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Patricia A. Plummer
Executive Director of the Board

DOCKET NUMBER 507-13-3211

IN THE MATTER OF § **BEFORE THE STATE OFFICE**
PERMANENT CERTIFICATE §
NUMBER 674951 § **OF**
ISSUED TO §
CHRISTOPHER ROSS THOMPSON § **ADMINISTRATIVE HEARINGS**

OPINION AND ORDER OF THE BOARD

TO: CHRISTOPHER ROSS THOMPSON
C/O MARC MEYER, ATTORNEY
33300 EGYPT LANE, SUITE B-200
MAGNOLIA, TX 77354-2739

PAUL D. KEEPER
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) Respondent's exceptions to the PFD; (3) the ALJ's final letter ruling of September 9, 2013; (4) Staff's recommendation that the Board adopt the PFD regarding the registered nursing license of Christopher Ross Thompson with changes; and (5) 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. The Respondent filed exceptions to the PFD on August 5, 2013. On September 9, 2013, the ALJ issued his final letter ruling, in which he declined to make any changes to the PFD.

The Board, after review and due consideration of the PFD; Respondent's exceptions to the PFD; the ALJ's final letter ruling of September 9, 2013; 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 law¹, the Board agrees with the ALJ's recommendation that revocation of the Respondent's license is the appropriate sanction in this matter².

The Respondent's conduct, as outlined in adopted Findings of Fact Numbers 5 through 17 and Conclusions of Law Numbers 6 through 24, raises serious concerns about the Respondent's professional character³. The Respondent repeatedly engaged in a pattern of criminal conduct, which he failed to disclose to the Board, even when required⁴. The Respondent's criminal conduct involved serious crimes, as well as crimes of moral turpitude⁵. Further, the Respondent's criminal conduct spans many years, at times when Respondent was old enough to be fully accountable for his actions⁶. The Respondent's conduct was serious, and long lasting, and the Respondent does not seem to have remediated his conduct, as his most recent criminal conduct occurred in 2010 and his most recent court adjudication occurred in 2011⁷.

The Board recognizes that the Respondent presented mitigating evidence during the hearing. No evidence of actual harm to patients, history of impairment by drugs or alcohol, or prior disciplinary history with the Board was produced⁸. Further, the Respondent presented letters of support⁹. The Board has evaluated these mitigating factors as outlined in the PFD in determining the appropriate sanction in this case. The Board has also reviewed its policies, rules, Disciplinary Guidelines for Criminal Conduct, and Disciplinary

¹ The Board, not the ALJ, is the final decision maker concerning sanctions. Once it has been determined that a violation of the law has occurred, the sanction is a matter for the agency's discretion. Further, the mere labeling of a recommended sanction as a conclusion of law or as a finding of fact does not change the effect of the ALJ's recommendation. As such, the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact and conclusions of law. The choice of penalty is vested in the agency, not in the courts. An agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency's oversight. The propriety of a particular disciplinary measure is a matter of internal administration with which the courts should not interfere. See *Texas State Board of Dental Examiners vs. Brown*, 281 S.W. 3d 692 (Tex. App. - Corpus Christi 2009, pet. filed); *Sears vs. Tex. State Bd. of Dental Exam'rs*, 759 S.W.2d 748, 751 (Tex.App. - Austin 1988, no pet); *Firemen's & Policemen's Civil Serv. Comm'n vs. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984); *Granek vs. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 781 (Tex.App. - Austin 2005, pet. denied); *Fay-Ray Corp. vs. Tex. Alcoholic Beverage Comm'n*, 959 S.W.2d 362, 369 (Tex.App. - Austin 1998, no pet.).

² The Board agrees that the Respondent's violations of the Nursing Practice Act and Board rules, as set out in the adopted Conclusions of Law, collectively warrant license revocation.

³ See pages 13 and 15-16 of the PFD and adopted Findings of Fact Numbers 5 through 17.

⁴ See pages 10 through 17 of the PFD and adopted Findings of Fact Numbers 5 through 17.

⁵ See adopted Findings of Fact Numbers 5 through 17 and Conclusion of Law Number 10.

⁶ See page 14 of the PFD and adopted Findings of Fact Numbers 5 through 17.

⁷ See adopted Findings of Fact Numbers 16 and 17.

⁸ See adopted Findings of Fact Numbers 18-21.

⁹ However, the Board notes that the Respondent committed the criminal misdemeanor offenses of *Assault Causing Bodily Injury* (2007) and *Theft of Property Worth \$50 to \$500* (2010), as well as one incident of non-disclosure to the Board (2007) during the time period that the individuals identified in the letters of support knew the Respondent and attested to his character. The Board finds that this fact significantly diminishes the individuals' recommendations regarding the Respondent's character.

Matrix. After a review of the aggravating and mitigating factors, the Board has determined that the mitigation presented by the Respondent is insufficient to overcome the seriousness and intentional nature of the Respondent's conduct. The Board finds that, pursuant to the Board's Disciplinary Matrix, the Board's Disciplinary Guidelines for Criminal Conduct, 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.

The Board also notes that the ALJ includes discussion in the PFD¹⁰ that revocation under the Board's Disciplinary Guidelines for Criminal Conduct is absolute in this matter and that the Board's rules do not provide for mitigation of the terms of a revocation¹¹. The Board's Disciplinary Guidelines for Criminal Conduct, the Board's rules¹², and the Occupations Code Chapter 53 require a case by case and factor by factor analysis when determining the appropriate sanction in a contested case matter. The Board does not agree that "revocation is absolute" without a case by case analysis. The Board has engaged in this analysis in reaching its determinations in this case for the reasons stated herein, and like the ALJ, the Board finds revocation to be appropriate.

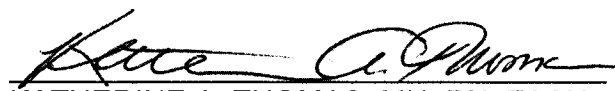
IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 674951 previously issued to CHRISTOPHER ROSS THOMPSON, to practice nursing in the State of Texas be, and the same is hereby, REVOKED.

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

Entered this 17th 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. 507-13-3211 (July 16, 2013).

¹⁰ See page 17 of the PFD.

¹¹ Nevertheless, the ALJ notes that the Board has authority to exercise discretion regarding the application of its laws and policies. See the ALJ's final letter ruling of September 9, 2013, page 3.

¹² See 22 Tex. Admin. Code §§213.27, 213.28, and 213.33(c).

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 16, 2013

VIA INTERAGENCY

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

RE: **Docket No. 507-13-3211; Texas Board of Nursing v. Christopher Ross
Thompson**

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 that reads "Paul D. Keeper".

Paul D. Keeper
Administrative Law Judge

PDK/eh

XC: R. Kyle Hensley, Assistant General Counsel, 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 78701 (with 1 CD) -
VIA INTERAGENCY
Marc M. Meyer, RN, JD, Law Office of Marc Meyer, P.L.L.C. 33300 Egypt Lane, Suite B-200,
Magnolia, TX 77354-2739 - VIA REGULAR MAIL

TEXAS BOARD OF NURSING,
Petitioner

v.

CHRISTOPHER ROSS THOMPSON,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

I. JURISDICTION AND NOTICE 2

II. BACKGROUND AND PROCEDURAL HISTORY..... 2

III. APPLICABLE LAWS 5

IV. DISCUSSION..... 6

 A. Staff's Complaint..... 6

 B. Parties' Arguments..... 8

 C. Analysis..... 10

 1. Criminal Behavior as Alleged Violations of Act and Board Rules..... 10

 a. Charges I and II 10

 b. Charges III, IV, and V..... 10

 c. Charges VI and VII 11

 d. Charges VIII, IX, and X..... 11

 2. Sanctions under the Guidelines 12

 a. Failure to Disclose, Code § 301.452(b)(2)..... 13

 b. Conviction for or Placement on Deferred Adjudication for a
 Felony or Misdemeanor Involving Moral Turpitude, Code §
 301.452(b)(3)..... 14

 c. Unprofessional or Dishonorable Conduct, Code § 301.452(b)(10)15

 3. Analysis of Parties' Positions and Recommendation..... 16

V. FINDINGS OF FACT..... 18

VI. CONCLUSIONS OF LAW..... 20

VII. RECOMMENDATION..... 22

SOAH DOCKET NO. 507-13-3211

TEXAS BOARD OF NURSING,
Petitioner

v.

