent's complaint.

[23] Staff Ex. 5.

[24] This includes time spent practicing in another state, before she moved to Texas and became licensed in this state in 2010.

Respondent worked for CPNS Staffing, a nursing staffing agency that placed her in positions in several Houston-area hospitals. Respondent testified that the agency had to stop giving her assignments because this disciplinary matter was pending. However, her supervisor at CPNS wrote a letter of support stating that, while employed by CPNS, Respondent had "displayed professionalism in the execution of her duties and was proven to be of good moral character."[25] Respondent said her supervisor was aware both that Respondent had pleaded guilty to a felony charge of assaulting a police officer, and that the letter of recommendation was being provided to Board Staff in connection with this proceeding.

## IV. ANALYSIS

As set forth in Order No. 2, which granted Staff's summary-disposition motion in part, the Board is authorized to take disciplinary action against Respondent's nursing license because the undisputed evidence shows that (1) she has been placed on "deferred adjudication community supervision . . . for a felony" and (2) she has engaged in "unprofessional or dishonorable conduct," which the Board defines to include criminal conduct.[26] The only question that remains for determination, then, is what sanction should be imposed.

### A.    Sanction for Criminal Conduct

Staff seeks the revocation of Respondent's nursing license. Under Chapter 53 of the Texas Occupations Code, revocation is an available sanction because Respondent's crime (assault) is directly related to the profession of nursing.[27] Moreover, when imposing discipline for criminal conduct, the Board's Guidelines expressly recommend revocation of a nurse's license where, as here, the nurse has been placed on deferred adjudication for felony assault

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[25]  Resp. Ex. 2.

[26]  Tex. Occ. Code § 301.452(b)(3), (10); 22 Tex. Admin. Code § 217.12(13).

[27]  Tex. Occ. Code § 53.021(a)(1); 22 Tex. Admin. Code § 213.28(b)(1)(A)(xxii); Guidelines. Chapter 53 includes a statute that sets forth factors to consider in determining whether a conviction relates to an occupation. Tex. Occ. Code § 53.022. However, the need to separately analyze the statutory factors with respect to Respondent's offense is effectively subsumed by the Board's Guidelines and rule which preemptively conclude that assault (among other crimes) is directly related to the nursing profession.

within the last five years.   However, the Guidelines do not <u>require</u> revocation in every case where a deferred adjudication order was entered less than five years ago, thus a sanction determination can be made only after careful consideration of the various factors set forth in the Chapter 53, the Guidelines, and related Board rules.

### 1.    Chapter 53 Considerations

With respect to the factors listed in Chapter 53,[28] there is no evidence that Respondent has engaged in any past criminal activity, other than the assault at issue is this case.  Also, Staff offered no evidence addressing Respondent's conduct or work activity either before or after the assault, and the ALJ accepts as true Respondent's assertion that she had never assaulted anyone else or had any conflicts with patients in her eight-year career as a nurse; that she maintained a record of steady employment until this disciplinary matter interfered with her ability to work; that she supports her dependents; and that she has maintained a record of good conduct since her arrest and is currently in compliance with the terms of her deferred adjudication.  While these facts work in Respondent's favor, the evidence also established that Respondent was thirty years old, an adult, when the assault on Officer Boxie was committed, her crime was relatively recent (committed just over two years ago), and she remains on community supervision as part of her deferred adjudication.   There was also no evidence of Respondent's rehabilitation or rehabilitative effort since her conflict with Officer Boxie.   To the contrary, Respondent steadfastly denies her guilt, despite having pleaded guilty to assault, and asserts that she was victimized by the Houston police officers and the criminal justice system.  Respondent was also not able to produce any letters of recommendation from prosecution, law enforcement, or correctional authorities.

### 2.    Considerations in the Guidelines and Other Board Rules

The Board's Disciplinary Matrix directs that, for nurses convicted or placed on deferred adjudication or community supervision for a felony, disciplinary decisions must be guided by the

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[28] *See supra,* pp. 3-4.

