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Patricia Thomas
Executive Director of the Board

DOCKET NUMBER 507-14-4775

IN THE MATTER OF § BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE §
NUMBERS 794686 & 124412, § OF
ISSUED TO §
BRANDY DAWN BLANCHARD § ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

TO: BRANDY DAWN BLANCHARD
c/o DANIEL J. BARRERA, ATTORNEY
DANIEL BARRERA & ASSOCIATES, P.C.
2075 ANTOINE DR.
HOUSTON, TX 77055

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

At the regularly scheduled public meeting on April 16-17, 2015, the Texas Board of Nursing (Board) considered the following items: (1) the Proposal for Decision (PFD) regarding the above cited matter; (2) Staff's recommendation that the Board adopt the PFD with changes; and (3) Respondent's recommendation to the Board regarding the PFD and order, if any.

The Board finds that after proper and timely notice was given, the above styled case was heard by an Administrative Law Judge (ALJ) who made and filed a PFD containing the ALJ's findings of facts and conclusions of law. The PFD was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. Staff filed exceptions to the PFD on January 6, 2015. The Respondent did not file any exceptions to the PFD or a response to Staff's exceptions to the PFD. On January 30, 2015, 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, including the ALJ's letter ruling of January 30, 2015; 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, except for proposed Conclusion of Law Number 5, which is modified and adopted as set out herein and proposed Conclusion of Law Number 7, which is not adopted by the Board, but is hereby re-designated as a recommendation. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

Modification of PFD

The Board has authority to review and modify a PFD in accordance with the Government Code §2001.058(e). Specifically, §2001.058(e)(1) authorizes the Board to

change a finding of fact or conclusion of law made by the ALJ or vacate or modify an order issued by the ALJ if the ALJ did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions. Further, §2001.058(e)(3) authorizes the Board to change a finding of fact or conclusion of law made by the ALJ or vacate or modify an order issued by the ALJ if the Board determines that a technical error in a finding of fact should be changed.

Proposed Conclusion of Law Number 5

Proposed Conclusion of Law Number 5 contains a typographical error, in that it references Board rule 213.12 instead of 217.12. As such, the Board finds that the conclusion of law should be modified to correct this typographical error.

IT IS, THEREFORE, ORDERED THAT, under the authority of §2001.058(e)(3), for the reasons outlined herein, proposed CONCLUSION OF LAW NUMBER 5 is MODIFIED and ADOPTED as follows:

Adopted Conclusion of Law Number 5

5. Ms. Blanchard's conduct that resulted in her convictions for the Class B misdemeanor offenses of driving while intoxicated and boating while intoxicated constitute unprofessional conduct. 22 Tex. Admin. Code §217.12.

Proposed Conclusion of Law Number 7

The ALJ found that the disciplinary sanctions available to the Board for the Respondent's conduct include the issuance of a warning or reprimand with stipulations¹. Although labeled as a proposed *conclusion of law*, proposed Conclusion of Law Number 7 is part of the ALJ's ultimate recommendation and supports the ALJ's recommended sanction in this matter. As such, the Board re-designates proposed Conclusion of Law Number 7 as part of the ALJ's recommendation and declines to adopt it as a *conclusion of law*.

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 law², the Board generally agrees with the ALJ that a Warning with Stipulations for one year should be imposed against the Respondent's licenses. However, the Board finds that additional stipulations than those recommended by the ALJ should be imposed as part of the disciplinary action.

¹ See proposed Conclusion of Law Number 7.

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

In this case, the ALJ found that the Respondent committed two violations of the Nursing Practice Act and Board rules, for which she is subject to disciplinary action³. The Board agrees with the ALJ that the Respondent's conduct constitutes unprofessional conduct⁴. Further, the Board finds that the Respondent's unprofessional conduct constitutes a second tier, sanction level I sanction under the Board's Disciplinary Matrix.

When an individual has committed more than one violation of the Nursing Practice Act and/or Board rules⁵, the Board is statutorily required⁶ to consider taking a more severe action than it would otherwise impose for a singular violation. Likewise, the Board must consider the more severe sanction recommended by the Disciplinary Matrix if more than one violation of the Nursing Practice Act and/or Board rules is being considered. In this case, the Respondent committed two criminal offenses, a few years apart from one another, involving the possession and/or use of alcohol. The Board agrees with the ALJ that this conduct is related to the practice of nursing and poses a risk of harm to the public⁷. The Board notes, however, the mitigating factors found by the ALJ. The Respondent has practiced for approximately 25 years without any complaints regarding her work performance⁸. Further, the Respondent has had no further criminal history since her 2013 conviction and has provided evidence of successfully abstaining from alcohol consumption for 27 consecutive months⁹.

After carefully reviewing and considering the aggravating and mitigating factors in this case, the Board has determined, pursuant to the Board's Disciplinary Matrix¹⁰, the Occupations Code Chapter 53, and the Board's rules, including 22 Tex. Admin. Code §213.27 and §213.33(e), that the Respondent's licenses should be subject to a Warning with Stipulations, for one year. However, the Board finds that, in addition to the remedial education course recommended by the ALJ¹¹, the Respondent should also be required to complete a course in critical thinking¹². Further, although indirect supervision and random drug testing would normally be imposed by the Board as part of a Warning with Stipulations, the Board finds it appropriate to deviate from Board precedent in this case.

