



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 Thomas
Executive Director of the Board

DOCKET NUMBER 507-15-0260

**IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 217893
ISSUED TO
JESSICA JOYCE YOUNG**

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

OPINION AND ORDER OF THE BOARD

**TO: JESSICA JOYCE YOUNG
c/o MARC M. MEYER, ATTORNEY
33300 EGYPT LANE, SUITE C600
MAGNOLIA, TX 77354**

**BETH BIERMAN
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701**

At the regularly scheduled public meeting on October 22-23, 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 exceptions to the PFD; (3) Respondent's exceptions to the PFD; (4) Respondent's response to Staff's exceptions to the PFD; (5) the ALJ's final letter ruling of July 8, 2015; (6) Staff's recommendation that the Board adopt the PFD with changes; and (7) 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 May 13, 2015. The Respondent filed exceptions to the PFD on May 15, 2015. On May 28, 2015, the Respondent filed a response to Staff's exceptions to the PFD. On July 8, 2015, the ALJ issued her final letter ruling, in which she amended Findings of Fact 9 and 10, but declined to make any other changes to the PFD.

The Board, after review and due consideration of the PFD; the parties' exceptions and response; the ALJ's final letter ruling of July 8, 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, including Findings of Fact 9 and 10, as amended by the ALJ in her final letter ruling of July 8, 2015. 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.

ALJ's Analysis Regarding Alleged Violation of §301.452(b)(9)

In its filed charges against the Respondent, Staff alleged a violation of §301.452(b)(9). In her analysis regarding this alleged violation, the ALJ states that no evidence was provided that the Respondent used alcohol or drugs while on duty or was under the influence of alcohol or drugs while on duty. The ALJ further states that no evidence was presented regarding the Respondent's on-call responsibilities. As a result, the ALJ concluded that Respondent did not violate §301.452(b)(9). The Board does not agree with the ALJ that a nurse must be on duty or on-call in order to violate §301.452(b)(9). To interpret this provision of the Nursing Practice Act to require such a showing contradicts the basic principles of statutory construction and misconstrues applicable law. As such, the Board rejects the ALJ's interpretation and analysis in this regard and does not consider it as precedent for any purpose. Irregardless, the Board declines to make any new findings of fact or conclusions of law or to modify any findings of fact or conclusions of law related to this specific issue.

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 that the most appropriate sanction in this matter is an Enforced Suspension of the Respondent's license, followed by a three year probationary period².

The Respondent's conduct involves non-compliance with a prior Board Order³. The Respondent's non-compliance with her prior Board order constitutes a violation of §301.452(b)(1) and (10)⁴. For her violation of §301.452(b)(1), the Board agrees with the

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 See pages 12 and 14 of the PFD.

³ See Finding of Fact 10.

⁴ See Conclusions of Law 4-5.

ALJ that the Respondent's conduct should be treated as a second tier offense⁵. However, unlike the ALJ, the Board finds that the Respondent's conduct should be treated as a sanction level II sanction. As the ALJ points out⁶, when an individual has been previously disciplined or is being disciplined for more than one violation of the Nursing Practice Act and/or Board rules, the Board is statutorily required⁷ to consider taking a more severe action than it would otherwise impose. As such, the Board finds a second tier, sanction level II sanction more appropriate for the Respondent's violation of §301.452(b)(1) than a sanction level I sanction. 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)⁸. As the ALJ points out, the Respondent was required to abstain from the use of drugs and alcohol. She admitted to consuming alcohol in violation of the Order. The Respondent's conduct was serious in nature. As such, the Board finds that a second tier, sanction level II sanction is collectively warranted for the Respondent's conduct.

For a second tier, sanction level II sanction for a violation of §301.452(b)(1), the Board's Matrix authorizes licensure suspension or revocation. For a second tier, sanction level II sanction for a violation of §301.452(b)(10), the Board's Matrix also authorizes licensure suspension or revocation. After carefully considering the aggravating factors in this case, the Board has determined, pursuant to the Board's Disciplinary Matrix⁹ and the Board's rules, including 22 Tex. Admin. Code §213.27 and §213.33(e), that the Respondent's license should be subject to a suspension instead of revocation. Further, the Board agrees with the ALJ that the suspension should be enforced¹⁰. The Board also agrees that the Respondent's license should be subject to a three year probationary period with probationary stipulations.

First, the Board finds that a remedial education course in critical thinking is necessary and appropriate to encourage good professional judgment and critical thinking. The Board also finds that a nursing jurisprudence and ethics course is appropriate and consistent with the Board's rules¹¹. Further, the Board finds that supervisory stipulations are necessary to ensure an appropriate level of accountability for the duration of the Order and to ensure that future violations of the Nursing Practice Act and Board rules do not occur. The Board finds no evidence in the record to justify a departure from the normal supervisory requirements associated with an Enforced Suspension, followed by probationary stipulations. Therefore, the Board finds that the Respondent's practice should be directly supervised for the first year of the Order and indirectly supervised for the remaining period of the Order. The Board finds that these safeguards are necessary to adequately protect the public while the Respondent re-enters the workplace. The Board

⁵ See page 9 of the PFD.

⁶ See page 9 of the PFD.

⁷ See Tex. Occ. Code §301.4531.

⁸ See page 12 of the PFD.

⁹ 22 Tex. Admin. Code §213.33(b).

¹⁰ See pages 12 and 14 of the PFD.

¹¹ See 22 Tex. Admin. Code §213.33(f).

further finds that employer notifications and quarterly employer reports are necessary to implement the supervisory requirements of the Order. Finally, abstention and drug testing are also warranted for the duration of the Order. These provisions are consistent with the provisions of 22 Tex. Admin. Code §213.33(e)(6)¹².

IT IS THEREFORE ORDERED that Registered Nurse License Number **217893**, previously issued to **JESSICA JOYCE YOUNG** to practice nursing in Texas is hereby **SUSPENDED** and said suspension is **ENFORCED** until Respondent:

- A. Completes an appropriate treatment program approved by the Board;
- ~~B. Provides documentation of successful completion; and~~
- C. Obtains twelve (12) consecutive months of sobriety, which may be demonstrated by monthly urine drug screens consistent with the "DRUG AND ALCOHOL RELATED REQUIREMENTS" of this Order.

Any relapse prior to the completion of the required twelve (12) consecutive months of sobriety will result in revocation or, at a minimum, an extension of the enforced suspension until such twelve (12) consecutive months of sobriety and additional treatment have been attained.

IT IS FURTHER ORDERED, upon verification of successful completion of the above requirements, the Suspension will be **STAYED**, and **RESPONDENT** will be placed on **PROBATION** for a minimum of three (3) years **AND** until Respondent fulfills the requirements of this Order.

- D. **RESPONDENT SHALL** pay all re-registration fees, if applicable, and **RESPONDENT'S** licensure status in the State of Texas will be updated to reflect the applicable conditions outlined herein.
- E. This Order **SHALL** apply to any and all future licenses issued to Respondent to practice nursing in the State of Texas.
- F. This Order **SHALL** be applicable to Respondent's nurse licensure compact privileges, if any, to practice nursing in the State of Texas.

¹² 22 Tex. Admin. Code §213.33(e)(6) provides that a suspension may include reasonable probationary stipulations, such as the completion of remedial education courses, not less than two years of supervised practice, limitations of nursing activities; and periodic Board review.

- G. 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.
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I. 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.