Guidelines, which include a list of non-exclusive factors to be considered. The factors listed in the Guidelines are largely repetitive of the factors that are also listed in Texas Occupations Code § 53.023 and have been addressed above. Among the remaining considerations listed in the Guidelines, the Board is directed to consider "the nature and seriousness of the crime," including the "absence of criminal plan or premeditation, presence of contributing influences, evidence of immature thought process/judgment at the time of activity, etc."[29] The Board must also consider "the actual damages, physical or otherwise, resulting from the criminal activity."[30] Here, Respondent's crime—assault of a police officer—is a very serious one, particularly so considering that Officer Boxie was actually injured in the assault. And while the crime was not premeditated, the evidence does indicate that alcohol contributed to Respondent's conduct (based on Officer Boxie's testimony that Respondent was clearly intoxicated when she was arrested).

The Guidelines also require consideration of any evidence of Respondent's remorse, current maturity and personal accountability, and evidence that she has learned from her past mistakes. Because Respondent now denies committing the assault on Officer Boxie, she can show no remorse for it. At most, Respondent has acknowledged that she should not have used profanity when commenting to her boyfriend about Officer Boxie, and she expressed remorse for her cursing. She did testify that, "I could have handled everything in a different manner," but this falls short of taking personal accountability and expressing remorse for the crime to which she pleaded guilty. Another factor to be considered is whether the Respondent's conduct reflects "a lack of truthfulness or trustworthiness."[31] In her criminal proceeding, Respondent admitted to a state district judge that she had committed the assault on Officer Boxie, but in her testimony in this case Respondent has denied the assault ever happened. These conflicting positions cannot be reconciled, which means that Respondent must have been dishonest in her statements made in one of the two proceedings. That dishonesty is relevant in determining the appropriate sanction.

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[29] In addition to being listed in the Guidelines, the Board rules found in 22 Texas Administrative Code §§ 213.28(c)(3) and 213.33(c)(14) also require the ALJ and Board to consider the nature and seriousness of Respondent's crime.

[30] Consideration of this factor is required by both the Guidelines and, with slightly different working, by 22 Texas Administrative Code § 213.33(c)(8).

[31] Consideration of this factor is required both by the Guidelines and by the Board's Rule found at 22 Texas Administrative Code § 213.33(c)(2).

Additional factors that must be considered under the Guidelines and Board rules include the extent to which a nursing license might offer Respondent an opportunity to engage in another assault, and the relationship of her crime to her fitness to perform as a nurse.[32] Therefore, it is also relevant that the Board has concluded, in both its Guidelines and Rule 213.28, that assault is a crime that is directly related to the practice of nursing.[33] The Board reached this conclusion, in part, because it believes that "[p]atients could be vulnerable to similar acts involving intent to injure or reckless behavior that would risk injury," and because "nurses who commit these crimes outside the workplace raise concern about the nurse's propensity to repeat that same misconduct in the workplace and raise concerns regarding the individual's ability to provide safe, competent care to patients."[34]

The other factors that must be considered under the Guidelines do not easily fit the facts of this case. There was no evidence or argument that Respondent failed to disclose her offense to the Board, that her crime was due to chemical dependency or mental illness, or addressing whether she has a support system in place to prevent future criminal activity, so these factors have no bearing on the ALJ's recommendation. Likewise, Staff offered no evidence or argument addressing whether Respondent is currently fit and able to practice safely and in accordance with the Nursing Practice Act and other rules; the ALJ accepts as true Respondent's testimony that she is a good nurse who is generally able to exercise self-control in the workplace.[35] Respondent is currently still serving her community supervision term, so it is premature to consider the successful completion of her term or whether her crime will be expunged.

Having conducted the case-specific analysis required by Chapter 53 and the Board's rules, and having weighed the various factors that the applicable statutes and the Board's rules require to be considered, the ALJ finds no basis in this record for deviating from the Guidelines

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[32] *See* Guidelines; 22 Tex. Admin. Code § 213.28(c)(5), (6).

[33] *See* Guidelines; 22 Tex. Admin. Code § 213.28(b)(1)(A)(xxii).

[34] *See* Guidelines; 22 Tex. Admin. Code § 213.28(b)(1)(B)(v).

[35] In addition to being listed in the Guidelines as factors that must be considered, Respondent's practice history and ability to practice safely must be considered pursuant to the Board's Rule found at 22 Texas Administrative Code § 213.33(c)(4) and (5).

recommendation that the Board revoke the license of a nurse who, like Respondent, has been placed on deferred adjudication for felony assault within the last five years.