³ See adopted Conclusions of Law Numbers 5 and 6.

⁴ The Board's rules, located at 22 Tex. Admin. Code §213.28(b)(5), explain how offenses involving the possession or use of controlled substances, dangerous drugs, or mood-altering substances are related to the practice of nursing. See also adopted Conclusions of Law Numbers 5 and 6.

⁵ See adopted Conclusions of Law Numbers 5 and 6.

⁶ See Tex. Occ. Code §301.4531.

⁷ See adopted Conclusions of Law Numbers 5 and 6.

⁸ See page 2 of the PFD and adopted Finding of Fact Number 16.

⁹ See adopted Findings of Fact Numbers 11-13 and 17.

¹⁰ 22 Tex. Admin. Code §213.33(b).

¹¹ See pages 7 and 9 of the PFD.

¹² See 22 Tex. Admin. Code §213.33(f), which requires disciplinary orders to include participation in a program of education, including a course in nursing jurisprudence and ethics. Remedial education courses are also authorized under 22 Tex. Admin. Code §213.33(e)(3).

The Respondent has provided evidence of substantial mitigation, including a long and stable work history. Further, the Respondent has provided evidence of a favorable substance use evaluation¹³ and successful abstinence for a lengthy period of time. As such, the Board finds that supervised practice and random drug testing is not necessarily required for the duration of the Order. However, the Board finds that a minimal level of accountability is appropriate for the duration of the Order. As such, the Board finds that employer notifications, incident reporting, and quarterly employer reports are adequate to protect the public and ensure that future violations of the Nursing Practice Act and Board rules will not occur. These requirements are authorized under 22 Tex. Admin. Code §213.33(e)(3)¹⁴.

I. TERMS OF ORDER

IT IS THEREFORE ORDERED that RESPONDENT SHALL receive the sanction of **WARNING WITH STIPULATIONS** in accordance with the terms of this Order.

- A. This Order SHALL apply to any and all future licenses issued to Respondent to practice nursing in the State of Texas.
- B. This Order SHALL be applicable to Respondent's nurse licensure compact privileges, if any, to practice nursing in the State of Texas.
- C. Respondent may not work outside the State of Texas in another nurse licensure compact party state without first obtaining the written permission of the Texas Board of Nursing and the Board of Nursing in the nurse licensure compact party state where Respondent wishes to work.

II. COMPLIANCE WITH LAW

While under the terms of this Order, RESPONDENT shall comply in all respects with the Nursing Practice Act, Texas Occupations Code, §§301.001 *et seq.*, the Rules and Regulations Relating to Nurse Education, Licensure and Practice, 22 TEX. ADMIN. CODE §§211.1 *et seq.*, and this Order.

III. REMEDIAL EDUCATION COURSE(S)

In addition to any continuing education requirements the Board may require for licensure renewal, RESPONDENT SHALL successfully complete the following remedial education course(s) **within one (1) year of the effective date of this Order, unless otherwise specifically indicated:**

- A. **A Board-approved course in Texas nursing jurisprudence and ethics that shall be a minimum of six (6) hours in length.** The course's content shall include the Nursing Practice Act, standards of practice, documentation of care, principles of nursing ethics, confidentiality, professional boundaries, and the Board's Disciplinary Sanction Policies regarding: Sexual Misconduct; Fraud, Theft and

¹³ See adopted Finding of Fact Number 15.

¹⁴ 22 Tex. Admin. Code 213.33(e)(3) provides that a Warning with Stipulations may include reasonable probationary stipulations, which may include the completion of remedial education courses and periodic Board review.

Deception; Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder; and Lying and Falsification. Courses focusing on malpractice issues will not be accepted. Home study courses and video programs will not be approved.

- B. The course **"Sharpening Critical Thinking Skills,"** a 3.6 contact hour online program provided by the National Council of State Boards of Nursing (NCSBN) Learning Extension.

In order to receive credit for completion of this/these course(s), RESPONDENT SHALL CAUSE the instructor to submit a Verification of Course Completion form or SHALL submit the continuing education certificate, as applicable, to the attention of Monitoring at the Board's office. RESPONDENT SHALL first obtain Board approval of any course prior to enrollment if the course is not being offered by a pre-approved provider. *Information about Board-approved courses and Verification of Course Completion forms are available from the Board at www.bon.texas.gov/compliance.*

IV. EMPLOYMENT REQUIREMENTS

In order to complete the terms of this Order, RESPONDENT must work as a nurse, providing direct patient care in a licensed healthcare setting, for a minimum of sixty-four (64) hours per month for four (4) quarterly periods [one (1) year] of employment. This requirement will not be satisfied until four (4) quarterly periods of employment as a nurse have elapsed. Any quarterly period without continuous employment with the same employer for all three (3) months will not count towards completion of this requirement. Periods of unemployment or of employment that do not require the use of a registered nurse (RN) or a vocational nurse (LVN) license, as appropriate, will not apply to this period and will not count towards completion of this requirement.