CHRISTOPHER ROSS THOMPSON,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff (Staff) of the Texas Board of Nursing (Board), Petitioner, alleges that Christopher Ross Thompson, Respondent, a registered nurse (RN), violated the laws governing the practice of nursing by engaging in criminal conduct and by failing to disclose his criminal history to the Board. The administrative law judge (ALJ) recommends that the Board revoke Mr. Thompson's nursing license.

I. JURISDICTION AND NOTICE

Neither party challenged jurisdiction or notice. The matters are addressed in the findings of fact and conclusions of law.

II. BACKGROUND AND PROCEDURAL HISTORY

On December 5, 2000, while Mr. Thompson was in nursing school, he submitted to the Board his completed Application for Initial Licensure. On the form, Mr. Thompson attested that he had never been convicted of a crime other than a minor traffic violation.¹ At the time, Mr. Thompson had been the subject of court orders in four separate criminal matters.

On October 18, 1983, when Mr. Thompson was 16 or 17 years old, the County Criminal Court No. 1 of Tarrant County accepted his plea of guilty in Cause No. 207077 for Theft of Property Worth \$20 to \$200, entered an order of deferred adjudication, and placed Mr. Thompson on probation for twelve months.²

¹ Staff Ex. 7.

² Staff Ex. 16. During the hearing, Mr. Thompson testified to his approximate age. His birthdate is not identified in any of the exhibits.

On October 25, 1983, Mr. Thompson committed the felony offense of Credit Card Abuse. On April 23, 1984, the 213th District Court of Tarrant County accepted Mr. Thompson's plea of guilty in Cause No. 0222420D, entered an order of deferred adjudication, placed him on probation for three years, and required him to pay court costs.³

On November 6, 1984, the County Criminal Court No. 1 of Tarrant County entered a judgment of conviction against Mr. Thompson in Cause No. 0234711 for misdemeanor Theft of Property Worth \$20 To \$200. The court sentenced Mr. Thompson to three days in the county jail with credit for time served.⁴

On September 7, 1995, the County Criminal Court No. 9 of Tarrant County accepted Mr. Thompson's plea of guilty in Cause No. 576796 and entered an order of deferred adjudication for the misdemeanor Class A offense of Fraudulent Destruction, Removal, or Concealment of Writing. The court placed Mr. Thompson on probation for two years and ordered him to pay a fine and court costs.⁵

On January 30, 2001, the Board issued to Mr. Thompson a license as an RN. The Board had no knowledge of his criminal background.⁶ After the Board issued the license, Mr. Thompson continued to be charged with crimes and continued to be subject to criminal judgments by the courts of Texas.

On September 15, 2001, Mr. Thompson committed two Class B misdemeanor Thefts of Property Worth \$50 to \$500. On January 17, 2002, Mr. Thompson entered a plea of no contest to each charge in the County Criminal Court of Dallas County in Cause Nos. M-0133707A and M-0133708A. The court entered orders of deferred adjudication and placed Mr. Thompson on probation for nine months.⁷

³ Staff Ex. 17.

⁴ Staff Ex. 6.

⁵ Staff Ex. 18.

⁶ Staff Ex. 1 at 1.

⁷ Staff Exs. 8, 9.

On November 23, 2003, Mr. Thompson submitted to the Board his first online application form for the renewal of his nursing license. In the application, he answered "no" to the question, "Since issuance or last renewal, have you plead guilty (including no contest plea), been found guilty or convicted of any felony or misdemeanor other than a minor traffic violation?"⁸

Mr. Thompson's criminal problems continued. On July 1, 2003, Mr. Thompson committed the state jail felony offense of Securing Execution of Document by Deception. On March 1, 2007, the Criminal District Court No. 5 of Dallas County accepted Mr. Thompson's plea of guilty in Cause No. F-0600503-L, entered an order of deferred adjudication, placed him on probation for two years, and ordered him to pay a fine and court costs.⁹

On November 29, 2007, Mr. Thompson submitted to the Board his second online renewal application form. In it, he answered "no" to the question, "Have you, within the past 24 months or since your last renewal, for any criminal offense, including those pending appeal . . . pled . . . guilty?"¹⁰

Mr. Thompson's criminal problems continued. On November 29, 2007, Mr. Thompson committed the misdemeanor offense of Assault Causing Bodily Injury. On December 2, 2010, the County Court at Law No. 6 accepted his plea of guilty in Cause No. 68832910, sentenced him to one year of confinement in the Collin County jail, suspended the imposition of the sentence, placed Mr. Thompson on probation for two years, and ordered him to pay a fine and court costs.¹¹

On October 14, 2008, Mr. Thompson was indicted for insurance fraud in Cause No. F-0901230H for an amount more than \$1,500 but less than \$20,000, an alleged violation of section 35.02 of the Texas Penal Code. By the filing of a Plea Agreement on September 28, 2011, Mr. Thompson agreed to a conviction for the Class A misdemeanor offense of Attempted

⁸ Staff Ex. 10.

⁹ Staff Ex. 11.

¹⁰ Staff Ex. 12.

¹¹ Staff Ex. 13.

Insurance Fraud.¹² On September 28, 2011, the Criminal District Court No. 1 of Dallas County accepted his plea of guilty, entered an order of deferred adjudication, placed him on probation for 18 months, and ordered him to pay a fine and court costs.¹³

While the criminal proceedings in Cause No. 68291810 were pending, on April 11, 2010, Mr. Thompson committed the Class B misdemeanor offense of Theft of Property Worth \$50 to \$500. On December 2, 2010, the County Court at Law No. 6 accepted his plea of guilty in Cause No. 68291810, sentenced him to 180 days of confinement in the Collin County jail, suspended the imposition of the sentence, placed Mr. Thompson on probation for one year, and ordered him to pay a fine and court costs.¹⁴

Staff became aware of Mr. Thompson's criminal background, and on March 19, 2013, Staff sent Mr. Thompson a notice of formal charges and filed with SOAH a Request to Docket Form. SOAH set a hearing on the merits for May 2, 2013. On March 20, 2013, Staff sent Mr. Thompson a notice of hearing.¹⁵ On April 15, 2013, the ALJ granted Mr. Thompson's unopposed motion for continuance. On May 20, 2013, the ALJ convened the hearing on the merits. Attorneys representing the parties were Kyle Hensley for Staff and Marc Meyer for Mr. Thompson. The record closed the same day.

III. APPLICABLE LAWS

The Texas Nursing Practice Act (Act) and the Board's rules govern disciplinary matters involving licensed nurses.¹⁶ The Board has the authority to sanction a nurse for violation of its laws.¹⁷ The Board has adopted a Disciplinary Matrix¹⁸ and Disciplinary Guidelines for Criminal

¹² Under the provisions of section 35.02 of the Texas Penal Code, a court may issue a conviction for a Class A misdemeanor if the value of the insurance claim is \$500 or more but less than \$1,500.

¹³ Staff Ex. 15

¹⁴ Staff Ex. 14.

¹⁵ Staff Ex. 4.

¹⁶ Tex. Occ. Code (Code) ch. 301; 22 Tex. Admin. Code chs. 213 and 217.

¹⁷ Code § 301.452.

¹⁸ 22 Tex. Admin. Code § 213.33(b) (Rule 213.33(b)).

Conduct (Guidelines).¹⁹ The Board has also adopted formal written policies on Disciplinary Sanctions for Fraud, Theft, and Deception²⁰ and on Disciplinary Sanctions for Lying and Falsification.²¹

During Mr. Thompson's 27-year history of criminal violations, the laws governing the practice of nursing changed. The legislature amended the Act three times, effective September 1, 1999, 2001, and 2011. The Board amended its rule defining "unprofessional conduct," section 217.12 of title 22 of the Texas Administrative Code, three times, effective April 23, 1992, September 1, 1999, and September 28, 2004. The ALJ includes Attachment A that outlines the scope and effective dates of the applicable changes in the Act and the Board rule.

