



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.
Michelle P. Thomas
Executive Director of the Board

DOCKET NUMBER 507-16-0935

**IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBERS 160665 and 656200,
ISSUED TO
HUGH COLE**

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**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**

OPINION AND ORDER OF THE BOARD

**TO: HUGH COLE
C/O MARC MEYER
LAW OFFICE OF MARC MEYER, PLLC
33300 EGYPT LANE, SUITE C600
MAGNOLIA, TX 77354-2878**

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

At the regularly scheduled public meeting on July 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) the ALJ's final letter ruling of May 26, 2016; (4) Staff's recommendation that the Board adopt the PFD with changes; and (5) Respondent's recommendation to the Board regarding the PFD and order, if any.

The Board finds that after proper and timely notice was given, the above styled case was heard by an Administrative Law Judge (ALJ) who made and filed a PFD containing the ALJ's findings of facts and conclusions of law. The PFD was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. Staff filed exceptions to the PFD on April 4, 2016. The Respondent did not file any exceptions to the PFD nor did he file a response to Staff's exceptions to the PFD. On May 26, 2016, the ALJ issued her final letter ruling, in which she recommended amendments to several proposed Findings of Fact and Conclusions of Law to correct typographical errors. However, the ALJ declined to make any changes to her recommended sanction.

The Board, after review and due consideration of the PFD; Staff's exceptions to the PFD; the ALJ's final letter ruling of May 26, 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, except for proposed Finding of Fact Number 3 and Conclusions of Law Numbers 5 and 7, which are modified and adopted as stated herein, and proposed Conclusions of Law Numbers 9 and 10, which are not adopted by the Board, but are re-designated as recommendations. 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. Section 2001.058(e)(3) further authorizes the Board to change a finding of fact or conclusion of law to correct technical errors.

Proposed Finding of Fact Number 3

Proposed Finding of Fact Number 3 contains a typographical error regarding the effective date of the Order of Conditional Eligibility issued to the Respondent. Consistent with the ALJ's letter ruling of May 26, 2016, the Board agrees that the proposed finding should be modified to correct this error.

Under the authority of §2001.058(e)(3), IT IS, THEREFORE ORDERED THAT FINDING OF FACT 3 is MODIFIED and ADOPTED as follows:

Adopted Finding of Fact Number 3

3. On October 13, 1998, the Board granted Mr. Cole an Order of Conditional Eligibility allowing him to sit for the National Council Licensure Examination for Registered Nurses, and if he passed the examination, issuing him a coded license with stipulations, none of which specifically addressed his alcohol consumption.

Proposed Conclusion of Law 5

Proposed Conclusion of Law Number 5 contains a typographical error in the Board's rule citation. Further, an appropriate corresponding reference to the Nursing Practice Act is omitted from the proposed conclusion of law. Consistent with the ALJ's letter ruling of May 26, 2016, the Board agrees that the proposed conclusion should be modified to correct these errors.

Under the authority of §2001.058(e)(1) & (3), IT IS, THEREFORE ORDERED THAT CONCLUSION OF LAW 5 is MODIFIED and ADOPTED as follows:

Adopted Conclusion of Law 5

5. Mr. Cole's conduct that resulted in his 2013 DWI conviction constitutes unprofessional conduct. 22 Tex. Admin. Code §217.12(13); Tex. Occ. Code §301.452(b)(10).

Proposed Conclusion of Law 7

Proposed Conclusion of Law Number 7 contains a typographical error in the Board's rule citation. Consistent with the ALJ's letter ruling of May 26, 2016, the Board agrees that the proposed conclusion should be modified to correct this error.

Under the authority of §2001.058(e)(3), IT IS, THEREFORE ORDERED THAT

CONCLUSION OF LAW 7 is MODIFIED and ADOPTED as follows:

Adopted Conclusion of Law 7

7. The evidence presented does not establish by a preponderance that by driving without a valid license in 2014, Mr. Cole engaged in unprofessional or dishonorable conduct. 22 Tex. Admin. Code §217.12(13).

Proposed Conclusions of Law Numbers 9 and 10 and Recommendation for Sanction

The ALJ states in proposed Conclusions of Law Numbers 9 and 10 that the Respondent should be disciplined as first tier, sanction level II violations of §301.452(b)(2) and (10) pursuant to the Board's Disciplinary Matrix. Although labeled as proposed conclusion of laws, proposed Conclusions of Law Numbers 9 and 10 are part of the ALJ's ultimate sanction recommendation and support the ALJs' recommended sanction in this matter. A recommendation for sanction is not a proper conclusion of law. As such, the Board re-designates proposed Conclusions of Law Numbers 9 and 10 as part of the ALJ's recommendation and declines to adopt them as conclusion of laws.²

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 law,³ the Board agrees with the ALJ that the Respondent's licenses should be subject to an enforced suspension.⁴

The Board finds that the Respondent's conduct warrants a first tier, sanction level II sanction for his violation of Tex. Occ. Code §301.452(b)(2) and a second tier, sanction level II sanction for his violation of Tex. Occ. Code §301.452(b)(10). For a first tier, sanction level II sanction for a violation of §301.452(b)(2), the Board's Disciplinary Matrix⁵

² The Board notes the inconsistency in proposed Conclusions of Law Numbers 9 and 10 and the ALJ's analysis and discussion on pages 15-16 of the PFD, as they relate to the appropriate tier and sanction level for Respondent's violations of Tex. Occ. Code §301.452(b)(2) and (10). Nonetheless, the Board finds that the Respondent's conduct warrants a first tier, sanction level II sanction for his violation of Tex. Occ. Code §301.452(b)(2) and a second tier, sanction level II sanction for his violation of Tex. Occ. Code §301.452(b)(10).

³ 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.).

⁴ See pages 16 and 19 of the PFD.

⁵ 22 Tex. Admin. Code §213.33(b).

authorizes licensure revocation. 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. A suspension may be probated or enforced. Further, if the individual's criminal conduct involves alcohol, the suspension may be enforced until the individual completes treatment and shows one year of verifiable sobriety. Probationary stipulations may then follow the probated suspension. Further, and pursuant to 22 Tex. Admin. Code §213.28(c),⁶ the Board's Guidelines for Criminal Conduct authorize a variety of sanctions for repetitive alcohol related conduct, such as a second or third *Driving While Intoxicated* offense, including licensure suspension or revocation.

In determining the appropriate sanction in this case, the Board must consider the aggravating and mitigating factors. It is undisputed that the Respondent was convicted of *Driving While Intoxicated* in 2014.⁷ Further, it is undisputed that the Respondent was previously convicted in 1990 and 1991 of two separate *Driving While Intoxicated* offenses.⁸ It is true that the Respondent's prior convictions occurred more than twenty years ago. However, like the ALJ, the Board finds the Respondent's recent conviction, coupled with his inability to comply with his probationary requirement to abstain while on probation, raises doubt about his ability to make good choices when consuming alcoholic beverages.⁹ The Respondent testified that he has abstained from alcohol since August 2014,¹⁰ but the Respondent has not participated in any treatment program, and does not have any system to verify evidence of ongoing sobriety.¹¹ The Respondent's recent criminal conduct is recent in time, serious in nature, and exposed the public to the risk of serious harm.¹² Further, the Respondent's failure to truthfully disclose his criminal history on his 2013 renewal application evidences, at a minimum, a lack of accountability and good judgment.¹³ Further, the Board views an individual's violations of the Nursing Practice Act (NPA) and/or Board rules collectively. If multiple violations of the NPA and/or Board rules are present in a single case, the Board considers the most severe sanction recommended for anyone of the individual violations.¹⁴ Additionally, when an individual has been previously disciplined or is being disciplined for more than one violation of the NPA and/or Board rules,

⁶ Pursuant to 22 Tex. Admin. Code §213.28(c), the Board shall utilize the Disciplinary Guidelines for Criminal Conduct in all disciplinary matters involving an individual's criminal history. For the misdemeanor offense of *Driving While Intoxicated* (second or third), where the judicial order occurred within the last five years, the Board's Guidelines for Criminal Conduct recommend either licensure suspension or revocation if the Respondent is unable to provide verifiable evidence of successful completion of treatment and twelve consecutive months of sobriety.

⁷ See adopted Finding of Fact Number 6.

⁸ See adopted Finding of Fact Number 4.

⁹ See page 16 of the PFD.

¹⁰ See *id.*

¹¹ See pages 15-16 of the PFD.

¹² See page 16 of the PFD.

¹³ See *id.*

¹⁴ 22 Tex. Admin. Code §213.33(b).

the Board is statutorily required¹⁵ to consider taking a more severe action than it would otherwise impose.

The Board has also considered the mitigating factors in this matter. First, since the issuance of the Order of Conditional Eligibility in 1998, the Respondent has worked as a nurse without further incident.¹⁶ The Respondent has provided excellent nursing care and, while at work, exhibited good professional character.¹⁷ No evidence of actual damages was presented and the Respondent testified that he has abstained from alcohol consumption since August 2014.¹⁸

Having considered the aggravating and mitigating factors, the Board agrees with the ALJ that an enforced suspension is the most appropriate sanction in this case. Like the ALJ, the Board finds it significant that the Respondent was unable to stop drinking alcoholic beverages, despite the threat of having his probation revoked and spending 18 months in jail.¹⁹ This conduct supports the Board's concerns that the Respondent may have alcohol dependency issues.²⁰ Further, the Respondent has not completed a treatment program and has not provided verifiable evidence of ongoing sobriety.²¹ As such, the Board finds that the Respondent's licenses should be suspended until the Respondent completes a chemical dependency evaluation that indicates he is safe to return to practice and has obtained twelve consecutive months of sobriety. Following such suspension, the Board finds that the Respondent should be subject to three years of probationary stipulations. This sanction is supported by the record and is consistent with the Board's Disciplinary Matrix, Guidelines for Criminal Conduct, and its rules, including §213.28 and §213.33.

As part of the probationary stipulations, the Board finds that the Respondent should be required to complete remedial education courses in nursing jurisprudence and ethics and critical thinking²². These courses are designed to reiterate the rules and regulations applicable to the Respondent's practice and prevent future violations of the NPA and Board rules from occurring. The Board further finds that the Respondent's practice should be restricted for the first year of the Order and subject to supervision and Board monitoring to ensure the Respondent's compliance with the NPA and Board rules and to ensure safe nursing practice. Further, the Board finds that employer notifications and quarterly reporting are necessary to monitor the Respondent's compliance with the requirements of

¹⁵ See Tex. Occ. Code §301.4531.

¹⁶ See adopted Finding of Fact Number 15 and page 15 of the PFD.

¹⁷ See adopted Finding of Fact Number 16 and pages 13-14 of the PFD.

¹⁸ See page 15 of the PFD.

¹⁹ See pages 13 and 15 of the PFD.

²⁰ See page 15 of the PFD.

²¹ See page 16 of the PFD.

²² 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.

the Order. Finally, the Board finds that abstention and random drug screening are necessary for the duration of the Order. Based upon the Respondent's history and recent criminal conduct involving alcohol, the Board finds these provisions to be warranted to ensure safe nursing practice. These provisions are authorized by, and are consistent with, the provisions of 22 Tex. Admin. Code §213.33(e)(6).²³

IT IS THEREFORE ORDERED, that Registered Nurse License Number 656200 and Vocational Nurse License Number 160665, previously issued to **HUGH COLE**, to practice nursing in Texas are hereby **SUSPENDED** and said suspension is **ENFORCED** until Respondent meets all of the requirements in paragraphs A-C below:

- A. **RESPONDENT shall undergo a chemical dependency evaluation that meets the requirements specified by the Board** in its adopted Guidelines for Physical and Psychological Evaluations, which may be found at the following link: <http://www.bon.texas.gov/pdfs/eval-guidelines.pdf>. **RESPONDENT SHALL** notify the performing evaluator of this Order of the Board. **RESPONDENT** shall cause the performing evaluator to send a report of the evaluation to the Board's office. **RESPONDENT SHALL** comply with any recommendations made by the evaluator for therapy or other follow-up, in addition to the probationary terms stated herein. If the evaluation states that the **RESPONDENT** currently lacks fitness to practice nursing, **RESPONDENT'S** license(s) to practice nursing **SHALL** remain **SUSPENDED** until such time as the same evaluator deems the **RESPONDENT** safe to return to direct patient care.
- B. **RESPONDENT** shall complete an appropriate treatment program approved by the Board and provide documentation of successful completion.
- C. **RESPONDENT** shall obtain 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

²³ 22 Tex. Admin. Code §213.33(e)(6) provides that a suspension, either enforced or probated, 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.

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.
- 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.

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 courses **within one (1) year of the suspension being stayed, unless otherwise specifically indicated:**

- A. **A 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 in the State of Texas, providing direct patient care in a clinical 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. **No Night or Rotating Shifts, Overtime, or On-Call:** For the first year [four (4) quarters] of employment as a Nurse under this Order, RESPONDENT SHALL NOT practice as a nurse on the night shift, rotate shifts, work overtime, accept on-call assignments, or be used

for coverage on any unit other than the identified, predetermined unit(s) to which Respondent is regularly assigned.

- E. No Critical Care:** For the first year [four (4) quarters] of employment as a Nurse under this Order, RESPONDENT SHALL NOT practice as a nurse in any critical care area. Critical care areas include, but are not limited to, intensive care units, emergency rooms, operating rooms, telemetry units, recovery rooms, and labor and delivery units.
- F. No Administration of Controlled Medications:** For the first year [four (4) quarters] of employment as a Nurse under this Order, RESPONDENT SHALL NOT administer or have any contact with controlled substances, Nubain, Stadol, Dalgan, Ultram, Propofol, or other synthetic opiates.
- G. Indirect Supervision:** For the remainder of the probation 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.
- H. 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, 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.

Entered this 21st day of July, 2016.

TEXAS BOARD OF NURSING


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

Attachment: Proposal for Decision; Docket No. 507-16-0935 (March 24, 2016)

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 24, 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. 507-16-0935; Texas Board of Nursing v. Hugh Cole

Dear Ms. Thomas:

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

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

Sincerely,

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

Catherine C. Egan
Administrative Law Judge

CCE/ap
Enclosures

xc: Jessica Lance, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – VIA INTERAGENCY
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) – VIA INTERAGENCY
Marc Meyer, Law Office of Marc Meyer, PLLC, 33300 Egypt Lane, Suite C600, Magnolia, TX 77354-2878 – VIA REGULAR MAIL

SOAH DOCKET NO. 507-16-0935

TEXAS BOARD OF NURSING,
Petitioner

v.

HUGH COLE,
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 disciplinary action against Hugh Cole (Respondent), a licensed vocational nurse (LVN) and registered nurse (RN), pursuant to Texas Occupations Code (Code) § 301.452(b)(2) and(10) for alleged violations of the Code and Board rules.¹ According to Staff, Mr. Cole engaged in unprofessional or dishonorable conduct by (1) driving while intoxicated (DWI) on September 19, 2013, (2) failing to disclose his conviction for this DWI on his 2014 renewal application, and (3) driving without a valid driver's license in 2014. Staff also maintains that Mr. Cole's failure to disclose his 2013 DWI conviction on his 2014 renewal application constitutes fraud or deceit in his attempt to renew his nursing license. After considering the evidence and applicable law, the Administrative Law Judge (ALJ) finds that the evidence establishes two of Staff's three allegations and recommends that the Board impose an enforced suspension and require Mr. Cole to undergo a chemical dependence evaluation.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

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

On January 25, 2016, ALJ Catherine C. Egan convened the hearing on the merits in the State Office of Administrative Hearings (SOAH) in Austin, Texas. Assistant General Counsels

¹ The Board's rules are codified at 22 Texas Administrative Code chapter 211 *et seq.* For convenience, a Board rule may be referred to as "Board Rule ____."

Jessica Lance and R. Kyle Hensley represented Staff. Attorney Marc Meyer represented Mr. Cole. The record closed at the conclusion of the hearing.

II. APPLICABLE LAW

The Board is authorized to take disciplinary action against a nurse who has engaged in “fraud or deceit in procuring or attempting to procure a license to practice professional nursing and vocational nursing,” or who has engaged in “unprofessional or dishonorable conduct . . . that is likely to deceive, defraud, or injure a patient or the public.”²

The Board’s rules define “unprofessional conduct” to include:

- 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.³
- Failing to answer specific questions or providing false or misleading answers that would have affected the decision to license, employ, certify, or otherwise utilize a nurse.⁴

If a nurse has violated the Code or a Board rule, the Board is authorized to impose disciplinary sanctions ranging from the issuance of a written warning to revocation of a person’s license. The criteria utilized by the Board to determine the effect a criminal history has on a nurse’s licensure is set out in Board Rule 213.28. When Mr. Cole committed his 2013 DWI, the Board’s rule provided that “Driving While Intoxicated (2 or more counts)” was a criminal offense that directly relates to and affects the practice of nursing, because nurses who abuse alcohol “may have impaired judgment while caring for patients and are at risk of harming patients.” Repeated DWI

² Tex. Occ. Code § 301.452(b)(2) and (10).

³ 22 Tex. Admin. Code § 217.12(13).

⁴ 22 Tex. Admin. Code § 217.12(6)(I).

violations “suggest a willingness to continue in reckless and dangerous conduct, or an unwillingness to take appropriate corrective measures, despite previous disciplinary action by the state.”⁵

Chapter 53 of the Code authorizes licensing agencies, including the Board, to consider a person’s criminal conviction in determining whether to deny, suspend, or revoke a license, if the crime directly relates to the licensed occupation. A license can still be suspended or revoked, or a person can be denied a license, if the crime is not directly related to the duties and responsibilities of the occupation when the crime was committed less than five years before the date the person applies for licensure for the offense to be considered directly related to the occupation.⁶ The factors for the licensing authority to consider include:

- the nature and seriousness of the crime;
- the relationship of the crime to the purpose for requiring a license to engage in the occupation;
- the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as this in which the person previously had been involved; and
- the relationship of the crime to the ability capacity or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.⁷

To determine a licensee’s fitness to perform the duties and discharge the responsibilities of the licensed occupation, the licensing agency shall consider the following factors:

- the extent and nature of the person’s past criminal activity;
- the age of the person when the crime was committed;

⁵ 22 Tex. Admin. Code § 213.28(b)(5)(A)(ii) was repealed on October 29, 2015, and replaced by 22 TAC § 213.28(b)(5)(G).

⁶ Tex. Occ. Code § 53.021(a)(1).

⁷ Tex. Occ. Code § 53.022.

- 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 a person's fitness, including letters of recommendations⁸

The licensee has the responsibility to furnish, if any, letters of recommendation and to show proof that the licensee has (1) maintained a record of steady employment; (2) supported any dependents; (3) maintained a record of good conduct; and (4) paid all outstanding court costs, supervision fees, fines, and restitution ordered.⁹

The Board has created Disciplinary Guidelines for Criminal Conduct (Guidelines)¹⁰ that, together with the factors set out in Board Rule 213.28(e), must be considered in conjunction with the recommended sanctions in the Board's Disciplinary Matrix (Matrix)¹¹ in determining the appropriate sanction to impose in disciplinary matters. In 2013, when Mr. Cole committed the DWI offense, Board Rule 213.28 identified factors that repeat many of those set out in chapter 53 of the Code for the Board to consider in evaluating whether a criminal offense rendered the licensee ineligible for renewal of licensure. These factors include, among others: the nature and seriousness of the crime; the extent and nature of the person's past criminal activity; the amount of time that has elapsed since the person's last criminal activity; the person's conduct and work activity before and after the criminal activity; and evidence of any rehabilitation or rehabilitative efforts.¹²

⁸ Tex. Occ. Code § 53.023.

⁹ Tex. Occ. Code § 53.024.

¹⁰ 22 Tex. Admin. Code § 213.28(d). 38 TexReg 3152 was published on May 17, 2013. The language regarding a second and third DWI violation contained in the current Disciplinary Guidelines for Criminal Conduct is essentially the same as that in 2013.

¹¹ 22 Tex. Admin. Code § 213.33(b).

¹² 22 Tex. Admin. Code § 213.28(d) and (e) was repealed on October 29, 2015, and replaced it with a revised version of the Board Rule 213.28.

The Guidelines provides a recommended sanction or range of sanctions for each criminal offense. According to the Guidelines, a second misdemeanor DWI offense for which a judicial order was issued less than 5 years ago is directly related to the practice of nursing because nurses who abuse alcohol may have impaired judgment and are at risk for harming patients and/or the public. For a second misdemeanor offense, the nurse must present verifiable evidence of the successful completion of treatment and 12 consecutive months of sobriety.¹³ If there is no proof of the completion of treatment and 12 consecutive months of sobriety, revocation or suspension is warranted until the individual is able to provide such proof.¹⁴

In addition, Board Rule 213.33, which includes the Matrix, identifies the factors the Board and SOAH “shall utilize . . . in all disciplinary and eligibility matters.”¹⁵ The Matrix sets out the disciplinary actions applicable for violations of the Code and Board rules and generally classifies offenses as first, second, or third tier, and as a sanction level I or level II. The sanction level is determined by consideration of relevant aggravating and mitigating circumstances.

According to the Matrix, a violation of Code § 301.452(b)(2) for failing to honestly and accurately provide information to the Board that may have affected the renewal of a license is a first tier offense. Aggravating circumstances include committing multiple offenses, the relevance or seriousness of the hidden information, and whether the disclosure of such hidden information would have prevented licensure. Mitigating factors include the seriousness of the hidden information, the age of the licensee at the time of the violation, and the licensee’s “justified reliance upon advice of legal counsel.”¹⁶ A sanction level I violation calls for remedial education and/or a fine of \$250 or

¹³ 22 Tex. Admin Code § 213.28(m)(5) refers to the Disciplinary Guidelines for Criminal Conduct approved by the Board and published in the *Texas Register* (38 TexReg 3152) on May 17, 2013. This statute was repealed on October 29, 2015. However, the language regarding a second and third DWI violation contained in the current Disciplinary Guidelines for Criminal Conduct found at 22 Tex. Admin. Code § 213.28(d) is essentially the same as that found in the *Texas Register* regarding the Board’s Disciplinary Guidelines in 2013.

¹⁴ 22 Tex. Admin. Code § 213.28(d).

¹⁵ 22 Tex. Admin. Code § 213.33(b). The Board first adopted the Matrix by rule in October 2007 (*see* 35 Tex. Reg. 1210 (2010) (discussing history of the Matrix)). The Matrix in its present graphic form was first adopted to be effective February 12, 2010.

¹⁶ 22 Tex. Admin. Code § 213.33(b).

more for each additional violation. A sanction level II violation warrants revocation of the nurse's license.¹⁷

The Matrix classifies unprofessional or dishonorable conduct in violation of Code § 301.452(b)(10) as a first tier offense if it is an isolated failure to comply with Board rules with no adverse patient effects.¹⁸ If the licensee repeats the offense, the matrix classifies it as a second tier offense. A sanction level I, second tier offense includes, among other things, a warning with stipulations. A sanction level II, second tier offense, warrants either a suspension or revocation.¹⁹ If the violation includes misdemeanor conduct involving alcohol, at a minimum, the suspension must remain in place until the licensee presents verifiable evidence of successful completion of treatment and 12 consecutive months of sobriety.²⁰

III. DISCUSSION

Staff relied on its documentary evidence (eleven exhibits) and Mr. Cole's testimony. Aside from his own testimony, Mr. Cole called Ron Russette, RN, and Eric Jacobsen, M.D., to testify and presented one exhibit.²¹

¹⁷ 22 Tex. Admin. Code § 213.33(b).

¹⁸ The aggravating circumstances for violations under Code § 301.452(b)(10) include: "number of events, level of material or financial gain, actual harm, severity of harm, prior complaints or discipline for similar conduct, patient vulnerability, involvement of or impairment by alcohol, illegal drugs, or controlled substances or prescription medications, criminal conduct." Mitigating circumstances include: "voluntary participation in established or approved remediation or rehabilitation program and demonstrated competency, full restitution paid." 22 Tex. Admin. Code § 213.33(b).

¹⁹ As noted above, the tier and sanction levels take into account the aggravating and disciplinary factors relevant to violations of Code § 301.452(b)(10).

²⁰ 22 Tex. Admin. Code § 213.33(b).

²¹ Staff Exs. 1, 2, 2a, 2b, 2c, 3, 4, 5, 6, 7, 8. Res. Ex. 1.

A. Background

The facts in this case are largely undisputed. Mr. Cole was licensed as an LVN on November 14, 1996. On February 26, 1998, Mr. Cole submitted to the Board a Petition for Declaratory Order in which Mr. Cole disclosed to the Board the following criminal history:

A misdemeanor conviction for DWI on October 26, 1990, in the District Court of Bowie County, Texas, in Cause Number D-020-MR-0000901519, for which the court placed Mr. Cole on probation for 2 years and imposed a fine (1990 DWI).

A misdemeanor conviction for Failure to Stop and Render Aid on October 26, 1990, in the District Court of Bowie County, Texas, in Cause Number D-020-MR-0000901520, for which the court placed Mr. Cole on probation for 2 years to run concurrent with his 1990 DWI conviction.

A felony DWI conviction on July 16, 1991, in the 5th District Court of Bowie County, Texas, in Cause Number D-5-CR-91-070, for which the court placed Mr. Cole on probation for 5 years (1991 DWI). In addition, the court ordered that Mr. Cole submit to chemical tests, attend AA four times a week, serve 80 hours of community service, and be evaluated by a APO to determine the appropriate treatment for alcohol. Mr. Cole met these conditions on August 6, 1996.²²

On October 1, 1998, the Board granted Mr. Cole an Order of Conditional Eligibility allowing him to sit for the National Council Licensure Examination for Registered Nurses.²³ The Board licensed Mr. Cole as an RN on November 10, 1998.²⁴

B. Mr. Cole's Recent Conduct

On February 24, 2014, Mr. Cole entered a guilty plea and was convicted of DWI, a Class B misdemeanor, in the County Court of Law of Bowie County, Texas, Cause No. 14M0229-CCL. The offense occurred on September 19, 2013. As a result of the conviction, the court sentenced Mr. Cole

²² Staff Ex. 5

²³ Staff Ex. 5.

²⁴ Staff Ex. 1.

to 180 days confinement in the Bowie County Jail, which the court suspended and instead placed Mr. Cole on probation for 18 months. Mr. Cole was also ordered to pay a fine and court costs.²⁵ As a condition of probation, Mr. Cole was required to abstain from all alcohol consumption.²⁶

On June 18, 2014, Mr. Cole submitted his renewal application to the Board. Mr. Cole answered "No" to the following questions:

Have you, within the past 24 months or since your last renewal application, for any criminal offense, including those pending appeal:

- A. been convicted of a misdemeanor?
- B. been convicted of a felony?
- C. pled nolo contendere, no contest, or guilty?
- D. received deferred adjudication?
- E. been placed on community supervision or court-ordered probation, whether or not adjudicated guilty?
- F. been sentenced to serve jail or prison time? court-ordered confinement?
- G. been granted pre-trial diversion?
- H. been arrested or have any pending criminal charges?
- I. been cited or charge with any violation of the law?
- J. been subject of a court-martial; Article 15 violation, or received any form of military judgement/punishment/action?²⁷

On January 7, 2015, Mr. Cole pleaded guilty and was convicted for operating a motor vehicle on a highway with a suspended driver's license, a class B misdemeanor, in the County Court at Law, Fannin County, Texas, Case No. 47917. The offense occurred on October 18, 2014. The court sentenced Mr. Cole to 2 days in the county jail and ordered him to pay court costs.²⁸

²⁵ Staff Ex. 6.

²⁶ Staff Ex. 6 at 3.

²⁷ Staff Ex. 7.

²⁸ Staff Ex. 8.

C. Staff's Allegations

Staff alleges that Mr. Cole is subject to disciplinary action in accordance with Code § 301.452(b)(10) for violating Board Rule 217.12(6)(I) and (13)²⁹ by engaging in the following unprofessional conduct: (1) DWI in 2013, thereby exposing the public to the risk of serious harm; (2) failing to disclose this information to the Board in his 2014 renewal application, and (3) being convicted of driving without a valid license in 2015. Staff also asserts that Mr. Cole is subject to disciplinary action under Code § 301.452(b)(2) for failing to disclose his 2013 DWI to the Board in his 2014 renewal application. According to Staff, the Board should impose an enforced suspension pending a chemical dependency evaluation. The enforced suspension would require 12 months of documented sobriety and a three-year-probated suspension with random alcohol and drug tests.

D. Mr. Cole's Evidence**1. Mr. Cole's Testimony**

Mr. Cole does not dispute that in 2014 he pleaded guilty to, and was convicted of, his third DWI. But, Mr. Cole pointed out that his first two DWIs occurred more than 20 years ago and before he became licensed as a nurse. Mr. Cole concedes that he exercised poor judgment on September 19, 2013, when he thought he was able to drive after he had been drinking alcoholic beverages with his friends. He explained that this occurred during a difficult period in his life, and pointed out that until his 2013 DWI he had not had any problems with the Board. He emphasized that he has an excellent reputation as a nurse and wants to continue working as a nurse.

Mr. Cole testified that he and his ex-wife divorced on June 27, 2013. On September 19, 2013, he and his ex-wife had an unsettling exchange about their son's living arrangements. Later that day, his friends took him to a restaurant. According to Mr. Cole, he had a

²⁹ 22 Tex. Admin. Code § 217.12(13).

drink with dinner and a few more drinks after dinner. Mr. Cole could not remember how many drinks or what he drank that night.

Before the divorce, Mr. Cole clarified, he enjoyed an alcoholic drink every two to three weeks. Mr. Cole testified that at the time of his arrest, he drank alcohol when he went out with friends, usually every week or two. After he was convicted of DWI in February 2014, the court sentenced Mr. Cole to 180 days in jail, but placed him on community supervision (probation) for 18 months beginning February 24, 2014. Although the probation order required Mr. Cole to “[c]ompletely abstain from the possession and use of an alcoholic beverages and drugs,”³⁰ Mr. Cole admitted he did not quit drinking until August 2, 2014, when his probation officer strongly recommended that he stop. Mr. Cole could not explain why he kept consuming alcohol after his third DWI, except to say he thought he had control over his drinking and did not believe it impaired his ability to perform at work. According to Mr. Cole, he is no longer on probation and still maintains his sobriety.

Mr. Cole testified the reason he answered “no” to the criminal history portion of his 2014 renewal application was because his criminal attorney advised him that he only had to disclose a felony DWI. He agreed that the question asked about misdemeanor convictions, in addition to any felony convictions, and that he should have disclosed his 2013 DWI.

Mr. Cole admitted that in 2015 he was convicted for driving with a suspended driver’s license, but explained he was unaware his license had been suspended because he never received notice of the suspension. According to Mr. Cole, he first learned that his license was suspended when the police stopped and arrested him for driving with a suspended license. However, Mr. Cole does recall being told his driver’s license would be suspended when the police arrested him for DWI in September 2013.

³⁰ Staff Ex. 6.

2. Testimony of Ron Russette, RN

Ron Russette, a registered nurse, has worked with Mr. Cole for about 12 years and is familiar with his performance as a nurse. Mr. Russette testified that he was aware that Mr. Cole was convicted of the 2013 DWI, that he failed to disclose this conviction to the Board, and that he drove without a valid license. He was also aware of Mr. Cole's 1990 and 1991 DWIs, but pointed out that those convictions happened 20 years ago.

According to Mr. Russette, Mr. Cole is one of the finest nurses he has ever worked with. He reported that as a nurse Mr. Cole is compassionate, intelligent, calm, and maintains his discipline even under extreme pressure. Mr. Russette stated that he has never seen Mr. Cole intoxicated at work, but agreed he has not been with Mr. Cole when he drinks socially. In Mr. Russette's opinion, Mr. Cole exhibits good professional character and is an excellent nurse.

3. Testimony of Eric Jacobsen, M.D.

Dr. Jacobsen testified that he met Mr. Cole about 15 years ago and until a year ago worked with Mr. Cole at the hospital. In his opinion, Mr. Cole exhibits good professional character as a nurse. Dr. Jacobsen stated that Mr. Cole's medical acumen is superior, and that he is an excellent supervisor and patient advocate. According to Dr. Jacobsen, Mr. Cole provides outstanding nursing care. Although Dr. Jacobsen knows about Mr. Cole's 2013 DWI, he said that it does not change his opinion of Mr. Cole's professional ability because he has observed Mr. Cole's nursing abilities for years. Dr. Jacobsen was also aware that Mr. Cole did not disclose his 2013 DWI to the Board, but believed this was an error on Mr. Cole's part. Dr. Jacobsen attested to Mr. Cole's good professional character.

IV. ALJ'S ANALYSIS AND RECOMMENDATION

A. Violations

The facts are generally undisputed. Mr. Cole has worked as an LVN since 1996, and as an RN since 1998, without any previous disciplinary action by the Board. Mr. Cole concedes that in September 2013, he was arrested and later convicted for his third DWI—the 2013 DWI. The previous two DWI convictions occurred more than 20 years ago (1990 and 1991), and were disclosed to the Board before he was issued his RN license.

A Class B misdemeanor DWI is conduct that the Board has determined constitutes unprofessional conduct as defined by Board Rule 217.12(13) and subjects Mr. Cole to disciplinary action under Code § 301.452(b)(10). There is no evidence that Mr. Cole was ever under the influence of alcohol at work, or that his ability to carry out his nursing duties were ever compromised by his consumption of alcohol. However, driving while intoxicated exposed the public to a risk of serious harm.

Mr. Cole violated Code § 301.452(b)(2) and (10) when he failed to disclose his 2013 DWI to the Board on his renewal application. Although Mr. Cole testified that his criminal attorney told him he only needed to disclose a DWI felony to the Board, the question on his application asked if he had been convicted of a misdemeanor. Mr. Cole's decision to answer "no" to this question was deceitful and misleading, constitutes unprofessional conduct as that term is defined in Board Rule 217.12(6)(1), and subjects him to disciplinary action in accordance with Code § 301.452(b)(2).

Staff alleged that Mr. Cole engaged in unprofessional conduct by driving while his license was suspended because of the 2014 DWI. According to Staff, Mr. Cole's conduct was "criminal conduct" as defined in Board Rule 217.12(13). Board Rule 217.12(13) states that criminal conduct constituting unprofessional conduct must involve "a crime or criminal behavior or conduct **that could affect the practice of nursing.**" Staff did not present evidence to show how driving without a valid license could affect the practice of nursing. In addition, the Guidelines do not identify driving

without a valid driver's license as a crime that directly relates to the nursing profession. Therefore, the ALJ finds insufficient evidence to show that by driving without a valid license Mr. Cole engaged in unprofessional conduct in violation of Board Rule 217.12(13).

In conclusion, the evidence established that Mr. Cole is subject to disciplinary action pursuant to Code § 301.052(b)(2) and (10) due to his 2013 DWI and his failure to disclose this misdemeanor conviction on his 2014 renewal application, in violation of Board Rule 217.12(6)(1) and (13). The evidence did not establish that Mr. Cole's 2015 conviction for driving without a license constituted unprofessional conduct as defined by Board Rule 217.12(13). Therefore, the evidence failed to establish that Mr. Cole is subject to disciplinary action for driving without a valid license.

B. Sanctions

The remaining issue to resolve is what disciplinary action, if any, to impose. As previously discussed, the Board rules identify several factors that must be considered in conjunction with the Matrix.³¹ The relevant aggravating factors established by the evidence include (1) the risk of serious harm to the public caused by Mr. Cole's decision to DWI in 2013; (2) his failure to comply with the probation requirement that he abstain from the consumption of alcohol for 6 months, and doing so only after his probation officer told him to; and (3) his failure to disclose his 2013 DWI on his 2014 renewal application, evidencing a lack of trustfulness. The evidence was insufficient to establish that Mr. Cole has a pattern of DWI based on his 1990 and 1991 DWIs because more than 20 years passed before his 2013 DWI.

Other factors inure to Mr. Cole's benefit. Mr. Cole has worked as a nurse since 1996 without any prior disciplinary action. Throughout this time, the credible evidence established that he has provided excellent nursing care and, while at work, exhibited good professional character. There

³¹ 22 Tex. Admin. Code § 213.33(c).

was no evidence presented that any actual damages resulted from his violations. Mr. Cole has abstained from alcohol consumption since August 2014, even after he completed his probation.

The Matrix also identifies aggravating and mitigating factors that must be considered for violations of Code § 301.452(b)(2).³² The Board should consider as a mitigating factor that Mr. Cole has no history of previous violations. However, it is an aggravating factor that he hid his 2013 DWI conviction by failing to disclose it to the Board in his 2014 renewal application. It is unclear from the evidence whether this information would have prevented the renewal of his RN license.

Mr. Cole's excuse for failing to disclose his 2013 DWI on his renewal application was not persuasive. According to Mr. Cole, he relied on his criminal lawyer's advice that he was only required to disclose felony DWIs when he answered "no" to the question regarding whether he had any misdemeanor convictions in the previous 24 months. The question did not require legal advice—it was quite simple. The question asked if Mr. Cole had been convicted of a misdemeanor within the past 24 months. Mr. Cole knew he had been convicted of a misdemeanor, yet chose to answer "no" to this question. Reliance on the advice of counsel in doing so was not justified and was deceitful.

The aggravating factors set out in the Matrix for violations of Code § 301.452(b)(10) include the number of events; level of gain or harm; the severity of harm; prior complaints or discipline for similar conduct; patient vulnerability; impairment by alcohol or drugs; and criminal conduct. The mitigating factors include voluntary participation in a remediation or rehabilitation program, demonstrated competency, and full restitution. Mr. Cole had two events that constitute unprofessional or dishonorable conduct warranting disciplinary action under Code § 301.452(b)(10), one of which involved his driving while impaired by alcohol, and the other his failure to disclose the 2013 DWI to the Board. Mr. Cole has three DWIs, two of which occurred more than 20 years ago.

³² According to the Matrix, the "Aggravating Circumstances for § 301.452(b)(2) [include]: Multiple offenses, the relevance or seriousness of the hidden information, whether the hidden information, if known, would have prevented licensure. Mitigating Circumstances for § 301.452(b)(2) [include]: Seriousness of the hidden violation; age of the applicant at time applicant committed violation; and applicant's justified reliance upon advice of legal counsel." 22 Tex. Admin. Code § 213.33(b).

There was no evidence of any actual harm to his patients or to the public. Until 2014, Mr. Cole had no prior complaints or discipline for similar conduct. Mr. Cole has voluntarily abstained from any alcohol consumptions since August 2014, but there is no evidence that he has participated in an approved remediation or rehabilitation program. Mr. Cole represented that he has paid all court-ordered fines and costs.

Mr. Cole's explanation for consuming alcoholic beverages on September 19, 2013, an argument with his ex-wife about visitation with his son, while stressful, does not excuse or mitigate the potential harm Mr. Cole could have caused by driving while intoxicated. Mr. Cole's continued consumption of alcohol for 6 months after he was placed on probation is troubling. A condition of his probation required Mr. Cole to "completely abstain from the possession and use of any alcoholic beverages and drugs,"³³ yet he could not for 6 months. It only after his probation officer strongly urged him to quit drinking that Mr. Cole did so. Mr. Cole's inability to quit drinking alcoholic beverages, despite the threat of having his probation revoked and spending 18 months in jail, supports Staff's concern that Mr. Cole has dependency issues with alcohol. Staff's request that Mr. Cole undergo a chemical dependency evaluation is reasonable.

Staff maintains that Mr. Cole's violations constitute second tier violations warranting a sanction level II, and requests that the Board impose an enforced suspension against Mr. Cole. An enforced suspension would require Mr. Cole to show 12 months of documented sobriety and impose an additional 3-year suspension with stipulations, which include maintaining his sobriety and random drug and alcohol screening. Mr. Cole maintains that his violations are at the second tier, sanction level I, and requests that the Board issue a reprimand with stipulations that require drug and alcohol testing for a period to be determined by the Board, and supervised practice at the incident reporting level.

Based on the evidence, the ALJ finds that Mr. Cole's violation of Code § 301.452(b)(2) is a first tier offense, sanction level I violation, and his violation of Code § 301.452(b)(10) is a second

³³ Staff Ex. 6 at 3.

tier offense, sanction level II. Mr. Cole's repeated convictions for DWI, even though two occurred more than 20 years ago, coupled with his failure to comply with the court-ordered abstinence while on probation, raise doubts about his ability to make good choices when consuming alcoholic beverages. Although Mr. Cole testified that he has abstained from alcohol since August 2014, he has not participated in any treatment program, and does not have any system in place to help him avoid the temptation to drink. That his alcohol consumption has not influenced his professional ability to provide nursing services is fortunate. Nevertheless, his conduct of DWI exposed the public to the risk of serious harm. In addition, Mr. Cole's failure to disclose his 2013 DWI evidenced poor judgment and a lack of accountability. Therefore, the ALJ recommends that the Board impose an enforced suspension, and that Mr. Cole be required to undergo a chemical dependency evaluation. If the results of the chemical dependency evaluation indicate that Mr. Cole does not have a dependency issue with alcohol or drugs, the Board may consider modifying the length of the suspension.

V. FINDINGS OF FACT

1. Hugh Cole is licensed in the State of Texas as a vocational nurse (LVN) holding license number 160665, and as a registered nurse (RN) holding license number 656200. At the time of the hearing, Mr. Cole's LVN license was in delinquent status, but his RN license was current.
2. The Texas Board of Vocational Nurse Examiners issued the LVN license to Mr. Cole on November 14, 1996. The Texas Board of Nursing (Board) issued the RN license to Mr. Cole on November 10, 1998.
3. On October 1, 1998, the Board granted Mr. Cole an Order of Conditional Eligibility allowing him to sit for the National Council Licensure Examination for Registered Nurses, and if he passed the examination, issuing him a coded license with stipulations, none of which specifically addressed his alcohol consumption.
4. Before the Board licensed Mr. Cole, Mr. Cole disclosed to the Board the following criminal history:
 - On October 26, 1990, Mr. Cole was convicted of DWI, a misdemeanor, in the District Court of Bowie County, Texas, in Cause Number D-020-MR-0000901519, for which he was fined and placed on probation for 2 years.
 - On October 26, 1990, Mr. Cole was convicted for Failure to Stop and Render Aid, a misdemeanor, by the District Court of Bowie County, Texas, in Cause Number D-

020-MR-0000901520, and was placed on probation to run concurrent with his 1990 DWI conviction.

- On July 16, 1991, Mr. Cole was convicted of Felony DWI in the 5th District Court of Bowie County, Texas, in Cause Number D-5-CR-91-070, for which he was placed on probation for 5 years during which time he was ordered to submit to chemical tests requested by the Probation Department; attend AA meeting four times a week; serve 80 hours of community service; and be evaluated by an APO to determine the appropriate type of treatment for alcohol. Mr. Cole met the court's conditions on August 6, 1996.
5. On September 19, 2013, Mr. Cole was arrested for driving while intoxicated (DWI).
 6. On February 24, 2014, Mr. Cole pleaded guilty to the Class B misdemeanor offense of DWI in the County Court of Law of Bowie County, Texas, Cause No. 14M0229-CCL. The same day, the Court found Mr. Cole guilty, sentenced him to 180 days of confinement in the Bowie County Jail, and ordered him to pay a \$1,000 fine and court costs (2013 DWI). The Court suspended the sentence and placed Mr. Cole on probation for 18 months, during which he was required to completely abstain from the possession and use of any alcoholic beverages.
 7. In violation of his probation, Mr. Cole continued consuming alcohol until August 2014, and only stopped when his probation officer told him that he needed to stop drinking.
 8. Mr. Cole otherwise successfully completed the terms of his probation.
 9. On June 18, 2014, Mr. Cole submitted a renewal application with the Board in which he misrepresented his recent criminal activity by denying that he pleaded guilty to and was convicted of the 2013 DWI.
 10. On October 18, 2014, Mr. Cole was charged with driving on a highway with a suspended driver's license, a class B misdemeanor.
 11. On January 7, 2015, Mr. Cole pleaded guilty to the Class B misdemeanor offense of driving with a suspended driver's license, in Case No. 47917, before the County Court of Law of Fannin County, Texas. The Court found Mr. Cole guilty and sentenced him to 2 days in jail for time already served.
 12. Mr. Cole was unaware that his driver's license was suspended until he was arrested on October 14, 2015.
 13. There is no evidence that driving without a valid driver's license could affect the practice of nursing.

14. There is no evidence in the record that driving without a valid driver's license is likely to deceive, defraud, or injure a patient or the public.
15. This is the first disciplinary action brought against Mr. Cole by the Board.
16. Mr. Cole has an excellent work history as a nurse and is regarded by his colleagues as a good nurse who exhibits good professional character.
17. Mr. Cole regrets his conduct and represented that he intends to continue his sobriety.
18. Staff of the Board sent formal charges to Mr. Cole's address of record by certified mail on August 14, 2015.
19. Staff sent a notice of hearing to Mr. Cole by certified mail and facsimile on October 29, 2015. 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.
20. The hearing convened on January 25, 2016, at the William P. Clements Building, 300 West 15th Street, Austin, Texas. Assistant General Counsels Jessica Lance and R. Kyle Hensley represented Staff. Attorney Marc Meyer represented Mr. Cole. The record closed at the conclusion of the hearing on the same day.

VI. CONCLUSIONS OF LAW

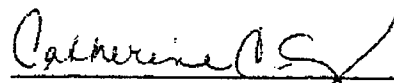
1. The Board has jurisdiction over this matter. Tex. Occ. Code ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
3. Notice of the hearing on the merits was provided as required. Tex. Occ. Code § 301.454; Tex. Gov't Code §§ 2001.051 and 2001.052.
4. Staff had the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
5. Mr. Cole's conduct that resulted in his 2013 DWI conviction constitutes unprofessional conduct. 22 Tex. Admin. Code § 213.12.

6. Mr. Cole engaged in unprofessional conduct by failing to disclose his 2013 DWI in his 2014 renewal application. Tex. Occ. Code § 301.452 (b)(2); 22 Tex. Admin. Code § 217.12(6)(I).
7. The evidence presented does not establish by a preponderance that by driving without a valid license in 2014, Mr. Cole engaged in unprofessional or dishonorable conduct. 22 Tex. Admin. Code § 213.12(13).
8. Because Mr. Cole failed to answer truthfully the question regarding his 2013 DWI conviction in his 2014 renewal application and thereby engaged in unprofessional conduct, he is subject to disciplinary action by the Board pursuant to Texas Occupations Code (Code) § 301.452(b)(2) and (10).
9. Mr. Cole conduct should be disciplined as a first tier, sanction level II violation of Code § 301.452(b)(2) pursuant to the Board's Disciplinary Matrix. 22 Tex. Admin. Code § 213.33.
10. Mr. Cole's conduct should be disciplined as a first tier, sanction level II violation of Code § 301.452(b)(10) pursuant to the Board's Disciplinary Matrix. 22 Tex. Admin. Code § 213.33.

VII. RECOMMENDATION

Based on the above Findings of Fact and Conclusions of Law, and applying the Board's Disciplinary Matrix, the ALJ recommends that the Board impose an enforced suspension and require Mr. Cole to undergo a chemical dependency evaluation. If the results of the chemical dependency evaluation indicate that Mr. Cole does not have a dependency issue with alcohol or drugs, the Board may consider modifying the length of the suspension.

SIGNED March 24, 2016.



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



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

April 4, 2016

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

Via Electronic Filing

Re: In the Matter of Permanent Registered Nurse License No. RN 656200 &
Permanent Vocational Nurse License No. 160665
Issued to HUGH COLE
SOAH Docket No. 507-16-0935

Dear Judge Egan:

Enclosed please find Staff's Exceptions to the Proposal for Decision in the above-referenced matter.

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

Please feel free to contact me at (512) 305-6880 should you have any questions and/or concerns. Thank you in advance for your time and assistance in this matter.

Sincerely,

Jessica M. Lance (handwritten signature)

Jessica M. Lance
Assistant General Counsel

Enclosure: Staff's Exceptions to the Proposal for Decision

cc: Hugh Cole
c/o Attorney Marc Meyer
Law Office of Marc Meyer, PLLC
33300 Egypt Lane, Suite C600
Magnolia, Texas 77354

Via Fax (866) 839-6920
& CMRRR

91 7199 9991 7031 6327 9633

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SOAH DOCKET NUMBER 507-16-0935

In the Matter of	§	TEXAS STATE OFFICE
Permanent Registered Nurse	§	
License Number 656200 &	§	
Permanent Vocational Nurse	§	OF
License Number 160665	§	
Issued to HUGH COLE,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

STAFF'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

COMES NOW, Staff of the Texas Board of Nursing (hereinafter "Staff" or "the Board").

On March 28, 2016, a Proposal for Decision (PFD) was issued in this matter. Pursuant to 1 TEX. ADMIN. CODE § 155.507(c) Staff files this, its *Exceptions to the Proposal for Decision*. Staff excepts to the PFD as follows.

1. Staff excepts to the ALJ's statements that Respondent does not have any previous disciplinary history and his lack of disciplinary history is mitigation. Respondent's Order of Conditional Eligibility, dated October 13, 1998, was admitted as Staff's Exhibit 5 without stipulation and constitutes disciplinary history. Additionally, Staff explicitly stated in its Formal Charges: "NOTICE IS ALSO GIVEN that Respondent's past disciplinary history, as set out below and described in the Order(s) which is/are attached and incorporated by reference as part of these charges, will be offered in support of the disposition recommended by staff: Order of the Board dated October 13, 1998." (Formal Charges with attached Order, dated October 13, 1998, Staff's Exhibit 3 at 5). Staff respectfully requests the ALJ remove those statements indicating Respondent does not have any prior disciplinary history with the Board.

Specifically, Staff requests the first sentence on page 12 of the PFD be amended, removing the portion that reads "without any previous disciplinary action by the Board." Staff also requests the first sentence of the last paragraph on page 13 of the PFD be amended, removing the portion that reads "without any prior disciplinary action." Third, Staff requests the ALJ remove the following sentence on page 14 of the PFD: "The Board should consider as a mitigating factor that Mr. Cole has no history of previous violations." Finally, Staff requests the ALJ remove the second full sentence on page 15 of the PFD, which reads: "Until 2014, Mr. Cole had no prior complaints or discipline for similar conduct."

Mr. Cole's previous two DWI convictions were the basis for the Order issued to him on October 13, 1998 and that Order constitutes prior disciplinary history for the same conduct forming the basis of this disciplinary proceeding—Driving While Intoxicated. Additionally, Mr. Cole was provided notice that his prior disciplinary history, including

the 1998 Order, would be offered in support of the disposition recommended by Staff. The 1998 Order is prior disciplinary history and is considered an aggravating factor.

2. Staff excepts to Finding of Fact Number 2, which states Respondent's RN license was issued by the Board of Nursing. Respondent's RN license was issued prior to the merging of the Board of Vocational Nurse Examiners and Board of Nurse Examiners. Respondent's RN license was therefore issued by the Board of Nurse Examiners, not the Board of Nursing. Staff proposes Finding of Fact Number 2 be amended to reflect Respondent's RN license was issued by the Board of Nurse Examiners.
3. Staff excepts to Finding of Fact Number 3, which states the Board granted Mr. Cole an Order of Conditional Eligibility on October 1, 1998. The Order was entered on October 13, 1998. (Staff's Exhibit 5 at 6). Staff proposes Finding of Fact Number 3 be amended to reflect the Order was entered on October 13, 1998. Staff also proposes the date be amended on Page 7 of the PFD.
4. Staff excepts to Finding of Fact Number 15, stating this is the first disciplinary action the Board has brought against Respondent. As stated in supra 1, Respondent's Order of Conditional Eligibility constitutes previous disciplinary history and was admitted as Staff's Exhibit 5 without stipulation. Staff proposes Finding of Fact Number 15 be removed.
5. Staff excepts to Conclusion of Law Number 5, which cites 22 Tex. Admin. Code § 213.12. As stated in the ALJ's analysis and recommendation, Respondent's unprofessional conduct violates 22 Tex. Admin. Code § 217.12(13) and is grounds for disciplinary action under Tex. Occ. Code § 301.452(b)(10). Staff proposes the citation be changed to: Tex. Occ. Code § 301.452(b)(10); 22 Tex. Admin. Code § 217.12(13).
6. Staff excepts to Conclusion of Law Number 6, which omits Tex. Occ. Code § 301.452(b)(10). As stated in the ALJ's analysis and recommendation, Respondent's violation of 22 Tex. Admin. Code § 217.12(6)(I) is grounds for disciplinary action under Tex. Occ. Code § 301.452(b)(10). Staff proposes the citation be changed to: Tex. Occ. Code § 301.452(b)(2)&(10); 22 Tex. Admin. Code § 217.12(6)(I).
7. Staff excepts to Conclusion of Law Number 7, which cites 22 Tex. Admin. Code § 213.12(13). As stated in the ALJ's analysis and recommendation, unprofessional conduct is defined by 22 Tex. Admin. Code § 217.12. Staff proposes the citation be changed to: 22 Tex. Admin. Code § 217.12(13).
8. Staff excepts to Conclusion of Law Numbers 9 and 10. These conclusions are recommended sanctions couched as conclusions of law. A recommendation for a sanction is not a proper conclusion of law. While it may be appropriate for the ALJ to recommend a sanction, it is ultimately up to the Board to determine the appropriate sanction. 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. Thus, the board is not required to give presumptively binding effect to an ALJ's recommendation regarding the

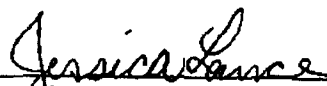
sanctions in the same manner as with other findings of fact and conclusions of law. The Board, not the ALJ, is the final decision maker concerning sanctions. Once it has been determined that a violation of the law has occurred, the sanction is a matter for the agency's discretion. The choice of penalty is vested in the agency, not in the courts. Further, 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 Tex. State Bd. of Dental Exam'rs v. Brown*, 281 S.W.3d 692 (Tex. App.—Corpus Christi 2009, pet. filed); *Sears v. 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 v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984); *Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 781 (Tex. App.—Austin 2005, pet. denied); *Fay-Ray Corp. v. Tex. Alcoholic Beverage Comm'n*, 959 S.W.2d 362, 369 (Tex. App.—Austin 1998, no pet.). As these are not proper conclusions of law, Staff proposes they be removed from the PFD.

PRAYER

Staff respectfully requests that the ALJ amend: (a) the analysis to acknowledge Respondent does have previous disciplinary history; (b) Finding of Fact Numbers 2 and 3; and (c) Conclusions of Law Numbers 5, 6, and 7. Staff also respectfully requests the ALJ remove Finding of Fact Number 15, and Conclusions of Law Numbers 9 and 10.

Respectfully submitted,

TEXAS BOARD OF NURSING



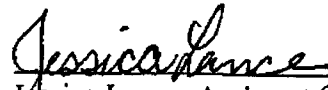
Jessica Lance, Assistant General Counsel
State Bar No. 24091434
333 Guadalupe, Tower III, Suite 460
Austin, Texas 78701
P: (512) 305-6880; F: (512) 305-8101

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Staff's Exceptions to the Proposal for Decision* was sent via Certified Mail, Return Receipt Requested, on April 4, 2016, to:

Hugh Cole
c/o Attorney Marc Meyer
Law Office of Marc Meyer, PLLC
33300 Egypt Lane, Suite C600
Magnolia, Texas 77354

Via Fax (866) 839-6920
& CMRRR



Jessica Lance, Assistant General Counsel

State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

May 26, 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 NO. 512/305-8101

RE: Docket No. 507-16-0935; Texas Board of Nursing v. Hugh Cole

Dear Ms. Thomas:

On April 4, 2016, the staff (Staff) of the Texas Board of Nursing (Board) filed exceptions to the proposal for decision (PFD) issued on March 24, 2016. The response to the exceptions was due on April 19, 2016. Hugh Cole has not filed a response to Staff's exceptions and the deadline to do so has passed.

Staff excepted to portions of the Administrative Law Judge's (ALJ) analysis and to Findings of Fact Nos. 2, 3, and 15, and Conclusions of Law Nos. 5-7, 9, and 10. After reviewing Staff's exceptions, the Administrative Law Judge (ALJ) recommends that the Board correct the typographical error in Finding of Fact No. 3 and in Conclusion of Law No. 7, but does not oppose Staff's requested modifications to Finding of Fact No. 2 and 5, as described below.¹ The ALJ recommends all other exceptions be overruled.

Finding of Fact, No. 2

Staff requested that Finding of Fact No. 2 be modified to state that the Board of Nurse Examiners issued the registered nurse's license. Staff explained that Respondent's license was issued before the Board of Vocational Nurse Examiners and Board of Nurse Examiners were merged into the Board of Nursing. Although the ALJ does not think this modification is necessary, the Board is free to modify the finding to read:

¹ The changes to the Findings of Fact Nos. 2 and 3 are bolded.

2. The Texas Board of Nursing (Board) f/k/a the Board of Nurse Examiners issued the RN license to Mr. Cole on November 10, 1998.

Finding of Fact No. 3

Staff requests that Findings of Fact No. 3 be corrected to reflect that the Order of Conditional Eligibility was entered by the Board on October 13, 1998, not October 1, 1998. The ALJ agrees.

Amended Finding of Fact No. 3 should read:

3. On October 13, 1998, the Board granted Mr. Cole an Order of Conditional Eligibility allowing him to sit for the National Council Licensure Examination for Registered Nurses, and if he passed the examination, issuing him a coded license with stipulations, none of which specifically addressed his alcohol consumption.

Finding of Fact No. 15

Staff excepted to the portions of the ALJ's analysis and to Finding of Fact No. 15, which states, "[t]his is the first disciplinary action brought against Mr. Cole by the Board." According to Staff, the Order of Conditional Eligibility issued on October 13, 1998 (the Order), constituted disciplinary action taken by the Board against Mr. Cole. The ALJ disagrees.

In the Order, the Executive Director declared Respondent conditionally eligible to take the National Council Licensure Examination for Registered Nurses. In October 1998, when the Order was issued the Board of Nurse Examiners had jurisdiction pursuant to Texas Revised Civil Statutes articles 4525(a) and 4519a. At that time, Article 4525(a) did not identify a Conditional Eligibility Order as disciplinary action. In addition, the Order does not state that the Board was taking disciplinary action against Respondent.

The Board rules in 1998 also distinguished between an order of conditional eligibility and disciplinary action. In 22 Texas Administrative Code § 213.1 the term "Declaratory Order" is defined as a Board order issued pursuant to Texas Civil Statute article 4519a, not that it constituted disciplinary action. Again, at 22 Texas Administrative Code § 213.31, the Board's rule recognized a distinction between a licensee subject to disciplinary action and petitioners seeking a determination of licensure under article 4519a. The rule stated:

Licensees subject to disciplinary action and petitioners seeking a determination of licensure eligibility have certain rights and options available to them in connection with these mechanisms.

The parties did not offer any legal authority or Board policy in effect in 1998 during the hearing to establish that the Order constituted disciplinary action taken against Mr. Cole by the Board. Therefore, the ALJ recommends that the Board overrule Staff's exceptions to her analysis and Finding of Fact No. 15.

Conclusion of Law No. 5

Staff requests that Conclusion of Law No. 5 be modified to add to the Board's rule subsection 13 and to include Texas Occupations Code § 301.452(b)(10). The ALJ agrees.

Amended Conclusion of Law No. 5 should read:

5. Mr. Cole's conduct that resulted in his 2013 DWI conviction constitutes unprofessional conduct. 22 Tex. Admin. Code § 213.12(13); Tex. Occ. Code § 301.452(b)(10).

Conclusion of Law No. 6

Staff requests that Conclusion of Law No. 6 be modified to include subsection (10) to Texas Occupations Code § 301.452(b). The ALJ does not believe it is necessary to add the citation to Texas Occupations Code § 301.452(b)(10) because Conclusion of Law No. 8 does so.

Conclusion of Law No. 7

Staff requests that a Conclusion of Law No. 7 be corrected to reflect that the Board rule violated as § 217.12(13), and not 213.12.

Amended Conclusion of Law No. 7 should read:

7. The evidence presented does not establish by a preponderance that by driving without a valid license in 2014, Mr. Cole engaged in unprofessional or dishonorable conduct. 22 Tex. Admin. Code § 217.12(13).

Conclusions of Law Nos. 9 and 10

Staff also excepted to Conclusions of Law Nos. 9 and 10 asserting that these conclusions are recommended sanctions. The ALJ appreciates that the Board determines the appropriate sanction to impose against a licensee. The ALJ's recommended sanctions are in a separate section after the conclusions of law clearly identified as "Recommendation." However, Conclusions of Law No. 9 and 10 apply the facts of this case to the Board's Disciplinary Matrix found at 22 Texas Administrative Code § 213.33, upon which the Board will rely in determining the sanction in this case. Therefore, the ALJ recommends the exceptions be overruled.

With the above noted changes, the PFD is ready for the Board's consideration.

Sincerely,



Catherine C. Egan
Administrative Law Judge

CCE/ap

xc: Jessica Lance, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - **VIA FACSIMILE NO. 512/305-8101**
R. Kyle Hensley, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - **VIA FACSIMILE NO. 512/305-8101**
Kathy A. Hoffman, Legal Assistant Supervisor, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - **VIA FACSIMILE NO. 512/305-8101**
Marc Meyer, Law Office of Marc Meyer, PLLC, 33300 Egypt Lane, Suite C600, Magnolia, TX 77354-2878 - **VIA FACSIMILE NO. 866/839-6920**