II. 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 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.*

III. 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 twelve (12) quarterly periods [three (3) years] of employment. This requirement will not be satisfied until twelve (12) 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. **Direct Supervision:** For the first year [four (4) quarters] of employment as a Nurse under this Order, RESPONDENT SHALL be directly supervised by a Registered Nurse, if licensed as a Registered Nurse, or by a Licensed Vocational Nurse or a Registered Nurse, if licensed as a Licensed Vocational Nurse. Direct supervision requires another nurse, as applicable, to be working on the same unit as RESPONDENT and immediately available to provide assistance and intervention. RESPONDENT SHALL work only on regularly assigned, identified and predetermined unit(s). RESPONDENT SHALL NOT be employed by a nurse registry, temporary nurse employment agency, hospice, or home health agency. RESPONDENT SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.
- D. **Indirect Supervision:** For the remainder of the probationary period, RESPONDENT SHALL be supervised by a Registered Nurse, if licensed as a Registered Nurse, or by a Licensed Vocational Nurse or a Registered Nurse, if licensed as a Licensed Vocational Nurse, who is on the premises. The supervising nurse is not required to be on the same unit or ward as RESPONDENT, but should be on the facility grounds and readily available to provide assistance and intervention if necessary. The supervising nurse shall have a minimum of two (2) years experience in the same or similar practice

setting to which the Respondent is currently working. RESPONDENT SHALL work only regularly assigned, identified and predetermined unit(s). RESPONDENT SHALL NOT be employed by a nurse registry, temporary nurse employment agency, hospice, or home health agency. RESPONDENT SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

- E. **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 twelve (12) quarters [three (3) years] of employment as a nurse.

IV. DRUG AND ALCOHOL RELATED REQUIREMENTS

- A. While under the terms of this Order, RESPONDENT SHALL abstain from the use of alcohol, tramadol and all controlled substances, except as prescribed by a licensed practitioner for a legitimate purpose. If prescribed, RESPONDENT SHALL CAUSE the licensed practitioner to submit a written report identifying the medication, dosage and the date the medication was prescribed. The report shall be submitted directly to the office of the Board by the prescribing practitioner, within ten (10) days of the date of the prescription. In the event that prescriptions for controlled substances are required for periods of two (2) weeks or longer, the Board may require and RESPONDENT SHALL submit to a pain management and/or chemical dependency evaluation by a Board approved evaluator. The performing evaluator must submit a written report meeting the Board's requirements to the Board's office within thirty (30) days from the Board's request.
- B. While working as a nurse under the terms of this Order, RESPONDENT SHALL submit to random periodic screens for alcohol, tramadol, and controlled substances. The Board will provide instructions on how to enroll in the Board's drug and alcohol testing program following the entry of this Order and screening will begin when Respondent obtains employment and submits the Notification of Employment form to the Board.
- For the first three (3) month [1st quarter] period RESPONDENT works as a nurse under the terms of this Order, random screens shall be performed at least once per week.
 - For the next three (3) month [2nd quarter] period, random screens shall be performed at least twice per month.

- For the next six (6) month period [3rd & 4th quarters], random screens shall be performed at least once per month.
- For the remainder of the probation period, if any, random screens shall be performed at least once every three (3) month quarterly period.

All random screens SHALL BE conducted through urinalysis. Screens obtained through urinalysis are the sole method accepted by the Board. Any test result for a period of time in which the RESPONDENT is not working as a nurse under the terms of this Order will not count towards satisfaction of this requirement. All screens shall be properly monitored and produced in accordance with the Board's policy on Random Drug Testing. A complete chain of custody shall be maintained for each specimen obtained and analyzed. RESPONDENT SHALL be responsible for the costs of all random drug screening during the stipulation/probation period.

Specimens shall be screened for at least the following substances and their metabolites:

Amphetamines	Meperidine
Barbiturates	Methadone
Benzodiazepines	Methaqualone
Cannabinoids	Opiates
Cocaine	Phencyclidine
Ethanol	Propoxyphene
tramadol hydrochloride (Ultram)	

A Board representative may appear at the RESPONDENT'S place of employment at any time during the probation period and require RESPONDENT to produce a specimen for screening.

Consequences of Positive or Missed Screens. Any positive result for which RESPONDENT does not have a valid prescription or refusal to submit to a drug or alcohol screen may subject RESPONDENT to further disciplinary action, including TEMPORARY SUSPENSION pursuant to Section 301.4551, Texas Occupations Code, or REVOCATION of Respondent's license(s) and nurse licensure compact privileges, if any, to practice nursing in the State of Texas. Further, failure to report for a drug screen, excessive dilute specimens, or failure to call in for a drug screen may be considered the same as a positive result or refusal to submit to a drug or alcohol screen.

V. FURTHER COMPLAINTS

If, during the period of probation, an additional allegation, accusation, or petition is reported or filed against the Respondent's license(s), the probationary period shall not expire and shall automatically be extended until the allegation, accusation, or petition has been acted upon by the Board

VI. 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.

VII. SUPERCEDING ORDER

IT IS FURTHER ORDERED that the sanction and conditions of this Order SHALL supercede all previous stipulations required by any Order entered by the Texas Board of Nursing.

Entered this 23rd day of October, 2015.

TEXAS BOARD OF NURSING



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

Attachment: Proposal for Decision; Docket No. 507-15-0260 (April 27, 2015).

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 27, 2015

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. 507-15-0260; Texas Board of Nursing v.
Jessica Joyce Young, LVN, Permanent Cert. No 217893**

Dear Ms. Thomas:

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

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

Sincerely,

A handwritten signature in black ink that reads "Beth Bierman".

Beth Bierman
Administrative Law Judge

BB/eh
Enclosures

xc: Natalie Adelaja, 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) - **VIA INTERAGENCY**
Marc M. Meyer, RN, JD, Law Office of Marc Meyer, P.L.L.C., 33300 Egypt Lane, Suite C600, Magnolia, TX 77354-2878 - **VIA REGULAR MAIL**

TEXAS BOARD OF NURSING,
Petitioner

v.

JESSICA JOYCE YOUNG, LVN,
PERMANENT CERT. NO. 217893,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Board of Nursing (Board) Staff seeks disciplinary action against Respondent Jessica Joyce Young, a licensed vocational nurse (LVN), because she tested positive for metabolites of alcohol when she was required by a Board order to refrain from using alcohol. The Administrative Law Judge (ALJ) recommends that Ms. Young's license be suspended, the suspension be enforced for a period of one year, and thereafter the suspension be probated for three years.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

ALJ Beth Bierman convened the hearing on the merits at the State Office of Administrative Hearings (SOAH) in Austin on March 12, 2015. Neither party contested jurisdiction or notice. Those issues will be addressed only in the findings of fact and conclusions of law. Assistant General Counsel Natalie Adelaja represented Staff, and attorney Marc Meyer represented Ms. Young. The hearing concluded and the record closed that day.

II. BACKGROUND

A. Alleged Violations

In its amended charges, Staff made these allegations against Ms. Young:

Charge I: On or about April 26, 2013, while employed as a Charge Nurse with Colonial Care Center, Schulenburg, Texas, Ms. Young engaged in the intemperate use of Ethyl Glucuronide (EtG) and Ethyl Sulfate (EtS), metabolites of alcohol (ethanol), in that she produced a specimen for a urine drug screen that tested positive for EtG and EtS.¹ Staff asserts that the use of alcohol by a licensed vocational nurse, while subject to call or duty, could impair the nurse's ability to recognize subtle signs, symptoms or changes in the patient's condition, and could impair the nurse's ability to make rational, accurate, and appropriate assessments, judgments, and decisions regarding patient care, thereby placing the patient in potential danger.²

Charge II: On or about May 9, 2013, while employed as a Charge Nurse with Colonial Care Center, Schulenburg, Texas, Ms. Young engaged in the intemperate use of EtG and EtS, metabolites of alcohol (ethanol), in that she produced a specimen for a urine drug screen that tested positive for EtG and EtS.³ Staff asserts that the use of alcohol by a licensed vocational nurse, while subject to call or duty, could impair the nurse's ability to recognize subtle signs, symptoms or changes in the patient's condition, and could impair the nurse's ability to make rational, accurate, and appropriate assessments, judgments, and decisions regarding patient care, thereby placing the patient in potential danger.⁴

Charge III: On or about May 9, 2013, Ms. Young failed to comply with the terms of an Agreed Order issued by the Board on February 12, 2013. In the Agreed Order, Ms. Young agreed to abstain from the consumption of alcohol.⁵

¹ Staff Ex. 10.

² Staff Ex. 4b at 5.

³ Staff Ex. 6.

⁴ Staff Ex. 4b at 5.

⁵ Staff Ex. 4b at 6. Staff did not allege that Ms. Young failed to comply with the Agreed Order when she submitted a specimen on April 26, 2013, that tested positive for alcohol.

B. Agreed Order

Since September 2008, Ms. Young has held vocational nursing license number 217893. During her tenure as a licensee, Ms. Young has been the subject of an Agreed Order issued February 12, 2013.⁶

That order involved a guilty plea by Ms. Young for a Class B misdemeanor offense of possession of marijuana. The Board found there was a serious risk to public health and safety as a result of impaired nursing care due to intemperate use of controlled substances or chemical dependency. Ms. Young received a warning with stipulations.

The Agreed Order required Ms. Young to be supervised by a registered or vocational nurse and to abstain from the consumption of alcohol, Nubain, Stadol, Dalgan, Ultram, or other synthetic opiates, and/or the use of controlled substances except as prescribed by a licensed practitioner for a legitimate purpose. The Agreed Order made Ms. Young subject to random drug and alcohol screens for a one-year probationary period. If her tests produced a positive result or if she failed to report for a screen, then she would be regarded as non-compliant with the order and subject to further discipline.

C. Applicable Laws

The Texas Nursing Practice Act (Act)⁷ authorizes the Board to impose sanctions against a nurse for: (1) "a violation of . . . an order issued under [the Act]";⁸ (2) "[i]ntemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient";⁹ or

⁶ Staff Ex. 9. The Agreed Order was for a period of one year.

⁷ Tex. Occ. Code ch. 301.

⁸ Act § 301.452(b)(1).

⁹ Act § 301.452(b)(9). The Act defines "intemperate use" to include "practicing nursing or being on duty or on call while under the influence of alcohol or drugs." Act § 301.452(a).

(3) “[u]nprofessional or dishonorable conduct that, in the Board’s opinion, is likely to deceive, defraud, or injure a patient or the public.”¹⁰

Through the adoption of rules,¹¹ the Board has determined that unprofessional or dishonorable conduct includes: (1) “[c]areless or repetitive conduct that may endanger a client’s life, health or safety”;¹² (2) an inability to practice safely, demonstrated by “actual or potential inability to practice nursing with reasonable skill and safety to clients by reasons of . . . use of alcohol, drugs, chemicals, or any other mood-altering substances . . .”;¹³ (3) “[u]se of any . . . drug, prescribed or un-prescribed, or . . . alcoholic beverages while on duty or on call and to the extent that such use may impair the nurse’s ability to safely . . . practice [the type of nursing] authorized by the nurse’s license”;¹⁴ (4) “a positive drug screen for a substance for which there is no lawful prescription”;¹⁵ or (5) “[v]iolating an order of the Board. . . .”¹⁶

In seeking an enforced suspension of Ms. Young’s license, Staff also relied on the Board’s policies about the practice of nursing by persons with substance abuse or dependency problems.¹⁷ The Board also relied on its Disciplinary Matrix.¹⁸

¹⁰ Act § 301.452(b)(10).

¹¹ 22 Tex. Admin. Code part 11. Subsequent references to the Board’s rules will be to “Rule ____.”

¹² Rule 217.12(4).

¹³ Rule 217.12(5).

¹⁴ Rule 217.12(10)(A).

¹⁵ Rule 217.12(10)(D).

¹⁶ Rule 217.12(11)(B).

¹⁷ Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder (adopted July 26, 2002, as revised) (Substance Abuse Policy). The Substance Abuse Policy is available on the Board’s website at <http://www.bon.texas.gov/disciplinaryaction/pdfs/chemical.pdf>.

¹⁸ Rule 213.33(b) and on the Board’s website at <http://www.bon.texas.gov/disciplinaryaction/pdfs/discp-matrix.html>.

III. DISCUSSION

Staff's eleven exhibits were admitted. Staff offered the expert testimony of Dr. Matthew Ferrara, Ph.D. Respondent offered 12 exhibits, which were admitted, and Ms. Young testified on her own behalf. Based on its review of the evidence, Staff argued for a one-year enforced suspension of Ms. Young's license to be followed by a three-year probationary period. Ms. Young requested a probated suspension of her license with stipulations.

A. Dr. Ferrara's Testimony

Dr. Ferrara is a clinical and forensic psychologist first licensed by the Texas State Board of Examiners of Psychologists in 1984.¹⁹ He has an extensive clinical background in substance abuse problems. Dr. Ferrara performed a chemical dependency evaluation of Ms. Young on October 9, 2013.²⁰ As part of this evaluation, Dr. Ferrara interviewed Ms. Young, had her complete various psychological tests, and performed a review of documents provided to him by the Board.

In his report, Dr. Ferrara reviewed the circumstances of the events surrounding Ms. Young's possession offense, the Agreed Order, and the issues in 2013 leading to the current disciplinary action against Ms. Young.

According to Dr. Ferrara's report, in or about 2009, Ms. Young was introduced to a co-worker's son, Marcus. At that time, Ms. Young was 23 years old and Marcus was 21 years old. Ms. Young related to the doctor that she and Marcus would smoke marijuana and drink beer together at his mother's house. Marcus also had an addiction to prescription drugs. At that time, Ms. Young worked a 2 to 10 p.m. shift and would smoke a "blunt" with Marcus when she got off work.

¹⁹ Staff Ex. 11.

²⁰ A copy of Dr. Ferrara's evaluation report is in evidence as Staff Ex. 8.

On or about August 6, 2009, Ms. Young and Marcus had consumed a twelve-pack of beer, smoked marijuana, and shared a Xanax. Marcus passed out at the table and Ms. Young went to sleep in another room. The mother found Marcus passed out at about 7 to 8 a.m., woke Ms. Young, and, together with the stepfather, they took his vital signs and then moved Marcus to the couch. At approximately 11 a.m. the mother found Marcus foaming at the mouth. They performed CPR on Marcus, and he was taken to the hospital, but he died as a result of an overdose. Ms. Young was questioned by the police as to what drugs or alcohol she and Marcus had consumed. During the investigation, the police found marijuana in Ms. Young's purse, and she was charged with possession. Toxicology reports indicated that Marcus had methadone, Xanax, Valium, marijuana, and alcohol in his system when he died.

In February 2010, Ms. Young pleaded guilty to the possession charge and received 18 months probation. During her probationary period, she had a positive drug screen for marijuana. She was then required to attend a drug education class.²¹

Dr. Ferrara concluded in his report that:

“[I]t appears Ms. Young has significant risk factors. Specifically, Ms. Young has an alcohol and cannabis abuse disorder and she shows signs of having abused Vicodin and Xanax. Ms. Young's pattern of substance misuse allowed her to become associated with an individual who overdosed and died due to substance abuse. Ms. Young was put on probation for Possession of Marijuana and she used marijuana while on probation she used drugs [sic]. Since being off probation, Ms. Young has used drugs and alcohol more frequently. Ms. Young stated that she has used alcohol since the time she signed the Board Agreed Order. Ms. Young has misused prescription drugs at least once in the past and her job would give her access to prescription drugs which she could misuse. Overall, the results of this evaluation raise serious concerns about Ms. Young's ability to conform her behavior to the Nursing Practice Act, Board rules and regulations, and general accepted standards of nursing practice.

Given the results of the assessment, it is recommended that Ms. Young NOT be allowed to practice nursing or use her nursing licensing. Should Ms. Young want to work as a licensed nurse, she should complete a substance abuse treatment program, with an aftercare component and document that she is drug/alcohol free

²¹ Staff Ex. 8 at 4.

for a period of time. If she is allowed to resume her practice as a nurse, she should have her practice monitored, e.g., TPAPN.”²²

Dr. Ferrara testified that since he had evaluated Ms. Young in October 2013, he still was of the opinion that Ms. Young was presently unfit to practice as a licensed vocational nurse. He believed there was a risk of harm to patients or the public if she were allowed to continue her nursing practice at this time.

Dr. Ferrara admitted that Ms. Young’s work evaluations during 2011-2013 indicated her work performance was outstanding.²³ Nonetheless, he believed Ms. Young’s conduct evidenced warning signs of a progressive substance abuse disease. Dr. Ferrara explained that in the early stages of the disease, problems associated with the disease manifest in the person’s personal life. In the later stages of the disease, the problems flow over into their professional life. In his view, Ms. Young’s substance abuse disorder has entered into her professional life—although not into her practice—because she has had positive alcohol and drug screens while being monitored by the Board and while under court-ordered probation. According to Dr. Ferrara, “[w]e are seeing the early warning signs. . . . It’s just a question of, ‘Can you see the risk and do you want to manage it?’ In my case, I can see [the risk] and I’m recommending we manage it.”²⁴

B. Ms. Young’s Testimony

Ms. Young has worked as a LVN for Colonial Care Center for five years. Her employment with Colonial Care Center encompassed the time during which she was under court-ordered probation in 2010 to 2011, and under the Agreed Order entered in 2013. She has received very positive job evaluations while at Colonial Care Center, and there is no evidence that a patient has suffered any harm while under her care.

²² Staff Ex. 8 at 7. (emphasis in original).

²³ Staff Ex. 5 at 12-14.

²⁴ Digital Recording at 1:00:00; 1:00:30-37.

Ms. Young admitted she had consumed alcohol while under the Agreed Order, but denied she had ever consumed alcohol within 12 hours prior to going to work and denied ever being intoxicated while at work. She contended the last time she had consumed an alcoholic beverage was sometime in January 2015. She explained it was New Year's Eve, she was with friends, and at the time, she was not under any order preventing her from consuming alcohol.

IV. ANALYSIS

Staff alleged that Ms. Young's actions violated §§ 301.452(b)(1), (9), and (10) of the Act and Board Rule §§ 217.12(4), (5), (10)(A), (10)(D) and (11)(B). These alleged violations, contended Staff, make Ms. Young subject to disciplinary action.

A. Alleged Violation of Section 301.452(b)(1) (regarding violation of the Act, Board rule or Board order)

Ms. Young did not dispute that she consumed alcohol while under the Agreed Order. She contends, however, that there is no evidence that a patient has been harmed by her conduct and that the evidence shows she has been an excellent employee. Because Ms. Young consumed alcohol in direct contradiction to the Agreed Order, she violated Act § 301.452(b)(1) and Rule 217.12(11)(B). She is, therefore, subject to disciplinary action by the Board.

The Board's imposition of discipline is guided by the Board's Disciplinary Matrix. The Disciplinary Matrix lists the potential sanctions to which a nurse is subject by section of the Act and then by tiers (usually three) and by two sanction levels. For the three sections of the Act that Ms. Young allegedly violated, the Disciplinary Matrix authorizes the Board to impose sanctions ranging from remedial education to revocation of the license. The determination of the proper sanction is a function of the determination of which sections of the Act Ms. Young violated and which tier and sanction is appropriate, if any.

The Disciplinary Matrix treats as a First Tier offense an "[i]solated failure to comply with [a] procedural Board rule. . . ." or a "[f]ailure to comply with a technical, non-remedial

requirement in a prior Board order. . . .” Ms. Young’s violation was not an isolated failure nor a failure to comply with a non-remedial requirement. A Second Tier Offense is shown by a “[f]ailure to comply with a substantive requirement in a prior Board order. . . .” The ALJ concludes that Ms. Young’s violation should be treated as a Second Tier Offense.

Sanction Level I for a Second Tier Offense provides for a range of penalties, but drug and alcohol violations are treated separately from the other types of violations:

Violations of stipulations that are related to alcohol or drug misuse will result in next higher administrative sanction, . . . [including] an Enforced Suspension until the nurse receives treatment and obtains one (1) year of sobriety and then probation of the license with a fine and drug stipulations for three (3) years.²⁵

Sanction Level II includes suspension or revocation. Whether this higher sanction level should be applied is addressed in the Board’s introduction to its Disciplinary Matrix:

If the person is being disciplined for multiple violations of either Chapter 301, or a rule or order adopted under Chapter 301, the Board shall consider taking a more severe disciplinary action, including revocation of the person’s license, than the disciplinary action that would be taken for a single violation; and

If the person has previously been the subject of disciplinary action by the Board, the Board shall consider taking a more severe disciplinary action, including revocation of the person’s license, than the disciplinary action that would be taken for a person who has not previously been the subject of disciplinary action by the Board.²⁶

Ms. Young’s violation of the Agreed Order subjects her to at least an enforced suspension for the periods shown in the language under Sanction Level I. Ms. Young’s conduct also subjects her to sanctions under Sanction Level II because she has committed multiple violations and she has previously been the subject of disciplinary action by the Board. Because Staff requested an enforced suspension under Sanction Level I, the ALJ concludes that Sanction

²⁵ Disciplinary Matrix at unpaginated 2.

²⁶ Disciplinary Matrix at unpaginated 1.

Level I is appropriate under the facts. Therefore, an enforced suspension of her license is appropriate.

B. Alleged Violation of Section 301.452(b)(9) (regarding intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient)

Staff alleged that Ms. Young violated the Act by the intemperate use of alcohol or drugs ~~and that her use endangered or could have endangered a patient.~~²⁷ Staff also alleged that she violated two related Board rules, one prohibiting the use of drugs or alcohol while on duty or on call²⁸ and the other prohibiting a positive drug screen for a substance for which there is no lawful prescription.²⁹

While Ms. Young did have two positive screens for metabolites of alcohol while under the Agreed Order and while she was employed by Colonial Care Center, there is no evidence that she used alcohol or drugs while on duty or was under the influence of alcohol or drugs while on duty. There is also no evidence that Ms. Young was on call when she provided the two positive screens for alcohol. The phrase "on call" is not defined in the Board's rules. Further, there was no evidence presented as to Ms. Young's on-call responsibilities with Colonial Care Center. There was also no evidence as to whether she worked, or what hours she worked, on the dates the two positive specimens were collected. Therefore, Staff did not show that Ms. Young violated Act § 301.452(b)(9) or Rule 217.12(10)(A).

Staff also did not show that Ms. Young violated Rule 217.12(10)(D). While she had two positive alcohol screens, there is no evidence that Ms. Young presented a positive *drug* screen for a substance for which there is no lawful prescription. To show a violation of that rule, the evidence must prove she had a positive drug screen but no lawful prescription.

²⁷ Act § 301.452(b)(9). "Intemperate use" includes practicing nursing or being on duty or on call while under the influence of alcohol or drugs. Act § 301.452(a).

²⁸ Rule 217.12(10)(A).

²⁹ Rule 217.12(10)(D).

C. Alleged Violation of Section 301.452(b)(10) (regarding unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public)

Ms. Young admitted that she consumed alcohol in contradiction to the Agreed Order. She therefore engaged in unprofessional conduct, in violation of Act § 301.452(b)(10) and Rule 217.12(11)(B).

Staff also alleged that she violated the Board rule pertaining to unprofessional conduct by engaging in careless or repetitive conduct that may endanger a client's life, health, or safety,³⁰ or demonstrating the actual or potential inability to practice nursing with reasonable skill and safety by reason of use of alcohol, drugs, chemicals, or any other mood-altering substances, or as a result of any mental or physical condition.³¹ Because the ALJ finds that she has engaged in unprofessional conduct by consuming alcohol in contradiction to the Agreed Order, the ALJ does not make additional findings against Ms. Young under Rule 217.12.

As with the other violation above, a First Tier Offense analysis does not apply to these facts because her conduct was not an isolated failure to comply with Board rules. A Second Tier Offense requires "serious risk to patient or public safety," and a Third Tier Offense requires proof of resultant harm. Of these two, the Second Tier Offense category is more appropriate under the facts of this case.

For Sanction Level I, the sanctions are warnings or reprimands with stipulations, requiring "abstention from unauthorized use of drugs and alcohol. . ." and random drug testing. This was the sanction level that applied to the Agreed Order. For Sanction Level II, the relevant penalties are suspension or revocation. A suspension must be combined with a fine, remedial education, and other rehabilitative efforts as prescribed by the Board.

³⁰ Rule 217.12(4).

³¹ Rule 217.12(5).

Given that Ms. Young had previously been given a warning with stipulations and ordered to abstain from the use of drugs or alcohol—substantive requirements that she violated—Sanction Level II is the appropriate level to apply in this case.

D. Summary and Recommendation

Ms. Young violated Act §§ 301.452(b)(1) and (10) and Rule 217.12(11)(B). She is, therefore, subject to disciplinary action by the Board. The ALJ concurs with Staff's recommended disciplinary sanctions. Ms. Young knowingly violated a Board order by submitting an alcohol screen that was positive for alcohol. Further, Dr. Ferrara credibly testified that Ms. Young has a potential substance abuse problem that needs to be taken seriously before it progresses further into her nursing practice. Twice she has been ordered not to consume alcohol or drugs during probationary periods and each time she defied those orders. The ALJ recommends, therefore, that Ms. Young receive an enforced one-year suspension, to be followed by a three-year probationary period, to give her a chance to fully rehabilitate.

V. FINDINGS OF FACT

1. Jessica Young holds a vocational nursing license, permanent certificate number 217893, issued by the Texas Board of Nursing (Board).
2. On January 5, 2015, Board Staff mailed a copy of an amended notice of hearing with formal charges to Ms. Young's counsel of record by certified mail, return receipt requested.
3. The amended notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. On March 12, 2015, Administrative Law Judge (ALJ) Beth Bierman convened the hearing on the merits at the William P. Clements Building, 300 West 15th Street, Austin, Texas. Assistant General Counsel Natalie Adelaja represented Staff. Ms. Young appeared and was represented by attorney Marc M. Meyer. The hearing concluded and the record closed that day.

5. On or August 6, 2009, Ms. Young and a friend, Marcus, had consumed a twelve-pack of beer, smoked marijuana, and shared a Xanax. Marcus passed out and died as a result of an overdose. During the investigation, the police found marijuana in Ms. Young's purse and she was charged with possession.
6. In February 2010, Ms. Young pleaded guilty to the possession charge and received 18 months probation. During her court-ordered probationary period, she submitted a positive drug screen for marijuana. She was then required to attend a drug education class.
7. On February 12, 2013, Ms. Young entered into an Agreed Order with the Board. The Agreed Order required Ms. Young to abstain from the consumption of alcohol, Nubain, Stadol, Dalgan, Ultram, or other synthetic opiates, and/or the use of controlled substances except as prescribed by a licensed practitioner for a legitimate purpose. If prescribed medication, Ms. Young was required to submit a written report identifying the medication, dosage, and the prescription date. The Agreed Order also required Ms. Young to submit to random periodic screens for controlled substances, tramadol hydrochloride, and alcohol.
8. On or about April 26, 2013, while employed as a Charge Nurse with Colonial Care Center, Schulenburg, Texas, Ms. Young produced a specimen for a urine drug screen that tested positive for Ethyl Glucuronide (EtG) and Ethyl Sulfate (EtS), metabolites of alcohol (ethanol).
9. On or about May 9, 2013, while employed as a Charge Nurse with Colonial Care Center, Schulenburg, Texas, Ms. Young produced a specimen for a urine drug screen that tested positive for EtG and EtS.
10. Ms. Young failed to comply with the February 12, 2013 Agreed Order by submitting a urine specimen on May 9, 2013, that tested positive to alcohol.

VI. CONCLUSIONS OF LAW

1. The Board has jurisdiction to discipline its licensees. Tex. Occ. Code ch. 301.
2. Ms. Young received proper notice of the hearing. Tex. Gov't Code §§ 2001.051-.052.
3. Staff had the burden of proving the case by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
4. Ms. Young violated an order of the Board, which subjects Ms. Young to disciplinary action under the Texas Occupations Code § 301.452(b)(1).

-
5. Ms. Young engaged in conduct prohibited by Texas Occupations Code § 301.452(b)(10) and 22 Texas Administrative Code § 217.12(11)(B), for which Ms. Young is subject to disciplinary action by the Board.

VII. SANCTION RECOMMENDATION

The ALJ recommends that Ms. Young's license be suspended, the suspension be enforced for a period of one year, and thereafter the suspension be probated for three years.

SIGNED April 27, 2015



BETH BIERMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 217893
ISSUED TO
JESSICA JOYCE YOUNG

§
§
§
§
§

BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

STAFF'S EXCEPTIONS TO PROPOSAL FOR DECISION

COMES NOW, Staff of the Texas Board of Nursing and respectfully files its exceptions

to the PFD issued in this matter on April 27, 2015, as follows:

I.

Staff excepts to Finding of Fact Nine (9), which provides as follows:

“On or about May 9, 2013, while employed as a Charge Nurse with Colonial Care Center, Schulenberg, Texas, Ms. Young produced a specimen for a urine drug screen that tested positive for EtG and EtS.”

Staff respectfully requests that the Administrative Law Judge (ALJ) amend Finding of Fact Nine (9) to include the fact that EtG and EtS are metabolites of alcohol (ethanol), in conformity with Finding of Fact Eight (8).¹

II.

Staff excepts to Finding of Fact Ten (10), which provides as follows:

“Ms. Young failed to comply with the February 12, 2013 Agreed Order by submitting a urine specimen on May 9, 2013, that tested positive for alcohol.”

Staff respectfully requests that the ALJ amend Finding of Fact Ten (10) to include the fact that the Respondent submitted a urine specimen on April 26, 2013, that tested positive for alcohol.

¹ See PFD, at 13.

III.

Staff excepts to the ALJ's lack of a Conclusion of Law in the Proposal for Decision (PFD) that the Respondent's conduct violated section 301.452(b)(9) due to the Respondent engaging in the intemperate use of alcohol.² On page ten (10) of the PFD, the ALJ discusses that Staff did not present evidence that the Respondent was on duty or on call as a nurse when she produced positive drug screens for alcohol on April 26, 2013, and May 9, 2013, and thus, there was no violation of section 301.452(b)(9).³ However, while the definition of intemperate use includes the use of alcohol or drugs while a nurse is subject to call or duty, the statute does not indicate that the definition is exclusive. From the Respondent's testimony, we know that she has been employed as a licensed vocational nurse at Colonial Care Center since 2010.⁴ The Respondent also testified that she consumed alcohol while under the Board Order entered on February 12, 2013, that required her to abstain from the consumption of alcohol.⁵ The Respondent's conduct of consuming alcohol while under the Board order not to do so amounts to intemperate use within the meaning of the statute.

Therefore, Staff respectfully requests the ALJ amend the PFD by adding an additional Conclusion of Law, as follows:

"Ms. Young engaged in the intemperate use of alcohol or drugs, which subjects Ms. Young to disciplinary action under the Texas Occupations Code § 301.452(b)(9)."

² TEX. OCC. CODE § 301.452(b)(9).

³ See PFD, at 10.

⁴ See PFD, at 7.

⁵ See PFD, at 8.

IV.

Staff excepts to the lack of Conclusions of Law that the Respondent's conduct violated Board Rules 217.12(4), (5), and (10)(D). With respect to Board Rule 217.12(4) and (5), the ALJ does not make any findings. Regarding Board Rule 217.12(4), the Respondent engaged in careless or repetitive conduct that could have endangered a client by virtue of the fact that she produced two positive drug screens for alcohol on April 26, 2013, and May 9, 2013, while she was under a Board Order requiring her to abstain from the consumption of alcohol.⁶ Additionally, the Respondent's inability to practice safely within the meaning of Board Rule 217.12(5) was demonstrated by the positive drug screens as well as Dr. Ferrara's chemical dependency evaluation and testimony that concluded the Respondent had a substance use disorder and was unfit to practice as a nurse until she completed a substance abuse treatment program.⁷ Finally, with respect to Board Rule 217.12(10)(D)⁸, in the Analysis section of the PFD, the ALJ discusses that Staff did not show that the Respondent violated Board Rule 217.12(10)(D) because the Respondent did not have a positive drug screen for a substance for which there was no lawful prescription.⁹ The Respondent submitted specimens that resulted positive for alcohol on April 26, 2013, and May 9, 2013. Alcohol is a drug within the meaning of Rule 217.12(10)(D). Furthermore, alcohol is not a drug for which the Respondent could have a lawful prescription. Therefore, the Respondent violated Rule 217.12(10)(D) when she consumed alcohol on the above-mentioned dates.

Therefore, Staff respectfully requests the ALJ amend the PFD by adding language to Conclusion of Law Five (5), as follows:

⁶ 22 TEX. ADMIN. CODE § 217.12(4).

⁷ 22 TEX. ADMIN. CODE § 217.12(5).

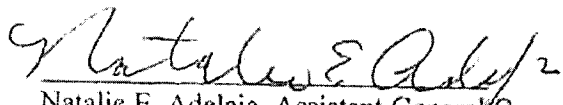
⁸ 22 TEX. ADMIN. CODE § 217.12(10)(D).

⁹ See PFD, at 10.

"Ms. Young engaged in conduct prohibited by Texas Occupations Code § 301.452(b)(10) and 22 Texas Administrative Code § 217.12(4), (5), (11)(B), and (10)(D), for which Ms. Young is subject to disciplinary action by the Board."

Respectfully submitted,

TEXAS BOARD OF NURSING



Natalie E. Adelaja, Assistant General Counsel
State Bar No. 24064715
333 Guadalupe, Tower III, Suite 460
Austin, Texas 78701
P: (512) 305-6880; F: (512) 305-8101

CERTIFICATE OF SERVICE

I hereby certify by my signature below that a true and correct copy of *Staff's Exceptions to the Proposal for Decision* has been provided by Facsimile on May 13, 2015, to:

Jessica Joyce Young
c/o Marc M. Meyer, Attorney
33300 Egypt Lane, Suite C600
Magnolia, TX 77354

Via Facsimile: (866) 839-6920



Natalie E. Adelaja, Assistant General Counsel

DOCKET NO. 507-15-0260

IN THE MATTER OF	§	
PERMANENT CERTIFICATE	§	BEFORE THE TEXAS STATE
NUMBER 217893	§	
ISSUED TO JESSICA JOYCE YOUNG,	§	OFFICE OF ADMINISTRATIVE HEARINGS
RESPONDENT	§	

RESPONDENT'S RESPONSE TO STAFF'S EXCEPTIONS TO THE PROPOSAL FOR DECISION
TO THE HONORABLE ADMINISTRATIVE LAW JUDGE;

NOW COMES the Respondent, Jessica Joyce Young, through her attorney, to file these Responses to Staff's Exceptions to the Proposal for Decision.

REPLY TO STAFF'S EXCEPTIONS

Finding of Fact No. Nine (9): Respondent responds to Staff's Exception to Finding of Fact No. Nine (9) by asserting that the proposed verbiage is unnecessary and redundant. There is no need for the additional verbiage to make clear the meaning that Ethyl Glucuronide and Ethyl Sulfate are metabolites of ethyl alcohol.

Finding of Fact No. Ten (10): Respondent responds to Staff's Exception to Finding of Fact No. Ten (10) by asserting that the April 26th, 2013 laboratory test was negative for alcohol.¹ For substantially the same reasons as contained in the Respondent's exception to Finding of Fact No. Ten (10), the Respondent reasserts that a positive test for Ethyl Glucuronide, which according to testimony may show that the Respondent consumed ethyl alcohol, is not a positive test for alcohol by itself. For this reason, the Respondent respectfully requests that the ALJ deny Staff's Exception to Finding of Fact No. Ten (10) and grant Respondent's request that Finding of Fact No. Ten (10) be struck from the Proposal for Decision.

Missing Conclusions of Law: The Respondent responds to Staff's Exception to the Administrative Law Judge failing to add a Conclusion of Law regarding disciplinary action under Section 301.452(b)(9) of the Texas Occupations Code related to intemperate use by asserting that Staff provides no statutory or case law to support the argument that a positive test

¹ Staff's Exhibit 10, at 5.

for metabolites of alcohol constitutes intemperate use. That is because the case law at the State Office of Administrative Hearings, despite the non-precedential status of prior decisions at SOAH, clearly supports the analysis the Administrative Law Judge has propounded. *In the Matter of Certificate No. 712727 Issued to Jesse R. Rodriguez*, the Administrative Law Judge dismissed multiple charges related to intemperate use, clearly indicating that there must be a nexus between the use of the prohibited substance and the nurse's practice.² In the PFD, the Administrative law Judge clearly articulated a rationale consistent with the persuasive rationale from *Rodriguez* and the Respondent believes that no additional Conclusion of Law is warranted in this case.

Additionally, Staff of the Board of Nursing request that the Administrative Law Judge add a Conclusion of Law related to alleged violations of three Board Rules. Regarding Board rule 217.12(4), Staff asserts that the Respondent engaged in careless or repetitive conduct for a grand total of two positive drug screens. However, Staff presented no additional evidence that such conduct on the part of the Respondent was careless – in fact, Staff presented no evidence that the Respondent was careless in her practice and could not point to any specific careless behavior as a result of the alleged injection of alcohol. And the Respondent asserts that to characterize two episodes as repetitive stretches the meaning of that term beyond all bounds of reasonableness.

With regards to Board Rule 217.12(5), the Board again asserts that the Respondent could not practice safely without presenting evidence that the Respondent was not practicing safely. In fact, as the Administrative Law Judge points out, all of the evidence related to the Respondent's practice was positive. Staff stretches the speculation of Dr. Ferrara in order to try to reach this conclusion, but even Dr. Ferrara had to admit there was no evidence of problems with the patients practice.³

Finally, Staff asserts that just because there is a positive test for metabolites of alcohol, that must be a violation of Board Rule 217.12(10)(D). However, this ignores the plain language

² *In the Matter of Certificate No. 712727 Issued to Jesse R. Rodriguez*, Texas State Office of Administrative Hearings (October 5, 2009), at 16-18.

³ Proposal for Decision, at 7.

of the Rule: "(D) A positive drug screen for which there is no lawful prescription;"⁴ As Staff points out, there is no prescription for alcohol available because it is not required under the law. The Respondent asserts that there can be no violation in this case because 1) alcohol is not a drug within the meaning of this subsection,⁵ and 2) there can be no lawful prescription for alcohol. Therefore, the Respondent asserts that there should be no additional Conclusions of Law added as requested by Staff in their Exceptions to the Proposal for Decision.

PRAYER FOR RELIEF

Respondent, Jessica Joyce Young prays that the honorable Administrative Law Judge:

1. Deny the relief requested by Staff of the Texas Board of Nursing in their exceptions to the PFD;
2. Grant the relief requested by the Respondent in her Exceptions to the PFD; AND
3. Propose to the Texas Board of Nursing in a Decision all relief at law or in equity to which Respondent is entitled.

Respectfully submitted,

By: _____
 Marc M. Meyer
 State Bar No. 24070266
 Attorney for Jessica Joyce Young
 33300 Egypt Lane, Suite C600
 Magnolia, TX 77354-2878
 Tel: 281.259.7575
 Fax: 866.839.6920

⁴ 22 TEXAS ADMINISTRATIVE CODE §217.12(10)(D).

⁵ Cf 22 TEX. ADMIN. CODE §217.12(5). When the Board wants to include alcohol in a Board Rule, they specify alcohol and don't just list it as a drug.

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of May, 2015, a true and correct copy of the above and foregoing document was served on the following individual(s) at the location(s) and in the manner indicated below:

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

Natalie Adelaja, Assistant General Counsel
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, TX 78701
VIA FACSIMILE AT 512-305-8101

Marc M. Meyer

TIME RECEIVED May 15, 2015 4:42:08 PM CDT	REMOTE CSID FAX	DURATION 153	PAGES 6	STATUS Received
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Law Office of Marc Meyer, PLLC

Texas Nursing & EMS Lawyer

Marc M. Meyer, RN, LP, MS, JD Principal Office, Magnolia, TX

May 15th, 2015

To: Docketing, State Office of Administrative Hearings
Natalie Adelaja, Assistant General Counsel. Texas Board of Nursing

Re: ~~In the Matter of Permanent Certificate Number 217893 Issued to Jessica Joyce Young; Exceptions to the PFD~~

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

Marc M. Meyer, RN, JD
Law Office of Marc Meyer, PLLC
33300 Egypt Lane, Suite C600 (please note new suite number)
Magnolia, TX 77354-2878
Office: 281.259.7575
Fax: 866.839.6920
marc@marcmeyerlawfirm.com
www.marcmeyerlawfirm.com

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The sender of this message is licensed to practice law in the State of Texas. Thank you.

DOCKET NO. 507-15-0260

IN THE MATTER OF	§	
PERMANENT CERTIFICATE	§	BEFORE THE TEXAS STATE
NUMBER 217893	§	
ISSUED TO JESSICA JOYCE YOUNG,	§	OFFICE OF ADMINISTRATIVE HEARINGS
RESPONDENT	§	

RESPONDENT'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES the Respondent, Jessica Joyce Young, through her attorney, to file these Exceptions to the Proposal for Decision.

EXCEPTIONS

Finding of Fact No. Ten (10): Respondent excepts to Finding of Fact No. Ten (10) because it is not supported by any evidence. Specifically, Staff offered the laboratory report for May 9th, 2013 drug and alcohol testing, which clearly indicated that the Respondent tested negative for ethyl alcohol.¹ A positive test for Ethyl Glucuronide, which according to testimony may show that the Respondent consumed ethyl alcohol, is not a positive test for alcohol. For this reason, the Respondent objects to Finding of Fact No. Ten (10) in its entirety and respectfully requests that it be struck from the Proposal for Decision.

Recommended Sanction: The Respondent excepts to the Sanction Recommendation asserted by the Administrative Law Judge in that a sanction of a one-year enforced suspension followed by a three year probated suspension is excessive and does not take into account the mitigating evidence presented by the Respondent.

First, the Respondent notes that in her summary and recommendations, the ALJ appears to indicate that the Respondent has been ordered twice by the Board of Nursing to abstain from drugs and alcohol.² However, this does not square with the single agreed order dated February 12, 2013 that was admitted as an exhibit by Staff and acknowledged by the ALJ in the Proposal

¹ Staff's Exhibit 6, at 5.

² Proposal for Decision (PFD), at 12.

for Decision.³ The Respondent does not deny that there were two positive tests for metabolites of alcohol in April and May, 2013, but to characterize the situation as having been twice ordered to abstain from the consumption of alcohol is incorrect. In addition, the Respondent notes that the February 12th, 2013 Board Order was a Warning with stipulations.⁴

Second, while the Board has the authority to raise the level of the sanction for violations of prior orders, going all the way to an enforced suspension bypasses several steps in the disciplinary ladder the Board has set and doesn't consider the considerable mitigating evidence offered by the Respondent. While Dr. Ferrara testified that he felt there was a risk that the Respondent has a potential substance abuse problem that may progress into her nursing practice, he could point to no instances where the Respondent showed that there were problems in her nursing practice for any reason – in fact, he admitted that her work performance appeared to be good⁵ and there was no evidence produced by Staff which indicated that there were any problems with the Respondent's nursing care.⁶ In fact, all of the admitted evidence would seem to indicate that the Respondent's practice history is positive and there is no evidence of actual harm to any patients.⁷ In fact, as the Respondent testified, she continues to work for the same employer, and has done so for five years.⁸

The Respondent also believes the ALJ over interprets portions of the Board's disciplinary matrix in recommending the enforced suspension. First, related to the violation of Subsection 301.452(b)(1), the ALJ quotes a portion of the recommended sanction under Sanction Level I that properly states the recommended sanction ("Violations of Stipulation that are related to alcohol or drug misuse will result in (the) next higher administrative sanction."), but then

³ *Id.*, at 3. See also Staff's Exhibit 9.

⁴ *Id.*

⁵ PFD, at 7.

⁶ See 22 TEXAS ADMINISTRATIVE CODE §213.33(c)(1) & (4).

⁷ Respondent's Exhibits 1–9 & 11 (admitted portions only).

⁸ PFD, at 7.

includes after the ellipses a portion that was contained in the parenthesis as an example.⁹ The Respondent asserts that the example in the parenthesis relates to violations of Board Orders for Peer Assistance programs (TPAPN), which are the equivalent of a probated suspension and not the Warning that the Respondent allegedly violated. This would argue the sanction should be a Reprimand rather than an Enforced Suspension suggested by the ALJ.¹⁰ Even taking into account the ALJ's discussion that a Sanction Level II may be appropriate based on multiple violations and that a suspension may be appropriate, the next higher level sanction would be a Probated Suspension.

Second, while the analysis related to the Subsection 301.452(b)(10) violation does not suffer from the flawed reading of the disciplinary matrix to reach an enforced suspension, the Respondent notes that the ALJ only states that Sanction Level II is the appropriate sanction level.¹¹ The Respondent does not disagree with this analysis, but asserts that the foregoing analysis proposed for the sanction under Subsection (b)(1) also leads to a Probated Suspension under Subsection (b)(10) as well. While the Respondent acknowledges that the Board has the authority to increase the level of the disciplinary action for multiple violations, as noted by the ALJ, the Respondent asserts that consideration of the mitigation presented should lead to consideration of a sanction lesser than an Enforced Suspension.

Finally, when considered as a whole and considering the fact that the Respondent has had exemplary practice history without any episodes of impairment, the Respondent asserts that it would be unjust to take her away from bedside nursing for the risk that her potential substance abuse issues would invade her professional life and affect patients. Dr. Ferrara suggests that he sees the risk and recommends managing the risk. The Respondent argues that the risk can be properly managed with a Probated Suspension without the need for enforcement at this time.

⁹ 22 TEX. ADMIN. CODE §213.33(b) (Texas Board of Nursing Disciplinary Matrix, hereinafter "Matrix"), at 2. (citations to online pdf version, available at http://www.bne.state.tx.us/pdfs/disciplinaryaction_pdfs/discp-matrix.pdf).

¹⁰ See 22 TEX. ADMIN. CODE §213.33(e). Though not clear from the Board's rules, the order of sanctions general in considered to go as follows: Remedial Education; Warning; Reprimand; Suspension (Probated, then Enforced); Revocation.

¹¹ PFD, at 12.

PRAYER FOR RELIEF

Respondent, Jessica Joyce Young prays that the honorable Administrative Law Judge:

1. Strike Finding of Fact No. Ten (10);
 2. Change the Sanction Recommendation to a Probated Suspension, with stipulations to be determined by the Texas Board of Nursing; AND
 3. Propose to the Texas Board of Nursing in a Decision all relief at law or in equity to which Respondent is entitled.
-

Respectfully submitted,

By: 

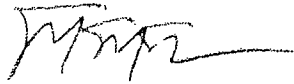
Marc M. Meyer
State Bar No. 24070266
Attorney for Jessica Joyce Young
33300 Egypt Lane, Suite C600
Magnolia, TX 77354-2878
Tel: 281.259.7575
Fax: 866.839.6920

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of May, 2015, a true and correct copy of the above and foregoing document was served on the following individual(s) at the location(s) and in the manner indicated below:

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

Natalie Adelaja, Assistant General Counsel
Texas Board of Nursing
333 Guadalupe, Suite 3-460
Austin, TX 78701
VIA FACSIMILE AT 512-305-8101



Marc M. Meyer

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 8, 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 (512) 305-8101

RE: SOAH Docket No. 507-15-0260; *Texas Board of Nursing v. Jessica J. Young*

Dear Ms. Thomas:

On May 14, 2015, Staff filed exceptions to the Proposal for Decision (PFD). Respondent Jessica J. Young filed exceptions on May 15, 2015. Respondent filed replies to Staff's exceptions on May 29, 2015.

Staff excepts to Findings of Fact Nos. 9 and 10, and further excepts to the lack of Conclusions of Law in the PFD that Respondent violated Texas Occupations Code § 301.452.(b)(9), or Board rules 22 Texas Administrative Code §§ 217.12(4), (5) and (10)(D).

Respondent excepts to Finding of Fact No. 10 and to the ALJ's recommended sanction of enforced suspension for a period of one year.

Finding of Fact No. 9

Staff requests that I amend Finding of Fact No. 9 to include the fact that EtG and EtS are metabolites of alcohol, consistent with Finding of Fact No. 8. Respondent contends the amendment is unnecessary and redundant. Staff's requested amendment is supported by the evidence and should be incorporated into Finding of Fact No. 9.

Amended Finding of Fact No. 9 should read:

9. On or about May 9, 2013, while employed as a Charge Nurse with Colonial Care Center, Schulenburg, Texas, Ms. Young produced a specimen for a urine drug screen that tested positive for EtG and EtS, metabolites of alcohol (ethanol).

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Finding of Fact No. 10

Staff requests that I amend Finding of Fact No. 10 to include that Respondent failed to comply with the Agreed Order by submitting a positive urine specimen on April 26, 2013. Respondent requests that Finding of Fact No. 10 be struck in its entirety because she contends it is not supported by the evidence.

~~As was indicated on page 2 of the PFD, Staff did not allege in its amended formal charges that Ms. Young failed to comply with the Agreed Order when she submitted a positive urine specimen on April 26, 2013. Because Staff did not include this conduct in its amended formal charges, I did not include it in Finding of Fact No. 10. I do not recommend the finding be changed as urged by Staff. However, the finding should be amended to be consistent with Finding of Fact No. 9, for the reasons discussed above.~~

Amended Finding of Fact No. 10 should read:

10. Ms. Young failed to comply with the February 12, 2013 Agreed Order by submitting a urine specimen on May 9, 2013, that tested positive for EtG and EtS, metabolites of alcohol (ethanol).

Staff's Proposed Conclusions of Law

Staff requested inclusion of Conclusions of Law that in the PFD that Respondent violated Texas Occupations Code § 301.452.(b)(9), and Board rules 22 Texas Administrative Code §§ 217.12(4), (5) and (10)(D). For the reasons discussed in Sections IV of the PFD, I did not find that Respondent violated these sections of the code or Board rules. Therefore, I recommend no changes to the PFD to include Staff's proposed Conclusions of Law.

Recommended Sanction

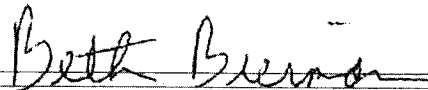
Respondent argues that the sanction I recommended—a one-year enforced suspension followed by a three-year probated suspension—is excessive. The recommended sanction is appropriate and supported by the applicable law and evidence for the reasons stated in the PFD. Therefore, I am not amending the recommended sanction in the PFD.

Respondent further contended that I misstated the evidence when I wrote on page 12 that Respondent had twice been ordered not consume alcoholic beverages or take drugs during a probationary period and twice she had failed to comply with those orders. The PFD is supported by the evidence. Respondent had a positive drug screen while under court-ordered probation, and then admittedly consumed alcohol while under the Agreed Order not to do so.

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Therefore, with the above changes, the PFD is ready for your consideration.

Sincerely,



Beth Bierman
Administrative Law Judge

xc: Natalie E. Adelaja, 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 AND CERTIFIED EVIDENTIARY RECORD VIA INTERAGENCY MAIL
Marc Meyer, Law Office of Marc Meyer, P.L.L.C., 33300 Egypt Lane, Suite C600, Magnolia, TX 77354 - VIA FACSIMILE (866) 839-6920