IV. DISCUSSION

A. Staff's Complaint

Staff's complaint lists its administrative charges I through X against Mr. Thompson. Each administrative charge identifies the sections of the Act and the Board rule on which Staff relies.²²

Board Charge	Date of Conviction/ Violation of Act or Rules	Violation of Criminal Laws	Alleged Violation of Nursing Laws	Section of Act/Rule Allegedly Violated
I	11-06-84	Misdemeanor theft in Cause No. 0234711	Conviction for a misdemeanor involving moral turpitude; unprofessional behavior	Code § 301.452(b)(3), (10) (1999)

¹⁹ <http://www.bon.texas.gov/disciplinaryaction/discp-guide.html>.

²⁰ State Ex. 20 (admitted for the purpose of administrative notice).

²¹ State Ex. 21 (admitted for the purpose of administrative notice).

²² Staff did not include all of Mr. Thompson's criminal violations in Staff's ten charges.

Board Charge	Date of Conviction/ Violation of Act or Rules	Violation of Criminal Laws	Alleged Violation of Nursing Laws	Section of Act/Rule Allegedly Violated
II	12-05-00	—	Failure to disclose to Board conviction in Cause No. 0234711; failure to conform to laws governing nursing	Code § 301.452(b)(2), (10) (1999) ²³ Rule 217.12(23) (1999)
III and IV	01-17-02	2 Class B misdemeanor thefts in Cause Nos. M-0133707A and M-0133708A	Unprofessional conduct for “no contest” pleas; failure to conform to laws governing nursing	Code § 301.452(b)(10) (2001); Rule 217.12(1) (1999)
V	11-23-03	—	Failure to disclose to Board “no contest” plea in Cause Nos. M-0133707A and M-0133708A; fraud and deceit in obtaining license; unprofessional conduct; failure to answer specific questions	Code § 301.452(b)(2), (10) (2001); Rule 217.12(23) (1999) ²⁴
VI	03-01-07	State jail felony offense of Securing Execution of Document by Deception in Cause No. F-0600503-L	Conviction for a felony and unprofessional behavior	Code § 301.452(b)(3), (10)(2001); Rule 217.12(13) (2004)

²³ Charge II fails to identify the version of the Act or the Rule. Staff's absence of citation to an effective date in the charge appears to mean that current version of the law was in effect. For at least Charges II, V, and VI, Staff either included the wrong effective date or included no citation to an effective date. For all charges, the ALJ will presume that the applicable date of the law is the one in effect at the time of the alleged violation. The corrected version is listed in this table. Neither the error nor the correction affects the recommendation in this proposal for decision.

²⁴ Charge V identifies Rule 217.12(23) as “effective 11/01/2003.” Staff's source for that information is unclear. The Office of the Secretary of State identifies the effective date of the rule as September 1, 1999. 24 TexReg 4001. In addition, the complaint appears to include errors in a number of Staff's other citations to the applicable versions of the Act and the rule. The ALJ has used in this proposal for decision the versions listed by the Office of the Secretary of State as they apply to the various sections of the Act and subsections of the rule. The change does not affect the outcome of the proposal for decision.

Board Charge	Date of Conviction/ Violation of Act or Rules	Violation of Criminal Laws	Alleged Violation of Nursing Laws	Section of Act/Rule Allegedly Violated
VII	11-29-07	—	Failure to disclose to Board plea of guilty in Cause No. F-0600503-L; fraud in procuring license; unprofessional behavior; failure to answer specific questions	Code § 301.452(b)(2), (10) (2011); Rule 217.12(6)(I)
VIII	12-02-10	Misdemeanor offense of Assault Causing Bodily Injury in Cause No. 68832910	Conviction for a misdemeanor and unprofessional behavior	Code § 301.452(b)(3), (10) (2011); Rule 217.12(13) (2004)
IX	12-02-10	Class B misdemeanor offense of theft	Conviction for a misdemeanor of moral turpitude and unprofessional behavior	Code § 301.452(b)(3), (10) (2011) Rule 217.12(13) (2004)
X	09-28-11	Class A misdemeanor offense of Attempted Insurance Fraud ²⁵	Deferred adjudication for a misdemeanor and unprofessional behavior	Code § 301.452(b)(3), (10) (2011); Rule 217.12(13) (2004)

B. Parties' Arguments

Staff raises five separate arguments for the revocation of Mr. Thompson's license. First, Staff argues that Mr. Thompson is a habitual thief, a characteristic that makes him ineligible to hold a license as a nurse. Staff argues that Mr. Thompson's repeated criminal acts require revocation because Mr. Thompson was the subject of multiple criminal judgments of conviction, orders of deferred adjudication, and orders of probation. Staff relies on the provisions of the Disciplinary Matrix that address section 301.452(b)(10) of the Code. Staff asserts that Mr. Thompson's violations of the Act and Rules establish a Second Tier Offense, Sanction Level II, a category that requires revocation.

²⁵ The charge inaccurately describes the insurance fraud offense for which Mr. Thompson entered a guilty plea as a Class B misdemeanor offense.

Second, Staff argues that Mr. Thompson is a habitual liar. Specifically, Staff alleges that Mr. Thompson violated section 301.452(b)(2) of the Code by lying to the Board when he submitted his initial license application form and when he submitted his two online renewal forms. Staff argues that Mr. Thompson's actions qualify under the Disciplinary Matrix as a Second Tier Offense, Sanction Level I, a category that requires revocation.

Third, Staff argues that Mr. Thompson's criminal history qualifies him for revocation under the Guidelines based on his deferred adjudication for the felony of Securing Execution of Document by Deception. Although the Guidelines do not list the crime, Staff argues that the Guidelines are not an exclusive list. Staff asserts that Mr. Thompson's crime is a form of felony fraud, like Insurance Fraud, that carries with it a sanction of revocation.

Fourth, Staff argues that the dollar amounts involved in Mr. Thompson's various criminal court judgments and orders for misdemeanor theft should be consolidated. By consolidation, the amounts involved in his thefts would reach \$4,999, the maximum dollar amount that would allow Staff to treat Mr. Thompson's multiple misdemeanor thefts as felony theft. That treatment, according to Staff, would subject Mr. Thompson's license to revocation under the Guidelines.

Fifth, Staff argues that Mr. Thompson's criminal actions should be treated as a fraud against his fellow nurses because he was able to procure a license by false means. By committing a fraud against his fellow nurses, Staff argues that Mr. Thompson's license is subject to being revoked.

Mr. Thompson's defense focused on issues affecting the selection of a sanction and less on whether his actions constituted violations of the Act and rules, including: (1) his criminal history has had no negative impact on his performance of his nursing duties; (2) the Board has issued no disciplinary orders against him; (3) no former employer, patient, or Staff member has made a complaint against him; (4) he is not currently on probation; (5) more than three years have passed since his last criminal act; and (6) Charge X involved only an attempt to commit criminal fraud and not the commission of criminal fraud, which is one of the Disciplinary Matrix's listed crimes that are considered to be unprofessional behavior. Mr. Thompson asserted that his failure to disclose and his criminal history combine to constitute a Second Tier Offense

that should be treated as a Sanction Level 1. Mr. Thompson argues that the result should be a reprimand or a suspension but not revocation.

C. Analysis

1. Criminal Behavior as Alleged Violations of Act and Board Rules

a. Charges I and II

When Mr. Thompson was a nursing student, he placed himself within the Board's authority when he filed an application for a license as a nurse. Code § 301.252. He was obligated to disclose his previous criminal convictions to the Board. Code § 301.2511(b). Mr. Thompson failed to disclose his 1984 conviction because he relied on the judge's explanation that the convicting court's placement of his criminal information under seal made the information not subject to disclosure. His violation of his obligation to disclose made Mr. Thompson subject to discipline under the Act, as did his conviction for misdemeanor theft, a crime involving moral turpitude. Code § 301.452(b)(3) (1999 version, repealed); *Ex parte De Los Reyes*, 392 S.W.3d 675, 676 (Tex. Crim. App. 2013). In addition, Mr. Thompson's criminal behavior made him subject to discipline because it constituted unprofessional or dishonorable conduct. Code § 301.452(b)(10) (1999 version, repealed). Staff proved its allegations in Charges I and II.

b. Charges III, IV, and V

Mr. Thompson had the obligation to disclose to the Board his two convictions in 2002 for Class B theft misdemeanors, the result of criminal judgments issued about a year after he was licensed as a registered nurse. Code §§ 301.301 and 301.3011(b). As with his violations in Charges I, II, and III, his failure to disclose his criminal history in his 2003 license renewal application constituted fraud and deceit and failure to answer specific questions on his renewal form, and his criminal behavior constituted separate violations of the Act's prohibitions against a nurse's engaging in crimes of moral turpitude. Code § 301.452(b)(2), (10) (2001 version, repealed); Rule 217.12(1), (23) (1999 version, repealed). Staff proved its allegations in Charges III, IV, and V.

c. **Charges VI and VII**

When Mr. Thompson was convicted of a felony on March 1, 2007, his actions again constituted unprofessional behavior. Code § 301.452(b)(3), (10) (2001 version, repealed); Rule 217.12(13) (2004 version, repealed). Similarly, when Mr. Thompson renewed his license for a second time, on November 29, 2007, he failed for a third time to disclose his criminal history. This failure constituted fraud and deceit in obtaining a renewal of his license, unprofessional conduct, and failure to answer specific questions on his renewal form. Act § 301.452(b)(2), (10); Rule 217.12(6)(I). Staff proved its allegations in Charges VI and VII.

d. **Charges VIII, IX, and X**

When Mr. Thompson was convicted of misdemeanor theft in 2010, the crime constituted a crime of moral turpitude, thereby violating the provisions of the Act's section 301.452. Staff alleged that Mr. Thompson's 2010 misdemeanor conviction for aggravated assault and his 2011 misdemeanor conviction for attempted insurance fraud were separate violations of the Act's requirement that a nurse demonstrate good professional character.²⁶

In its Rule 213.27(g), the Board lists its Disciplinary Sanctions for Fraud, Theft, and Deception²⁷ as a source for determining whether particular criminal violations violate the requirement of good professional character. Included in the list are the crimes of aggravated assault and three crimes of insurance fraud detailed in sections 35.02(a-1), (c)(1) through (3), and (d) of the Texas Penal Code.²⁸ Without explanation, Rule 213.27(g) does not include section 35.02(b)'s crime of insurance fraud.²⁹ Similarly, Rule 213.28(b)(3)(A)(iii) through (v) lists the same sections of the Texas Penal Code and does not include the crime listed in section 35.02(b).

²⁶ Staff did not allege that these convictions involved crimes of moral turpitude.

²⁷ <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>.

²⁸ See pages 3, 9, 10, and 18 of the document.

²⁹ Sections 35.02(a) and (a-1) of the Texas Penal Code seem to describe a single crime: preparing and presenting (or causing to prepare and present) an insurance claim that the person knows contains false or misleading material information. Section 35.02(b) is a different crime, involving an intent to defraud or deceive an insurer, coupled with the requirement that a person must solicit, offer, pay, or receive a benefit "in connection with the furnishing of goods or services for which a claim for payment is submitted under an insurance policy." The Board's rules do not explain the reason for including one form of insurance fraud as unprofessional conduct but not the other form of insurance fraud.

The court's Order of Deferred Adjudication for insurance fraud does not specify the provision of section 35.02 that Mr. Thompson violated other than "Attempted Insurance Fraud."³⁰ As a consequence, the ALJ cannot determine if the violation is for a crime that is listed in Rules 213.27(g) and 213.28(b).

As a separate argument, Staff relied on the language in the Board's adopted policy relating to Disciplinary Sanctions for Lying and Falsification.³¹ In that document, the Board lists the following factor: "A conviction or judicial order involving a crime of lying or falsification raises concern that the person may engage in similar conduct while practicing nursing and place patients at risk." The "similar conduct" to which the rule refers is falsification of documents relating to patient care or to employment applications or license applications.

Although the evidence established that Mr. Thompson's behavior involved insurance fraud, the evidence was not sufficient to prove that his behavior involved conduct relating to patient care or to applications submitted for employment or licensing as a nurse. Although Mr. Thompson's criminal history on this issue is clear, the evidence is insufficient to support a legal conclusion that Mr. Thompson's behavior constituted unprofessional behavior under Staff's listed sections of the Act and Rules. Staff proved its allegations in Charges VIII and IX but not in Charge X.

2. Sanctions under the Guidelines

The Board has the authority to suspend or revoke a license for the commission of a violation of section 301.452(b) of the Code, including those listed in Mr. Thompson's violations detailed in Charges I through IX. The Board has adopted a schedule of sanctions in its Disciplinary Matrix, and most of the sections of the Disciplinary Matrix are divided into tiers of offenses and levels of sanctions.

³⁰ State Ex. 15 at 4.

³¹ <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>.

a. **Failure to Disclose, Code § 301.452(b)(2)**

For failure to disclose information to the Board as part of an application for a license or for application for renewal of a license, the Disciplinary Matrix has two tiers: a First Tier for violations associated with the Board's decision to grant a license, and Second Tier for violations associated with intentional misrepresentation of extensive criminal history, multiple violations or offenses, or professional character. Aggravating circumstances for both tiers include: "[m]ultiple offenses; the relevance or seriousness of the hidden information; [and] whether the information, if known, would have prevented licensure." Mitigating circumstances include: "[s]eriousness of the hidden violation; age of applicant at time applicant committed violation; and applicant's justified reliance upon advice of legal counsel."

Mr. Thompson's initial application to the Board in 2001 included his failure to disclose his 1984 misdemeanor theft conviction. The prohibited behavior would constitute a First Tier offense. Although the information about the conviction would have been relevant for the Board's review of Mr. Thompson's initial application, Mr. Thompson demonstrated a credible but mistaken belief that he was not required to disclose the information because of the court's sealing of the record. That reliance on a legal error constituted a mitigating factor.

But, Mr. Thompson's subsequent decisions to withhold new relevant criminal history in his 2003 and 2007 license renewals were not mitigated by his misunderstanding. These later criminal judgments were not subject to judicial seal. The information withheld by Mr. Thompson would have revealed to the Board his multiple and serious criminal offenses. It is reasonable to assume that the Board would have taken some disciplinary measures if the Board had received this information. Mr. Thompson's ongoing nondisclosures convert the sanction to a Second Tier offense because the nondisclosures involved Mr. Thompson's intentional misrepresentation of his extensive criminal history, multiple violations and offenses, and evidence of serious problems with his professional character. The Level I sanction for a Second Tier offense is denial of an application for licensure or revocation of an existing nursing license.

b. Conviction for or Placement on Deferred Adjudication for a Felony or Misdemeanor Involving Moral Turpitude, Code § 301.452(b)(3)

Mr. Thompson was convicted or placed on deferred adjudication for one felony and four misdemeanors involving moral turpitude. This section of the Disciplinary Matrix addressing convictions and deferred adjudications has neither offense tiers nor sanction levels. Instead, the Disciplinary Matrix relies on the Guidelines, among other sources.³²

Mr. Thompson's 2007 state jail felony conviction of Securing Execution of Document by Deception is not listed in the Guidelines. However, the Guidelines are not intended to be exhaustive, and the Board may rely on the sanctions associated with similar crimes. A False Report or Statement is a similar crime that is listed in the Guidelines. The elements of the crime of False Report or Statement appear to be more like Mr. Thompson's crime than the elements of Insurance Fraud, as suggested by Staff.³³ The sanction for a five-year-old (or more) conviction for a False Report or Statement is issuance of a license with stipulations if the nurse is not on probation.

Aggravating circumstances include that Mr. Thompson was 40 or 41 years old when he committed the felony for which he was convicted. Mitigating factors include that Mr. Thompson is not currently on probation, and he expressed remorse for his actions at the SOAH hearing on the merits. His crimes were unrelated to his work with patients and with the delivery of nursing care. He claimed to have learned from his past mistakes.

Mr. Thompson was convicted for the four misdemeanors during a period when he was between 17 and 44 years old. One of the convictions was issued 29 years ago, two were issued 11 years ago, and one was issued three years ago. All of the thefts involved amounts of less than \$1,500. The Guidelines' sanction for misdemeanor thefts committed five years ago or more (and for which the fifth year anniversary since release has not occurred) is "issue license." For

³² The other sources are Rule 213.28, section 301.4535 of the Code, and chapter 53 of the Texas Occupations Code.

³³ Tex. Penal Code §§ 32.32(b). The crime involves a person's intentional or knowing making of a materially false or misleading written statement to obtain property.

misdemeanor thefts committed between zero and three years ago, the sanction is "issue license with sanctions," but the Guidelines do not specify the sanctions to be imposed.³⁴

Staff asserted that the ALJ should consolidate all four of Mr. Thompson's theft convictions into a single amount of greater than \$1,500, a separate crime for which a different set of sanctions applies. Staff presented no basis in policy or law to support its suggestion. The assertion is rejected as without merit.

The ALJ recommends that the Board disregard the three misdemeanor convictions that are more than ten years old, at least for the purpose of considering violations of section 301.452(b)(3) of the Code. The Board should consider the three misdemeanor convictions for the purposes of the other two violations of the Act and Rules. The Board should consider the 2010 misdemeanor conviction because of its proximity in time. Because the Guidelines are not specific about the sanctions to be applied or the factors to be taken into account, the Board should consider all of the information available. That information includes Mr. Thompson's extensive criminal history, his failure to disclose, and his lack of professional conduct. Under the circumstances, an appropriate sanction would include a non-probated suspension of Mr. Thompson's license for a period of two years.

c. Unprofessional or Dishonorable Conduct, Code § 301.452(b)(10)

The facts in this case do not support consideration of Mr. Thompson's violations as a First Tier offense: an isolated failure to comply with Board rules. The question is whether the facts are more appropriately analyzed as a Second or Third Tier offense.

A Second Tier offense applies to conduct that poses risk but has not created actual harm: "[f]ailure to comply with a substantive Board rule regarding professional conduct resulting in serious *risk* to . . . public safety" and [r]epeated acts of unethical behavior which places . . . [the] public at *risk* of harm." A Third Tier offense applies to conduct that has resulted in actual harm:

³⁴ If the theft was committed during the practice of nursing, a different set of sanctions applies. Those conditions do not apply in these facts.

“[r]epeated acts of unethical behavior which *result in harm* to the . . . public” and “unethical conduct *resulting in a material or financial loss* to [the] public in excess of \$4,999.99.”

Mr. Thompson’s actions have involved actual harm to the public and not merely the risk of harm. He has been charged with misdemeanors by county attorneys and a felony by a criminal district court’s grand jury, and he has pleaded guilty to the charges. A Third Tier analysis is more appropriate, although the ALJ notes that none of Mr. Thompson’s crimes have involved direct patient care or the practice of nursing.

The sanction for a Third Tier offense is revocation of an existing nursing license.

3. Analysis of Parties’ Positions and Recommendation

Staff presented four legally supportable arguments for the Board’s taking administrative action against Mr. Thompson’s nursing license: his status as a felon, his long-term history of convictions for misdemeanor theft, his history of non-disclosure of criminal history to the Board, and his repeated failure to demonstrate professional conduct since his becoming licensed as a nurse. Staff asserted that the appropriate penalty should be revocation.

Mr. Thompson’s arguments address mitigating factors, and the facts support his assertions. The record shows nothing about Mr. Thompson’s criminal history’s having affected his performance of his nursing duties. No patient or provider has complained about his work, and the Board has never entered a disciplinary order against him. Additionally, Mr. Thompson accurately asserts that three years have passed without his having been charged with new crimes and without his having any continuing obligations to any probation department.

Mr. Thompson offered written letters of support. Dr. April Wiechmann, an assistant professor of psychology, has known Mr. Thompson for five years, including during his work with head injury patients under Dr. Wiechmann’s supervision.³⁵ Dr. Wiechmann’s letter stated that she was aware of his criminal background but found him to be a serious and dependable employee.

³⁵ Resp. Ex. A.

Yvonne Montano of JLB Companies in Mesquite, Texas, has known Mr. Thompson since 2008 while he was working as a private duty nurse for the company.³⁶ Ms. Montano's affidavit noted that Mr. Thompson was authorized to use the company vehicle, credit card, and petty cash. The company had no complaints about his work and found Mr. Thompson to have performed his nursing duties "with honor, respect, and integrity."

Celia Chavarria is an RN who supervised Mr. Thompson during his work at the Collin County Adult Clinic from May 2007 through his second semester of graduate studies in September 2012.³⁷ Mr. Thompson was a volunteer at the clinic who conducted education and training for newly diagnosed insulin-dependent diabetic patients. As part of his work, Mr. Thompson had access to the clinic's funds, pharmaceuticals, and patient records. Ms. Chavarria's affidavit stated that Mr. Thompson's work was never the subject of problems.

Finally, the records of the Board reflect that its files reflect no evidence of Mr. Thompson's actions having caused a material or financial loss to a patient or the public in excess of \$4,999.99, no actual harm to any patient under his care, no history of impairment by drugs or alcohol, and no history of complaints at the Board.³⁸

Mitigating circumstances affect the severity of the potential sanction but not the seriousness of the underlying violation. The Guidelines provide that Mr. Thompson's violations should result in revocation. Because revocation is absolute, the rules do not provide a mitigation of the terms of a revocation.

This is a case in which Mr. Thompson's extensive criminal history provides the Board with ample reason to revoke his license and in which his creditable professional life provides ample reason to mitigate that sanction. The Board's rules and policies provide little guidance on how those two conclusions are to be balanced. The Board alone has the administrative discretion to exercise that authority. The ALJ is limited by the Act and the Rules as written. Under the provisions of the law, Mr. Thompson's license should be revoked.

³⁶ Resp. Ex. B.

³⁷ Resp. Ex. C.

³⁸ Resp. Ex. D.

V. FINDINGS OF FACT

1. Christopher Ross Thompson (Respondent) was licensed in Texas as a Registered Nurse (RN) on January 30, 2001, by the Texas Board of Nursing (Board).
2. On March 19, 2013, Staff of the Board (Staff) sent Respondent a notice of formal charges and referred the matter to the State Office of Administrative Hearings (SOAH) for a hearing on the merits.
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.
4. The hearing convened May 20, 2013, in the William P. Clements Building, 300 West 15th Street, Austin, Texas. All parties participated in the hearing. The record closed at the conclusion of the hearing that day.
5. On October 18, 1983, when Mr. Thompson was 16 or 17 years old, the County Criminal Court No. 1 of Tarrant County accepted his plea of guilty in Cause No. 207077 for Theft of Property Worth \$20 to \$200, entered an order of deferred adjudication, and placed Mr. Thompson on probation for twelve months.
6. On October 25, 1983, Mr. Thompson committed the felony offense of Credit Card Abuse. On April 23, 1984, the 213th District Court of Tarrant County accepted Mr. Thompson's plea of guilty in Cause No. 0222420D, entered an order of deferred adjudication, placed him on probation for three years, and required him to pay court costs.
7. On November 6, 1984, the County Criminal Court No. 1 of Tarrant County entered a judgment of conviction against Mr. Thompson in Cause No. 0234711 for misdemeanor Theft of Property Worth \$20 To \$200. The court sentenced Mr. Thompson to three days in the county jail with credit for time served.
8. On September 7, 1995, the County Criminal Court No. 9 of Tarrant County accepted Mr. Thompson's plea of guilty in Cause No. 576796 and entered an order of deferred adjudication for the misdemeanor Class A offense of Fraudulent Destruction, Removal, or Concealment of Writing. The court placed Mr. Thompson on probation for two years and ordered him to pay a fine and court costs.
9. On December 5, 2000, while Mr. Thompson was in nursing school, he submitted to the Board his completed Application for Initial Licensure. On the form, Mr. Thompson attested that he had never been convicted of a crime other than a minor traffic violation.
10. On January 30, 2001, the Board issued to Mr. Thompson a license as an RN. The Board had no knowledge of his criminal background.

11. On September 15, 2001, Mr. Thompson committed two Class B misdemeanor Thefts of Property Worth \$50 to \$500. On January 17, 2002, Mr. Thompson entered a plea of no contest to each charge in the County Criminal Court of Dallas County in Cause Nos. M-0133707A and M-0133708A. The court entered orders of deferred adjudication and placed Mr. Thompson on probation for nine months.
12. On November 23, 2003, Mr. Thompson submitted to the Board an online application form for the renewal of his nursing license in which he answered "no" to the question, "Since issuance or last renewal, have you plead guilty (including no contest plea), been found guilty or convicted of any felony or misdemeanor other than a minor traffic violation?"
13. On July 1, 2003, Mr. Thompson committed the state jail felony offense of Securing Execution of Document by Deception. On March 1, 2007, the Criminal District Court No. 5 of Dallas County accepted Mr. Thompson's plea of guilty in Cause No. F-0600503-L, entered an order of deferred adjudication, placed him on probation for two years, and ordered him to pay a fine and court costs.
14. On November 29, 2007, Mr. Thompson submitted to the Board an online renewal application form in which he answered "no" to the question, "Have you, within the past 24 months or since your last renewal, for any criminal offense, including those pending appeal . . . pled . . . guilty?"
15. On November 29, 2007, Mr. Thompson committed the misdemeanor offense of Assault Causing Bodily Injury. On December 2, 2010, the County Court at Law No. 6 accepted his plea of guilty in Cause No. 68832910, sentenced him to one year of confinement in the Collin County jail, suspended the imposition of the sentence, placed Mr. Thompson on probation for two years, and ordered him to pay a fine and court costs.
16. On October 14, 2008, Mr. Thompson was indicted for insurance fraud in Cause No. F-0901230H for an amount more than \$1,500 but less than \$20,000, an alleged violation of section 35.02 of the Texas Penal Code. By the filing of a Plea Agreement on September 28, 2011, Mr. Thompson agreed to a conviction for the Class A misdemeanor offense of Attempted Insurance Fraud. On September 28, 2011, the Criminal District Court No. 1 of Dallas County accepted his plea of guilty, entered an order of deferred adjudication, placed him on probation for 18 months, and ordered him to pay a fine and court costs.
17. On April 11, 2010, Mr. Thompson committed the Class B misdemeanor offense of Theft of Property Worth \$50 to \$500. On December 2, 2010, the County Court at Law No. 6 accepted his plea of guilty in Cause No. 68291810, sentenced him to 180 days of confinement in the Collin County jail, suspended the imposition of the sentence, placed Mr. Thompson on probation for one year, and ordered him to pay a fine and court costs.
18. Dr. April Wiechmann, an assistant professor of psychology, has known Mr. Thompson for five years, including during his work with head injury patients under her supervision. Mr. Thompson was a serious and dependable employee.

19. Yvonne Montano of JLB Companies in Mesquite, Texas, has known Mr. Thompson since 2008 while he was working as a private duty nurse for the company. Mr. Thompson was authorized to use the company vehicle, credit card, and petty cash, and performed his nursing duties "with honor, respect, and integrity."
20. Celia Chavarria is an RN who supervised Mr. Thompson during his work at the Collin County Adult Clinic from May 2007 through his second semester of graduate studies in September 2012. Mr. Thompson was a volunteer at the clinic who conducted education and training for newly diagnosed insulin-dependent diabetic patients. As part of his work, Mr. Thompson had access to the clinic's funds, pharmaceuticals, and patient records. Mr. Thompson's work was never the subject of problems.
21. The Board's records reflect no evidence of Mr. Thompson's actions having caused a material or financial loss to a patient or the public in excess of \$4,999.99, no actual harm to any patient under his care, no history of impairment by drugs or alcohol, and no history of complaints at the Board.

VI. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. Tex. Occ. Code (Code) ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
3. Notice of the hearing on the merits was provided as required by Code § 301.454 and by the Administrative Procedure Act, Texas Government Code §§ 2001.051 and 2001.052.
4. Licensed nurses are subject to disciplinary action by the Board pursuant to Code § 301.452.
5. Staff had the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
6. A person is subject to disciplinary action for "fraud or deceit in procuring or attempting to procure a license to practice professional nursing." Code § 301.452(b)(2) (1999 and 2001 version, repealed) (current version).
7. A person is subject to disciplinary action for "fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing." Code § 301.452(b)(2).
8. A person is subject to disciplinary action for a conviction for a felony or for a misdemeanor involving moral turpitude. Code § 301.452(b)(3) (1999 version, repealed)

9. A person is subject to disciplinary action for “a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude.” Code § 301.452(b)(3) (current version).
10. Misdemeanor theft is a crime of moral turpitude. *Ex parte De Los Reyes*, 392 S.W.3d 675, 676 (Tex. Crim. App. 2013).
11. A person is subject to disciplinary action for unprofessional or dishonorable conduct that, in the Board’s opinion, is likely to deceive, defraud, or injure a patient or the public. Code § 301.452(b)(10) (current version).
12. Renewal of a license by the Board is conditioned on the Board’s obtaining the person’s criminal history record information. Code § 301.3011(b) (current version).
13. Unprofessional conduct includes “failing to . . . conform to the [Act] and the Board’s rules . . .” 22 Tex. Admin. Code § 217.12(1) (1999 version, repealed)
14. Unprofessional conduct includes “[f]ailing to answer specific questions or providing false or misleading answers that would have affected the decision to license, employ, certify or otherwise utilize a nurse.” 22 Tex. Admin. Code § 217.12(6)(I) (current version)
15. Unprofessional conduct includes “[c]riminal [c]onduct—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.” 22 Tex. Admin. Code § 217.12(13) (current version).
16. Unprofessional conduct includes “failing to answer specific questions that would have affected the decision to license . . . an RN.” 22 Tex. Admin. Code § 217.12(23) (1999 version, repealed).
17. The Board lists its Disciplinary Sanctions for Fraud, Theft, and Deception as a source for determining whether particular criminal violations violate the requirement of good professional character. 22 Tex. Admin. Code § 213.27(g) (current version).
18. The Disciplinary Sanctions for Fraud, Theft, and Deception include the crimes of aggravated assault and insurance fraud, as listed in sections 35.02(a-1), (c)(1) through (3), and (d) of the Texas Penal Code but not section 35.02(b).
19. The provisions of 22 Tex. Admin. Code §§ 213.27(g) and 213.28(b) do not include section 35.02(b) of the Texas Penal Code’s crime of insurance fraud as a violation of the requirement of good professional character.
20. Staff proved by a preponderance of the evidence that Mr. Thompson was convicted one or more misdemeanors for theft, a crime of moral turpitude.
21. Staff proved by a preponderance of the evidence that Mr. Thompson was convicted of a felony.

- 22. Staff provided by a preponderance of the evidence that Mr. Thompson engaged in unprofessional conduct.
- 23. Staff provided by a preponderance of the evidence that Mr. Thompson failed to report his criminal history to the Board.
- 24. Staff provided by a preponderance of the evidence that Mr. Thompson used fraud and deceit in obtaining license.

VII. RECOMMENDATION

Based upon the above-stated findings of fact and conclusions of law, the ALJ recommends that the Board revoke Mr. Thompson's license.

SIGNED July 16, 2013.



**PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

ATTACHMENT A			
Applicable Changes in Statute During 1999-2011			
Text of the Act Making A Person Subject to Denial of a License or Disciplinary Action for:	Code Section Effective 09-01-99	Code Section Effective 09-01-01	Code Section Effective 09-01-11
"fraud or deceit in procuring or attempting to procure a license to practice professional nursing"	§ 301.452(b)(2)	§ 301.452(b)(2)	—
"fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing"	—	—	§ 301.452(b)(2)
"a conviction for a felony or for a misdemeanor involving moral turpitude"	§ 301.452(b)(3)	§ 301.452(b)(3)	—
"a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude"	—	—	§ 301.452(b)(3)
"unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public."	§ 301.452(b)(10)	§ 301.452(b)(10)	§ 301.452(b)(10)

Applicable Changes in Rules During 1999-2011			
Text of Board Rule Defining "Unprofessional Conduct" to Include:	22 TAC section Effective 04-23-92	22 TAC section Effective 09-01-99	22 TAC section Effective 09-28-04
"failing to . . . conform to the [Act] and the Board's rules . . ."	—	§ 217.12(1)	—
"Misconduct" including: "Failing to answer specific questions or providing false or misleading answers that would have affected the decision to license, employ, certify or otherwise utilize a nurse"	—	—	§ 217.12(6)(I)
"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"	—	—	§ 217.12(13)
"failing to answer specific questions that would have affected the decision to license . . . an RN"	—	§ 217.12(23)	—

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Law Office of Marc Meyer, PLLC

Texas Nursing & EMS Lawyer

Marc M. Meyer, RN, LP, MS, JD

Principal Office, Magnolia, TX

August 5, 2013

To: Docketing, State Office of Administrative Hearings
Kyle Hensley, Assistant General Counsel, Texas Board of Nursing

Re: In the Matter of Permanent Certificate Number 674951 Issued to Christopher Ross Thompson; Docket
No. 507-13-3211; Exceptions to the Proposal for Decision

Please see the attached exceptions to the proposal for decision in this matter. If you have any questions, please
call me at (281) 259-7575. Thank you,

Marc M. Meyer, RN, JD
Law Office of Marc Meyer, PLLC
33300 Egypt Lane, Suite B200
Magnolia, TX 77354-2878
Office: 281.259.7575
Fax: 866.839.6920
marc@marcmeyerlawfirm.com
www.marcmeyerlawfirm.com

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DOCKET NO. 507-13-3211

IN THE MATTER OF	§	
PERMANENT CERTIFICATE	§	BEFORE THE TEXAS STATE
NUMBER 674951	§	
ISSUED TO CHRISTOPHER ROSS	§	OFFICE OF ADMINISTRATIVE HEARINGS
THOMPSON, RESPONDENT	§	

RESPONDENT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES Respondent, Christopher Ross Thompson, pursuant to 1 TEXAS ADMINISTRATIVE CODE §155.507(c), and files these Exceptions to the Proposal for Decision, and shows the Court:

EXCEPTIONS

Conclusion of Law No. Twenty-Four (24): Respondent excepts to Conclusion of Law No. Twenty-Four (24) as not supported by Findings of Fact or the analysis by the Administrative Law Judge (ALJ). In order to find that there was fraud and deceit by the Respondent there would need to be some finding that the Respondent intentionally or knowingly failed to disclose the material facts required by the Board.¹ But in this case, the Respondent provided an explanation related to the reasons why he did not disclose the relevant convictions in 2003² and 2007.³ This explanation was not that the Respondent thought the matters were sealed judicially as indicated by the ALJ in the Proposal for Decision,⁴ but that the Respondent's understanding was that orders of deferred adjudication need not be disclosed to the Board. The Respondent's mistaken belief that he did not need to disclose those criminal episodes that were handled by deferred adjudication probation does not support a finding that the Respondent intentionally or knowingly failed to disclose a material fact to the Board and thus the Respondent believes that Conclusion

¹ See *Oler v. State*, 998 S.W.2d 363, 368 (Tex. App.-Dallas 1999, pet. ref'd, untimely filed).

² Hearing Audio, at 1:06:00.

³ *id.*, at 1:08:40.

⁴ Proposal for Decision, at 14.

of Law No. Twenty-Four (24), which holds that the Respondent used fraud or deceit to procure his nursing license, is in error.

Section IV. Analysis: Respondent excepts to Section IV Analysis in part, specifically the assertion that mitigating circumstances do not allow for the ALJ to recommend a sanction other than revocation in this matter “[b]ecause revocation is absolute, the rules do not provide a mitigation of the terms of a revocation.”⁵ There is only one place in the Nursing Practice Act (NPA) where there is any reference to a revocation as being the required disciplinary action, specifically Section 301.4535 which provides that revocation is the appropriate sanction for conviction of certain criminal offenses.⁶ It is also noted that there are provisions within Chapter 53 of the Occupations Code which also mandate revocations when a licensee is incarcerated in a prison or state jail for a felony offense.⁷ Neither of these situations is relevant in this case.

What is relevant is that these matters are guidelines, and subject to a weighing of factors under NPA Section 301.4531(b). The ALJ noted as much in the Proposal for Decision just before stating that revocation is absolute.⁸ And the Respondent does not deny that the guidelines in this matter may provide the Board “with ample reason to revoke his license,” as noted by the ALJ.⁹ However, nowhere in the Board’s rules is there a rule that states that if the Disciplinary Matrix or Disciplinary Guidelines for Criminal Conduct recommend a sanction of revocation preclude the mitigation of that sanction. In fact, the Disciplinary Guideline for Criminal Conduct specifically states that “each case must be considered on its own merits, taking into account the presence of aggravating and/or mitigating factors.”¹⁰ Therefore, it is clear that the ALJ is not constrained when the guidelines propose a revocation from considering mitigating factors that may suggest a disciplinary action other than revocation.

⁵ PFD, at 17.

⁶ TEXAS OCCUPATIONS CODE §301.4535(a).

⁷ TEX. OCC. CODE §53.021(b).

⁸ PFD, at 17.

⁹ *id.*

¹⁰ Disciplinary Guideline for Criminal Conduct, at 1. Available at www.bon.texas.gov/disciplinaryaction/pdfs/Guidelines-CriminalConduct.pdf.

In addition, the Respondent believes that ALJ understates the authority of the ALJ while rightfully indicating that the Board has the final authority to determine sanctions. While the Board has not authorized the State Office of Administrative Hearings (SOAH) to issue final rulings on sanctions under Section 2001.058(f) of the Government Code, there is also no prohibition under the Government Code or in the NPA which limits the from the ALJ from undertaking the balancing that the ALJ appears to shy away from in this matter. The Board is not a fact finder and cannot retry the case; SOAH and the ALJ is the sole judge of witness credibility and evidence.¹¹ And the ALJ clearly has the authority to issue findings of fact and conclusions of law under Section 2003.042 of the Government Code. What is equally clear is that the Board does retain the authority to change the proposal for decision in the case where the ALJ does not apply the facts or the law according to Board policies, and that they have to explain why the ALJ deviated from the Board's guidelines or policies.¹² The Respondent suggests that because the Board has not provided enough guidance on how to balance the Respondent's criminal history with his creditable professional life, then it is incumbent upon the ALJ to undertake that balancing. If the Board wishes to provide such guidance, then the Board can provide guidance in the form of changing the Recommendation for Sanction and providing the reasons under Section 2001.058(e) of the Government Code.

Recommendation for Sanction: Respondent excepts to the Recommendation for Sanction in that it appears, as noted in the discussion above, that the ALJ did not weigh the mitigating evidence in relation to the seriousness of the underlying violation and came to the conclusion that the ALJ could not consider mitigation from revocation in this matter. The Respondent thus asserts that the mitigating circumstances indicate that the proper disciplinary action is something less than a revocation of the Respondent's license.

The mission of the Board "is to protect and promote the welfare of the people of Texas by ensuring that each person holding a license as a nurse in the State of Texas is competent to

¹¹ See *Yselta Indep. School Dist. v. Meno*, 933 S.W.2d 748, 751 n.5 (Tex. App.—Austin 1996, writ denied).

¹² Texas Government Code §2001.058(e). But see also *Froemming v Texas Board of Dental Examiners*, No. 03-11-00399-CV, at 2 (Tex. App.—Austin, June 1, 2012); *Granek vs. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 781 (Tex. App. - Austin 2005, pet. denied); *Cf. State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711, 721 (Tex. App.—Austin 2007, pet. denied) (concluding that section 201.112(c) of the Transportation Code superseded section §2001.058(e) of the Government Code).

practice safely.”¹³ The Respondent has admitted to all of the criminal charges brought forward by the Board and there is no question that the Board has the authority to impose disciplinary action in this matter.¹⁴ But, as the ALJ has pointed out in the Proposal for Decision, the Respondent has shown evidence that “no evidence of Mr. Thompson’s actions having caused a material or financial loss to a patient or the public in excess of \$4,999.99, no actual harm to any patient under his care, no history of impairment by drugs or alcohol, and no history of complaints at the Board.”¹⁵ In addition, the Respondent presented three letters attesting to her character from persons with whom the Respondent has worked with or for as a nurse.¹⁶ This evidence was strong enough that the ALJ commented that the Respondent’s “credible professional life provides ample reason to mitigate that sanction [revocation].”¹⁷

Based on this mitigating evidence, the Respondent asserts that he is not a danger to the public and that the evidence shows that the Respondent is currently competent to practice nursing safely. In addition, the Respondent asserts that the public policy contained in the Board’s mission is not supported by revoking the Respondent’s license and that the public can be adequately protected by a probated suspension. A revocation of the Respondent’s license at this time does nothing more to further the legitimate public policy aims of the Board and the Board’s mission, but only serves as a punishment for past unfortunate events for which he has expressed remorse.¹⁸

PRAAYER

Respondent, Christopher Ross Thompson, prays that the honorable Administrative Law Judge:

1. Delete Conclusion of Law No. Twenty-Four (24);
2. Rewrite the Section IV Analysis in a manner consistent with the exceptions noted above;

¹³ See <http://www.bon.texas.gov/index.html>.

¹⁴ PFD, at 9.

¹⁵ *id.*, at 17.

¹⁶ See Respondents Exhibits A–C.

¹⁷ PFD, at 17.

¹⁸ *id.*, at 14.

3. Change the Recommendation to recommend the Respondents' nursing license be suspended for two years, but that the suspension be fully probated, with such reasonable stipulations as the Board deems necessary; AND
4. Propose to the Texas Board of Nursing in a Decision all relief at law or in equity to which Respondent is entitled.

Respectfully submitted,

By: 

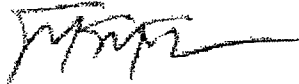
Marc M. Meyer
Texas Bar No. 24070266
33300 Egypt Lane, Suite B200
Magnolia, TX 77354
Tel. (281) 259-7575
Fax. (866) 839-6920
Attorney for Respondent Christopher Ross
Thompson

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of August, 2013, a true and correct copy of the above and foregoing document was served on the following individual(s) at the location(s) and in the manner indicated below:

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

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



Marc M. Meyer

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 9, 2013

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

VIA FACSIMILIE NO. 512/305-7400

**RE: Docket No. 507-13-3211; Texas Board of Nursing v. Christopher Ross
Thompson**

Dear Ms. Thomas:

This letter reviews the August 5, 2013 exceptions to the Proposal for Decision submitted by Mr. Thompson. Staff did not file a reply.

Mr. Thompson's Exception to Conclusion of Law No. 24

Conclusion of Law No. 24 states: "Staff prov[ed] by a preponderance of the evidence that Mr. Thompson used fraud and deceit in obtaining license."

Mr. Thompson argues that an Administrative Law Judge's (ALJ) reaching a conclusion of law about a respondent's fraud or deceit requires that the ALJ make a finding of fact that the respondent acted intentionally or knowingly in failing to disclose material facts. Mr. Thompson relies on the holding in *Oler v. State*, 998 S.W.2d 363, 368 (Tex. App.—Dallas 1999, pet. ref'd) to support his argument.

The ALJ reads the holding somewhat differently. In *Oler*, the defendant failed to disclose his medical history to four different physicians. His purpose was to obtain controlled substances from multiple sources. On appeal, the defendant argued that because his failure to inform the prescribing physicians about his other prescriptions was not a criminal offense, he had committed no crime. The Dallas Court of Appeals rejected that argument on two grounds. First, the court held that a defendant's "nondisclosure of a material fact, in order to obtain what one would otherwise not be able to obtain, can constitute fraud." *Oler v. State*, 998 S.W.2d at 369. Second, the court noted that the provisions of the applicable law, the Texas Health and Safety Code, "imposes an affirmative legal duty on one obtaining a controlled substance from a physician to do so *without* engaging in 'misrepresentation, fraud, forgery, deception, or subterfuge.'" *Id.* at 369-70. [Emphasis in the original.]

In Mr. Thompson's administrative hearing, the evidence showed that he repeatedly failed to disclose to the Board his criminal history. That criminal history was a material fact upon which the Board had relied in renewing his license. As with the requirement in the Texas Health and Safety Code in *Oler*, section 301.2511 of the Texas Occupations Code imposes an affirmative duty that an applicant

must submit to the board, in addition to satisfying the other requirements of this subchapter, a complete and legible set of fingerprints, on a form prescribed by the board, for the purpose of obtaining criminal history record information from the Department of Public Safety and the Federal Bureau of Investigation.

Mr. Thompson's actions failed to comply with the statutory requirement. His failures were not due to a mistake of fact, and the information that he failed to disclose was material to the Board's review of his applications for renewal of his license.

The exception should be denied because the conclusion of law is based on factually accurate findings of fact that are drawn from the evidence admitted in the record.

Mr. Thompson's Exception to ALJ's Analysis and Recommendation for Sanctions

State Office of Administrative Hearings ALJ's respond to parties' exceptions to proposed findings of fact and conclusions of law but generally not to parties' exceptions to an ALJ's analysis. The ALJ will respond to this exception for the purpose of clarifying the ALJ's scope of authority.

Mr. Thompson excepts to ALJ's recommendation for sanctions in Section VII and to the ALJ's analysis in Section IV of the proposal for decision. At page 17 of the proposal for decision, the text states that because the requirement of "revocation is absolute," the Board's rules do not provide a mitigation of the terms of a revocation. Mr. Thompson argues that no rule or statute requires revocation of a license when the licensee has failed to disclose material facts. Instead, Mr. Thompson notes that the Board's Disciplinary Guidelines for Criminal Conduct do not preclude consideration of mitigating factors. Because of the interplay between law and

policy, Mr. Thompson argues that the ALJ is not constrained from recommending sanctions other than revocation.

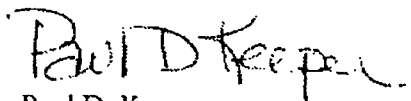
Mr. Thompson accurately identifies the language of the statute and the Board's rules. Nonetheless, Mr. Thompson argues that the ALJ has the same authority as the Board in applying the Board's rules and policies to the facts of a particular case. The ALJ does not agree.

In applying the agency's laws and policies to the facts in a case, the Board has the authority to exercise more discretion in its application of these provisions than does the ALJ. An ALJ's proposal for decision describes how an ALJ interprets the law and the Board's policies. The ALJ's proposal for decision includes a recommendation for Board action based on the law as written, whether in statute, rule, adopted policy, or judicial holding.

But, in reaching its decision, the Board has the right to adopt or reject the ALJ's recommendation based on the Board's own balancing of the evidence in the record and its understanding of the law, including the Board's own policies. How the Board chooses to exercise that discretion is solely within the power of the Board to determine. The ALJ's proposal for decision is the product of his analysis of the facts and the law as it stands as of the time of the issuance of the proposal for decision.

If the Board directs the ALJ to reopen the record to consider a new interpretation of its policies or rules, then the ALJ will do so. Until then, the ALJ stands on his proposal for decision and recommendation as written.

Sincerely,



Paul D. Keeper
Administrative Law Judge

PDK/eh

XC: Kyle Hensley, Assistant General Counsel, TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - **VIA FACSIMILE NO. 512/305-6880**
Dina Flores, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - **VIA FACSIMILE NO. 512/305-8101**
Marc M. Meyer, Law Office of Marc Meyer, PLLC, 33300 Egypt Lane, Suite B-200, Magnolia, TX 77354-2739 - **VIA FACSIMILE NO. 866/839-6920**