



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.  
*William O'Malley*  
Executive Director of the Board

**DOCKET NUMBER 507-15-5153**

**IN THE MATTER OF  
PERMANENT CERTIFICATE  
NUMBER 671276**

**ISSUED TO  
HENRY CHUKWUKA ELUEBO**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**OPINION AND ORDER OF THE BOARD**

**TO: HENRY CHUKWUKA ELUEBO  
C/O MARC MEYER  
LAW OFFICE OF MARC MEYER, PLLC  
33300 EGYPT LANE, SUITE C600  
MAGNOLIA, TX 77354**

**MICHAEL J. O'MALLEY  
ADMINISTRATIVE LAW JUDGE  
300 WEST 15TH STREET  
AUSTIN, TEXAS 78701**

At the regularly scheduled public meeting on April 21-22, 2016, 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 response to Staff's exceptions to the PFD; (4) the ALJ's final letter ruling of March 9, 2016; (5) Staff's recommendation that the Board adopt the PFD with changes; and (6) 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 February 16, 2016. The Respondent filed a response to Staff's exceptions to the PFD on March 3, 2016. The ALJ issued a final letter ruling on March 9, 2016, in which he declined to modify his proposed findings of fact and conclusion of law, but did modify his recommended sanction to clarify that the Respondent's license should be subject to a six month enforced suspension, followed by a two year probated suspension, to include remedial education courses deemed appropriate by the Board.

The Board, after review and due consideration of the PFD; Staff's exceptions to the PFD; the Respondent's response to Staff's exceptions to the PFD; the ALJ's final letter ruling of March 9, 2016; 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. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

## Recommendation for Sanction

The Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact or conclusions of law<sup>1</sup>. In this case, the Board finds that a probated suspension of the Respondent's license for a period of two years is the most appropriate sanction.

The Respondent's conduct constitutes a violation of §301.452(b)(3) and (10)<sup>2</sup>. For his violation of §301.452(b)(3), the Board's Disciplinary Guidelines for Criminal Conduct (Guidelines) apply<sup>3</sup>. For the felony offense of *Assault*, where the offense was adjudicated within the last five years, the Board's Guidelines authorize licensure revocation<sup>4</sup>. For his violation of §301.452(b)(10), the Board's Disciplinary Matrix<sup>5</sup> also applies. The Board finds that the Respondent's conduct constitutes a second tier, sanction level II sanction. For a second tier, sanction level II sanction for a violation of §301.452(b)(10), the Board's Disciplinary Matrix authorizes either licensure suspension or revocation. Further, the Matrix states that any probated suspension should be for a minimum of two or three years with monitored and supervised practice, depending on applicable Board policy<sup>6</sup>.

The Board has considered the aggravating and mitigating factors in this case. The Board agrees that the Respondent's criminal offense is serious in nature<sup>7</sup>. The offense is also related to the practice of nursing<sup>8</sup>. Stress inherent in the practice of nursing, as well as the potential combativeness of patients, requires the control of impulses that lead to assaultive offenses<sup>9</sup>. Patients could be vulnerable to similar acts involving an intent to

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<sup>1</sup> 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.).

<sup>2</sup> See adopted Conclusion of Law Number 5.

<sup>3</sup> See 22 Tex. Admin. Code §213.28.

<sup>4</sup> See the Board's Disciplinary Guidelines for Criminal Conduct, for the felony offense of *Assault*.

<sup>5</sup> 22 Tex. Admin. Code §213.33(b).

<sup>6</sup> *Id.*

<sup>7</sup> See adopted Finding of Fact Number 4.

<sup>8</sup> See adopted Conclusion of Law Number 6.

<sup>9</sup> See the Board's Disciplinary Guidelines for Criminal Conduct, for the felony offense of *Assault*.

injure or reckless behavior that would risk injury<sup>10</sup>. Although the ALJ finds the Respondent is unlikely to repeat his crime in the performance of his nursing duties<sup>11</sup>, the Board notes the speculative nature of this finding and re-iterates its concern regarding this type of serious and volatile behavior. The Board, however, also notes the mitigation presented at hearing. First, the Respondent has a solid professional reputation and is a patient and caring nurse<sup>12</sup>. The Respondent has not committed any other crimes, either before or after the crime at issue<sup>13</sup>. Further, the Respondent is currently in compliance with the terms of his probation<sup>14</sup>, although he must still complete the remaining term of his probation<sup>15</sup>, which was originally scheduled to terminate sometime in 2018<sup>16</sup>.

The ALJ has recommended an enforced suspension of the Respondent's license for a period of six months, to be followed by a probationary term of two years<sup>17</sup>. Based on the evidence in the record, however, the Board finds it appropriate to impose a probated suspension against the Respondent's license for a period of two years, with probationary stipulations. This sanction is authorized by the Board's Disciplinary Matrix<sup>18</sup> and appropriately balances the mitigation shown by the Respondent with the seriousness and recency of his criminal offense<sup>19</sup>. Further, the Board finds that the evidence of mitigation in the record appropriately supports a lesser sanction than revocation or an enforced suspension.

However, the Board finds that probationary stipulations are appropriate and necessary for the duration of the Respondent's probated suspension<sup>20</sup>. First, the Board finds that the Respondent should be required to complete remedial education courses in nursing jurisprudence and ethics and critical thinking<sup>21</sup>. These courses are intended to

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<sup>10</sup> *Id.*

<sup>11</sup> See adopted Finding of Fact Number 5.

<sup>12</sup> See adopted Finding of Fact Number 6.

<sup>13</sup> See adopted Finding of Fact Number 7.

<sup>14</sup> See adopted Findings of Fact Numbers 8 and 10.

<sup>15</sup> See adopted Finding of Fact Number 8.

<sup>16</sup> See adopted Finding of Fact Number 2.

<sup>17</sup> See page 9 of the PFD and the ALJ's final letter ruling of March 9, 2016.

<sup>18</sup> See the Board's Disciplinary Matrix for a second tier, sanction level II sanction for a violation of §301.452(b)(10).

<sup>19</sup> The Respondent pled guilty and received a deferred adjudication in July 2014. See adopted Finding of Fact Number 2.

<sup>20</sup> The Board notes that the Respondent is in agreement with some of these probationary stipulations. See Respondent's response to Staff's exceptions to PFD, page 3.

<sup>21</sup> See 22 Tex. Admin. Code §213.33(f), which requires individuals subject to a Board Order to participate in a program of education or counseling prescribed by the Board, which at a minimum, must include a review course in nursing jurisprudence and ethics.

address the Respondent's demonstrated deficiencies and to prevent similar violations from occurring in the future. Further, the Board finds that the Respondent's practice should be indirectly monitored for the duration of the Order. Given the serious nature of the Respondent's criminal behavior, this minimized level of supervision is necessary to ensure patient safety and the Respondent's accountability for the duration of the Order and should be sufficient to detect, and prevent, future violations of the Nursing Practice Act and Board rules from occurring. The Board does not believe a lesser form of supervised practice would provide the necessary safeguards to monitor the Respondent's practice and ensure that any potentially dangerous conduct is timely detected and remediated. The Board further finds that employer notifications are necessary to implement the supervisory requirements of the Order. These requirements are necessary to ensure that the Respondent's employers are aware of the supervisory terms of the Order and that the Respondent complies with them. The Board further finds that regular employer reports must be submitted to the Board to ensure the Respondent's compliance with the terms of the Order, as well as with the minimum standards of nursing practice and professional conduct. Finally, the Board finds that probation reports are necessary until the Respondent is released from probation. This requirement ensures that the Respondent is complying with the terms of his probation until its completion. These provisions are authorized by, and are consistent with, the provisions of 22 Tex. Admin. Code §213.33(e)(6)<sup>22</sup>.

IT IS THEREFORE ORDERED that Registered Nurse License Number 671276, previously issued to HENRY CHUKWUKA ELUEBO, to practice nursing in Texas, is hereby **SUSPENDED** with the suspension **STAYED** and Respondent is hereby placed on **PROBATION**, in accordance with the terms of this Order, for a minimum of two (2) years **AND** until Respondent fulfills the requirements of this Order.

### **TERMS OF ORDER**

#### **I. SANCTION AND APPLICABILITY**

- 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 must 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

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<sup>22</sup> 22 Tex. Admin. Code §213.33(e)(6) provides that a suspension may be enforced or probated and may include reasonable probationary stipulations, such as the completion of remedial education courses, at least two years of supervised practice, limitations of nursing activities, and periodic Board review.

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 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.

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 eight (8) quarterly periods [two (2) years] of employment. This requirement will not be satisfied until eight (8) 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. **Indirect Supervision:** While under the terms of this Order, 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.

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 eight (8) quarters [two (2) years] of employment as a nurse.

## V. PROBATION REPORTS

RESPONDENT SHALL CAUSE his/her probation officer to submit written reports on forms provided to the Respondent by the Board. The reports shall indicate the RESPONDENT'S compliance with the court ordered probation. The reports shall be furnished each and every three (3) month quarterly period until RESPONDENT is released from probation.

## VI. 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.

## VII. 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 21<sup>st</sup> day of April, 2016.

TEXAS BOARD OF NURSING

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

Attachment: Proposal for Decision; Docket No. 507-15-5153 (February 1, 2016).

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

February 1, 2016

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. 507-15-5153; Texas Board of Nursing v. Henry C. Eluebo**

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](http://www.soah.state.tx.us).

Respectfully,

*Michael J. O'Malley*  
Michael J. O'Malley  
Administrative Law Judge

MJO/Ls  
Enclosures

xc: 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; Certified Evidentiary Record) – **VIA INTERAGENCY**  
Marc M. Meyer, Law Office of Marc Meyer, P.L.L.C., 33300 Egypt Lane, Ste. C600, Magnolia, TX 77354-2878 – **VIA REGULAR MAIL**

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SOAH DOCKET NO. 507-15-5153

TEXAS BOARD OF NURSING,  
Petitioner

v.

HENRY CHUKWUKA ELUEBO,  
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Staff (Staff) of the Texas Board of Nursing (Board) brought this action against Henry Chukwuka Eluebo (Respondent) seeking revocation of his license because he pleaded guilty on July 25, 2014, to the third-degree felony offense of Assault Family Violence – Impeding Breath. The Administrative Law Judge (ALJ) recommends that Respondent's license be suspended for six months.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

Matters concerning notice and jurisdiction are undisputed. Therefore, those matters are set out in the findings of fact and conclusions of law without further discussion here.

ALJ Michael J. O'Malley convened the hearing on the merits on November 23, 2015, at the State Office of Administrative Hearings in Austin, Texas. Assistant General Counsel R. Kyle Hensley represented Staff, and Attorney Marc M. Meyer represented Respondent. The record closed on December 22, 2015, after the parties filed post-hearing briefs.

## II. DISCUSSION

### A. Background

On July 25, 2000, the Board licensed Respondent as a Permanent Registered Nurse, License No. RN 671276.<sup>1</sup> On July 25, 2014, Respondent pleaded guilty to the third-degree felony of Assault Family Violence – Impeding Breath in Case No. F-2013-1952-F, *The State of Texas v. Henry Eluebo*, in the 431st Judicial District Court of Denton County, Texas.<sup>2</sup> The district court deferred adjudication of Respondent's guilt, placed Respondent on community supervision for a period of four years, and ordered Respondent to pay a \$750 fine, perform 120 hours of community service, and complete the Batterer's Intervention Program and the Domestic Violence Impact Panel.

### B. Applicable Law

Staff pleaded that Respondent's criminal offense subjects him to disciplinary action under Texas Occupations Code § 301.452(b)(3) and (10). Section 301.452(b)(3) provides that a licensee is subject to disciplinary action for "a conviction for, or placement on deferred adjudication, community service, or deferred disposition for, a felony or for a misdemeanor involving moral turpitude." Section 301.452(b)(10) states that a licensee is subject to disciplinary action for "unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public."

Staff also pleaded that Respondent's crime constitutes grounds for a disciplinary action under 22 Texas Administrative Code § 217.12(6)(C) and (13). This section defines "unprofessional conduct" to include the following:

- (6) Misconduct—actions or conduct that include, but are not limited to . . .

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<sup>1</sup> Staff Ex. 1 at 1.

<sup>2</sup> Staff Ex. 5 at 2.

- (C) causing or permitting physical, emotional abuse or injury or neglect to the client or the public, or failing to report to the employer, appropriate legal authority and/or licensing board.

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

Pursuant to 22 Texas Administrative Code § 217.12(13), criminal conduct constitutes “unprofessional or dishonorable conduct,” and § 213.28 specifies the factors to consider in determining the effect of criminal conduct on the eligibility of a licensee to retain his license.<sup>3</sup> Specifically, to determine the eligibility and fitness for licensure of a licensee with a criminal history, the Board must consider the following relevant factors:

- any felony or misdemeanor involving moral turpitude;
- the nature and seriousness of the crime;
- the relationship of the crime to the purposes for requiring a license to engage in nursing practice;
- the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved;
- the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of nursing practice;
- whether imprisonment followed a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision;
- the extent and nature of the person’s past criminal activity;
- the age of the person when the crime was committed;

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<sup>3</sup> 22 Tex. Admin. Code § 213.28(a).

- the amount of time that has elapsed since the person's last criminal activity;
- the conduct and work activity of the person before and after the criminal activity;
- evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and
- other evidence of the person's present fitness, including letters of recommendation from: prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person; the sheriff or chief of police in the community where the person resides; and any other persons in contact with the convicted person.<sup>4</sup>

### **C. Staff's Allegations and Evidence**

Staff offered court documents showing that on July 25, 2014, Respondent entered a guilty plea to the third-degree felony offense of Assault Family Violence – Impeding Breath. According to Staff's Formal Charges, that action constitutes grounds for disciplinary action in accordance with Texas Occupations Code § 301.452(b)(3) and (10) and is a violation of 22 Texas Administrative Code § 217.12(6)(C) and (13).<sup>5</sup>

### **D. Respondent's Evidence**

Respondent testified that he was not aware at the time he entered his guilty plea to a felony offense of the impact it would have on his nursing license. According to Respondent, he has paid all costs and fines associated with his deferred adjudication, and he represented that he has not been arrested for any criminal behavior prior to or after May 24, 2013. Respondent also testified that he continues to work and support his dependents while on probation. Respondent admitted to the offense but said he reacted when he found out his wife was having an affair. Respondent stated, however, that he completed his required courses in anger management and has been compliant with the conditions of his community supervision.

<sup>4</sup> 22 Tex. Admin. Code § 213.28(c), (e).

<sup>5</sup> Staff Ex. 3.

Respondent called two witnesses to testify about his professional character. Godling Onyegbunwa and Benjamin Momah, both former colleagues of Respondent, testified. Mr. Onyegbunwa worked for Respondent at a home health agency and consulted with him about the home health agency that Mr. Onyegbunwa now operates. Mr. Onyegbunwa testified that Respondent is a very good, patient nurse and is willing to treat the most vulnerable patients.

Mr. Momah testified that he worked with Respondent and supervised him, but he had to terminate Respondent because of his conviction. Mr. Momah testified, however, that he considered Respondent to be a good and caring nurse, and very intelligent. Mr. Momah terminated Respondent only because of his conviction, but he indicated he would re-hire Respondent if he were off probation.

Respondent would also like the Board to consider that there was no material or financial loss to the public; the behavior was not the result of impairment by alcohol or controlled substances; Respondent has not shown lack of fitness to practice nursing because of drugs; Respondent has not shown reason that he lacks the skills to practice nursing; Respondent has been licensed since July 2000; Respondent's behavior did not cause harm to a patient; and Respondent has not been subject to any prior disciplinary action by the Board.<sup>6</sup>

#### **E. ALJ's Analysis**

The ALJ concludes that Staff has met its burden to show that Respondent is subject to disciplinary action under Texas Occupations Code § 301.452(b)(3) and (10), and 22 Texas Administrative Code §§ 217.12(6)(C) and (13). Staff proved that Respondent pleaded guilty to, and was placed on deferred adjudication/community supervision for the third-degree felony offense of Assault Family Violence – Impeding Breath. Furthermore, Respondent does not contest that, based on his plea, the Board has authority to discipline his nursing license under Texas Occupations Code § 301.452(b)(3)<sup>7</sup> and (10).<sup>8</sup>

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<sup>6</sup> Respondent Ex. 1.

<sup>7</sup> A deferred adjudication under Texas Occupations Code § 301.452(b)(3) requires an analysis of the factors under 22 Tex. Admin. Code § 213.28 to determine the appropriate sanction.

Although Respondent agrees that some form of disciplinary action is appropriate, he argues that revocation is not automatic or appropriate in this case. The ALJ agrees that revocation is not automatic for the third-degree felony offense of Assault Family Violence – Impeding Breath under Texas Penal Code § 22.01(b)(2)(B). Section 301.4535(b) of the Texas Occupations Code states that the Board, as appropriate, shall revoke a license on final conviction or a plea of guilty for certain offenses. Section 301.4535(a) does not list Texas Penal Code § 22.01 as one of those offenses.<sup>9</sup> The Board, however, considers Assault Family Violence – Impeding Breath, an offense against a person, as criminal conduct relating to the practice of nursing.<sup>10</sup> Because there is no automatic revocation for Assault Family Violence – Impeding Breath, it is necessary to consider the factors in Board's Disciplinary Guidelines for Criminal Conduct to determine the appropriate sanction. After weighing the mitigating factors, the Board may determine to exercise its discretion in determining an appropriate penalty. Therefore, the ALJ will analyze the factors in 22 Texas Administrative Code § 213.28(d) and (e) (Disciplinary Guidelines for Criminal Conduct) to assist the Board in determining an appropriate penalty.

The crime of Assault Family Violence – Impeding Breath is a serious crime. Although the crime is related to the practice of nursing, the evidence indicates that Respondent is unlikely to repeat his crime in the performance of his nursing duties. Respondent committed his crime in reaction to finding out that his wife was having an affair. Although the affair does not excuse his behavior, the crime was not committed while he was practicing nursing. This situation is unlikely to occur while practicing as a nurse. Furthermore, two of Respondent's colleagues testified that Respondent was a very patient and caring nurse. Both witnesses testified that Respondent's professional character was good. In addition, the district court did not imprison Respondent, but deferred adjudication and gave Respondent four years of community supervision. Respondent has paid all outstanding court costs and only has the remaining time to complete.

<sup>8</sup> Unprofessional conduct under Texas Occupations Code § 301.452(b)(10) is a Tier Two, Sanction Level 1 violation—warning or reprimand with stipulations. 22 Tex. Admin. Code § 213.33(b).

<sup>9</sup> Section 301.4535(a) references Texas Penal Code § 22.02 (Aggravated Assault, a first-degree felony), and section 301.4535(b) requires revocation for final conviction of Aggravated Assault.

<sup>10</sup> 22 Tex. Admin. Code § 213.28(b)(1).

The evidence also shows that Respondent has committed no other criminal offenses either before or after the commission of his crime. Almost three years have elapsed since his offense, and Respondent's conduct and work activity, before and after the criminal activity, appear to be fine. In fact, Respondent has completed anger management classes and has taken action related to his community service project approved by the judge. Respondent has also maintained steady employment and provided for his dependents. Respondent testified that he truly regrets his actions and has taken steps to improve his relationship with his wife.

The ALJ concludes that the evidence weighs against the revocation of Respondent's license and recommends a penalty less than revocation. Based on the evidence, the ALJ recommends a six-month suspension.

### III. FINDINGS OF FACT

1. On July 25, 2000, the Texas Board of Nursing (Board) licensed Henry C. Eluebo (Respondent) as a Permanent Registered Nurse, License No. RN 671276.
2. On July 25, 2014, Respondent pleaded guilty to the third-degree felony of Assault Family Violence – Impeding Breath in Case No. F-2013-1952-F, *The State of Texas v. Henry Eluebo*, in the 431st Judicial District Court of Denton County, Texas. The district court deferred adjudication of Respondent's guilt, placed Respondent on community supervision for a period of four years, and ordered Respondent to pay a \$750 fine, perform 120 hours of community service, and complete the Batterer's Intervention Program and the Domestic Violence Impact Panel.
3. Respondent has completed the conditions of his community supervision, and the only remaining requirement is to satisfy the remaining time of his four-year period of community supervision.
4. The crime of Assault Family Violence – Impeding Breath is a serious crime. Respondent committed his crime in reaction to finding out his wife was having an affair.
5. Respondent is unlikely to repeat his crime in the performance of his nursing duties.
6. Respondent is a very patient and caring nurse with a solid professional reputation.
7. Respondent has committed no other criminal offenses either before or after the commission of his crime.

8. Respondent has paid all outstanding court costs and only has the remaining time to complete.
9. Almost three years have elapsed since his offense, and Respondent's conduct and work activity, before and after the criminal activity, appear to be fine.
10. Respondent has completed anger management classes and has taken action related to his community service project approved by the judge.
11. Respondent has maintained steady employment and provided for his dependents.
12. Respondent truly regrets his actions and has taken steps to improve his relationship with his wife.
13. On January 9, 2015, Staff of the Board sent Respondent a Notice of Formal Charges.
14. On August 12, 2015, Staff mailed a Notice of Hearing to Respondent. 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.
15. Administrative Law Judge Michael J. O'Malley convened the hearing on the merits on November 23, 2015, in Austin, Texas. Assistant General Counsel R. Kyle Hensley represented Staff. Attorney Marc M. Meyers appeared and represented Respondent. The record closed on December 22, 2015.

#### 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 by Texas Occupations Code § 301.454 and by the Administrative Procedure Act, Texas Government 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. Due to Respondent's criminal conduct, he is subject to disciplinary action by the Board. Tex. Occ. Code § 301.452(b)(3), (10); 22 Tex. Admin. Code § 217.12(6)(C) and (13).

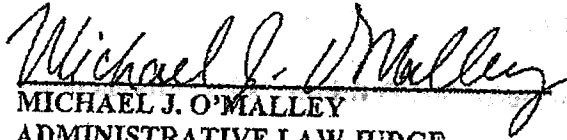


6. The Board considers Respondent's offense, Assault Family Violence – Impeding Breath, as relating to and affecting the practice of nursing. 22 Tex. Admin. Code § 213.28(b)(1).
7. Section 301.4535(b) of the Texas Occupations Code states that the Board, as appropriate, shall revoke a license on final conviction or a plea of guilty for certain offenses. Section 301.4535(a) does not list Texas Penal Code § 22.01, Assault Family Violence – Impeding Breath, as one of those offenses; therefore, this section is not applicable to Respondent.
8. Many of the mitigating factors listed under 22 Texas Administrative Code § 213.28(d) and (e) (Disciplinary Guidelines for Criminal Conduct) apply to Respondent.

#### V. RECOMMENDATION

The ALJ recommends that the Board suspend Respondent's license to practice nursing for six months, given the mitigating factors in support of Respondent.

SIGNED February 1, 2016.

  
MICHAEL J. O'MALLEY  
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

February 16, 2016

Docketing Division  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025

Via Electronic Filing

Re: In the Matter of Permanent Certificate Number **RN 671276**  
Issued to **HENRY CHUKWUKA ELUEBO**  
Docket No. **507-15-5153**

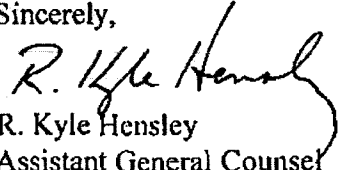
Dear Judge:

Enclosed please find **Petitioner's Exceptions to the Proposal for Decision**.

By copy of this letter, I am forwarding a copy of this document to 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  
Enclosure

cc: Henry Chukwuka Eluebo  
c/o Attorney Marc Meyer  
33300 Egypt Lane, Ste. C600  
Magnolia, Texas 77356

Via Facsimile (866) 839-6920  
and Email [marc@marcmeyerlawfirm.com](mailto:marc@marcmeyerlawfirm.com)

### Members of the Board

Kathleen Shipp, MSN, RN, FNP  
Lubbock, President

Nina Almasy, MSN, RN Austin	Deborah Bell, CLU, ChFC Abilene	Neissa Brown Springmann Austin	Patricia Clapp, BA Dallas	Tamara Cowen, MSN, RN Harlingen	Sheri Crosby, JD, SPHR Dallas
Marilyn Davis, MPA, BSN, RN Sugar Land	Monica Hamby, LVN Amarillo	Kathy Leander-Horn, LVN Groesbury	Mary M. LeBeck, MSN, RN Weatherford	Josefina Lujan, PhD, RN El Paso	Beverley Jean Natali, LVN Bryan

**DOCKET NO. 507-15-5153**

IN THE MATTER OF	§	BEFORE THE
PERMANENT CERTIFICATE	§	
NUMBER RN 671276	§	STATE OFFICE OF
ISSUED TO	§	
HENRY CHUKWUKA ELUEBO	§	ADMINISTRATIVE HEARINGS

**PETITIONER'S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

COMES NOW, STAFF OF THE TEXAS BOARD OF NURSING, Petitioner, in the above entitled and numbered cause to file these Exceptions to the Proposal for Decision.

**FINDING OF FACT NO. FIVE (5)**

Staff excepts to Finding of Fact No. Five (5). To state that as a fact that "Respondent is unlikely to repeat his crime in the performance of his duties" stretches the definition of what is a fact beyond any known definitions. Finding of Fact of No. Five (5) is pure conjecture. Other than his own testimony, Respondent presented no objective evidence as to whether or not he was likely to repeat his crime in the performance of his nursing duties.

The Respondent could have presented evidence of a forensic psychological evaluation delving into his propensity to repeat his criminal behavior, but did not do so. As the Board of Nursing explicitly states in the "Rationale for How Crimes Relate to the Practice of Nursing" for Assault, "Stress inherent in the practice of nursing and possible combativeness of patients in vulnerable states requires the control of impulses that lead to an assaultive offensive." The Respondent has shown no ongoing therapy to understand and control the anger that led to him choking his wife.

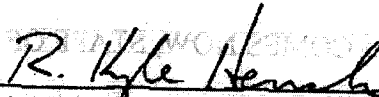
**RECOMMENDATION**

Staff excepts to the Administrative Law Judge's recommendation that the Board suspend the Respondent's license to practice nursing for six months. The ALJ's recommendation fails to adequately take into account the seriousness of the Respondent choking his wife in an angry fit of jealousy. Additionally, the ALJ's analysis leading to his recommendation attempts to isolate the Respondent's criminal behavior to the confines of the Respondent discovering his wife's affair. This ignores the Board's admonition that it is that failure of the "control of impulses to an assaultive offensive" that is the heart of the matter for the Board. The ALJ gives credence to the Respondent's two character witnesses. However, the Respondent failed to present any testimony from law enforcement, probation officials, or, most importantly, his victim.

Based on the evidence presented at the hearing, it is Staff's recommendation that the Respondent's license be revoked. In the alternative, Staff argues that the Respondent's license should be issued an enforced suspension for one year. This one year suspension would be followed with three years of probation during which time the Respondent's practice as a nurse would be monitored by the Board.

The Board of Nursing requests that the ALJ make the changes requested by Petitioner in its  
Exceptions to the Proposal for Decision.

**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

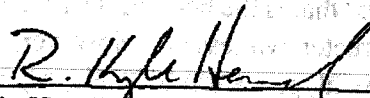
F: (512) 305-8101

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Petitioner's Exceptions to the Proposal for Decision* was sent via facsimile and e-mail, this the 16<sup>th</sup> day of February, 2016, to:

Henry Chukwuka Eluebo  
c/o Attorney Marc Meyer  
33300 Egypt Lane, Ste. C600  
Magnolia, Texas 77356

Via Facsimile (866) 839-6920  
and Email [marc@marcmeyerlawfirm.com](mailto:marc@marcmeyerlawfirm.com)



R. Kyle Hensley, Assistant General Counsel

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# Law Office of Marc Meyer, PLLC

Texas Nursing/EMS Lawyer

March 3rd, 2016

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

Re: In the Matter of Permanent Certificate Number 671276 Issued to Henry Chukwuka Eluebo; Response to Staff's Exceptions to the PFD

Please see the attached response to Staff's Exceptions to the PFD in this matter. If you have any questions, call me at (281) 259-7575.

Marc M. Meyer, RN, JD  
Law Office of Marc Meyer, PLLC  
33300 Egypt Lane, Suite C600  
Magnolia, TX 77354  
Office: (281) 259-7575  
Fax: (866) 839-6920  
marc@marcmeyerlawfirm.com

**DOCKET NO. 507-15-5153**

IN THE MATTER OF	§	
PERMANENT CERTIFICATE	§	BEFORE THE TEXAS STATE
NUMBER RN 671276	§	
ISSUED TO HENRY CHUKWUKA ELUEBO,	§	OFFICE OF ADMINISTRATIVE HEARINGS
RESPONDENT	§	

**RESPONDENT'S RESPONSE TO STAFF'S EXCEPTIONS  
TO THE PROPOSAL FOR DECISION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

NOW COMES Respondent, Henry Chukwuka Eluebo, and files this response to Staff's Exceptions to the Proposal for Decision:

**INTRODUCTION**

In this action, the Texas Board of Nursing (Board) sought to discipline the Respondent's license to practice nursing in the State of Texas because of the Respondent's conviction for Assault Family Violence – Impede Breath, a 3<sup>rd</sup> degree felony offense on or about May 24<sup>th</sup>, 2013. On February 1<sup>st</sup>, 2016, Administrative Law Judge ("ALJ") Michael J. O'Malley issued a Proposal for Decision ("PFD") recommending that the Respondent's license be suspended for six months, but didn't address any other potential stipulations. On February 17<sup>th</sup>, 2015, Board Staff filed exceptions to the proposal for decision, complaining that Finding of Fact No. Five (5) and the Recommended Sanction were incorrect. The Respondent argues that there is no error in Finding of Fact No. Five (5) and that the Recommended Sanction needs additional information to properly provide guidance to the Board.

**RESPONSE TO THE EXCEPTIONS**

**1. Finding of Fact No. Five (5)**

In their exception to Finding of Fact No. Five (5), Staff of the Board of Nursing complain that the ALJ stretches the definition of "fact" beyond "any known definitions" in stating that the "Respondent is unlikely to repeat his crime in the performance of his duties".<sup>1</sup> The Respondent reminds Staff that 1) the ALJ is the sole arbiter of credibility of a witness in a formal administrative hearing under the Administrative Procedures Act;<sup>2</sup> and 2) the burden of proof is not on the

<sup>1</sup> Petitioner's Exceptions to the Proposal for Decision, at 1.

<sup>2</sup> *State v. Mid-South Pavers, Inc.*, 246 S.W.3d 711 (Tex. App.-Austin 2007, pet. denied).

Respondent to present evidence that overwhelmingly supports a finding of fact, only that the finding of fact is supported by the preponderance of the evidence.<sup>3</sup> Staff argues that because the only evidence is the testimony of the Respondent, and there is no forensic psychological evaluation or ongoing therapy, then this finding of fact cannot be true.<sup>4</sup> However, Staff ignores the testimony of the Respondent's witnesses, who testified that they had no issues with his nursing practice.<sup>5</sup> In addition, if Staff believed that the Respondent was a continuing threat, they could have requested a forensic psychological examination themselves if they believed that the Respondent was truly a threat.<sup>6</sup> Therefore, the Respondent believes that the ALJ properly issued Finding of Fact No. Five (5) and this finding of fact should not be changed.

## 2. Recommended Sanction

In their Proposal for Decision, the ALJ simply states that the Respondent's nursing license should be suspended for six months.<sup>7</sup> The Respondent acknowledges that the Board of Nursing has broad latitude in determining the appropriate sanction in any disciplinary matter, but requests that the ALJ issue some additional guidance on appropriate stipulations, including the stipulation for release of the enforced suspension and for the length of the probated suspension after the enforced suspension is complete.

### a. The Enforced Suspension Should End When the Respondent is Released from Criminal Probation

While the Respondent has been convicted of what the ALJ rightly describes as a "a serious crime",<sup>8</sup> the ALJ also pointed out several other factors that caused him to recommend the suspension only be enforced for a few months rather than revoke the Respondent's nursing license.<sup>9</sup> And the Respondent does not disagree that an enforced suspension is likely appropriate

<sup>3</sup> *Granek v. Texas State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.-Austin 2005, no pet.)

<sup>4</sup> Exceptions, at 1.

<sup>5</sup> Proposal for Decision ("PFD"), at

<sup>6</sup> TEXAS OCCUPATIONS CODE § 301.4521. See also 22 TEXAS ADMINISTRATIVE CODE § 213.33(l).

<sup>7</sup> PFD, at 9.

<sup>8</sup> *Id.*, at 7, Finding of Fact No. 4.

<sup>9</sup> *Id.*, at 7 – 8, Findings of Fact Nos. 5–12.

based on the fact he was still on felony probation at the time of the hearing and had only recently applied for early termination of probation, which has not been granted as of this filing. But the Respondent asserts that it is more reasonable, and supported by Board of Nursing precedent, to premise the probation of his suspension on his release from felony probation, or in six months, whichever occurs first.<sup>10</sup> Of course, the Respondent also notes that it is consistent with Board precedent, as evidenced in *Ochoa*, that if he is off of probation by the time the Final Board Order is issued, then his suspension would be fully probated.

**b. Only Certain Remedial Education Courses Should be in the Final Order**

In general, Staff will mention if certain remedial education classes are to be required – here they did not because Staff was arguing for a revocation. However, the Respondent asserts that only two remedial education courses are generally required for these type of disciplinary actions. First, any disciplinary action issued by the Board is required to include a nursing jurisprudence and ethics course.<sup>11</sup> In addition, the Board has been requiring a National Council of State Boards of Nursing learning extension class entitled Critical Thinking Skills.<sup>12</sup> The Respondent asserts that these are the only classes that should be part of his disciplinary order.

**c. The Probated Suspension Should Only Last for Two Years**

While the ALJ mentioned a time certain related to the enforced suspension, there was no discussion of the probated suspension with stipulations that will invariably follow the end of the enforced suspension period. Again, the Respondent points to the decision in *Ochoa*, indicating that a two-year probated suspension would be appropriate based on Board precedent.<sup>13</sup>

**d. Supervision Requirements Should be Minimized Based on Mitigating Factors**

Finally, the Respondent asserts only minimal levels of supervision should be required, especially because of the extensive mitigating evidence in this case. First, as a matter of

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<sup>10</sup> See *In the Matter of Permanent Certificate Number 149249 Issued to Adelaide V. Ochoa*, Final Opinion and Order of the Board, at 2 (October 19, 2012) (pagination does not include the transmittal letter sent with the order to SOAH while filing the Final Board Order with SOAH). In that case, Ms. Ochoa had a conviction for felony DWI and was granted early termination of probation. This early termination of probation, plus other mitigating factors, were cited by the Board as the reasons that the Respondent should receive a fully probated suspension. *Id.*

<sup>11</sup> 22 TEXAS ADMINISTRATIVE CODE 213.33(f).

<sup>12</sup> See e.g. *Ochoa*, at 4.

<sup>13</sup> *Id.*, at 3.



background, the Board has three levels of supervision which it imposes in disciplinary matters above the level of remedial education. Most intensive is direct supervision, which requires a nurse to be supervised by a small group (usually two) of other nurses on the same unit. Next is indirect supervision, which requires that the nurses supervisor/monitor to be at the same facility, but not necessarily on the same unit. Both of these types of supervision generally preclude the ability of the nurse to work in home health, hospice or other areas where the nurse is one-on-one with patients for significant periods of time.

The final form of supervision, incident reporting, seems to be a good fit for the instant case. Incident reporting is the least restrictive type of supervision, basically requiring an employer to report any problems or issues that occur during the period of supervision, but does not require a specific nurse to supervise the Respondent. Based on the mitigating factors noted by the ALJ, there is no evidence in this case that the Respondent is truly a danger to patients, nor is there any evidence that he is likely to repeat his crime while performing nursing duties.<sup>14</sup> Therefore, the Respondent asserts that incident reporting is the proper level of supervision of the Respondent's nursing practice for the period of the Board's order.

#### **PRAYER**

**WHEREFORE, PREMISES CONSIDERED,** The Respondent prays that, upon consideration of these exceptions, the Administrative Law Judge make the no changes to the findings of fact and conclusions of law in the Proposal for Decision, and amend the recommended sanction as follows:

1. Change the recommendation to state that if the enforced suspension shall last until the Respondent obtains early termination of probation OR serves six months of an enforced suspension;
2. Recommend the probated suspension to follow the enforced suspension (if any) lasts no longer than 2 years;
3. Recommend that the Respondent only be required to take "Texas Nursing Jurisprudence and Ethics", and "Critical Thinking Skills" as remedial education courses; and
4. Recommend that the Respondent be required to have only minimal supervision, preferably incident reporting, but no greater than indirect supervision; and

---

<sup>14</sup> PFD, at 8, Finding of Fact No. 5.

Grant any other relief to which the Respondent is entitled from the Texas Board of Nursing.

Respectfully submitted,

By: Marc M Meyer

Marc M. Meyer

Texas Bar No. 24070266

33300 Egypt Lane, Suite C600

Magnolia, TX 77354

Tel. (281) 259-7575

Fax. (866) 839-6920

Attorney for Respondent Henry Chukwuka Eluebo

**CERTIFICATE OF SERVICE**

This is to certify that on the 3<sup>rd</sup> day of February, 2016, 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. 15<sup>th</sup> Street, Suite 504

Austin, TX 78701-1649

VIA FACSIMILE AT 512-322-2061

Kyle Hensley, Assistant General Counsel

Texas Board of Nursing

333 Guadalupe, Suite 3-460

Austin, TX 78701

VIA FASCIMILE AT 512-305-8101

Marc M Meyer

Marc M. Meyer

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

March 9, 2016

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

**VIA FACSIMILE: (512)305-8101**

**RE: Docket No. 507-15-5153; Texas Board of Nursing v. Henry C.  
Eluebo—Exceptions Letter**

Dear Ms. Thomas:

On February 16, 2016, the Staff (Staff) of the Texas Board of Nursing (Board) filed its exceptions to the Proposal for Decision (PFD). On March 3, 2016, Henry Chukwuka Eluebo (Respondent) filed his response to Staff's exceptions.

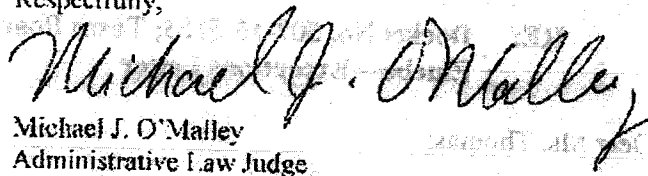
Staff filed two exceptions. Staff filed an exception to Finding of Fact (FOF) No. 5. FOF No. 5 states: "5. Respondent is unlikely to repeat his crime in the performance of his nursing duties." Staff asserts that there is insufficient evidence to support this finding and that it is pure conjecture. Staff maintains that Respondent could have presented a forensic psychological evaluation discussing Respondent's propensity to repeat his criminal activity. Respondent points out that not only did he testify that he is unlikely to repeat his the criminal behavior but two witnesses testified that Respondent is a caring and patient nurse with no issues with his nursing practice.

The Administrative Law Judge (ALJ) finds that FOF No. 5 is supported by a preponderance of the evidence and should not be modified or deleted. First, the evidence shows that Respondent's crime involved a personal matter and had nothing to do with the practice of nursing. Second, two nurses/colleagues testified on behalf of Respondent, and they testified that he was a patient and caring nurse, and he is willing to treat the most vulnerable patients. Third, Respondent has completed courses in anger management as part of his probation. Fourth, Respondent has no criminal history other than this one crime. Finally, Respondent is remorseful for his actions and has taken steps to improve his relationship with his wife.

Staff also excepts to the ALJ's recommended penalty of a six-month enforced suspension. Staff argues that the ALJ did not consider the seriousness of Respondent's crime in his penalty recommendation. Respondent states that the ALJ should consider remedial education courses and probated suspension to follow the enforced suspension.

There was minimal evidence submitted by either party on the recommended penalty/sanction. Staff recommended revocation based on what it believed was a serious crime. Although the ALJ agrees that Assault Family Violence – Impeding Breath is a serious crime, the ALJ also considered the mitigating factors that did not support revocation. Based on the evidence presented, the ALJ found a six-month enforced suspension to be reasonable and appropriate in this case. Respondent supports a two-year probated suspension following the six-month enforced suspension. Therefore, the ALJ supports a two-year probated suspension following the six-month enforced suspension and recognizes the Board's authority to require the probated suspension. If the Board believes that remedial education courses are necessary, the Board has that discretion to require such courses as well.

Respectfully,

  
Michael J. O'Malley  
Administrative Law Judge

MJO/Ls

xc: R. Kyle Hensley, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460,  
Austin, TX 78701 – **VIA FACSIMILE: (512)305-8101**  
Marc M. Meyer, Law Office of Marc Meyer, P.L.L.C., 33300 Egypt Lane, Ste. C600, Magnolia, TX  
77354-2878 – **VIA FACSIMILE: (866)839-6920**