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Stephanie Chapman
Executive Director of the Board

DOCKET NUMBER 507-16-2259

**IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 313786
ISSUED TO
MARTHA NYANGAU**

**§
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§
§
§**

**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**

OPINION AND ORDER OF THE BOARD

**TO: MARTHA NYANGAU
3000 SOUTH FIRST ST., APT 1024
LUFKIN, TX 75901**

**STEVEN D. ARNOLD
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701**

At the regularly scheduled public meeting on October 27-28, 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 recommendation that the Board adopt the PFD with changes; and (3) Respondent's recommendation to the Board regarding the PFD and order, if any.

The Board finds that after proper and timely notice was given, the above styled case was heard by an Administrative Law Judge (ALJ) who made and filed a PFD containing the ALJ's findings of facts and conclusions of law. The PFD was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed by any party.

The Board, after review and due consideration of the PFD; Staff's recommendations; and the presentation by the Respondent during the open meeting, if any, adopts all of the findings of fact and conclusions of law of the ALJ contained in the PFD as if fully set out and separately stated herein, except for proposed Conclusion of Law Number 10, which is hereby re-designated as a recommendation, and proposed Conclusion of Law Number 11, which is modified and adopted as set out herein. 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). Section 2001.058(e)(1) authorizes the Board to change a finding of fact or conclusion of law made by the ALJ or to vacate or modify an order issued by the ALJ if the Board determines that the ALJ did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions. Further, §2001.058(e)(3) authorizes the Board to change a finding of fact or conclusion of law to correct technical errors.

At the outset, the Board notes that there is a typographical error throughout the PFD

regarding the name of one of the witnesses that testified on behalf of the Board. The name of the witness should be reflected as *Denise Benbow* instead of *Denise Bimbo*. Under the authority of §2001.058(e)(3), the Board notes that this typographical error should be corrected throughout the PFD.

Proposed Conclusion of Law Number 10

Although labeled as a proposed conclusion of law, proposed Conclusion of Law Number 10 is part of the ALJ's ultimate sanction recommendation and is related to the ALJ's recommended sanction in this matter. A recommendation for sanction is not a proper conclusion of law. As such, the Board re-designates proposed Conclusion of Law Number 10 as part of the ALJ's recommendation and declines to adopt it as a conclusion of law.

Proposed Conclusion of Law Number 11

The Occupations Code §301.461 provides that a person who is found to have violated Chapter 301 (the Nursing Practice Act) may be assessed the administrative costs of conducting the hearing to determine the violation. The evidence in the record includes an Affidavit of Costs detailing the costs incurred by the Board and includes costs associated with copying exhibits and witness expenses, such as mileage, meals, lodging, and parking fees. While the Board does not necessarily disagree that the reimbursement of administrative costs could include additional costs, such as those noted by the ALJ in proposed Conclusion of Law Number 11, such additional costs are not present in this case, and as such, the Board finds it appropriate to adopt a conclusion of law that only references the costs requested in the Affidavit of Costs.

Therefore, under the authority of §2001.058(e)(1), it is ORDERED THAT CONCLUSION OF LAW NUMBER 11 is MODIFIED and ADOPTED as follows:

11. The Board is entitled to seek to impose the administrative costs of this proceeding on the Respondent as supported by the evidence in the record. Tex. Occ. Code §301.461.

Recommendation for Sanction

Although the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact or conclusions of law¹, the Board agrees with the ALJ that a Reprimand with Stipulations is

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.).

the most appropriate sanction in this matter².

It is unclear from the PFD whether the Respondent's conduct warrants a first tier, sanction level II sanction or a second tier, sanction level I sanction³. Nevertheless, the Board finds that the Respondent's violations of §301.452(b)(10) and (13) collectively warrant a second tier, sanction level I sanction, for which either a Warning or Reprimand with Stipulations is authorized⁴.

The Board views an individual's violations of the 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 any one of the individual violations⁵. Further, when an individual has been previously disciplined or is being disciplined for more than one violation of the NPA and/or Board rules, the Board is statutorily required⁶ to consider taking a more severe action than it would otherwise impose.