- A. **Notifying Present and Future Employers:** RESPONDENT SHALL notify each present employer in nursing and present each with a complete copy of this Order, including all attachments, if any, within five (5) days of receipt of this Order. While under the terms of this Order, RESPONDENT SHALL notify all future employers in nursing and present each with a complete copy of this Order, including all attachments, if any, prior to accepting an offer of employment.
- B. **Notification of Employment Forms:** RESPONDENT SHALL CAUSE each present employer in nursing to submit the Board's "Notification of Employment" form to the Board's office within ten (10) days of receipt of this Order. RESPONDENT SHALL CAUSE each future employer to submit the Board's "Notification of Employment form" to the Board's office within five (5) days of employment as a nurse.
- C. **Incident Reporting:** RESPONDENT SHALL CAUSE each employer to immediately submit any and all incident, counseling, variance, unusual occurrence, and medication or other error reports involving

RESPONDENT, as well as documentation of any internal investigations regarding action by RESPONDENT, to the attention of Monitoring at the Board's office.

- D. Nursing Performance Evaluations:** RESPONDENT SHALL CAUSE each employer to submit, on forms provided to the Respondent by the Board, periodic reports as to RESPONDENT'S capability to practice nursing. These reports shall be completed by the nurse who supervises the RESPONDENT and these reports shall be submitted by the supervising nurse to the office of the Board at the end of each three (3) month quarterly period for four (4) quarters [one (1) year] of employment as a nurse.

V. RESTORATION OF UNENCUMBERED LICENSE(S)

Upon full compliance with the terms of this Order, all encumbrances will be removed from RESPONDENT'S license(s) to practice nursing in the State of Texas and RESPONDENT may be eligible for nurse licensure compact privileges, if any.

Entered this 16th day of April, 2015.

TEXAS BOARD OF NURSING



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

Attachment: Proposal for Decision; Docket No. 507-14-4775 (December 19, 2014).

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 19, 2014

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. 507-14-4775; *Texas Board of Nursing v. Brandy Dawn
Blanchard*

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:daa
Enclosures

- c: R. Kyle Hensley, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – VIA INTERAGENCY
Kathy A. Hoffman, Legal Assistant Supervisor, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 (with 1 CD(s); Certified Evidentiary Record) – VIA INTERAGENCY
Daniel J. Barrera, Law Firm of Daniel J. Barrera & Associates, P.C., 2075 Antoine Drive, Houston, TX 77055-1829 – VIA REGULAR MAIL

SOAH DOCKET NO. 507-14-4775

TEXAS BOARD OF NURSING, Petitioner	§	BEFORE THE STATE OFFICE
	§	
v.	§	OF
	§	
BRANDY DAWN BLANCHARD, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Board of Nursing (Staff/Board) seeks to take disciplinary action against the nursing licenses issued to Respondent Brandy Dawn Blanchard, RN and LVN, for alleged violations of the Nursing Practice Act (the Act),¹ and the Board rules.² According to Staff, Ms. Blanchard's convictions for driving while intoxicated (DWI) and for boating while intoxicated (BWI) support the issuance of a warning by the Board with conditions. The Administrative Law Judge (ALJ) finds that Ms. Blanchard's criminal conduct violated the Act and Board rules and recommends that the Board issue a warning to Ms. Blanchard with the condition that she attend in person or online the nursing jurisprudence and ethics course within one year and provide her employer with a copy of the Board order.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The parties did not contest jurisdiction or notice so these matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

On October 29, 2014, ALJ Catherine C. Egan convened the hearing on the merits in the Offices of the State Office of Administrative Hearings (SOAH) in Austin, Texas. Assistant General Counsel R. Kyle Hensley represented Staff. Attorney Daniel J. Barrera represented Ms. Blanchard. The record closed at the conclusion of the hearing.

II. DISCUSSION

The evidence presented at the hearing consisted of Ms. Blanchard's testimony and the admission of the eight exhibits offered by Staff.³

¹ Tex. Occ. Code ch. 301.

² 22 Tex. Admin. Code (TAC) ch. 217.

³ State Exs. 1, 1a, 2, 2a, 3, 4, 5 and 6.

A. Undisputed Evidence

The Board licensed Ms. Blanchard as a licensed vocational license on May 26, 1989, and as a registered nurse on December 28, 2010.⁴ She has worked as a nurse for almost 25 years without being the subject of any previous Board disciplinary action. Currently, Ms. Blanchard works the night shift (7 p.m. to 7 a.m.) at the Behavioral Hospital of Bellaire (the hospital), a psychiatric hospital, in Houston, Texas. According to Ms. Blanchard, the hospital employs eight other nurses during the night shift and frequently assigned her to serve as the night supervisor.

