



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

DOCKET NUMBER 507-13-4108

**IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 737971
ISSUED TO
DAVINA DANIELLE MOORE**

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

OPINION AND ORDER OF THE BOARD

**TO: DAVINA DANIELLE MOORE
C/O MORRIS L. OVERSTREET, ATTORNEY
P.O. BOX 35
PRAIRIE VIEW, TX 77446**

**CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701**

At the regularly scheduled public meeting on April 16-17, 2014, 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 October 10, 2013; (4) Staff's recommendation that the Board adopt the PFD regarding the registered nursing license of Davina Danielle Moore without 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 September 13, 2013. Staff did not file a response to Respondent's exceptions to the PFD nor did Staff file its own exceptions to the PFD. On October 10, 2013, the ALJ issued her final letter ruling, in which she declined to make any changes to the PFD.

The Board, after review and due consideration of the PFD; Respondent's exceptions to the PFD; the ALJ's final letter ruling of October 10, 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 the appropriate sanction in this matter is revocation of the Respondent's license².

The Respondent's conduct, as outlined in adopted Findings of Fact Numbers 5, 8, and 12 through 16, and Conclusions of Law Numbers 5 and 6 raises serious concerns about the Respondent's ability to practice nursing safely in the future. The Respondent engaged in criminal behavior involving the inappropriate possession of controlled substances³. Further, the Respondent admitted that she had taken vials containing controlled substances and medications from her employer⁴. The Respondent did not properly dispose of the medications, nor did she report to her employer that she had taken the vials from the facility⁵. Controlled substances are ubiquitous in nursing practice and nurses handle and administer drugs frequently. A nursing license provides access and opportunity for an individual to engage in similar behaviors that may place patients and the public at risk of harm⁶. Further, the Respondent's criminal conduct is recent. The Respondent's conduct calls into question her professional character, honesty, trustworthiness, and integrity⁷. Further, there is insufficient evidence that Respondent has learned from her past mistakes in a way that would assure the Board that future misconduct will not occur⁸.

The Board recognizes that the Respondent presented some mitigating evidence during the hearing. Until the Respondent's 2012 convictions, she had no significant past

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 with the ALJ that the Respondent's conduct warrants a second tier, sanction level II sanction for her violations of §301.452(b)(10). See pages 14-15 of the PFD. Further, the Board finds that the most appropriate sanction under the Board's Disciplinary Guidelines for Criminal Conduct (where judicial order was entered less than five years ago for crimes involving possession, misappropriation, or misuse of controlled substance) is licensure revocation.

³ See pages 9-11 of the PFD and adopted Findings of Fact Numbers 5, 8, and 12 through 16.

⁴ See pages 8-11 of the PFD and adopted Findings of Fact Numbers 12-16.

⁵ See pages 8-11 of the PFD and adopted Findings of Fact Numbers 12-16.

⁶ See pages 12-13 of the PFD.

⁷ See pages 11-15 of the PFD.

⁸ *Id.*

criminal history, with the exception of a 2008 Class C misdemeanor for Theft by Check⁹. The Respondent has contributed to the support of her family¹⁰. Further, the Respondent has submitted to regular drug screens as a condition of her appeal bond and has had no positive results¹¹.

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 Matrix or Disciplinary Guidelines for Criminal Conduct is warranted. Therefore, the Board finds that, pursuant to the Board's Disciplinary Matrix, the Board's Disciplinary Guidelines for Criminal Conduct¹², 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 737971, previously issued to DAVINA DANIELLE MOORE, 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 16th day of April, 2014.

TEXAS BOARD OF NURSING


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

Attachment: Proposal for Decision; Docket No. 507-13-4108 (August 26, 2013).

⁹ See page 14 of the PFD.

¹⁰ *Id.*

¹¹ *Id.*

¹² Effective April 18, 2013 to present.

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 26, 2013

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

VIA INTERAGENCY

RE: Docket No. 507-13-4108; Texas Board of Nursing v. Davina Danielle Moore

Dear Ms. Thomas:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 Tex. Admin. Code § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "Catherine C. Egan".

Catherine C. Egan
Administrative Law Judge

CCE/ap
Enclosures

cc: Nikki Hopkins, 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; Certified Evidentiary Record) – VIA INTERAGENCY
Morris L. Overstreet, P. O. Box 35, Prairie View, TX 77446 – VIA REGULAR MAIL

SOAH DOCKET NO. 507-13-4108

TEXAS BOARD OF NURSING,
Petitioner

v.

DAVINA DANIELLE MOORE,
PERMANENT REGISTERED NURSE
LICENSE NUMBER 737971,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Board of Nursing (Board) seeks to revoke the registered nurse's license issued to Davina Danielle Moore (Respondent) because in 2012 she was convicted of two third-degree felonies and because she engaged in unprofessional conduct that was likely to deceive, defraud, or injure a patient or the public in violation of the Nursing Practice Act¹ and the Board's rules. Staff proved by a preponderance of the evidence that Respondent violated the Nursing Practice Act and the Board's rules, and that her nursing license should be revoked.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Neither party raised issues concerning notice and jurisdiction; therefore, those matters are set out in the findings of fact and conclusions of law. On May 8, 2013, Staff filed a motion for summary disposition (the motion). Respondent filed a response to the motion on May 17, 2013, to which Staff filed a reply. On June 6, 2013, the Administrative Law Judge (ALJ) issued Order No. 1 Granting Partial Summary Disposition regarding Respondent's convictions.

The hearing on the merits convened June 13, 2013, before ALJ Catherine C. Egan in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Assistant General Counsel Nikki R. Hopkins represented Staff. Attorney Morris L. Overstreet represented Respondent. The record remained open for Respondent to file copies of various drug tests taken

¹ Tex. Occ. Code ch. 301.

since her convictions. Respondent was ordered to file the post-hearing exhibit by June 20, 2013. Staff had to file any objections to the exhibit by June 27, 2013, and Respondent had to file her reply to any objections by July 3, 2013.

On June 24, 2013, Staff filed an objection to Respondent's post-hearing exhibits, and on June 28, 2013, Respondent replied to Staff's objections. The record closed June 28, 2013. However, SOAH's electronic computer information system (CIS) has no record that Respondent filed the post-hearing exhibit with SOAH. On August 21, 2013, the ALJ issued Order No. 3 directing Respondent to refile the post-hearing exhibit with confirmation of the original filing. The same day, Respondent filed the exhibit, which was marked Respondent Ex. 3, but acknowledged that the exhibit had not previously been filed with SOAH. However, Respondent presented confirmation that Staff had received the exhibit. Therefore, the record was reopened, Respondent Ex. 3 was admitted into evidence, and the record closed.

II. BACKGROUND AND APPLICABLE LAW

A. Background and Undisputed Facts

Respondent was licensed as a registered nurse (RN) in Texas on February 6, 2007. On March 23, 2011, while Respondent, Respondent's husband, and her three children were at home, the police and child protective services (CPS) arrived to investigate a complaint filed with CPS about Respondent's children. Respondent's children were 2, 6, and 11 years old.

The summary disposition record conclusively established that on December 20, 2012, following a jury trial in the 7th Judicial District Court of Smith County, Texas, Respondent was convicted of two third-degree felony offenses committed on March 23, 2011. The first conviction, under Cause No. 007-1663-11, was for possession of a controlled substance (less than 1 gram) in a drug-free zone (the controlled substance conviction), for which Respondent was sentenced to two years confinement in the Texas Department of Criminal Justice-Institutional Division. Respondent was 29 years old.

Respondent's second third-degree felony conviction was for possession of marijuana (more than 4 ounces and less than 5 pounds) in a drug-free zone, under Cause Number 007-1664-11 (the marijuana conviction).² For this conviction, Respondent was sentenced to five years confinement in the Texas Department of Criminal Justice-Institutional Division, to run concurrently with the controlled substance conviction sentence. However, the Court suspended this sentence and placed Respondent on community supervision for five years.

On December 12, 2012, Respondent appealed both convictions. The Court granted a \$100,000 appeal bond for the controlled substance conviction and a \$50,000 appeal bond for the marijuana conviction. The bonds required, among other things, that Respondent submit to bi-weekly drug testing. Respondent posted the appeal bonds before she was incarcerated for the controlled substance conviction. At the time of the hearing, Respondent had not been imprisoned for this conviction. Both appeals are pending before the Twelfth Court of Appeals in Tyler, Texas.

B. Applicable Law

Section 53.021(b) of the Texas Occupations Code provides:

A license holder's license shall be revoked on the license holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

Two Attorney General Opinions have interpreted this statutory language. Attorney General Opinion JM-482 interpreted this statutory language to "require a license to be revoked when the licensee's felony conviction results in his incarceration, or when his felony probation, parole, or mandatory supervision is revoked."³ Attorney General Opinion GA-0064 clarified that

² Section 481.134 of the Texas Health and Safety Code (the Controlled Substance Act), defines what constitutes "drug-free zones," and addresses certain criminal offenses committed without 1,000 feet of a school.

³ Texas Attorney General Opinion JM-482 (1986) at p. 7.

even if the licensing agency fails to revoke the license of a licensee who is imprisoned, the licensee's license is still automatically revoked.⁴

A nursing licensee is subject to disciplinary action for a conviction, or placement on deferred adjudication community supervision, for a felony; or for engaging in unprofessional or dishonorable conduct that is "likely to deceive, defraud, or injure a patient or the public."⁵ If the Board determines that a licensee has violated an act listed in Section 301.452(b) of the Texas Occupations Code, the Board may impose several methods of discipline, including issuing a written reprimand, suspending or revoking the license, or assessing a fine, or a combination of the sanctions.⁶

Board rule 217.12 defines what constitutes unprofessional conduct by a nurse.⁷ The rule is intended to protect clients and the public from a licensee's incompetent, unethical, or illegal conduct, and to identify unprofessional or dishonorable conduct that is likely to deceive, defraud, or injure clients or the public. Staff alleged that Respondent engaged in unprofessional conduct by engaging in:

- an unlawful practice by carelessly or repetitively violating a state or federal law relating to the practice of nursing, or violating a state or federal narcotics or controlled substance law;⁸ and
- 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.⁹

When a nurse violates the Nursing Practice Act or a Board rule, the Board is required to impose a disciplinary sanction, which can range from the issuance of a written warning to the

⁴ Texas Attorney General Opinion GA-0064 (2003) at 11.

⁵ Tex. Occ. Code § 301.452(b)(3) and (10).

⁶ Tex. Occ. Code § 301.453(a)(2), (5), (6), and (7).

⁷ 22 Tex. Admin. Code § 217.12.

⁸ 22 Tex. Admin. Code § 217.12(11)(B).

⁹ 22 Tex. Admin. Code § 217.12(13).

revocation of the nurse's license.¹⁰ The Board has adopted a Disciplinary Matrix that the Board and SOAH are required to use in assessing sanctions in all disciplinary matters.¹¹

The Disciplinary Matrix categorizes violations into tiers, with two sanction levels each, based upon the seriousness of the violation and risk of harm to patients or the public.¹² To determine the tier and sanction level for a particular violation or multiple violations, the Board's rules list certain factors that must be considered, such as evidence of potential harm to patients or the public, lack of truthfulness, practice history, present fitness to practice, previous disciplinary history, the length of time the nurse has practiced, as well as any aggravating and mitigating factors.¹³ The Board rules further clarify the factors to consider in evaluating whether a licensee has good professional character.¹⁴ Additionally, Section 53.023 of the Texas Occupations Code lists factors that must be considered in determining the present fitness of the licensee to perform the duties and responsibilities of the licensed occupation.¹⁵

III. ALLEGED VIOLATIONS

A. Evidence

Staff offered seven exhibits into evidence and called the following witnesses to testify:

- Kerri Long. Kerri Long has been a police officer for over ten years and at the time of this incident was employed by the Tyler Police Department. On March 23, 2011, Officer Long accompanied a CPS worker to Respondent's home on a welfare check. Because of what she observed in Respondent's home, Officer Long called her supervisor for backup.

¹⁰ Tex. Occ. Code § 301.453(a).

¹¹ 22 Tex. Admin. Code § 213.33(a).

¹² 22 Tex. Admin. Code § 213.33(b).

¹³ 22 Tex. Admin. Code § 213.33(b) and (c).

¹⁴ 22 Tex. Admin. Code § 213.27.

¹⁵ The Section 53.023 factors include: (1) the extent and nature of the person's past criminal activity; (2) the person's age when the crime was committed; (3) the time that has elapsed since the licensee's last criminal activity; (4) the licensee's conduct and work activity before and after the criminal activity; (5) the licensee's rehabilitative efforts; and (6) other evidence of the licensee's fitness including letters of recommendation.

- Lukas Neubauer. Lukas Neubauer is employed by the Tyler Police Department as a detective. He primarily investigates crimes related to narcotics, and on March 23, 2011, he went to Respondent's home to investigate whether Respondent and her husband were illegally in possession of drugs.
- Respondent. Respondent was called by Staff to testify about the allegations against her.
- Melinda Hester, RN, DNP. Dr. Hester testified as Staff's expert witness. She was licensed as a registered nurse in 1979, completed a master's degree in nursing in 1985, and a doctorate in nursing practices in 2011.

Respondent offered two exhibits during the hearing, and submitted an additional exhibit for consideration after the hearing. Although Respondent testified, she called no other witnesses.

1. The March 23, 2011 Incident

On March 23, 2011, Officer Long accompanied CPS to Respondent's home to investigate complaints that Respondent's children were coming to school smelling of marijuana. According to Officer Long, immediately after Respondent let them in the front door, Respondent's husband began flushing marijuana down the toilet. When Officer Long directed Respondent's husband to come to the front room, Respondent and her husband began yelling and insisting that Officer Long leave their house. Officer Long called her supervisor for backup, but did not leave the house. After the police discovered marijuana in Respondent's toilet, the narcotics unit was called to continue the investigation.

Although Respondent let her in the house, Officer Long denied that Respondent cooperated with the police. Instead, Respondent refused to sit down, screamed at the officers, and refused to answer any questions. During the police search, the police found marijuana; numerous vials of controlled substances and other medications that had been taken from the hospital where Respondent worked; various medical supplies; and approximately \$20,000 hidden in the freezer. Officer Long conceded that she did not see Respondent with drugs in her possession, but she emphasized that the marijuana and drugs were in Respondent's home. In addition, Officer Long pointed out, Respondent's home was in a drug-free zone because it was

within 1,000 feet of a school. Based on her experience and her observations of Respondent and the illegal substances in Respondent's home, Officer Long testified that she believed Respondent was a drug dealer.

When Detective Neubauer arrived at Respondent's home that day, he recalled that several other officers were already present. Detective Neubauer verified that he obtained a search warrant before the police searched Respondent's house. During the search, the police discovered 152 grams of marijuana, numerous vials containing controlled substances, and various medical supplies, including needles, syringes, and tourniquets. The controlled substances identified on the vials included hydromorphone, morphine sulfate, butorphanol tartrate, diazepam, midazolam, lorazepam, and fentanyl citrate.

According to Detective Neubauer, most of the vials were discovered in and on the master-room dresser shared by Respondent and her husband. The vials were from a hospital. Despite Respondent's protestations that she was unaware that her husband had marijuana in the house, Detective Neubauer testified that even their children knew. In his opinion, Respondent had to have been aware of the marijuana in her home. Detective Neubauer also stated that he had never seen as vast a quantity of medical drugs and supplies during a drug bust. In his opinion, the amount of controlled substances and marijuana found in Respondent's home created a danger to the neighborhood. Detective Neubauer opined that the controlled substances and marijuana were in Respondent's care, custody, and control, and reflected her disregard for the safety and well-being of other people.

According to Respondent, she and her children had returned home on March 23, 2011, to collect some clothes because she had left her husband the week before. When CPS and the police knocked on the front door, Respondent invited them in because they were there about her children. Respondent was aware that her husband smoked marijuana, but insisted that her husband did not smoke the marijuana in their home or around their children.

Respondent denied knowing that her husband had marijuana in the house, and denied knowing about the money hidden in the garage freezer. She explained that the garage was her

husband's "man cave," and neither she nor the children went in the garage. Respondent insisted that she was not using or selling any drugs, and had she known about the hidden money she would not have been working two jobs to pay their bills.

As for the vials discovered in their dresser, Respondent said that she took the medication vials from Mother Frances Hospital where she worked from 2007 to 2009. She admitted that she got the medication vials from Pyxis, the hospital pharmacy's electronic medication dispensing system, to administer to the patients. She put the empty or almost empty vials in her pocket intending to waste the rest of the medication properly or to dispose of the vials as required. On occasion, Respondent said she forgot to do so, and inadvertently took the vials home. Respondent admitted that some vials contained controlled substances that she should have wasted in front of another nurse, but explained that she was a new nurse and simply forgot. Respondent agreed that she learned how to properly waste medications in school and at Mother Frances Hospital.

According to Respondent, the reason she kept the vials at home was because she intended to return the vials to the hospital. However, she did not lock the vials in a safe place, but left them in and on her dresser where a child could access them. Respondent admitted that what she did was an unsafe practice. She also admitted that she knew she was required to return the medications that she removed from a hospital immediately and should have reported it to the hospital. She explained that she did not do so because she was working four shifts and it was too much for her. Respondent agreed that had the hospital known she was taking partially empty vials of controlled substances out of the hospital, the hospital would have fired her.

Respondent maintains that nursing is her passion. Although she wishes she had made better choices, Respondent insists that she is a good nurse and that she is not a threat to her patients or to the public. Respondent denies being a drug addict and notes that since her convictions, she has had to submit to regular drug screens to comply with the terms of her appeal bonds and they have all been negative. Respondent testified that since graduating in 2006, she has been employed as a nurse, and none of her employers had complaints about her job performance. Despite knowing about her convictions, Respondent testified that her current

employer trusts her nursing abilities. Respondent asked that the Board probate a suspension of her license so that she can continue to work.

2. The Convictions

Respondent does not dispute that on December 20, 2012, a jury convicted her of two third-degree felonies regarding possession of marijuana and controlled substances in a drug-free zone. Both offenses were committed on March 23, 2011, and both were committed in a drug-free zone. The ALJ granted a partial summary disposition regarding these convictions on June 6, 2013. Therefore, those issues are addressed in the findings of fact and conclusions of law.

B. ALJ's Analysis

According to the undisputed evidence, on December 20, 2012, Respondent was convicted for possession of controlled substances and marijuana in a drug-free zone. Respondent was given deferred adjudication for her marijuana conviction; but for her controlled substance conviction, Respondent was sentenced to two years confinement in the Texas Department of Criminal Justice-Institutional Division. Respondent would be imprisoned but for the appeal bonds that she posted. Although the automatic revocation under Section 53.021(b) of the Texas Occupations Code is inapplicable, Respondent is still subject to disciplinary action under the Nursing Practice Act if the evidence establishes that she was convicted of, or placed on deferred adjudication for, a felony; or if she engaged in unprofessional and dishonorable conduct that is likely to deceive, defraud, or injure a patient or the public.¹⁶

It is undisputed that Respondent was convicted of two third-degree felonies related to possession of drugs in a drug-free zone. Additionally, it is undisputed that Respondent received deferred adjudication community supervision for one of the felonies. Therefore, the Board may impose disciplinary action against Respondent in compliance with Sections 301.452(b)(3) of the Texas Occupations Code. The only remaining issue is whether Respondent engaged in

¹⁶ Tex. Occ. Code § 301.452(b)(3) and (10).

unprofessional or dishonorable conduct that was likely to deceive, defraud, or injure a patient or the public.

Board rule 217.12 addresses what constitutes unprofessional conduct by a nurse. The purpose of the rule is to protect clients and the public from a licensee's incompetent, unethical, or illegal conduct, and to identify unprofessional or dishonorable conduct that is likely to deceive, defraud, or injure clients or the public. Engaging in an unlawful practice by repetitively violating a state or federal narcotics or controlled substance law and engaging in criminal conduct, including a conviction or probation, that could affect the practice of nursing, is unprofessional conduct.¹⁷

Respondent was convicted of two felonies, both dealing with illegal substances and both occurring in a drug-free zone. According to the Board's rules, the record of conviction or order of deferred adjudication is conclusive evidence of guilt.¹⁸ If the licensee is guilty of a felony, the licensee is deemed to have violated Section 301.452(b)(10) of the Texas Occupations Code. Staff's argument that Respondent presents a danger to the public based on her conduct that resulted in her convictions is well taken. However, even if Respondent had not been convicted, her removal of the medication vials containing controlled substances from the hospital where she worked was unprofessional and created the potential risk of harm to her children and to the public.

Respondent presented no credible evidence showing that she secured the vials of controlled substances from the reach of her young children. Instead, Respondent left them on and in her dresser. If her children had ingested the controlled substances in the vials she misappropriated, the harm to her children could have been dire. In addition, Respondent did nothing to prevent her children from taking these vials of controlled substances to school where other children were at risk of harm. Respondent's failure to appreciate the risk to her own children, and other children, was disturbing and unprofessional.

¹⁷ 22 Tex. Admin. Code § 217.12(11)(B) and (13).

¹⁸ 22 Tex. Admin. Code § 213.27(c).

Respondent admitted that she knew if medication remained in a vial once the dose was properly administered to a patient, then another nurse had to witness her waste it. Respondent did not do so. Respondent also knew that she was prohibited from taking medication vials from the hospital, yet she did so repeatedly. In addition, Respondent knew that if she inadvertently took medication from the hospital, she was required to return it and to self-report the incident to the hospital. Respondent did not return the vials to the hospital. Instead, she stockpiled at home medication vials containing potent drugs. This conduct was unprofessional and exposed the public to risk of harm.

For the above stated reasons, the ALJ finds that Staff proved by a preponderance of the evidence that Respondent engaged in unprofessional conduct in violation of 22 Texas Administrative Code § 217.12(11)(B) and (13) and is subject to disciplinary action pursuant to Sections 301.452(b)(3) and (10) of the Texas Occupations Code.

IV. SANCTIONS

If the Board determines that a licensee has violated an act listed in Section 301.452(b), the Board may impose several methods of discipline, including revocation of the nursing license.¹⁹

A. Mitigating and Aggravating Factors

After considering the testimony at the hearing and the documentary evidence, Dr. Hester, Staff's expert, opined that the Board should revoke Respondent's nursing license. Dr. Hester explained that the Board's Disciplinary Guidelines reflect the Board's position regarding various felonies, particularly those concerning controlled substances. The police identified several vials of controlled substances and other drug-related paraphernalia in Respondent's home. Despite Respondent's representations that many of these vials were "empty," Dr. Hester testified that Respondent had misappropriated these medication vials—they were not hers to take from the hospital.

¹⁹ Tex. Occ. Code § 301.453(a).

Board rule 213.27 requires a licensed nurse to possess good professional character. Board rule 213.27(b)(2)(G) requires that a nurse have the integrity to promptly and fully self-disclose errors and omissions when such disclosure enhances the health of a patient or protects the patient or the public from unnecessary risk of harm.

After considering the following factors, and due to the severity to Respondent's conduct as discussed above, the ALJ agrees with Dr. Hester that Respondent's violations of Sections 301.452(b)(3) and (10) of the Texas Occupations Code are second-tier violations warranting sanction level II discipline, specifically revocation.

1. Actual or Potential Harm to Patient

Respondent misappropriated the medication vials and medical supplies that the police discovered in her home from the hospital. Respondent's conduct exposed her children and other neighborhood children to the risk of potential harm from taking these drugs.

2. Lack of Trustfulness or Trustworthiness

Respondent demonstrated a lack of trustworthiness when she failed to properly waste unused portions of medication and when she took the medication vials from the hospital. If, as Respondent testified, she inadvertently took the various medication vials from the hospital, then she was required to return the vials and report this infraction to the hospital even if she believed that the hospital might terminate her employment. Respondent's failure to do so is evidence of her lack of trustfulness.

3. Evidence of Practice History, Present Fitness to Practice, Prior Disciplinary Action, and Length of Time Respondent has Practiced

Respondent has been a licensed nurse for six years, and she has no prior disciplinary action. However, shortly after she was licensed, Respondent abused her position by misappropriating vials of controlled substances from the hospital where she worked. According to the evidence, the police discovered an overwhelming amount of medical grade controlled

substances and supplies in Respondent's home that she had taken from the hospital. Respondent admitted that she took the vials home, did not return them to the hospital, and stored them at home.

4. Attempts by Respondent to Correct or Stop the Violation

Respondent did not take steps to correct her misappropriation of medication vials from the hospital. Respondent's failure to return the medication vials to the hospital for years was a significant violation of nursing practices. Contrary to Respondent's claim that she had made a mistake because she was new nurse, the proper administration and documentation of medication is a basic nursing practice. Respondent's status as a new nurse is no justification for her conduct. Moreover, as Dr. Hester pointed out, when a nurse does something wrong, it is imperative that the nurse immediately report what happened to the hospital. Respondent did not.

5. The Seriousness of the Violations and the Threat to Public Safety

Respondent's failure to return the medication vials that she took home, particularly those containing controlled substances, was extremely serious. Respondent continues to practice nursing and continues to have access to medications that are dangerous. Respondent poses a danger to the public because her nursing license gives her access to various controlled substances and dangerous drugs that she has misappropriated in the past.

6. Evidence of Good Professional Character²⁰

Good professional character requires an evaluation of whether the nurse can practice in an autonomous role with patients; recognize and honor interpersonal boundaries appropriate to a health care setting; and promptly and fully self-disclose facts, circumstances, and errors or omissions that protect the nurse's patients.²¹ Respondent's removal of a significant number of medication vials from the hospital demonstrated a lack of good professional character. Leaving

²⁰ 22 Tex. Admin. Code § 213.33(c)(16).

²¹ 22 Tex. Admin. Code § 213.27(b).

those drugs at home for years in a location that was easily accessible to children also demonstrates Respondent's lack of good professional character and demonstrated her failure to appreciate the potential risk of harm her conduct created for her children and others.

B. Additional Factors²²

Most of the factors set out in Section 53.023 of the Texas Occupations Code are discussed above, but those that are not are addressed here. Until Respondent's December 20, 2012 convictions, she had no past criminal activity, with the exception of a 2008 Class C misdemeanor for theft by check. Respondent was an adult with young children when she took the vials and medical supplies home. She has contributed to the support of her family both before and after March 23, 2011. As a condition of Respondent's appeal bond, Respondent has had to submit to regular drug screens and has had no positive results. Respondent provided no letters of recommendation.

C. Tier Level, Sanction Level, and Recommended Sanction

Dr. Hester testified that Respondent's violations of Sections 301.452(b)(3) and (10) and her unprofessional conduct created a substantial risk of harm to the public and are second tier offenses that warrant sanction level II discipline, specifically revocation. She explained that Respondent's repeated misappropriation of vials containing controlled substances that she withdrew from the hospital's Pyxis system, her failure to return the vials, her failure to self-report, the financial harm to either the hospital and the patients for the medication vials and medical supplies that she took, and the substantial risk of harm to children who could have come in contact with these drugs contributed to her evaluation.

A first-tier offense applies to an isolated failure to comply with Board rules regarding unprofessional conduct, not the multiple violations that Respondent committed. Similarly, a

²² The Board's Disciplinary Guidelines for Criminal Conduct are available at:

<http://www.bon.state.tx.us/disciplinaryaction/discp-guide.html>.

first-tier offense applies to practices that pose a low risk of harm.²³ Respondent misappropriated dangerous drugs and controlled substances that posed a significant risk of harm to patients and the public. This was not a first-tier offense.

The ALJ agrees with Dr. Hester's recommendation that Respondent's violations constitute second tier offenses, warranting the level II sanction of revocation. Respondent committed multiple violations of the Act and Board rules. She repeatedly engaged in unprofessional conduct by: (1) misappropriating medication vials from the hospital; (2) failing to properly waste or dispose of any medication remaining in a vial after she administered the medications to the patients; and (3) failing to return the vials and supplies to the hospital or to self-report that she took these things from the hospital. Respondent also failed to implement measures to protect her young children and other children from the controlled substances she misappropriated.

Based on the violations proved in this case, the ALJ recommends that the Board revoke Respondent's nursing licenses.

In Staff's Second Amended Formal Charges, Staff requested that administrative costs of the proceeding be imposed against Respondent. However, Staff presented no evidence to support this request. Therefore, no administrative costs are awarded.

V. FINDINGS OF FACT

1. Respondent is a licensed registered nurse holding Permanent Certificate Number 737971 issued by the State of Texas.
2. On May 8, 2013, Staff filed the First Amended Notice of Hearing and the Second Amended Formal Charges against Respondent and sent it to Respondent's attorney of record.
3. Staff's First Amended Notice of Hearing incorporated the Second Amended Formal Charges against Respondent and included 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

²³ 22 Tex. Admin. Code § 213.33(b).

- 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 on the merits convened June 13, 2013, before ALJ Catherine C. Egan in Austin, Texas. Assistant General Counsel Nikki R. Hopkins represented Staff. Attorney Morris L. Overstreet represented Respondent. The record remained open for Respondent to file a post-hearing exhibit. On June 24, 2013, Staff filed an objection to Respondent's post-hearing exhibits, and on June 28, 2013, Respondent replied to Staff's objections. The record closed June 28, 2013.
 5. On December 20, 2012, following a jury trial, Respondent was convicted of a third-degree felony offense committed on March 23, 2011, for possession of a controlled substance (less than 1 gram) in a drug-free zone, in the 7th Judicial District Court of Smith County, Texas, under Cause No. 007-1663-11, and was sentenced to two years confinement in the Texas Department of Criminal Justice-Institutional Division (the controlled substance conviction).
 6. On December 12, 2012, Respondent appealed the controlled substance conviction. The Court granted a \$100,000 appeal bond with conditions that require, among other things, that Respondent submit to bi-weekly drug testing.
 7. To avoid imprisonment while she appealed the conviction, Respondent posted the \$100,000 appeal bond.
 8. On December 20, 2012, following a jury trial, Respondent was convicted of a third-degree felony offense committed on March 23, 2011, for possession of marijuana (more than 4 ounces and less than 5 pounds) in a drug-free zone, in the 7th Judicial District Court of Smith County, Texas, under cause number 007-1664-11, and was sentenced to five years confinement in the Texas Department of Criminal Justice-Institutional Division, to run concurrently with the controlled substance sentence (the marijuana conviction). The Court suspended the sentence and placed Respondent on community supervision for five years.
 9. On December 12, 2012, Respondent appealed the marijuana conviction and posted a \$50,000 appeal bond with conditions that require, among other things, that Respondent submit to bi-weekly drug testing.
 10. At the time of the hearing, both appeals were pending before the Twelfth Court of Appeals in Tyler, Texas.
 11. Respondent was 29 years old, at the time of her convictions.
 12. After she was licensed as a nurse, Respondent misappropriated vials containing controlled substances and other medications from the hospital where she was employed.
 13. Although Respondent knew that she was required to have another nurse witness her waste any unused medication, she repeatedly failed to do so.

14. Respondent did not return the vials to the hospital and did not report to the hospital that she had taken numerous medication vials from the hospital.
15. Respondent failed to implement measures to protect her children and the public from the controlled substances she misappropriated. Instead, Respondent left vials containing controlled substances on and in her dresser.
16. Respondent engaged in unprofessional conduct that was likely to deceive, defraud or injure clients or the public by: (1) misappropriating vials containing controlled substances and other medications from the hospital; (2) failing to properly waste and dispose of any unused medication; (3) failing to return the vials or to self-report to the hospital that she took medication vials from the hospital; and (4) by failing to protect children and the public from the controlled substances she misappropriated.
17. Until the December 20, 2012 convictions, Respondent had no record of any other felonies. However, she does have a 2008 Class C misdemeanor conviction for theft by check.
18. Respondent has worked as a nurse for over six years and until the charges at issue in this case, Respondent's nursing practices were not the subject of any disciplinary action by the Board.
19. Respondent has contributed to the support of her family both before and after the March 23, 2011 incident that resulted in her convictions.
20. As a condition of the appeal bonds Respondent posted to appeal her convictions, Respondent has had to provide regular drug screens and all have been negative.

VI. CONCLUSIONS OF LAW

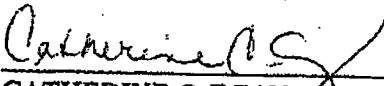
1. The Board has jurisdiction over the licensing and discipline of nurses. Tex. Occ. Code ch. 301, subch. D.
2. The State Office of Administrative Hearings has jurisdiction over contested cases referred by the Board, including the authority to issue a proposal for decision with proposed findings of fact 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, and 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 for her violations of Tex. Occ. Code §§ 301.452(b)(3) and (10); and 22 Tex. Admin. Code §§ 217.12(11)(B) and (13).
6. The Board is authorized to impose a disciplinary sanction up to and including revocation of a nurse's license when the nurse has violated the Nursing Practice Act, ch. 301 of the Texas Occupations Code, or a Board rule. Tex. Occ. Code § 301.453(a); 22 Tex. Admin. Code § 213.33(e).
7. To determine the appropriate disciplinary sanction to be imposed, the Board must consider the factors set forth in the Board's Disciplinary Matrix, 22 Tex. Admin. Code §§ 213.27 and 213.33(a)-(c), and Tex. Occ. Code § 53.023.

VII. RECOMMENDATION

Based on the above Findings of Fact and Conclusions of Law, the ALJ recommends that the Board revoke Respondent's license as a registered nurse (license number 737971).

SIGNED August 26, 2013.



CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

CAUSE NO. 507-13-4108

TEXAS BOARD OF NURSING
Petitioner

vs.

DAVINA DANIELLE MOORE
Permanent Registered Nurse
License Number 737971
Respondent

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

(Electronic Filing)

RESPONDENTS EXCEPTIONS AND REPLIES TO PROPOSAL FOR DECISION

Respondent received via regular mail on August 29, 2013 the Proposal for Decision (Proposal) in the above matter dated August 26, 2013 and now timely files exceptions and replies.

SUMMARY OF EXCEPTIONS AND REPLIES

The Proposal recommends revocation of Respondent's license because the Administrative Law Judge (ALJ) concluded that the Respondent was convicted of two third- degree felonies and that she engaged in unprofessional conduct that was likely to deceive, defraud or injure a patient or the public. Both conclusions are wrong and not supported by the evidence adduced from the hearing held on June 13, 2013.

I.

Respondent filed a motion to abate disciplinary proceedings because the alleged conduct which occurred on March 23, 2011 is currently being reviewed by the Court of Appeals in the 12th District of Texas and is not final. The motion to Abate was effectively denied by the ALJ and the staff (staff) of the Texas Board of Nursing (Board) was allowed to proceed with disciplinary action.

At the June 13, 2013 hearing, two Tyler, Texas law enforcement officers, Long and Neubauer, were allowed to testify telephonically over the written and oral objections made by the Respondent. The ALJ erroneously relied extensively on their testimony in the Proposal, even paraphrasing and quoting their testimony beginning on page 5 through 7. Neither officer was competent to testify as to what alleged contents were found in the house of respondent. Neither one is a chemists and any knowledge they may have had was the rankest of hearsay.

II.

Contrary to the ALJ, Respondent disputes that Section 301. 452 (b)(3) of the Texas

Occupational Code is applicable in her case, because respondent is not convicted nor on probation. Respondent disputes that Section 301.452(b)10 of the Texas Occupational Code is applicable in her case because the facts found by the ALJ to conclude harm are not supported by the facts adduced at the hearing on June 13, 2013

Does the unintentional removal of medication vials create a risk of harm to the public absent a showing of a usable quantity of content. The record is completely void as to whether any vial contained a usable quantity of anything.

III.

The ALJ shifts the burden to respondent to show that she somehow secured medication vials from her children and others. The ALJ concludes that because she did not provide valid proof, the public was at risk of harm. The staff has the burden of production of proof not the respondent.

IV.

Respondent specifically disputes as not supported by the record finding of facts numbers 12, 13, 15 and 16.

V.

Respondent disputes the conclusions of Law because they are based on findings of facts not supported by the record.

CONCLUSION

Respondent moves that the board (1) reject the Proposal, (2) abate the disciplinary proceeding or in the alternative convene a public hearing to decide the matter.

Respectfully,

MORRIS L. OVERSTREET
P.O. Box 35
Prairie View, Texas 77446
Tel: 512-844-8357
Fax: 713-225-2016

By: Morris L. Overstreet

MORRIS L. OVERSTREET
State Bar No. 00000046
Attorney for **DAVINA D. MOORE**

CERTIFICATE of SERVICE

This is to certify that on this 13 day of September, 2013 a true and correct copy of the above and foregoing document was served on the State Office of Administrative Hearings by electronic filing at the SOAH.

/s/: Morris L. Overstreet
MORRIS L. OVERSTREET

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

October 10, 2013

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

VIA FACSIMILE 512-305-8101

RE: **Docket No. 507-13-4108; *Texas Board of Nursing v. Davina Danielle Moore***

Dear Ms. Thomas:

On August 26, 2013, the Proposal for Decision (PFD) in this matter was sent to the Texas Board of Nursing (Board) for the Board's consideration. At the same time, copies of the PFD were sent to the parties.

On September 13, 2013, Respondent, Davina Danielle Moore, filed exceptions. There is no indication on Respondent's Certificate of Service that her exceptions were served on the Staff. Although it is unclear whether Respondent served the exceptions on Staff, after reviewing Respondent's exceptions I recommend that they not be adopted. The evidence and law presented in the case were considered and weighed carefully before the PFD was issued. The exceptions do not raise any matters not previously considered. Therefore, it is my recommendation that the PFD be adopted without change.

Sincerely,

A handwritten signature in cursive script that reads "Catherine C. Egan".

Catherine C. Egan
Administrative Law Judge

CCE:daa

cc: Jena Abel, Assistant General Counsel, TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - VIA FACSIMILE (512) 305-8101
Nikki Hopkins, Assistant General Counsel, TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - VIA FACSIMILE (512) 305-8101
Dina Flores, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - VIA FACSIMILE (512) 305-8101
Morris L. Overstreet, P. O. Box 35, Prairie View, TX 77446 - VIA FACSIMILE (713) 225-2016