The Board must consider the aggravating and mitigating factors in this case in order to determine the most appropriate sanction. The Respondent's conduct raises questions about her ability to practice safely and her professional character. Falling asleep on duty, while caring for a vulnerable patient, poses a risk of harm to the patient⁷. Further, documenting the nursing flow sheet with a false arrival time raises questions about the Respondent's honesty and integrity⁸. Further, the Respondent was not a new or inexperienced nurse when she committed these violations⁹. The ALJ did not note mitigation.

After carefully considering these aggravating and mitigating factors, the Board has determined, pursuant to the Board's Disciplinary Matrix and the Board's rules, including 22 Tex. Admin. Code §§213.27 and 213.33(e), that the Respondent's license should be subject to a Reprimand with Stipulations for a period of two years. The Board finds that a nursing jurisprudence and ethics course, a documentation course, and a critical thinking course¹⁰ are appropriate. The Board further finds that direct supervised practice is

² See pages 8 and 10 of the PFD.

³ The PFD contains inconsistent summaries of Ms. Benbow's testimony regarding the appropriate tier and sanction level of the Board's Disciplinary Matrix. Further, the ALJ's finding on page 8 of the PFD also appears inconsistent with the discussion and analysis regarding the appropriate tier and sanction level. See pages 6 and 8 of the PFD.

⁴ See the Board's Disciplinary Matrix, located at 22 Tex. Admin. Code §213.33(b).

⁵ 22 Tex. Admin. Code §213.33(b).

⁶ See Tex. Occ. Code §301.4531.

⁷ See adopted Findings of Fact Numbers 6-8.

⁸ See adopted Finding of Fact Number 5 and pages 7-8 of the PFD.

⁹ See adopted Finding of Fact Number 9.

¹⁰ See 22 Tex. Admin. Code §213.33(f), which requires disciplinary orders to include participation in a program of education, including a course in nursing jurisprudence and ethics, and §213.33(e)(4), which also authorizes the participation in a program of education.

appropriate and necessary for the first year of the Order, to be followed by indirect supervision for the remainder of the Order. Employment restrictions, employer notifications, and quarterly employer reports are also warranted for the probationary period of the Order. These conditions enable the Board to remain informed about the Respondent's practice while under the terms of this Order and ensure that the Respondent's practice is being supervised in accordance with the terms of the Order. Further, these conditions are necessary to ensure consistency in the Respondent's supervision so that patterns of practice may be effectively monitored and, if problematic, identified quickly. These requirements are authorized under 22 Tex. Admin. Code §213.33(e)(4)¹¹, are supported by the record, and are consistent with the Board's rules and policies. The Board further finds that an assessment of the administrative costs of the hearing is appropriate and authorized under Tex. Occ. Code §301.461.

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

I. APPLICABILITY

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

II. COMPLIANCE WITH LAW

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

III. REMEDIAL EDUCATION COURSE(S)

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

¹¹ 22 Tex. Admin. Code 213.33(e)(4) provides that a Reprimand with Stipulations shall include reasonable probationary stipulations, which may include: the completion of remedial education courses, limitations of nursing activities, periodic Board review, and supervised practice for a period of at least two years.

- A. **A Board-approved course in Texas nursing jurisprudence and ethics** that shall be a minimum of six (6) hours in length. The course's content shall include the Nursing Practice Act, standards of practice, documentation of care, principles of nursing ethics, confidentiality, professional boundaries, and the Board's Disciplinary Sanction Policies regarding: Sexual Misconduct; Fraud, Theft and Deception; Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder; and Lying and Falsification. Courses focusing on malpractice issues will not be accepted. Home study courses and video programs will not be approved.
- B. **A Board-approved course in nursing documentation** that shall be a minimum of six (6) hours in length. The course's content shall include: nursing standards related to accurate and complete documentation; legal guidelines for recording; methods and processes of recording; methods of alternative record-keeping; and computerized documentation. Home study courses and video programs will not be approved.
- C. **The course "Sharpening Critical Thinking Skills,"** a 3.6 contact hour online program provided by the National Council of State Boards of Nursing (NCSBN) Learning Extension.

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

IV. ADMINISTRATIVE REIMBURSEMENT

RESPONDENT SHALL pay an administrative reimbursement in the amount of four hundred and fifteen dollars and seventy nine cents (\$415.79). RESPONDENT SHALL pay this fine within forty five (45) days of entry of this Order. Payment is to be made directly to the Texas Board of Nursing in the form of cashier's check or U.S. money order. Partial payments will not be accepted.

V. 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 eight (8) quarterly periods [two (2) years] of employment. This requirement will not be satisfied until eight (8) quarterly periods of employment as a nurse have elapsed. Any quarterly period without continuous

employment with the same employer for all three (3) months will not count towards completion of this requirement. Periods of unemployment or of employment that do not require the use of a registered nurse (RN) or a vocational nurse (LVN) license, as appropriate, will not apply to this period and will not count towards completion of this requirement.

- A. Notifying Present and Future Employers:** RESPONDENT SHALL notify each present employer in nursing and present each with a complete copy of this Order, including all attachments, if any, within five (5) days of receipt of this Order. While under the terms of this Order, RESPONDENT SHALL notify all future employers in nursing and present each with a complete copy of this Order, including all attachments, if any, prior to accepting an offer of employment.
- B. Notification of Employment Forms:** RESPONDENT SHALL CAUSE each present employer in nursing to submit the Board's "Notification of Employment" form to the Board's office within ten (10) days of receipt of this Order. RESPONDENT SHALL CAUSE each future employer to submit the Board's "Notification of Employment form" to the Board's office within five (5) days of employment as a nurse.
- C. Direct Supervision:** For the first year [four (4) quarters] of employment as a Nurse under this Order, RESPONDENT SHALL be directly supervised by a Registered Nurse, if licensed as a Registered Nurse, or by a Licensed Vocational Nurse or a Registered Nurse, if licensed as a Licensed Vocational Nurse. Direct supervision requires another nurse, as applicable, to be working on the same unit as RESPONDENT and immediately available to provide assistance and intervention. RESPONDENT SHALL work only on regularly assigned, identified and predetermined unit(s). RESPONDENT SHALL NOT be employed by a nurse registry, temporary nurse employment agency, hospice, or home health agency. RESPONDENT SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.
- D. Indirect Supervision:** For the remainder of the stipulation/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.

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

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 28th day of October, 2016.

TEXAS BOARD OF NURSING



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

Attachment: Proposal for Decision; Docket No. 507-16-2259 (August 18, 2016)

State Office of Administrative Hearings



Lesli G. Ginn
Chief Administrative Law Judge

August 18, 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. 507-16-2259; Texas Board of Nursing v. Martha Nyangau

Dear Ms. Thomas:

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

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

Sincerely,

A handwritten signature in black ink that reads "Steven D. Arnold".

Steven D. Arnold
Administrative Law Judge

SDA/eh
Enclosures

xc: Jessica M. Lance, 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**
Martha Nyangau, 3000 South First Street, Apartment 1024, Lufkin, TX 75901 – **VIA REGULAR MAIL**

SOAH DOCKET NO. 507-16-2259

TEXAS BOARD OF NURSING,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
v.	§	OF
	§	
MARTHA NYANGAU,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff (Staff) of the Texas Board of Nursing (Board) brought this action against Martha Nyangau (Respondent) seeking sanctions against her license because she slept during her shift and falsified records. Staff also sought to recover the costs incurred in this proceeding. This proposal for decision finds that Staff established some of the violations and recommends that Respondent be reprimanded with stipulations as the Board deems necessary, and that Respondent be responsible for costs of this proceeding in the amount of \$415.79.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing convened June 6, 2016, before Administrative Law Judge (ALJ) Steven D. Arnold in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff was represented by Jessica M. Lance, Assistant General Counsel. Respondent represented herself. The record remained open until June 24, 2016, to permit the filing of the Staff's affidavit of costs and objections or responses to same. The record closed on June 24, 2016.

Matters concerning notice and jurisdiction were undisputed. Those matters are set out in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Applicable Law

Texas Occupations Code (Code) § 301.452(b)(10) provides that a Board licensee is subject to disciplinary action for “unprofessional or dishonorable conduct that, in the [B]oard’s opinion, is likely to deceive, defraud, or injure a patient or the public.” Code § 301.452(b)(12) provides that a Board licensee is subject to disciplinary action for “lack of fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public.” Finally, Code § 301.452(b)(13) provides that a Board licensee is subject to disciplinary action for “failure to care adequately for a patient or to conform to the minimum standards of acceptable nursing practice in a manner that, in the board’s opinion, exposes a patient or other person unnecessarily to risk of harm.”

Nurses are required to know and conform to the Texas Nursing Practice Act and the Board’s rules and regulations as well as all federal, state, or local laws, rules, or regulations affecting the nurse’s current area of nursing practice;¹ implement measures to promote a safe environment for clients and others;² and accurately and completely report and document the client’s status, nursing care rendered, orders, administration of medications and treatments, client responses, and contact with other health team members concerning significant events regarding client’s status.³

¹ 22 Tex. Admin. Code § 217.11(1)(A).

² 22 Tex. Admin. Code § 217.11(1)(B).

³ 22 Tex. Admin. Code § 217.11(1)(D).

The Board's rules defines "unprofessional conduct" to include unsafe practices,⁴ careless or repetitive conduct that may endanger a client's life, health, or safety,⁵ inability to practice safely,⁶ and misconduct.⁷

When a nurse violates a statute or rule, the Board is required to impose a disciplinary sanction, which can range from the issuance of a written warning to revocation of the nurse's license.⁸ The Board's rules address specific factors to be considered in sanctioning a nurse in a disciplinary proceeding. The Board has adopted a Disciplinary Matrix that the Board and the State Office of Administrative Hearings (SOAH) are required to use in all disciplinary matters.⁹ The Board's Disciplinary Matrix addresses the discipline to be imposed in cases where a nurse has engaged in conduct in violation of Code § 301.452(b)(10), (b)(12), and (b)(13). The Disciplinary Matrix categorizes offenses into three tiers, with two sanction levels each, based upon the seriousness of the offense and risk of harm to patients or the public. The Disciplinary Matrix also lists certain aggravating circumstances that must be considered as well as mitigating circumstances.¹⁰ The Disciplinary Matrix goes on to include another list of factors that the Board and SOAH must consider in determining the appropriate disciplinary sanction, including evidence of potential harm to patients or the public, evidence of a lack of truthfulness, evidence of present fitness to practice, previous disciplinary history, and the length of time the person has practiced.¹¹

The recommended sanction under the Board's Disciplinary Matrix for violation of Code § 301.452(b)(10), (b)(12), and (b)(13) is based on the appropriate tier of the offense, the appropriate sanction level, and applicable aggravating and mitigating factors.

⁴ 22 Tex. Admin. Code § 217.12(1).

⁵ 22 Tex. Admin. Code § 217.12(4).

⁶ 22 Tex. Admin. Code § 217.12(5).

⁷ 22 Tex. Admin. Code § 217.12(6).

⁸ Tex. Occ. Code § 301.453(a).

⁹ 22 Tex. Admin. Code § 213.33(a).

¹⁰ 22 Tex. Admin. Code § 213.33(b).

¹¹ 22 Tex. Admin. Code § 213.33(c).