## B.    Sanction for Unprofessional Conduct

Staff has also alleged that Respondent's assault on Officer Boxie constitutes "unprofessional conduct." Because the unprofessional conduct claim is based upon the same criminal conduct underlying the Board's other claim, the ALJ believes that it is more appropriate to evaluate Respondent's sanction under the Guidelines the Board has adopted to specifically address discipline for nurses with criminal convictions or deferred adjudications. However, the ALJ does note that revocation is among the sanctions authorized by the Disciplinary Matrix for a nurse's unprofessional conduct.

The Board's Disciplinary Matrix characterizes unprofessional conduct as a second-tier offense if the nurse's failure to comply with the professional conduct rule results in "serious risk to [a] patient or public safety." Because Respondent's crime resulted in actual bodily injury to a police officer, the ALJ agrees with Staff that her criminal conduct falls within this second tier. The sanctions for a second-tier violation of the professional conduct rules can range from a warning or reprimand (for Sanction Level I) up to revocation of licensure (for Sanction Level II), based upon the consideration of aggravating and mitigating factors. The ALJ notes that the unprofessional conduct at issue here involved actual harm to Officer Boxie and criminal conduct by Respondent, both of which are aggravating circumstances to be considered. There was no evidence of any mitigating circumstances that would suggest a more lenient sanction category should be considered.[36]

The Board's rules list revocation as an appropriate sanction for both criminal conduct and unprofessional conduct and, based on the record in this case, the ALJ believes that the appropriate sanction in this case is revocation of Respondent's license.

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[36] The Disciplinary Matrix directs that "voluntary participation in established or approved remediation or rehabilitation program and demonstrated competency, full restitution paid" are factors that can mitigate the sanction imposed in cases involving unprofessional conduct. 22 Tex. Admin. Code § 213.33(b).

## V. FINDINGS OF FACT

1.  Crystal Tamekia Johnson (Respondent) is licensed as a vocational nurse in the State of Texas and holds permanent certificate number 228005.

2.  Respondent's license was issued by the Texas Board of Nursing (Board) on May 6, 2010.

3.  On March 25, 2011, Respondent was arrested after cursing at, kicking, and hitting Houston police officer Drunzella Boxie during a ten-minute struggle outside a Houston nightclub.

4.  Respondent was thirty years old when she was arrested.

5.  During their struggle, Respondent grabbed Officer Boxie and pulled her down to the ground, causing bodily injury to Officer Boxie when she fell hard and painfully onto her knees on the concrete.

6.  After Respondent was placed under arrest, she refused to follow officers' instructions to walk back into the nightclub to await transport to jail, and she continued kicking, spitting, and cursing at the officers.

7.  Alcohol was a factor involved in Respondent's combative conduct on March 25, 2011.

8.  During her struggle with officers, Respondent received a black eye and scratches and bruises on her neck, shoulder, arms, and wrists.

9.  Following her arrest, Respondent was charged with third-degree felony assault of a public servant.

10. On July 12, 2011, Respondent pleaded guilty to the third-degree felony of Assault-Bodily Injury-Public Servant/Retaliation, in Case No. 130019901010 in the 338th Judicial District Court of Harris County, Texas.

11. On July 12, 2011, the court in Case No. 130019901010 deferred adjudication of guilt and placed Respondent on community supervision for a period of four years.

12. Respondent is still currently serving her community supervision sentence.

13. Respondent is the primary source of care and support for her five young children.

14. Respondent has been a licensed vocational nurse for nearly eight years (including time before she moved to Texas and became licensed in this state in 2010), loves her work, and has never harmed a patient.

15. Respondent is able to exercise self-control in the workplace.

16.     From 2009 until January of 2013, Respondent worked for CPNS Staffing, a nursing staffing agency that placed her in positions in several Houston-area hospitals.

17.     While employed by CPNS, Respondent displayed professionalism and good moral character in the course of her employment.

18.     CPNS Staffing stopped giving Respondent assignments because this disciplinary matter was pending.

19.     There is no evidence that Respondent has engaged in any criminal activity other than the assault on Officer Boxie.

20.     Respondent has maintained a record of good conduct since her arrest and is currently in compliance with the terms of her deferred adjudication.

21.     Despite pleading guilty to the assault on Officer Boxie, Respondent steadfastly denies her actual guilt and has therefore not taken personal accountability or expressed remorse for the crime.

22.     Respondent was dishonest in her statements made either in state district court, where she admitted that she had committed the assault on Officer Boxie, or in her testimony in this case, where she denied the assault ever happened.

23.     On November 20, 2012, Staff of the Board sent Respondent a Notice of Formal Charges filed against her.

24.     On February 5, 2013, Staff sent a Notice of Hearing to Respondent.  The notice contained:  (1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short, plain statement of the matters asserted.

25.     The hearing convened on April 4, 2013, before Administrative Law Judge Sarah Starnes in the William P. Clements Building, 300 West 15th Street, Austin, Texas. Staff for the Board was represented by Kyle Hensley, Assistant General Counsel.  Respondent represented herself. The record closed at the conclusion of the hearing on the same day.


## VI. CONCLUSIONS OF LAW

1.      The Board has jurisdiction over the licensing and discipline of nurses.  Tex. Occ. Code ch. 301, subch. D.

2.      The State Office of Administrative Hearings (SOAH) has jurisdiction over contested cases referred by the Board, including the authority to issue a proposal for decision with

proposed findings of fact and conclusions of law. Tex. Occ. Code § 301.459; Tex. Gov't Code ch. 2003.

3.   Respondent received adequate and proper notice of the hearing on the merits. Tex. Occ. Code § 301.454; Tex. Gov't Code §§ 2001.051, 2001.052.

4.   Staff had the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

5.   The Board may take disciplinary action against Respondent's nursing license pursuant to Texas Occupations Code § 301.452(b)(3).

6.   The Board may take disciplinary action against Respondent's nursing license pursuant to Texas Occupations Code § 301.452(b)(10) and 22 Texas Administrative Code § 217.12(13).

7.   The Board is authorized to suspend or revoke an occupational license if the person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation. Tex. Occ. Code § 53.021(a)(1).

8.   The Board has determined that assault is a crime that directly relates to the practice of nursing. 22 Tex. Admin. Code § 213.28(b)(1)(A)(xxii), (b)(1)(B); Texas Bd. of Nursing, Disciplinary Guidelines for Criminal Conduct (Guidelines), *available at* http://www.bon.texas.gov/disciplinaryaction/pdfs/Guidelines-CriminalConduct.pdf.

9.   A person who is placed on deferred adjudication can be treated by a licensing authority as having been convicted of an offense if, after considering the factors set forth in Sections 53.022 and 53.023(a) of the Texas Occupations Code, the licensing agency determines that (1) the person poses a continuing threat to public safety or (2) the person's employment in the licensed occupation would create the opportunity for him to repeat his offense. Tex. Occ. Code § 53.021(d).

10.  The Board has determined that nurses who commit assault crimes raise concern about the nurse's propensity to repeat the same misconduct in the workplace, and that they may place patients at risk because patients are vulnerable to similar acts. Guidelines; 22 Tex. Admin. Code § 213.28 (b)(1)(A)(xxii), (b)(1)(B)(v).

11.  Based on Findings of Fact Nos. 10 and 11 and Conclusions of Law 9 and 10, Respondent may be treated as a person convicted of the offense of assault.

12.  To determine whether a nurse is fit for licensure notwithstanding a criminal conviction, the Board must consider the factors set forth in § 53.023 of the Texas Occupations Code, the Board's Disciplinary Matrix, and a separate Board rule addressing the licensure of persons with criminal offenses. Tex. Occ. Code § 53.023; 22 Tex. Admin. Code §§ 213.28, 213.33(a), (c).

13.    For nurses who are disciplined for being convicted of a felony, or placed on deferred adjudication or community supervision for a felony, the Disciplinary Matrix directs that disciplinary decisions will be reviewed under the Guidelines, which also requires a case-by-case analysis of a list of non-exclusive factors. 22 Tex. Admin. Code § 213.33(b).

14.    To determine the sanction to be imposed against a nurse that has engaged in unprofessional conduct, the Board must consider the factors set forth in the Board's Disciplinary Matrix. Tex. Occ. Code § 213.33.

15.    Respondent's license is subject to revocation. Tex. Occ. Code § 53.021(a)(1); 22 Tex. Admin. Code § 213.33(b); Guidelines.

## VII. RECOMMENDATION

Based on the above Findings of Fact and Conclusions of Law, the ALJ recommends that the Board revoke Respondent's license to practice nursing in the State of Texas.

**SIGNED May 29, 2013.**

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SARAH STARNES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS