



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'Hanrahan
Executive Director of the Board

DOCKET NUMBER 507-16-1228

**IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 561876
ISSUED TO
JASON ERIC BORQUE**

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**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**

OPINION AND ORDER OF THE BOARD

TO: JASON ERIC BORQUE
5522 AVENUE O 1/2
GALVESTON, TX 77551

SHANNON KILGORE
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 PFD; (3) the Respondent's untimely exceptions to the PFD; (4) the ALJ's final letter ruling of May 6, 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 April 11, 2016. The Respondent filed untimely exceptions to the PFD on April 27, 2016. On May 6, 2016, the ALJ issued her final letter ruling, in which she declined to make any changes to the PFD.

The Board, after review and due consideration of the PFD; Staff's exceptions to the PFD; Respondent's untimely exceptions to the PFD; the ALJ's final letter ruling of May 6, 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

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,¹ the Board generally agrees with the ALJ that the Respondent's license should be suspended.² However, the Board finds that the suspension should be probated for a period of three years.

The Board agrees with the ALJ that the Respondent's conduct constitutes a second tier, sanction level II sanction for his violation of §301.452(b)(10).³ For a second tier, sanction level II sanction for a violation of §301.452(b)(10), the Board's Disciplinary Matrix⁴ authorizes either licensure suspension or revocation. The suspension may be probated or enforced. The Board's Guidelines for Criminal Conduct authorize a variety of sanctions for repetitive alcohol related conduct, such as a second *Driving While Intoxicated* offense, including licensure suspension or revocation, imposition of disciplinary stipulations, or peer assistance program participation.⁵

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 2014.⁶ Further, it is undisputed that the Respondent was previously convicted in 2003 of *Driving While Intoxicated*.⁷ Additionally, in 2009, the Respondent entered into an agreed Board Order relating to the misappropriation and

¹ The Board, not the ALJ, is the final decision maker concerning sanctions. Once it has been determined that a violation of the law has occurred, the sanction is a matter for the agency's discretion. Further, the mere labeling of a recommended sanction as a conclusion of law or as a finding of fact does not change the effect of the ALJ's recommendation. As such, the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact and conclusions of law. The choice of penalty is vested in the agency, not in the courts. An agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency's oversight. The propriety of a particular disciplinary measure is a matter of internal administration with which the courts should not interfere. See *Texas State Board of Dental Examiners vs. Brown*, 281 S.W. 3d 692 (Tex. App. - Corpus Christi 2009, pet. filed); *Sears vs. Tex. State Bd. of Dental Exam'rs*, 759 S.W.2d 748, 751 (Tex.App. - Austin 1988, no pet); *Firemen's & Policemen's Civil Serv. Comm'n vs. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984); *Granek vs. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 781 (Tex.App. - Austin 2005, pet. denied); *Fay-Ray Corp. vs. Tex. Alcoholic Beverage Comm'n*, 959 S.W.2d 362, 369 (Tex.App. - Austin 1998, no pet.).

² See pages 10-12 of the PFD.

³ See page 11 of the PFD.

⁴ 22 Tex. Admin. Code §213.33(b).

⁵ 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), 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. If the Respondent is able to provide verifiable evidence of successful completion of treatment and twelve consecutive months of sobriety, the Board's Guidelines for Criminal Conduct authorize licensure discipline (stipulations) or peer assistance program participation.

⁶ See adopted Finding of Fact Number 2.

⁷ See adopted Finding of Fact Number 3. Further, while the Board does not necessarily agree with the ALJ's analysis regarding its authority to take action on the Respondent's 2003 *Driving While Intoxicated* conviction or the application of the Board's rules or its Disciplinary Guidelines for Criminal Conduct to a one-time *Driving While Intoxicated* conviction, the Board declines, at this time, to modify the proposed findings of fact or conclusions of law. However, the Board does not consider the ALJ's analysis in this regard binding or precedential for any purpose.

intemperate use of Ativan and Demerol.⁸ As a result, the Respondent was required to complete the Texas Peer Assistance Program for Nurses (TPAPN), a two year program.⁹ The Respondent's conduct is recent in time, serious in nature, and indicates a pattern of concerning behavior involving the use of drugs and/or alcohol spanning several years.¹⁰ Further, the Board remains cognizant that it must consider taking a more severe action than it would otherwise impose if an individual has been previously disciplined or is being disciplined for more than one violation of the Nursing Practice Act (NPA) and/or Board rules.¹¹ In this case, the Respondent has been disciplined previously for a violation of the NPA and Board rules.¹²

The Board has also considered the mitigating factors in this matter. First, the Respondent has been subject to a breathalyzer interlock system on his vehicle for approximately two years and has had no apparent problems with drugs or alcohol during that time period.¹³ Further, over the past two years, the Respondent was recruited to work as a cardiac program manager due to his experience and excellent reputation; has been successful in his work; and has completed several college courses with high grades.¹⁴

Having considered the aggravating and mitigating factors, the Board finds the most appropriate sanction in this case to be licensure suspension. Further, the Board finds that the suspension should be probated, with probationary stipulations for a period of three years¹⁵. As found by the ALJ, the Respondent has been subject to a breathalyzer interlock system on his vehicle for approximately two years and has had no problems with drugs or alcohol during that time period. Further, the Respondent entered TPAPN in 2009 and completed the program in 2011. The Board finds sufficient evidence of completion of treatment and ongoing sobriety to justify a probated suspension in this case.

However, the Respondent's conduct involving drugs and/or alcohol spans several years, and the Respondent received his second *Driving While Intoxicated* conviction after completing TPAPN. This pattern of conduct raises some concern about the Respondent's ability to abide by the NPA and Board rules in the future and avoid behaviors that could negatively affect his ability to practice nursing safely. As such, the Board finds that the Respondent's practice should be monitored for a period of three years. Although not

⁸ See adopted Finding of Fact Number 5.

⁹ *Id.*

¹⁰ See adopted Findings of Fact Numbers 2-3 and 5.

¹¹ See Tex. Occ. Code §301.4531.

¹² See adopted Finding of Fact Number 5.

¹³ See adopted Finding of Fact Number 6.

¹⁴ See adopted Finding of Fact Number 8.

¹⁵ Not only is this an appropriate sanction based upon consideration of the aggravating and mitigating factors in this case, but a probated suspension of the Respondent's license is consistent with the Board's Disciplinary Matrix for a second tier, sanction level II sanction for a violation of §301.452(b)(10) where a crime involving alcohol is involved and the Respondent is able to show proof of sobriety for twelve consecutive months.

recommended by the ALJ, a probated suspension of the Respondent's license for a three year period is supported by the record and is consistent with the Board's Disciplinary Matrix and Guidelines for Criminal Conduct.

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 thinking¹⁶. 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 recognizes that the Respondent has shown a good work history for the last two years. Therefore, the Board finds that the Respondent should be permitted to retain his current position with his current employer while he works to satisfy the other requirements of the Order.¹⁷ The Board finds this departure from the supervisory stipulations normally associated with a probated suspension necessary to appropriately balance the mitigation shown by the Respondent with the need for the Respondent's accountability for the duration of the Order. The Board further finds that employer notifications and quarterly reporting are necessary to monitor the Respondent's compliance with the requirements of 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, prior agreed Board Order, 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).¹⁸

IT IS THEREFORE ORDERED that Registered Nurse License Number 561876 previously issued to **JASON ERIC BORQUE** 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 three (3) years **AND** until Respondent fulfills the requirements of this Order.

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

¹⁶ 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.

¹⁷ This recommendation was also made by the ALJ. See page 12 of the PFD.

¹⁸ 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

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 COURSES

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 effective date of this Order, 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. **Respondent's current employment as a cardiac program manager qualifies as approved employment to complete the terms of this Order, and Respondent shall be given credit towards completion of this Order through his current employment in this role, provided he meets the other requirements of this Order. Should Respondent's current employment as a cardiac program manager cease or change for any reason, Respondent shall be required to comply with the terms of this Order, as written.**

- 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. **While employed as a cardiac program manager with his current employer, Respondent is not required to comply with this stipulation. Should Respondents' current employment as a cardiac program manager with his current employer cease or change for any reason, Respondent shall be required to comply with the terms of this stipulation, as written, and without exception.**
- D. 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. . **While employed as a cardiac program manager with his current employer, Respondent is not required to comply with this stipulation. Should Respondents' current employment as a cardiac program manager with his current employer cease or change for any reason, Respondent shall be required to comply with the terms of this stipulation, as written, and without exception.**

- E. **Nursing Performance Evaluations:** RESPONDENT SHALL CAUSE each employer to submit, on forms provided to the Respondent by the Board, periodic reports as to RESPONDENT'S capability to practice nursing. These reports shall be completed by the nurse who supervises the RESPONDENT and these reports shall be submitted by the supervising nurse to the office of the Board at the end of each three (3) month quarterly period for twelve (12) quarters [three (3) years] of employment as a nurse. **While employed as a cardiac program manager with his current employer, these reports shall be completed by Respondent's current supervisor/employer.**

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. 507-16-1228 (March 28, 2016)

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 28, 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. 507-16-1228-Texas Board of Nursing v. Jason Eric Borque

Dear Ms. Thomas:

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Shannon Kilgore".

Shannon Kilgore
Administrative Law Judge

SK/tt
Enclosures

xc: John R. Griffith, 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 – **VIA INTERAGENCY**
Jason Eric Borque, 5522 Avenue O 1/2, Galveston, TX 77551 – **VIA REGULAR MAIL**

SOAH DOCKET NO. 507-16-1228

TEXAS BOARD OF NURSING,
Petitioner

v.

JASON ERIC BORQUE,
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 licensed registered nurse Jason Eric Borque. Staff alleges that: (1) Mr. Borque was convicted in 1991 of the misdemeanor offense of reckless conduct; (2) in 2003, he was convicted of misdemeanor driving while intoxicated (DWI); (3) in his 2005 renewal application, he failed to reveal the 2003 conviction; and (4) in 2014, he was convicted of misdemeanor DWI in connection with an incident in 2013. After considering the evidence and applicable law, the Administrative Law Judge (ALJ) determines that Mr. Borque should be sanctioned for the 2014 DWI offense and recommends a suspension of his license as described below.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Matters of notice and jurisdiction were undisputed and are therefore set out in the Findings of Fact and Conclusions of Law without further discussion.

The hearing convened on February 16, 2016, before ALJ Shannon Kilgore at SOAH's hearings facility in Austin, Texas. Staff was represented by John Griffith, Assistant General Counsel. Mr. Borque represented himself. The record closed at the conclusion of the hearing.

II. APPLICABLE LAW

A. Criminal Conduct

The Board is authorized to take disciplinary action against a nurse for “unprofessional or dishonorable conduct that, in the [B]oard’s opinion, is likely to deceive, defraud, or injure a patient or the public.”¹ The Board has enacted rules that define “unprofessional conduct” to include criminal conduct (including, but not limited to, a conviction involving a crime or criminal behavior or conduct that could affect the practice of nursing).² Similarly, chapter 53 of the Texas Occupations Code authorizes licensing agencies to consider a person’s criminal conviction (for a crime directly related to the licensed occupation) in determining whether to deny, revoke, or suspend a license.³ Before suspending or revoking the license of a person who has been convicted (or deemed convicted) of a crime, chapter 53 requires the Board to first determine whether that person is fit to perform the duties and discharge the responsibilities of the licensed profession. In making this determination, the Board is required to consider the following factors:

- (1) the extent and nature of the person’s past criminal activity;
- (2) the age of the person when the crime was committed;
- (3) the amount of time that has elapsed since the person’s last criminal activity;
- (4) the conduct and work activity of the person before and after the criminal activity;
- (5) evidence of the person’s rehabilitation or rehabilitative effort while incarcerated or after release; and
- (6) other evidence of the person’s fitness, including letters of recommendation from:

¹ Tex. Occ. Code § 301.452(b)(10).

² 22 Tex. Admin. Code § 217.12(13).

³ Tex. Occ. Code § 53.021(a)(1).

- (A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;
- (B) the sheriff or chief of police in the community where the person resides; and
- (C) any other person in contact with the convicted person.

The nurse has the responsibility, to the extent possible, to obtain and provide these recommendations. Additionally, the nurse is responsible for furnishing proof that he has:

- (1) maintained a record of steady employment;
- (2) supported his dependents;
- (3) maintained a record of good conduct; and
- (4) paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which he has been convicted.⁴

The Board has promulgated a rule concerning the "Licensure of Individuals with Criminal History" (Criminal History Rule) that addresses the relationship between DWI offenses and nursing, saying:

Driving While Intoxicated offenses involve the use and/or abuse of mood altering drugs while performing a state licensed activity affecting public safety, and repeated violations suggest a willingness to continue in reckless and dangerous conduct or an unwillingness to take appropriate corrective measures, despite previous disciplinary action by the state.⁵

The Criminal History Rule also repeats the chapter 53 factors.⁶ The Criminal History Rule further includes a set of Disciplinary Guidelines for Criminal Conduct (Guidelines)

⁴ Tex Occ. Code § 53.023.

⁵ 22 Tex. Admin. Code § 213.28(b)(5)(G).

⁶ 22 Tex. Admin. Code § 213.28(e).

addressing sanctions for nurses with criminal backgrounds.⁷ The Guidelines list factors, in addition to those in chapter 53, that may be used in a case-by-case analysis:

- the actual damages, physical or otherwise, resulting from the criminal activity;
- if the person's conduct evidences a lack of truthfulness or trustworthiness;
- evidence of remorse;
- evidence of current maturity and personal accountability;
- evidence of having learned from past mistakes;
- evidence of current support structures that will prevent future criminal activity;
- evidence of current ability to practice in accordance with the NPA, Board rules, and generally accepted standards of nursing
- 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;
- if imprisonment followed a felony conviction, felony community supervision revocation, revocation of parole or revocation of mandatory supervision;
- if the person's conduct resulted in the revocation of probation/community supervision;
- evidence of the person's safe practice;
- successful completion of probation/community supervision; and
- if criminal activity is due to, associated with, or related to substance abuse or chemical dependency, including alcohol, evidence of evaluation by a Board approved evaluator, treatment (written verification of compliance with any treatment), after care and support group attendance, and evidence of random drug screening.⁸

⁷ 22 Tex. Admin. Code § 213.28. The Guidelines are at subsection (d).

⁸ 22 Tex. Admin. Code § 213.28(d).

The Guidelines go on to identify various classes of crimes and to set out recommended sanctions for each.⁹ For misdemeanor DWI offenses indicating a possible issue with substance abuse or chemical dependency that may affect a nurse's ability to practice safely or that may threaten public safety, the Guidelines state the following, if the judicial order was issued no longer than five years ago:

For a misdemeanor, if verifiable evidence of successful completion of treatment and 12 consecutive months of sobriety, impose discipline/issue license with stipulations or a peer assistance program. If no proof of successful completion of treatment and 12 consecutive months of sobriety, Deny/Revoke/ Suspend, at a minimum, until individual is able to provide such evidence. For either felony or misdemeanor, a chemical dependency evaluation may be required.¹⁰

B. Failure to Disclose Information on Nursing License Application

As noted above, the Board is authorized to take disciplinary action against a nurse for "unprofessional or dishonorable conduct that, in the [B]oard's opinion, is likely to deceive, defraud, or injure a patient or the public."¹¹ The Board has enacted rules that define "unprofessional conduct" to include "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."¹² And, the Board can take action against a nurse based on fraud or deceit in procuring or attempting to procure a license to practice professional nursing.¹³

⁹ 22 Tex. Admin. Code § 213.28(d) ("Attached Graphic"). These were amended in 2015. The ALJ applies the new version of the Guidelines, which (as applied to this case) are somewhat different than, but not clearly stricter or more lenient than, the older version.

¹⁰ 22 Tex. Admin. Code § 213.28(d) ("Attached Graphic").

¹¹ Tex. Occ. Code § 301.452(b)(10).

¹² 22 Tex. Admin. Code § 217.12(6)(I).

¹³ Tex. Occ. Code § 301.452(b)(2).

C. Sanctions

When a nurse has violated the Act or related Board rules, the Board is required to impose a disciplinary sanction, which can range from the issuance of a written warning to revocation of the person's license, and may also include administrative penalties.¹⁴ The Board has adopted a Disciplinary Matrix (Matrix) that the Board and SOAH are required to use in assessing sanctions.¹⁵ The Matrix classifies violations into tiers (first, second, or third) and sanction levels (level I or II) to reflect the Board's concerns related to public safety and the seriousness of the violations.¹⁶ Additionally, the Matrix lists aggravating and mitigating factors for the Board to consider in its determination of the appropriate disciplinary action. If the person has previously been the subject of disciplinary action by the Board, the Board shall consider taking a more severe disciplinary action.¹⁷

Under the Matrix, unprofessional conduct resulting in a serious risk to public safety is a "second tier offense." A sanction Level II for such an offense may result in the following:

Denial of Licensure, Suspension, or Revocation of Licensure. Any Suspension would be enforced at a minimum until nurse pays fine, completes remedial education and presents other rehabilitative efforts as prescribed by the Board. If violation involves mishandling of controlled substances, misdemeanor crimes or criminal conduct involving alcohol, drugs or controlled substances then suspension will be enforced until individual has completed treatment and one year verifiable sobriety before suspension is stayed, thereafter the stipulations will also include abstinence from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities/practice settings and/or periodic Board review. Board will use its rules and disciplinary sanction policies related to substance use disorders and other alcohol and drug related conduct in analyzing facts. Probated suspension will be for a minimum of two (2) or three (3) years with Board monitored and supervised practice depending on applicable Board policy.¹⁸

¹⁴ Tex. Occ. Code §§ 301.453, .501.

¹⁵ 22 Tex. Admin. Code § 213.33(a).

¹⁶ 22 Tex. Admin. Code § 213.33(b).

¹⁷ 22 Tex. Admin. Code § 213.33(b), (c); *see also* Tex. Occ. Code § 301.4531.

¹⁸ 22 Tex. Admin. Code § 213.33(b).

A nurse with a criminal background is also subject to the sanctions provisions of the Guidelines, discussed above.

III. EVIDENCE

At the hearing, Staff presented nine exhibits and Mr. Borque presented one exhibit, all of which were admitted into the record without objection. Staff presented testimony from Mr. Borque, and Mr. Borque also testified on his own behalf.

The evidence shows the following chronology. The bolded items are those Staff relies on in this case as the basis for potential sanction:

- **1991 conviction for misdemeanor reckless conduct** (in connection with driving that occurred in November 1990);¹⁹
- **2003 conviction for misdemeanor DWI** (Mr. Borque was discharged from community supervision in 2004);²⁰
- **2005 failure to disclose 2003 conviction on renewal application for nursing license;**²¹
- 2009 agreed order related to Mr. Borque's misappropriation and intemperate use of Ativan and Demerol, resulting in his successful completion in 2011 of the Texas Peer Assistance Program for Nurses (TPAPN);²² and
- **2014 conviction for misdemeanor DWI.**²³ Mr. Borque was sentenced to 12 months of community supervision in connection with this offense. He testified that he has a few hours of community service yet to complete, but he is almost done.

Mr. Borque testified that he did not realize at the time that he had provided an incorrect answer on his 2005 renewal application. He stated that the Board wrote to him in 2011 or 2012

¹⁹ Staff's Ex. 5. Defendant was originally charged with DWI, but his conviction was for "reckless conduct." *Id.*

²⁰ Staff's Ex. 6.

²¹ Staff's Ex. 7.

²² Staff's Ex. 9.

²³ Staff's Ex. 8.

and asked him to explain why he had not disclosed the 2003 conviction, and he never heard anything further about the matter.

Concerning the 2014 DWI conviction (which was for an incident in 2013), Mr. Borque testified that he had been stressed and having trouble sleeping, so his doctor prescribed Ambien. He told his wife he had to go to the store and, when he came to, he was in his car with some cans of beer. He testified that, since his completion of the TPAPN program in 2011, he does not drink.

In the two years following the 2013 DWI, said Mr. Borque, he has had an exemplary work record, including being promoted and recruited, and finishing three college courses with a grade average of 3.85. He stated that he does not have a continuing substance abuse problem, he is not a danger to anyone, his DWIs occurred 10 years apart, and they were entirely unrelated to his work. He further stated that he works as a cardiac program manager for a specialty pharmacy (a job that does not involve direct patient care). He travels extensively for his work. As a result of the 2014 DWI conviction, he has had a breathalyzer interlock mechanism on his vehicle for two years and this, he said, shows his sobriety throughout that time. He stated that he is willing to be subject to random drug screening "forever."

Mr. Borque presented two letters of recommendation. T.J. Roberts, Regional Manager of AMD Infusion in Houston, writes that Mr. Borque was recruited to be a cardiac program manager "due to his extensive previous experience in cardiac care, high risk program management and excellent reputation in the local medical community" and that he is an "excellent employee."²⁴ Suzanne Denson, owner of Denson Home Health in Houston, wrote in April 2014 that, at the time, Mr. Borque oversaw over 120 patients and 15 nurses. She stated:

Jason is an intelligent, motivated individual. He is an excellent clinician and is well-respected by patients and staff members. He has over 23 years experience as an RN and is working towards his certification as a heart failure specialist, and

²⁴ Respondent's Ex. 1.

academically has returned to college to work towards his masters degree. He holds himself to a high professional standard and expects the same of his peers.²⁵

IV. ANALYSIS

The first basis for sanction asserted by Staff is Mr. Borque's 1991 conviction for misdemeanor reckless conduct. Although Staff points out that the charge for this offense was for DWI, neither chapter 53 nor the Board's rules allow sanction on the basis of a mere charge; it is the conviction that matters. Mr. Borque was not convicted of DWI. Reckless conduct is not among the crimes listed in the Board's Criminal History Rule as offenses directly related to nursing.²⁶ Therefore, the crime—not shown to be one "directly related" to nursing or that "could affect the practice of nursing"—is not sanctionable under Texas Occupations Code § 53.021(a)(1) or § 301.452(b)(10) (as further interpreted in 22 Texas Administrative Code § 217.12(13)). And, even if the reckless conduct conviction could be the basis for sanction, it should not be considered as significant by the Board. The conduct occurred 26 years ago. Mr. Borque was 21 years old at the time.²⁷ Mr. Borque's first conviction for DWI did not occur until 13 years later. There is no sound reason for sanctioning Mr. Borque for a misdemeanor offense committed so long ago.

Nor can the 2004 DWI conviction be considered as the basis for sanction. In addressing whether DWI offenses are directly related to nursing, the Board's rule says that "*repeated* violations suggest a willingness to continue in reckless and dangerous conduct or an unwillingness to take appropriate corrective measures, despite previous disciplinary action by the state."²⁸ The Guidelines do not have any recommended sanctions for DWI offenses where the

²⁵ Respondent's Ex. 1.

²⁶ 22 Tex. Admin. Code § 213.28(b).

²⁷ See Staff's Ex. 1 at 1. One of the factors to be considered under chapter 53 is whether the crime was an act of "youthful indiscretion," and the first factor the Board looks to under its rules on the subject is whether the act occurred when the licensee was 22 years old or younger at the time of the conduct. 22 Tex. Admin. Code § 213.28(k).

²⁸ 22 Tex. Admin. Code § 213.28(b)(5)(G) (emphasis added).

judicial order was entered over five years ago and the fifth-year anniversary since the licensee's release from probation has passed. It appears that the Board does not consider a first-time DWI misdemeanor conviction that occurred 12 years ago to be one directly related to the practice of nursing or that "could affect the practice of nursing." Mr. Borque is, therefore, not subject to sanction under Texas Occupations Code § 53.021(a)(1) or § 301.452(b)(10) (as further interpreted in 22 Texas Administrative Code § 217.12(13)) based on his 2004 conviction.

Likewise, there has been no showing that Mr. Borque's failure, in 2005, to disclose the 2004 first-time, misdemeanor DWI conviction on his 2005 renewal application "would have affected the decision to license" him. The Board's pre-2015 Guidelines do not specify any sanction for a first DWI offense.²⁹ Further, Mr. Borque testified persuasively that he has no recollection of the electronic application process he completed in 2005; on this record, the ALJ does not find that he engaged in fraud or deceit, which are intentional acts. Therefore, Mr. Borque is not subject to sanction on this basis under Tex. Occ. Code § 301.452(b)(2) or (10) (as further interpreted by 22 Texas Administrative Code § 217.12(6)(I)).

The fourth asserted basis for sanction, the 2014 misdemeanor DWI conviction, is supported by the law and facts. As a second DWI offense resulting in a judicial order less than five years ago, this crime can be considered directly related to nursing and sanctionable under Texas Occupations Code § 53.021(a)(1) and § 301.452(b)(10) (as further interpreted in 22 Texas Administrative Code § 217.12(13)).³⁰

The next question is: what sanction is appropriate? Staff argues for an enforced suspension until Mr. Borque has produced "verifiable evidence" (e.g., random drug screens) of sobriety for a 12-month period plus treatment, followed by some period of probated suspension with supervised nursing practice.

²⁹ Staff's Ex. 7.

³⁰ See also 22 Tex. Admin. Code § 213.28(b)(5)(G), (d).

The ALJ agrees that Staff's recommended sanction generally jibes with that recommended by the Guidelines and Matrix. The Guidelines say:

For a misdemeanor [DWI], if verifiable evidence of successful completion of treatment and 12 consecutive months of sobriety, impose discipline/issue license with stipulations or a peer assistance program. If no proof of successful completion of treatment and 12 consecutive months of sobriety, Deny/Revoke/Suspend, at a minimum, until individual is able to provide such evidence.³¹

Similarly, under the Matrix, the 2014 DWI crime is best categorized as unprofessional conduct resulting in a serious risk to public safety, which is a second tier offense. And, given that Mr. Borque was subject to a Board order in 2009 related to substance abuse issues, it generally makes sense to consider a Level II sanction for the 2014 DWI conviction. For a § 301.452(b)(10) second tier violation, Level II sanction, the Matrix provides:

If violation involves mishandling of controlled substances, misdemeanor crimes or criminal conduct involving alcohol, drugs or controlled substances then suspension will be enforced until individual has completed treatment and one year verifiable sobriety before suspension is stayed, thereafter the stipulations will also include abstention from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities/practice settings and/or periodic Board review. Board will use its rules and disciplinary sanction policies related to substance use disorders and other alcohol and drug related conduct in analyzing facts. Probated suspension will be for a minimum of two (2) or three (3) years with Board monitored and supervised practice depending on applicable Board policy.³²

However, the Guidelines specifically state that each case must be considered on its own merits. There are several factors at play in this case that warrant modification of the set of sanctions usually recommended by the Board's rules for a crime like Mr. Borque's. First is the fact that Mr. Borque has a good job in a medicine-related field that does not involve direct patient care. In order to successfully complete the specific sanctions recommended by the Guidelines and Matrix, Mr. Borque would have to leave his current employment and work in

³¹ 22 Tex. Admin. Code § 213.28(d) ("Attached Graphic").

³² 22 Tex. Admin. Code § 213.33(b) ("Attached Graphic").

direct patient care for several years. In other words, he would be put to a choice between his current, stable employment and his nursing license. Given that Mr. Borque has been subject to a breathalyzer interlock on his vehicle for approximately two years and has had no apparent problems with drugs or alcohol, during that time, it would make sense to allow Mr. Borque to undertake measures to fully assure the Board of his sobriety while not having to quit his job. Finally, there is the issue of the "treatment" recommended during the period of enforced suspension. It is unclear to the ALJ what that requirement entails. As Mr. Borque successfully completed TPAPN in 2011, his DWIs are spaced by approximately 10 years, and it is not clear from the record that he has an ongoing substance abuse problem, the ALJ does not recommend treatment in this case.

Therefore, the ALJ recommends that Mr. Borque be subject to an order requiring him to comply with either of the following set of sanctions, as follows:

- (1) an enforced suspension for as long as necessary to demonstrate 12 months of verified sobriety (through random drug screening or other means acceptable to the Board), followed by two years of probated suspension with stipulations, including monitored and supervised practice; or
- (2) an enforced suspension for as long as necessary to: first, demonstrate 24 months of verified sobriety (through random drug screening or other means acceptable to the Board) and, second, obtain a chemical dependency evaluation indicating that Mr. Borque is safe to return to practice.

Both of these options would give the Board confidence of Mr. Borque's sobriety and capacity to practice safely.

V. FINDINGS OF FACT

1. Jason Eric Borque (Respondent) holds license number 561876 issued by the Texas Board of Nursing (Board) and has been licensed as a registered nurse in Texas since 1990.
2. In 2014, Respondent was convicted in Galveston County Court at Law No. 1 (in Case No. MD-0341044) of driving while intoxicated (DWI), a class B misdemeanor offense committed on December 10, 2013. Respondent was sentenced to 12 months of

- community supervision in connection with this offense. He has yet to complete several hours of community service.
3. Respondent had a prior misdemeanor DWI conviction in 2003. He was placed on probation for one year and discharged from community supervision in 2004.
 4. A preponderance of the evidence does not support a finding that Respondent deliberately failed to disclose the 2003 conviction on his 2005 nursing license renewal application.
 5. In 2009, Respondent entered into an agreed Board order related to misappropriation and intemperate use of Ativan and Demerol, resulting in his successful completion in 2011 of the Texas Peer Assistance Program for Nurses.
 6. Respondent has been subject to a breathalyzer interlock on his vehicle for approximately two years and has had no apparent problems with drugs or alcohol during that time.
 7. Respondent works as a cardiac program manager for a specialty pharmacy (a job that does not involve direct patient care).
 8. Over the past two years, Respondent was recruited to the cardiac program manager job due to his extensive previous experience in cardiac care, high risk program management, and excellent reputation in the local medical community; he has been successful in his work; and he has completed several college courses with high grades.
 9. On December 1, 2015, Staff sent a Notice of Hearing to Respondent. The notice contained: (1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short, plain statement of the matters asserted.
 10. The hearing convened on February 16, 2016, before Administrative Law Judge Shannon Kilgore in the SOAH hearings facility in Austin, Texas. Staff was represented by John Griffith, Assistant General Counsel. Respondent represented himself at the hearing. The record closed at the conclusion of the hearing.

VI. CONCLUSIONS OF LAW

1. The Board has jurisdiction over the licensing and discipline of nurses. Tex. Occ. Code ch. 301.
2. SOAH has jurisdiction over contested cases referred by the Board, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. Tex. Occ. Code § 301.459; Tex. Gov't Code ch. 2003.

3. Respondent received adequate and proper notice of the hearing on the merits. Tex. Occ. Code § 301.454; Tex. Gov't Code §§ 2001.051-.052.
4. Staff had the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
5. Respondent is subject to sanction. Tex. Occ. Code § 301.452(b)(10); 22 Texas Admin. Code § 217.12(13).
6. The appropriate sanction should be based on the Board's Disciplinary Guidelines for Criminal Conduct, 22 Tex. Admin. Code § 213.28(d), and the Board's Disciplinary Matrix, 22 Tex. Admin. Code § 213.33, and sanctions should be analyzed on a case-by-case basis.

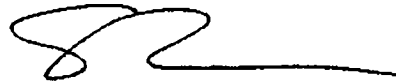
VII. RECOMMENDATION

The ALJ recommends that the Board issue an order providing that Respondent's registered nursing license be subject to:

(1) an enforced suspension for as long as necessary to demonstrate 12 months of verified sobriety (through random drug screening or other means acceptable to the Board), followed by two years of probated suspension with stipulations, including monitored and supervised practice; or

(2) an enforced suspension for as long as necessary to: first, demonstrate 24 months of verified sobriety (through random drug screening or other means acceptable to the Board) and, second, obtain a chemical dependency evaluation indicating that Mr. Borque is safe to return to practice.

SIGNED March 28, 2016.



**SHANNON KILGORE
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

April 11, 2016

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 Certificate No. 561876
Issued to JASON ERIC BORQUE
SOAH Docket No. 507-16-1228

Dear Judge:

Enclosed please find *Staff's Exceptions to 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) 305-8658 should you have any questions and/or concerns regarding this case.

Thank you in advance for your time and assistance with this matter.

Very truly yours,

John R. Griffith
Assistant General Counsel

JRG/cp
Enclosure

cc: Jason Eric Borque
5522 Avenue O 1/2
Galveston, Texas 77551

Via CMRRR #: 91 7199 9991 7031 5255 0439

Members of the Board

Kathleen Shipp, MSN, RN, FNP
Lubbeck, President

Nina Almasy, MSN, RN Austin	Deborah Bell, CLU, ChFC Abilene	Patricia Chapp, BA Dallas	Laura Disque, MN, RN Edinburg	Allison Edwards, DrPH, MS, RN Bellevue	Diana Flores, MN, RN Houston
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Monica Hamby, LVN Amarillo	Doris Jackson, DHA, (ABD), MSN, RN Pearland	Kathy Leader-Horn, LVN Granbury	Beverly Jean Nutall, LVN Weatherford	David Saucedo, II El Paso	Francis Stokes Fort Aransas
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SOAH DOCKET NO. 507-15-3077

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE	§	
NUMBER 561876	§	OF
ISSUED TO	§	
JASON ERIC BORQUE	§	ADMINISTRATIVE HEARINGS

STAFF'S EXCEPTIONS TO PROPOSAL FOR DECISION

TO THE HONORABLE JUDGE:

COMES NOW, Staff of the Texas Board of Nursing ("Staff" or "the Board"), by and through its attorney of record, John R. Griffith, and files Exceptions to the Proposal for Decision issued in this matter on March 28, 2016, and would state as follows:

I.

Staff excepts to the lack of a Finding of Fact and Conclusion of Law that Respondent's conduct regarding his 2004 DWI conviction constitutes unprofessional or dishonorable conduct, under § 301.452(b)(10) and 22 Tex. Admin. Code § 217.12(13).

In the ALJ's analysis, the ALJ states that "the Board does not consider a first-time DWI misdemeanor conviction that occurred 12 years ago to be one directly related to the practice of nursing or that "could affect the practice of nursing."¹ First, Board Rule 217.12² provides the following:

"The unprofessional conduct rules are intended to protect clients and the public from incompetent, unethical, or illegal conduct of licensees. The purpose of these rules is to identify unprofessional or dishonorable behaviors of a nurse which the board believes are likely to deceive, defraud, or injure clients or the public. Actual injury to a client need not be established. These behaviors include but are not limited to:.."

...(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."

Board Rule 217.12(13) provides that a wide range of criminal conduct or behavior constitutes unprofessional or dishonorable conduct. A first-time DWI is not excluded. Respondent's 2004 DWI conviction is clearly actionable unprofessional or dishonorable conduct per Board Rule 217.12(13) and Section 301.452(b)(10) of the Nursing Practice Act.

Remember that the issue here is whether or not the conduct is actionable or subject to discipline, not whether the Board would issue a sanction based on such misconduct based on the facts of a particular case. The ALJ is correct that the Board views "repeated" offenses more seriously, but that

¹ *Id.*

² 22 Texas Administrative Code § 217.12.

does not preclude the Board from having the jurisdiction to take action on a single offense under 217.12(13) and 301.452(b)(10). Practically, the Board might not have taken any action for a first-time DWI, but again, the Board had the authority, and still does, to take action under the law. The distinction between conduct being actionable and subjecting a nurse to a potential sanction, and actually taking action and imposing a sanction is important. The Board's authority to act cannot be limited by the Board's Criminal Guidelines or policy regarding what an appropriate sanction might be in a given case. In such cases, the ALJ could find a respondent violated the NPA and the Board's Rules, and that he or she is subject to discipline, but then simply not recommend any sanction based on the Board's rules and policy.

This issue is further complicated by the fact that Respondent did not disclose the 2004 conviction on his 2005 renewal. The Board was not even aware of the DWI conviction, and thus, unable to take any action. Finding that a 12 year old DWI does not directly relate to the practice of nursing, perhaps unintentionally, creates a benefit for a nurse that does not disclose criminal conduct. Under such reasoning, as the age of the criminal conduct grows, the Board's ability to take action and issue a sanction lessens. The age of the undisclosed 2004 DWI should not be used to make the determination that Respondent is not subject to discipline for such conduct, when in fact, the age of the misconduct is only relevant to the appropriate sanction, if any. Again, there is an important distinction between the conduct being actionable, or subject to discipline, and whether or not a sanction is appropriate.

Despite being actionable and subject to discipline, Staff does not argue that finding Respondent subject to a sanction for the DWI requires a greater sanction than that recommended by the ALJ regarding the 2014 DWI, which already takes into consideration that the 2014 DWI was in fact Respondent's second DWI.

Accordingly, Staff respectfully asks for a Finding of Fact and corresponding Conclusion of Law that addresses Respondent's 2004 DWI and finds Respondent subject to discipline under § 301.452(b)(10) and 22 TAC § 217.12(13).

II.

Staff excepts to the ALJ's recommended sanction in that while Sanction Recommendation One does generally comport the Board's Disciplinary Matrix, per Board Rule 213.33(b), Sanction Recommendation Two suggests a sanction that is not supported by the Disciplinary Matrix, and is not permitted by the Board's Disciplinary Guidelines for Criminal Conduct, both of which only require 12 months of verifiable sobriety.

Therefore, Staff respectfully asks the ALJ to limit the recommended sanction to Sanction Recommendation One.

507-16-1228

April 5, 2016

STATE OFFICE OF
ADMINISTRATIVE HEARINGS

2016 APR 27 PM 12: 01

Response to Proposal For Decision

I take exception to to ALJ's finding the 2014 DWI is a second tier offense. The ALJ stated the 2014 DWI is " ...best categorized as unprofessional conduct resulting in a serious risk to public safety."

On page 12 the ALJ states" As Mr Borque successfully completed TPAPIN in 2011, his DWIs are spaced by approximately 10 years, and it is not clear from the record that he has an ongoing substance abuse problem, the ALJ does not recommend treatment in this case. "

The above statement from page 12 clearly contradicts the finding of serious risk to the public. As this risk is an implied CONTINUING threat, I would have to have a clearly defined continuing substance abuse issue. The ALJ clearly states doubt regarding a continuing issue and does not recommend treatment. Also, judging this case on merit, my exemplary professional record, lack of any further legal issues, continuing education and the evidence of sobriety provided by 2 years of interlock device readings further dispute classification as a risk to public safety.

As to unprofessional conduct, this DWI did not occur during work hours or on call. I am at a loss as to how this can be considered UNPROFESSIONAL conduct as I was not functioning in this capacity at the time of the occurrence.

I also take exception to the recommended sanctions based on the following:
As this is not truly a second tier offense, the sanction is not appropriate.

I don't believe the BNE has adequately proved unprofessional conduct or continued public safety risk. As such, suspending my license and/or enforcing practice stipulations is not protecting the public safety, but merely acting punitively. I also fail to see the board has judged the case on merit as outlined in the guidelines.

Respectfully,
Jason Borque

State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

May 6, 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. 507-16-1228-Texas Board of Nursing v. Jason Eric Borque

Dear Ms. Thomas:

I issued the Proposal for Decision (PFD) in this case on March 28, 2016. The staff (Staff) of the Texas Board of Nursing timely filed exceptions on April 11, 2016. The respondent, Mr. Borque, filed untimely exceptions on April 27, 2016.¹ For the following reasons, I recommend no changes to the PFD.

Staff excepts to my analysis that the Board cannot sanction Mr. Borque for a 2003 first-time, misdemeanor DWI conviction. Staff asserts that Texas Occupations Code § 301.452(b)(10), as interpreted by 22 Texas Administrative Code § 217.12(13), authorizes sanction on the basis of such a conviction. However, there are two problems with Staff's assertion. First is the language of § 217.12(13), which requires that the criminal conduct "could affect the practice of nursing." There has been no showing that Mr. Borque's driving while intoxicated in 2003 could affect the practice of nursing.

Second, § 217.12(13) must be read to comport with the Legislature's directives to licensing agencies in chapter 53 of the Texas Occupations Code. Under § 53.021(a), the 2003 conviction, in order to be the basis of a license suspension, must be "directly related" to the licensed occupation. As discussed in the PFD at pages 9-10, Staff failed to show that the Board considers a 12-year-old, first-time DWI misdemeanor

¹ Although dated April 5, 2016, Mr. Borque's exceptions were received at the State Office of Administrative Hearings on April 27. Exceptions were due no later than April 15, 2016.

conviction to be one directly related to the practice of nursing.² The Board's rule identifying which criminal offenses are directly related to nursing speaks of repeated DWI offenses, and the Board's criminal guidelines do not have any recommended sanctions for DWI offenses where the judicial order was entered over five years ago and the fifth-year anniversary since the licensee's release from probation has passed.³ Given that the statute mandates a sanction for any conduct falling under § 301.452(b),⁴ it strongly appears that the 2003 conviction is not considered directly related to nursing.

Staff also excepts to part of the PFD's recommendation for a sanction because, Staff asserts, it departs from the sanctions provided in the Board's disciplinary matrix and criminal guidelines. However, both the matrix and the guidelines provide for flexibility in the face of case-specific factors.⁵ And, as the recommendation in the PFD is neither a finding of fact nor a conclusion of law, but merely a proposal based on the particular facts of this case, the Board is free to adopt, modify, or reject any or all of the recommendation.

As noted above, Mr. Borque's exceptions were not timely filed. Nonetheless, I note that he excepts to my determination that the 2014 DWI offense is a second-tier offense under the unprofessional conduct portion of the Board's disciplinary matrix. Mr. Borque asserts that there was no danger to the public in connection with his conduct. However, in making this determination, I considered the danger posed to the public by an intoxicated driver on the roads. And the Board's rules—which constitute laws applicable to this case—establish that repeated DWI criminal offenses are directly related to nursing and sanctionable.⁶

For these reasons, I recommend no change to the PFD. It is ready for consideration.

Sincerely,



Shannon Kilgore
Administrative Law Judge

SK/tt
Enclosures

xc: John R. Griffith, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 –
VIA FACSIMILE (512) 305-8101
Kathy A. Hoffman, Legal Assistant Supervisor, Texas Board of Nursing, 333 Guadalupe, Suite. 460, Austin, TX 78701–
VIA FACSIMILE (512) 305-8101
Jason Eric Borque, 5522 Avenue O 1/2, Galveston, TX 77551–**VIA REGULAR MAIL**

² That Mr. Borque did not disclose the 2003 conviction to the Board on his 2005 renewal application does not change the analysis under § 217.12(13) of the Board's rules or § 53.021(a) of the Texas Occupations Code.

³ 22 Tex. Admin. Code § 213.28(b)(5)(G), (d).

⁴ Tex. Occ. Code § 301.453

⁵ The criminal guidelines, by their own terms, set forth "recommended sanctions" and state that each case must be considered on its own merits 22 Tex. Admin. Code § 213.28(d). The matrix provides that any aggravating or mitigating factors that may exist in a particular matter, but that are not specifically listed, may also be considered by the Board. 22 Tex. Admin. Code § 213.33(b).

⁶ 22 Tex. Admin. Code §§ 213.28(b)(5)(G); 217.12(13).