On May 17, 2009, the police stopped Ms. Blanchard for speeding and arrested her for DWI. Her breath test revealed she had an alcohol concentration of .09. Ms. Blanchard pleaded guilty to the Class B misdemeanor of DWI on January 22, 2010, in Cause No. 2006.2645.CR1 before the County Court at Law of McLennan County, Texas.⁵ The Court found Ms. Blanchard guilty, imposed a \$2,000 fine, and sentenced her to confinement in the McLennan County Jail for 60 days (the 2009 DWI). The Court suspended the jail sentence for 9 months and released Ms. Blanchard on her own recognizance subject to various probationary conditions. These conditions included, among other things, her abstinence from alcohol consumption, her submission to random urine test and an alcohol/drug evaluation, and her completion of a DWI program.⁶ Ms. Blanchard successfully completed the terms of her probation, and on October 21, 2010, the Court discharged her from probation.⁷

On August 14, 2011, Ms. Blanchard was arrested in Montgomery County, Texas, for operating her jet ski on Lake Conroe while she was intoxicated. On November 18, 2013, Ms. Blanchard pleaded guilty to the Class B misdemeanor of BWI before the County Court at Law No. 4 of Montgomery County in Cause No. 11-271045 (the 2011 BWI). The Court found her guilty, imposed a \$1,000 fine, and sentenced her to three days in jail for time already served.⁸

It is undisputed that Ms. Blanchard informed the Board about both misdemeanor convictions.

⁴ State Exs. 1 and 1a.

⁵ State Ex. 5.

⁶ State Ex. 5 at 3-4.

⁷ State Ex. 5 at 5.

⁸ State Ex. 6.

B. Parties' Position and Legal Authority**1. Parties' Positions**

Staff alleges that Ms. Blanchard's conduct violated Section 301.452(b)(10) of the Texas Occupations Code and Board Rule 217.12(13)⁹ because both convictions relate to inappropriate intoxicated conduct. Although the Board does not impose any sanctions for the first DWI offense, Staff asserts that by repeating this conduct in less than 3 years, Ms. Blanchard engaged in unprofessional and dishonorable conduct that was likely to injure a patient or the public. According to Staff, the Board should impose on Ms. Blanchard a one-year warning with certain conditions. These conditions include: (1) completion of the Texas jurisdiction and ethics course within 12 months; (2) abstention from the consumption of alcohol and illicit drugs for a calendar year; (3) participation in random drug screens for a year; (4) indirect supervision at work; and (5) notification to her employer about the Board Order.

Ms. Blanchard points out that she has been a nurse for 25 years and has had no other complaints or disciplinary action filed against her. She acknowledges that she has two alcohol-related convictions, but asks the Board to consider the sanctions she has already experienced because of her misdemeanors. She noted that neither incident occurred while she was on-duty or on-call and that she disclosed her convictions to the Board. Additionally, the 2011 DWI pretrial probation (which lasted almost 27 months) required that Ms. Blanchard abstain from alcohol consumption and submit to random drug tests at her expense. Ms. Blanchard successfully satisfied these conditions. Ms. Blanchard sincerely regrets the choices she made that resulted in her convictions, and says that she has learned from these experiences. Ms. Blanchard asserts that she does not have a problem with alcohol consumption and does not present a danger to the public or to her patients.

2. Legal Authority

Section 301.452(b)(10) of the Texas Occupations Code provides that a nurse is subject to disciplinary action if the nurse engages in "unprofessional or dishonorable conduct" that is likely to deceive, defraud, or injure a patient or the public. Under Board Rule 217.12(13), criminal conduct

⁹ 22 TAC § 217.12(13).

constitutes “unprofessional or dishonorable conduct.” This includes a conviction or probation that involves “a crime or criminal behavior or conduct that could affect the practice of nursing.” Board Rule 213.28(b)(5)(A)(ii) identifies “Driving While Intoxicated (2 or more counts)” as being a criminal offense that directly relates to and affects the practice of nursing. The rule specifies that this is because nurses who abuse alcohol may have impaired judgment while caring for patients and are at risk of harming patients and that repeated violations “suggest a willingness to continue in reckless and dangerous conduct, or an unwillingness to take appropriate corrective measures, despite previous disciplinary action by the state.”¹⁰

Chapter 53 of the Texas Occupational Code sets out factors to consider in evaluating the consequences of criminal conduct in securing and retaining an occupational license, including the nursing profession. Board Rule 213.33 incorporates the factors set out in Chapter 53 for the Board to consider in evaluating the sanctions to impose in disciplinary matter and sets out a disciplinary matrix that SOAH and the Board “shall utilize . . . in all disciplinary and eligibility matters.”¹¹ The Disciplinary Matrix sets forth disciplinary actions applicable to a given offense, and generally classifies the offense as first, second, or third tier, and as sanction level I or level II. The sanction level is determined by consideration of relevant aggravating and mitigating circumstances. The matrix classifies unprofessional or dishonorable conduct as a first tier offense if it is an isolated failure to comply with Board rules with no adverse patient effects.¹² If the offense is repeated, the matrix classifies it a second tier offense. Sanctions for both a first and second tier violation include a warning with stipulations.¹³

¹⁰ Section 49.04 of the Texas Penal Code addresses DWI and Section 49.06 addresses BWI. Texas Penal Code § 49.09 applies to both DWI and BWI.

¹¹ 22 TAC § 213.33(b). The Board first adopted the matrix by rule in October 2007 (*see* 35 Tex. Reg. 1210 (2010) (discussing history of matrix)). The matrix in its present graphic form was first adopted to be effective February 12, 2010, and was designated by Staff as applicable to this proceeding.

¹² The aggravating circumstances for violations under § 301.452(b)(10) include: “number of events, level of material or financial gain, actual harm, severity of harm, prior complaints or discipline for similar conduct, patient vulnerability, involvement of or impairment by alcohol, illegal drugs, or controlled substances or prescription medications, criminal conduct.” Mitigating circumstances include: “voluntary participation in established or approved remediation or rehabilitation program and demonstrated competency, full restitution paid.”

¹³ As noted above, the tier and sanction levels take into account the aggravating and disciplinary factors relevant to violations of § 301.452(b)(10) of the Act.

The Board has also adopted Disciplinary Guidelines for Criminal Conduct (Guidelines) that provides a recommended sanction or range of sanctions for each criminal offense. According to the Guidelines, a second misdemeanor DWI offense is directly related to the practice of nursing because nurses who abuse alcohol may have impaired judgment while caring for patients, are at risk for harming patients and/or the public, and demonstrate a potential inability to practice nursing with reasonable skill and safety. For a second misdemeanor offense, the nurse must present verifiable evidence of the successful completion of treatment and 12 consecutive months of sobriety.

C. Ms. Blanchard's Testimony

Ms. Blanchard acknowledged that she made some poor choices in the past, and has accepted responsibility for those choices. She testified that she rarely consumes alcohol anymore and has not been intoxicated since her arrest for BWI. She stated that she appreciates the danger driving while intoxicated poses to the public and asserts that she will not drink and drive in the future. She intends on pursuing a masters in nursing.

According to Ms. Blanchard, the 2009 DWI occurred while she was off-duty and consoling a friend whose mother had recently been diagnosed with terminal cancer. She and her friend had a drink before she started to drive home. While driving home, the police stopped her for speeding and arrested her for DWI. Because she was arrested, Ms. Blanchard lost her job as a nurse at the jail. Ms. Blanchard pleaded guilty to DWI and was sentenced to probation for 9 months during which time she was required to abstain from alcohol. Ms. Blanchard successfully completed all the probationary requirements.

As for the BWI offense, Ms. Blanchard recalled that on August 14, 2011, she and a friend were at Lake Conroe. Before going out on her jet ski, Ms. Blanchard said she drank a Bloody Mary because she intended for her friend to drive. Despite her intent not to drive, when the jet-ski engine began cutting out Ms. Blanchard said she took over. They were about 100 yards from the dock when the game warden confronted her and arrested her for BWI. Ms. Blanchard emphatically denied that she posed a risk to anyone on that occasion because no one else was in the immediate area.

Ms. Blanchard emphasized that for the 27 months between her BWI arrest and the date of the judgment she was on pretrial probation/services as a condition of the bond. Throughout the

27 months, she was required to abstain from the consumption of alcohol. Ms. Blanchard clarified that for the first 30 days of her pretrial probation, the Court required her to wear a "scram" device that tested whether she had consumed alcohol every 30 minutes. She never had a positive result. After the first 30 days, the Court required Ms. Blanchard to install a deep lung device in her car that she had to blow into to verify she had not consumed any alcohol before the car would start. She was also required to participate in random drug screens and never tested positive for alcohol. Ms. Blanchard explained that she had to pay for all the pretrial services, including the random drug screens. Between her attorney fees and the costs, Ms. Blanchard estimated that she spent close to \$10,000.¹⁴

Ms. Blanchard represented that she would not have any trouble refraining from alcohol consumption or notifying her employer that she is subject to a Board Order but believes she has already abstained from alcohol consumption for 27 months. She did object to requiring her employer to provide her with indirect supervision because her employer might choose to discharge her. She also objected having to pay for random alcohol tests for yet another year.

Ms. Blanchard stressed that she has never reported to work intoxicated, never had a drink before work, and never drank at work. Ms. Blanchard also noted that when the Board asked her to undergo an evaluation by a Board-approved psychiatrist she did so voluntarily despite the cost – \$1,200. She understood that the psychiatrist had reported that she was not an alcoholic or a threat to her patients or the public. Ms. Blanchard said she was sorry she made the choices she did and recognizes that she made a bad decision to drive while intoxicated. However, she accepted the consequences for these choices, completed the terms of probation, paid all fines, and timely notified the Board about her convictions. Ms. Blanchard has had no other arrests or complaints and has maintained steady employment.

D. Analysis

The facts are generally undisputed. Ms. Blanchard admits that in 2009 she was arrested for and pleaded guilty to the Class B misdemeanor DWI offense. She also concedes that in 2011, she

¹⁴ Ms. Blanchard testified that her attorney had a heart attack and various health issues that contributed to the delay between her arrest and her conviction (27 months after her arrest).

was arrested for and pleaded guilty to the Class B misdemeanor BWI offense. This conduct constitutes unprofessional or dishonorable conduct as defined by Board Rule 217.12(13) and subjects her to disciplinary action under Section 301.452(b)(10) of the Texas Occupations Code. Ms. Blanchard concedes that DWI and BWI expose the public to possible harm. The question to resolve is what disciplinary action to impose.

The evidence showed that Ms. Blanchard has not only completed a DWI program as a requirement of her 2009 DWI probation, she also abstained from any alcohol consumption for more than 2 years. Although Ms. Blanchard's decision to drive/boat after consuming enough alcohol to be legally intoxicated is sanctionable, she has demonstrated that she can abstain for an extended period while working. Since her 2011 BWI arrest, Ms. Blanchard continued to work and deal with a protracted criminal proceeding while abstaining from consuming any alcohol. To require Ms. Blanchard to forego any alcohol consumption and to incur the expense of random alcohol screening for yet another year is unnecessarily punitive and unwarranted in this case. Similarly, because Ms. Blanchard's work has not been affected by her off-duty alcohol consumption, there is no justification to require her to receive indirect supervision at work. Based on the evidence, the ALJ recommends that the Board issue a warning for one year with the condition that Ms. Blanchard complete the nursing jurisprudence and ethics course within that year and provide to her employer a copy of the Board Order issued in this case.

III. FINDINGS OF FACT

1. Brandy Dawn Blanchard is licensed as a licensed vocational nurse (license number 124412) and as a registered nurse (license number 794686) in the State of Texas.
2. The Texas Board of Nursing (Board) issued to Ms. Blanchard the permanent vocational nurse license on May 26, 1989, and the permanent registered nurse license on December 28, 2010.
3. Staff of the Board sent formal charges to Ms. Blanchard's address of record by certified mail on June 25, 2014.
4. Staff sent a notice of hearing to Ms. Blanchard's attorney of record by certified mail and facsimile on August 6, 2014. 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.

5. The hearing convened on October 29, 2014, at the William P. Clements Building, 300 West 15th Street, Austin, Texas. Assistant General Counsel R. Kyle Hensley represented Staff. Attorney Daniel J. Barrera represented Ms. Blanchard. The record closed at the conclusion of the hearing on the same day.
6. On May 17, 2009, Ms. Blanchard was arrested for driving while intoxicated (DWI).
7. On January 22, 2010, Ms. Blanchard pleaded guilty to the Class B misdemeanor offense of Driving While Intoxicated in Cause No. 2006.2645.CR1 in the County Court at Law of McLennan County, Texas. The Court found Ms. Blanchard guilty, sentenced her to 60 days of confinement in the McLennan County Jail, and ordered her to pay a \$2,000 fine. The Court suspended the sentence and placed Ms. Blanchard on probation for 9 months during which time she was required to abstain from alcohol consumption, submit to an alcohol or drug dependency evaluation, and complete a DWI program (the 2009 DWI).
8. Ms. Blanchard successfully completed the terms of her probation and was discharged from probation on October 21, 2010.
9. On August 14, 2011, Ms. Blanchard was arrested in Montgomery County, Texas, for boating while intoxicated (BWI).
10. On November 18, 2013, Ms. Blanchard pleaded guilty to the Class B misdemeanor offense of Boating While Intoxicated, in Cause No. 11-271045-03, before the County Court of Law No. 4 of Montgomery County, Texas. The Court found Ms. Blanchard guilty, imposed a \$1,000 fine, and sentenced her to 3 days in jail for time already served (the 2011 BWI).
11. In the 27 months between her 2011 arrest and November 18, 2013, Ms. Blanchard was on pretrial probation and was required to abstain from alcohol consumption and to submit to random alcohol tests at her expense.
12. Ms. Blanchard did not test positive for alcohol consumption during these 27 months.
13. Ms. Blanchard successfully abstained from alcohol consumption for 27 consecutive months.
14. Ms. Blanchard properly disclosed to the Board her 2009 DWI and her 2011 BWI convictions.
15. At the request of Staff, Ms. Blanchard voluntarily secured a Board-approved psychiatrist's evaluation who reported to Ms. Blanchard that she was not an alcoholic or a risk to her patients.
16. This case is the first disciplinary action brought against Ms. Blanchard by the Board.
17. Ms. Blanchard has had no further criminal history since her 2011 BWI arrest.
18. Ms. Blanchard regrets her conduct that resulted in the 2009 DWI and the 2011 BWI convictions and states that she will not consume alcohol before driving or boating again.
19. Ms. Blanchard has maintained stable employment.

20. Ms. Blanchard intends to obtain a master's degree in nursing in the future.

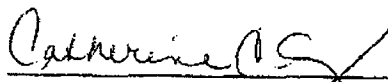
IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. Tex. Occ. 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. 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. Ms. Blanchard's conduct that resulted in her convictions for the Class B misdemeanor offenses of driving while intoxicated and boating while intoxicated constitute unprofessional conduct. 22 Tex. Admin. Code § 213.12.
6. Because Ms. Blanchard engaged in unprofessional conduct she is subject to disciplinary action by the Board pursuant to the Texas Occupations Code § 301.452(b)(10).
7. Disciplinary sanctions available to the Board for such conduct include the issuance of a warning or reprimand with stipulations. 22 Tex. Admin. Code § 213.33(b).

V. RECOMMENDATION

Based on the above Findings of Fact and Conclusions of Law, and applying the Board's Disciplinary Matrix, the ALJ recommends that the Board issue a warning to Ms. Blanchard with a one-year order requiring Ms. Blanchard to complete a course on nursing jurisprudence and ethics either on-line or in person. In addition, the ALJ recommends that the order require Ms. Blanchard to provide her employer with a copy of the Board Order.

SIGNED December 19, 2014.



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



Texas Board of Nursing

333 Guadalupe Street, Ste. 3-460, Austin, Texas 78701
Phone: (512) 305-7400 Fax: (512) 305-7401 www.bon.texas.gov

Katherine A. Thomas, MN, RN, FAAN
Executive Director

January 6, 2015

Administrative Law Judge Catherine C. Egan
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

Via Electronic Filing

RE: In the Matter of Permanent Certificate Numbers RN 794686 & LVN 124412
Issued to **BRANDY DAWN BLANCHARD**
Docket No. 507-14-4775

Dear Judge Egan:

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

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

Please feel free to contact me at (512) 305-7659 should you have any questions and/or concerns regarding this matter.

Sincerely,

R. Kyle Hensley
Assistant General Counsel

RKH/rm
Enclosure

cc: Brandy D. Blanchard
c/o Attorney Daniel J. Barrera
Daniel Barrera & Associates, P.C.
2075 Antoine Drive
Houston, TX 77055

Via Facsimile (713) 681-7714

Members of the Board

Kathleen Shipp, MSN, RN, FNP
Lubbock, *President*

Nina Almasy, MSN, RN Austin	Deborah Bell, CLU, ChFC Arlene	Patricia Clupp, BA Dallas	Tamara Cowen, MSN, RN Harlingen	Sheri Crosby, JD, SPHR Dallas	Marilyn Davis, MPA, BSN, RN Sugar Land
Shelby Fitzey, BBA Midlothian	Monica Hamby, LVN Amarillo	Kathy Leader-Horn, LVN Granbury	Mary M. LeBeck, MSN, RN Weatherford	Josefina Lujan, PhD, RN El Paso	Beverly Jean Nuttall, LVN Bryan

DOCKET NO. 507-14-4775

IN THE MATTER OF	§	BEFORE THE
PERMANENT CERTIFICATE	§	
NUMBERS RN 794686 & LVN 124412	§	STATE OFFICE OF
ISSUED TO	§	
BRANDY DAWN BLANCHARD	§	ADMINISTRATIVE HEARINGS

STAFF'S EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE JUDGE OF SAID COURT:

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

I.

Staff excepts to the last paragraph of the Administrative Law Judge's Analysis section on page 7 of the Proposal for Decision. Specifically, Staff excepts to the ALJ's pronouncement that "To require Ms. Blanchard to forego any alcoholic consumption and to incur the expense of random screening for yet another year is unnecessarily punitive and unwarranted in this case." Additionally, Staff excepts to the ALJ's analysis that "...because Ms. Blanchard's work has not been affect (sic) by her off-duty alcohol consumption, there is no justification to require her to receive indirect supervision at work."

II.

Staff excepts to the ALJ's Recommendation found on page 9 of the Proposal for Decision.

III.

Staff exceptions are based upon the ALJ not giving a full reading to the Board of Nursing's Disciplinary Matrix found at 22 TAC § 213.33(b). Under the matrix, multiple offenses of misconduct involving alcohol qualify as a second tier offense for §301.452(b)(10). Under Sanction Level 1 for §301.452(b)(10), the matrix mandates that if the violation involves "misdemeanor crimes or criminal conduct involving alcohol, drugs or controlled substances, then the stipulations will also include abstention from unauthorized use of drugs and alcohol, to be verified by random drug testing through urinalysis, limit specific nursing activities, and/or periodic Board review."

The ALJ bases her recommendation for no ban on alcohol consumption on her reading of the Respondent's abstaining from alcohol for 27 months while her Boating While Intoxicated case made it way through the Montgomery County Courts. However, this period of abstention was directly tied to the period where her case was on pretrial probation in Montgomery County. The mitigating factor of this sobriety is lessened because her liberty was on the line. It is not an undue hardship to the

Respondent to abstain from alcohol consumption for the year of her Board order. This abstention would protect the public by showing that the Respondent can maintain sobriety while not under the shadow of a criminal sentence by the State of Texas.

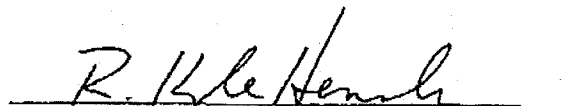
The Respondent should be placed under a Warning order one year in length. This order should include a ban on alcohol consumption to be verified through random drug urinalysis. Additionally, the Respondent should be indirectly supervised by a registered nurse.

Prayer:

WHEREFORE PREMISES CONSIDERED, Staff prays the Administrative Law Judge make the foregoing requested modifications to the Proposal For Decision.

Respectfully submitted,

TEXAS BOARD OF NURSING



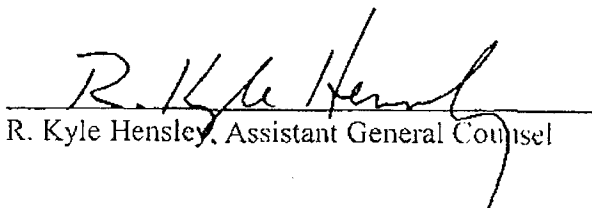
R. Kyle Hensley, Assistant General Counsel
State Bar No. 50511847
333 Guadalupe, Tower III, Suite 460
Austin, Texas 78701
P: (512) 305-7659
F: (512) 305-8101

CERTIFICATE OF SERVICE

I hereby certify that a true copy of *Staff's Exceptions to Proposal for Decision* was sent via Facsimile, on this, the 6th day of January, 2015, to:

Brandy D. Blanchard
c/o Attorney Daniel J. Barrera
Daniel Barrera & Associates, P.C.
2075 Antoine Drive
Houston, TX 77055

Via Facsimile (713) 681-7714



R. Kyle Hensley, Assistant General Counsel

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

January 30, 2015

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

VIA FACSIMILE NO. (512) 305-8101

RE: SOAH Docket No. 507-14-4775; *Texas Board of Nursing v. Brandy Dawn Blanchard*

Dear Ms. Thomas:

On January 7, 2015, Staff filed exceptions to the Proposal for Decision (PFD) issued by the undersigned administrative law judge (ALJ) on December 19, 2014. Respondent did not file exceptions or a response to Staff's exceptions.¹

Staff does not except to the ALJ's analysis, findings, or conclusions regarding Brandy Dawn Blanchard's violations of the Nursing Practice Act (the Act) and the Board rules. Instead, Staff's exceptions focused on the ALJ's recommendation regarding the appropriate sanctions to impose in this case. Staff agrees with the ALJ that Ms. Blanchard should be issued a warning for a year, be required to complete a course of nursing jurisdiction and ethics during that year, and be compelled to inform her employer of the Board's order. However, Staff argued that the Board's Disciplinary Matrix found at 22 Texas Administrative Code § 213.33(b) compels the Board to require Ms. Blanchard to abstain from alcohol consumption for another year and be subject to indirect supervision.

For the reasons set out in the PFD, the ALJ disagrees. Staff alleged that Ms. Blanchard's criminal conduct for driving while intoxicated in 2009 (DWI) and boating while

¹ Pursuant to 1 Texas Administrative Code § 155.507(c)(1), a reply to exceptions must be filed within 15 days of the filing of the exceptions. In this case, the deadline to file a reply to the January 7, 2015 exceptions was January 22, 2015. As of the date of this letter, no reply has been filed.

intoxicated in 2011 (BWI) constituted unprofessional and dishonorable conduct. Staff presented no evidence to show that Ms. Blanchard's work was affected by her alcohol consumption.

As discussed in the PFD, as a result of her DWI, Ms. Blanchard successfully completed a DWI program. After her arrest for BWI on August 14, 2011, Ms. Blanchard abstained from consuming alcohol for more than two years (August 14, 2011, through November 18, 2013). Throughout this period, Ms. Blanchard underwent random drug screens at her own expense that produced no positive results for alcohol. Ms. Blanchard had to pay for these tests.

Board rule 213.33 requires consideration not only of the disciplinary matrix but also numerous factors including: evidence of practice history; prior disciplinary action; length of time license; deterrent effect of sanction; actual damages; attempts by licensee to correct or stop violation; mitigating and aggravating circumstances; the extent to which the system dynamics of the practice setting contributed to the problem; and any other matter that just requires. As noted by Staff, the stipulations related to a second tier offense for unprofessional or dishonorable conduct that involves alcohol, at sanction level 1 includes "abstention from unauthorized use of drugs and alcohol, to be verified by random drug testing through urinalysis" The matrix further states that the Board will use its rules and disciplinary sanction policies related to drug or alcohol misuse in analyzing the facts.

The Board's disciplinary sanction policies related to drug or alcohol misuse require 12 continuous months of current sobriety when the nurse has "been diagnosed with substance dependency or abuse." The evidence presented does not indicate that Ms. Blanchard has been diagnosed with substance dependency. In fact, Staff did not allege that Ms. Blanchard engaged in the intemperate use of alcohol that could endanger a patient and did not request that she participate in a peer assistance program.

This case is unique in that Ms. Blanchard had already participated in a rehabilitation program and had recently completed a 27-month abstention from alcohol consumption. She has worked as a nurse for almost 25 years without being the subject of any Board disciplinary action until this case and she informed the Board about both misdemeanor convictions. Ms. Blanchard's work history does not indicate that she ever appeared at work inebriated or that she consumed alcohol while at work. The evidence does not support a finding that Ms. Blanchard's conduct warrants direct or indirect supervision.

Ms. Blanchard made poor choices while off-duty by DWI and BWI; however, the evidence does not support a finding that she is an alcoholic or that she needs to participate in the Board's approved peer assistance program. Based on the evidence in this case and the factors set

out in Board Rule 213.33, the ALJ recommends that the Board issue a warning for one year with the condition that Ms. Blanchard complete the nursing jurisprudence and ethics course within that year and provide her employer a copy of the Board Order.

Sincerely,



Catherine C. Egan
Administrative Law Judge

CCE:daa

- c: R. Kyle Hensley, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - **VIA FACSIMILE (512) 305-8101**
Kathy A. Hoffman, Legal Assistant Supervisor, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - **VIA FACSIMILE (512) 305-8101**
Daniel J. Barrera, Law Firm of Daniel J. Barrera & Associates, P.C., 2075 Antoine Drive, Houston, TX 77055-1829 - **VIA FACSIMILE (713) 681-7714**