For Code § 301.452(b)(10) violations, a failure to comply with a substantive Board rule regarding unprofessional conduct is categorized as a first tier offense if it resulted in no adverse patient effects, or if minor unethical conduct is at issue that involved no patient safety risk. If there is a serious risk to patient or public safety, such a violation is categorized as a second tier offense. The recommended punishments for first tier, sanction Level I under this offense are remedial education and/or a fine of \$250 or more, and for first tier, sanction Level II, the recommended punishments are warnings with stipulations. The recommended punishments for second tier, sanction Level I under this offense are warning or reprimand, and for second tier, Level II, the recommended punishments are suspension or revocation of the nurse's license.

For Code § 301.452(b)(12) violations, a lack of fitness based on any mental health condition, diminished capacity, or physical health condition is considered a second tier offense if there is a potential harm or adverse patient effects or other serious practice violations. The recommended punishments under sanction Level I for this offense are referral to a Board approved Peer Assistance Program, a warning, or reprimand with stipulations for a minimum of one year, and for Level II, the recommended punishments are denial of licensure or suspension of the nurse's license until the nurse can provide evidence of competency followed by probation with stipulations.

For Code § 301.452(b)(13) violations, practice below standard with a low risk of patient harm is considered a first tier offense, while practice below standard with patient harm or a risk of patient harm is a second tier offense. The recommended punishments for a sanction Level I of a first tier offense is remedial education and/or a fine and, for a sanction Level II of a first tier offense, the recommended punishment is a reprimand with stipulations. For a sanction Level I of a second tier offense, the recommended punishment is the same as for a sanction Level II of a first tier offense. For a sanction Level II of a second tier offense, the recommended punishment is the denial, suspension, revocation, or request for voluntary suspension of the license.

The Board is entitled to seek to impose the administrative costs of this proceeding on the Respondent, including the cost paid by the Board to SOAH and the Office of the Attorney General or other Board counsel for legal and investigative services, the cost of a court reporter and witnesses, reproduction of records, Board staff time, travel, and expenses.¹²

B. Evidence

Staff offered ten exhibits, all of which were admitted into evidence, and offered the testimony of four witnesses: Patient 2690124201 (Patient) and his wife; Kari Massey (Maxim Healthcare Services Clinical Supervisor); and Denise Bimbo (a registered nurse working for the Board). Respondent testified on her own behalf.

Respondent is licensed in Texas as a Vocational Nurse, holding license number 313786. Respondent was licensed as a nurse in 2009. She has worked for Maxim Healthcare Services (Maxim) as a nurse in Tennessee; Maryland; Washington, D.C.; and Texas.

1. Charge I – Falling Asleep While on Duty

The Patient's wife testified that at approximately 4:30 a.m. on October 27, 2014, she had awoken to get ready for work and found Respondent asleep. Respondent presented no evidence contesting this claim that she was asleep on duty.

Ms. Bimbo testified that Respondent lacked fitness to practice vocational nursing in that she was sleeping during her shift. Respondent's conduct could have affected her ability to recognize subtle signs, symptoms, or changes in a patient's conditions, and could have affected her ability to make rational, accurate, and appropriate assessments, judgments, and decisions regarding patient care, thereby placing the patient in potential danger. This is, according to Ms. Bimbo, a violation of Code § 301.452(b)(10), (b)(12), and (b)(13).

¹² Tex. Occ. Code § 301.461.

According to Ms. Bimbo, Respondent's actions constitute sanction Level II, first-tier offenses for each violation, carrying a potential penalty of reprimand with stipulations. Aggravating factors include multiple violations, a vulnerable patient, and length of service (*i.e.*, Respondent had been licensed since 2009 and was not newly licensed).

2. Charge II – Falsely Documenting Medical Records

On October 26, 2014, Respondent was to provide in-home nursing care for the Patient from 8:00 p.m. until 8:00 a.m. on October 27, 2014. The Patient testified, and Respondent admitted, that Respondent did not report to the Patient's house until approximately 9:15 p.m. on October 26, 2014. Phone logs provided by Maxim confirmed this time frame. Respondent logged her time on the Nursing Flow Sheet (a medical record) as having arrived at the Patient's house at 8:00 p.m. rather than her actual arrival time. This is, according to Ms. Bimbo, a violation of Code § 301.452(b)(10) and (b)(13).

Respondent testified that it was her understanding from prior practice with Maxim that when a nurse got lost and was late to the patient's house, she was supposed to report her time as her scheduled start time rather than her actual arrival time. This is contrary to the testimony of Ms. Massey, who stated that all nurses are instructed during orientation to accurately fill out medical records such as the Nursing Flow Sheet, and provided documentation supporting this claim.

Ms. Bimbo testified that Respondent's conduct created an inaccurate medical record, was deceptive, and defrauded her employer of compensation for time she did not actually work. Her analysis of the violations revealed that for the violation of Code § 301.452(b)(10), the actions constituted a second tier, sanction Level I offense, carrying a punishment of reprimand with stipulations, and for the violation of Code § 301.452(b)(13), the actions constituted a first tier, sanction Level I offense, carrying a punishment of remedial education and/or fine. Ms. Bimbo testified that when an offense violates multiple provisions, it is the highest sanction that is considered. Ms. Bimbo also testified about aggravating and mitigating factors insofar as the

Charge II violations are concerned. She stated that she found multiple violations, a vulnerable patient, lack of truthfulness, and length of service (*i.e.*, Respondent had been licensed since 2009 and was not newly licensed) as aggravating factors.

3. Costs

Staff introduced an affidavit of costs incurred in this proceeding for copying costs for three sets of trial exhibits totaling \$20.10, and witness fees for Kari Massey (including mileage, meals, lodging, and parking) totaling \$395.69. Respondent was given the opportunity to either object to the affidavit or present evidence that the costs claimed were either not necessary or not reasonable. Respondent presented no evidence. The mileage claimed is at the IRS-approved rate of \$0.54 per mile for 489 miles (the distance traveled for attendance at hearing), a total of \$264.06. Lodging costs of \$102.35, meals costs of \$20.28, and parking costs of \$9.00 are also reflected on the affidavit. The ALJ has reviewed these costs submitted by Staff and finds that they are both reasonable and necessary.

III. ANALYSIS

The evidence clearly shows that Respondent violated Code §§ 301.452(b)(10) and (b)(13) when she slept on duty; Respondent presented no evidence to dispute this contention. Although Ms. Bimbo testified that this action constituted a violation of Code § 301.452(b)(12), she did not elaborate on what mental or physical health condition she believes Respondent has, and the ALJ can find no such evidence in the record. Therefore, Staff has not proved this violation. Respondent's action failed to meet the standards of 22 Texas Administrative Code § 217.11(1)(B), in that the action failed to promote a safe environment for the Patient. It also constituted a violation of 22 Texas Administrative Code §§ 217.12(1)(B) and (4), in that it constituted an action that failed to conform to generally accepted nursing standards, and may endanger the Patient's health or safety. Staff presented no evidence to support its claim that this action violated 22 Texas Administrative Code §§ 217.12(1)(E) and (5).

As to the violation of Code §§ 301.452(b)(10) and (b)(13) for falsifying the Nurse Flow Sheet, Respondent did not contest the fact that she arrived late and her testimony that she was never informed that she needed to insert her actual arrival time on the Nurse Flow Sheet does not overcome the documentation presented by Staff to support her receipt of that information during her orientation. Staff presented evidence supporting its claim that this action constituted a violation of 22 Texas Administrative Code §§ 217.11(1)(A) and (1)(D) in that it is a violation of the Board's rules and regulations and it is a failure to accurately document matters related to the Patient's care. Staff also presented evidence that this action constituted a violation of 22 Texas Administrative Code §§ 217.12(1)(A), (1)(C), (6)(A), and (6)(H) in that it evidenced failure to conform to the minimum standards of nursing, showed the improper management of client records, and involved falsifying records as well as providing information that was false, deceptive or misleading in connection with the practice of nursing.

The aggravating factors, according to Staff, support the imposition of a first tier, Level II sanction for the violations of Code § 301.452(b)(10) and (b)(13). The evidence supports a finding that Respondent's conduct is a first tier, Level II offense.

Finally, Staff presented uncontested evidence that its costs in this proceeding were \$415.79. Those costs appear to be both reasonable and necessary. The evidence supports the imposition of these costs on Respondent.

IV. FINDINGS OF FACT

1. Martha Nyangau (Respondent) was licensed in Texas as a Vocational Nurse by the Texas Board of Nursing (Board).
2. Respondent was licensed as a nurse in 2009. She has worked for Maxim Healthcare Services (Maxim) as a nurse in Tennessee; Maryland; Washington, D.C.; and Texas.
3. On October 26, 2014, Respondent was to provide in-home nursing care for Patient 2690124201 (Patient) from 8:00 p.m. until 8:00 a.m. on October 27, 2014.
4. Respondent did not report to Patient's house until approximately 9:15 p.m. on October 26, 2014. Phone logs provided by Maxim confirmed this time frame.

5. Respondent logged her time on the Nursing Flow Sheet (a medical record) as having arrived at Patient's house at 8:00 p.m. rather than her actual arrival time.
6. Respondent fell asleep while on duty on October 27, 2014.
7. The patient was vulnerable at the time of Respondent's violations.
8. Respondent's conduct posed a risk of harm to the Patient.
9. Respondent had been licensed for approximately five years and was not a new or inexperienced nurse when she committed her violations.
10. Staff incurred reasonable and necessary costs of \$415.79 in prosecuting its case against Respondent.
11. On December 16, 2015, Staff of the Board (Staff) sent Respondent a Notice of Formal Charges filed against her.
12. On February 10, 2016, Staff mailed a Notice of Hearing to Respondent.
13. 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 factual matters asserted.
14. The hearing convened on June 6, 2016, in the William P. Clements Building, 300 West 15th Street, Austin, Texas. All parties participated in the hearing. The record remained open until June 24, 2016, to permit the filing of the Staff's affidavit of costs and objections or responses to same. The record closed on June 24, 2016.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. Tex. Occ. Code (Code) ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
3. Notice of the hearing on the merits was provided as required by Code § 301.454 and by the Administrative Procedure Act, Texas Government Code §§ 2001.051-.052.
4. Staff had the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.

5. By falling asleep while on duty, Respondent violated Code §§ 301.452(b)(10) and (13), as well as 22 Texas Administrative Code §§ 217.11(1)(B) and §§ 217.12(1)(B) and (4).
6. By falsely documenting her arrival time, Respondent violated Code §§ 301.452(b)(10) and (13), as well as 22 Texas Administrative Code §§ 217.11(1)(A), (1)(D) and §§ 217.12(1)(A), (1)(C), (6)(A), and (6)(H).
7. Respondent is subject to disciplinary action by the Board due to her violations. Tex. Occ. Code § 301.452(b).
8. The Board may impose a disciplinary sanction including the issuance of a written warning or reprimand with stipulations. Tex. Occ. Code § 301.453; 22 Tex. Admin. Code § 213.33(e).
9. To determine the appropriate disciplinary sanction to be imposed, the Board must consider the factors set forth in 22 Texas Administrative Code § 213.33 and the Board's Disciplinary Matrix contained therein.
10. The Board is authorized to issue a reprimand with stipulations. Tex. Occ. Code §§ 301.452(b), 301.453; 22 Tex. Admin. Code § 213.33.
11. The Board is entitled to seek to impose the administrative costs of this proceeding on the Respondent, including the cost paid by the Board to SOAH and the Office of the Attorney General or other Board counsel for legal and investigative services, the cost of a court reporter and witnesses, reproduction of records, Board staff time, travel, and expenses. Tex. Occ. Code § 301.461.

VI. RECOMMENDATION

Based upon the above-stated findings of fact and conclusions of law, the ALJ recommends that Respondent be reprimanded with such stipulations as the Board determines necessary and that the Board recover costs of the proceeding in the amount of \$415.79.

SIGNED August 18, 2016.


STEVEN D. ARNOLD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS