DOCKET NUMBER 507-18-4577

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
PERMANENT LICENSE	§	
NUMBER 231944,	§	OF
ISSUED TO	§	
DAVID ALVAREZ-BERNAL	§	ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

TO: DAVID ALVAREZ-BERNAL
1761 DAVE ELLIOTT
EL PASO, TX 79936

SUZANNE FORMBY MARSHALL
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on January 24-25, 2019, 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; 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 recommendations made by the Respondent, if any, adopts all of the findings of fact and conclusions of law of the ALJ contained in the PFD. 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 agrees that the most appropriate sanction in this matter is a Remedial Education Order, as set out herein.[2]

The Board finds that the Respondent's conduct collectively warrants a first tier, sanction level I sanction for his violations of §301.452(b)(10) and (b)(13). The Board finds, as was recommended by the ALJ, that a remedial education order is the most appropriate sanction in this matter.

There is no question that the Respondent's conduct crossed acceptable professional boundaries between him and his patient.[3] However, no harm resulted from the Respondent's conduct and there were no repeated acts of unprofessional conduct by the Respondent.[4] Further, this appears to be a one-time occurrence, and the Respondent has no prior disciplinary history with the Board.[5]

Therefore, after carefully reviewing and considering the aggravating and mitigating factors identified by the ALJ in this case, the Board has determined, pursuant to the Board's Disciplinary Matrix[6] and the Board's rules, including 22 Tex. Admin. Code §213.33, that the most appropriate sanction in this case is a remedial education order.

The Board finds that the stipulations should include the completion of a nursing jurisprudence and ethics course, a critical thinking course, and a professional boundaries course[7]. These requirements are supported by the record and are consistent with the Board's rules and policies.

TERMS OF ORDER

I. SANCTION AND APPLICABILITY

IT IS THEREFORE ORDERED that RESPONDENT SHALL receive the

sanction of **REMEDIAL EDUCATION** in accordance with the terms 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.

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[1] Pursuant to Tex. Occ. Code. §301.459 (a-1), although the Administrative Law Judge may make a recommendation regarding an appropriate an action or sanction, the Board has the sole authority and discretion to determine the appropriate action or sanction.

[2] See pages 6 and 8 of the PFD.

[3] See adopted Finding of Fact Number 3 and page 4 of the PFD.

[4] See adopted Finding of Fact Number 9 and page 6 of the PFD.

[5] See adopted Findings of Fact Numbers 5 and 8.

[6] See 22 Tex. Admin. Code §213.33(b).

[7] See **Error! Main Document Only.**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.

B. This Order SHALL be applicable to RESPONDENT'S nurse licensure compact privileges, if any, to practice nursing in the State of Texas.

C. As a result of this Order, RESPONDENT'S license(s) will be designated "single state" and RESPONDENT may not work outside the State of Texas in another nurse licensure compact party state.

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 Nursing Education, Licensure and Practice, 22 TEX. ADMIN. CODE §§211.1 *et seq.*, and this Agreed Order.

III. UNDERSTANDING BOARD ORDERS

Within thirty (30) days of entry of this Order, RESPONDENT must successfully complete the Board's online course, "Understanding Board Orders", which can be accessed on the Board's website from the "Discipline & Complaints" drop-down menu or directly at: *http://www.bon.texas.gov/UnderstandingBoardOrders/index.asp*. Upon successful completion, RESPONDENT must submit the course verification at the conclusion of the course, which automatically transmits the verification to the Board.

IV. REMEDIAL EDUCATION COURSE(S)

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

A. **A Board-approved course in Texas nursing jurisprudence and ethics** that shall be a minimum of six (6) hours in length. The course's content shall include the Nursing Practice Act, standards of practice, documentation of care, principles of nursing ethics, confidentiality, professional boundaries, and the Board's Disciplinary Sanction Policies regarding: Sexual Misconduct; Fraud, Theft, and Deception; Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder; and Lying and Falsification. Courses focusing on malpractice issues will not be accepted. Home study 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.

C. **The course "Professional Boundaries in Nursing,"** a 3.0 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 <u>not</u> being offered by a pre-approved provider. *Information about Board-approved courses and Verification of Course Completion forms are available from the Board at* <u>*www.bon.texas.gov/compliance*</u>.

V. 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, subject to meeting all existing eligibility requirements in Texas Occupations Code Chapter 304, Article III, RESPONDENT may be eligible for nurse licensure compact privileges, if any.

Entered this 24th day of January, 2019.

TEXAS BOARD OF NURSING

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

Attachment: Proposal for Decision; Docket No. 507-18-4577 (November 14, 2018)

State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

November 14, 2018

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

     RE: Docket No. 507-18-4577; Texas Board of Nursing v. David Alvarez-Bernal

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, a SOAH rule which may be found at www.soah.texas.gov.

Sincerely,

Suzanne Formby Marshall
Administrative Law Judge

SFM/tt
Enclosures

xc: Helen Kelley, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Suite 460, Austin, TX 78701 – **VIA INTERAGENCY**
Kathy A. Hoffman, Legal Assistant Supervisor, Texas Board of Nursing, 333 Guadalupe, Tower III, Suite 460, Austin, TX 78701 – **VIA INTERAGENCY**
David Alvarez-Bernal, 1761 Dave Elliott, El Paso, TX 79936 – **VIA REGULAR MAIL**

TEXAS BOARD OF NURSING,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
v.	§	OF
	§	
DAVID ALVAREZ-BERNAL,	§	
LVN LICENSE NO. 231944,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Board of Nursing (Board) seeks to impose disciplinary sanctions against Licensed Vocational Nurse (LVN) David Alvarez-Bernal because Staff alleges he requested to borrow money from a patient, in violation of the Nursing Practice Act (Act)[1] and Board rules.[2] The Administrative Law Judge (ALJ) concludes that Staff met its burden to prove the allegation by a preponderance of the evidence and, for the reasons discussed below, recommends that the Board enter a remedial education order against Mr. Alvarez-Bernal, requiring him to take continuing education courses on maintaining appropriate boundaries with patients, jurisprudence and ethics, and critical thinking.

I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

Notice and jurisdiction were undisputed and are set out in the Findings of Fact and Conclusions of Law without further discussion. The hearing on the merits convened on September 17, 2018, before ALJ Suzanne Formby Marshall at the State Office of Administrative Hearings (SOAH) facilities in Austin, Texas. Assistant General Counsel Helen Kelley represented Staff. Respondent appeared and represented himself. The hearing concluded and the record closed that day.

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[1] Tex. Occ. Code (Code) ch. 301.

[2] Section 301.452 of the Code authorizes the Board to impose discipline for violations of the Act, Board rules, or Board orders. In this proposal for decision, references to Board rules will be either to "Board Rule X" or to the rule's citation.

II. DISCUSSION

A.   Applicable Law

Staff alleges that Respondent engaged in unprofessional conduct that was likely to deceive, defraud, or injure a patient,[3] and failed to conform to the minimum standards of acceptable nursing practice in a manner that exposed the patient unnecessarily to a risk of harm.[4] Staff has the burden of proving its allegations by a preponderance of the evidence.[5]

Once a violation of the Act or Board rules is established, the Board must consider the appropriate sanction. In doing so, Board Rule 213.33 is applicable. That rule sets out a disciplinary matrix (Matrix) that is intended to match the severity of the sanction imposed to the nature of the violation at issue, while taking into account mitigating and aggravating factors.[6] The Matrix classifies offenses by tier and sanction level, and must be consulted by the ALJ and the Board in determining the appropriate sanction.

In this case, Staff seeks a warning with stipulations and a fine of $250 for the alleged violations. The stipulations would include informing employers of the incident; quarterly performance evaluations; and indirect supervision. Staff also seeks the requirement of several continuing education courses on maintaining appropriate boundaries with patients; jurisprudence and ethics; and critical thinking.

Mr. Alvarez-Bernal admits his violation and, in general, does not object to being sanctioned for the violation. However, he testified that he specifically objects to the requirement of indirect supervision.

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[3] Code § 301.452(b)(10); 22 Tex. Admin. Code (TAC) § 217.12(1)(A), 6(D).

[4] Code § 301.452(b)(13); 22 TAC § 217.11(1)(A), (J).

[5] 1 TAC § 155.427.

[6] 22 TAC § 213.33; *see also* Code § 301.4531 (requiring the Board to adopt a schedule of sanctions).

B.   Evidence

Staff offered nine exhibits, which were admitted into evidence, and the testimony of Mr. Alvarez-Bernal. The evidence in this case was mostly undisputed. Mr. Alvarez-Bernal has worked in health care for over twenty years as a certified nurse aide, phlebotomist, and as an LVN. On October 26, 2017, Mr. Alvarez-Bernal was employed as an LVN with El Paso Community Home Health Inc., in El Paso, Texas. His job duties consisted of providing skilled nursing care to patients in their homes. On that day, Mr. Alvarez-Bernal telephoned one of his patients[7] and asked if he could borrow approximately $300 because of a personal financial hardship.

Mr. Alvarez-Bernal explained that he thought he had phrased the question to Patient 2234 as being more in the nature of asking whether she knew someone who could lend him some money rather than a direct request to her. However, he acknowledged that it was possible she could have thought he was directly asking her for the money and may have felt threatened. Mr. Alvarez-Bernal concedes that what he did crossed acceptable patient boundaries and was wrong.

As a result of the incident, Mr. Alvarez-Bernal was terminated from employment by El Paso Community Home Health Inc. He currently works at Urgent Care Home health agency in El Paso and provides care to 8 patients, ranging in age from approximately 30 to 80 years old.

Mr. Alvarez-Bernal testified that he has worked very hard in the health care field for many years. He said he became an LVN at the age of 50 years old, having gone to school when he was 48 years old, to obtain additional education in the health care field. Currently, he is 61 years old.

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[7] In order to protect the patient's confidentiality, the patient was designated as Patient 2234. That patient was approximately 86 years old at the time.

Mr. Alvarez-Bernal testified that providing good nursing care to his patients is very important to him, and he takes a good deal of pride in his work. He said he knew what he did was wrong, that he had never done such a thing before, and he would never do such a thing again. He explained that at the time, he was experiencing a difficult family financial situation.

Mr. Alvarez-Bernal traveled to the hearing from El Paso, attending in person, because he said it was important for the Board and ALJ to see the kind of person he was instead of speaking through recommendation letters submitted by others. He expressed great respect for the Board and recognized that action needed to be taken against him for his mistake, but he was very concerned about his ability to continue working in home health nursing. He was especially concerned about the Board's proposed requirement of indirect supervision because of his home health practice and the practical difficulties of supervision in that setting.

C.   Analysis

Staff proved that Mr. Alvarez-Bernal asked one of his home health care patients for approximately $300. His conduct crossed acceptable professional boundaries between him and his patient. The Act prohibits unprofessional conduct in the practice of nursing that is likely to deceive, defraud, or injure a patient.[8] The Act also sets forth the minimum acceptable level of standards of nursing practice.[9] The Board's rules related to unprofessional conduct and standards of nursing practice overlap to some degree. Board Rule 217.12(6)(D) provides that unprofessional conduct results when professional boundaries of the nurse/client relationship are violated, including financial exploitation of the client. And, unprofessional conduct also includes carelessly failing to practice nursing in conformity with the standards of minimum acceptable nursing practice, as set out in Board Rule 217.11.[10] A nurse is required to know and conform to all laws, rules and regulations affecting their current area of nursing practice.[11]

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[8] Code § 301.452(b)(10).

[9] Code § 301.452(b)(13).

[10] 22 Tex. Admin. Code § 217.12(1)(A). The minimum standards of acceptable nursing practice also require a nurse to know, recognized, and maintain professional boundaries of the nurse-client relationship. 22 Tex. Admin. Code § 217.11(1)(J).

[11] 22 Tex. Admin. Code § 217.11(1)(A).

The question, then, is what is the appropriate sanction for his conduct? Staff argued that the violation of Texas Occupations Code § 301.452(b)(10) and (b)(13) should be considered a Second Tier Offense, Sanction Level 1.[12] A Second Tier Offense for a violation of Code § 301.452(b)(10) requires findings of a serious risk to the patient or public safety; repeated acts of unethical behavior or unethical behavior which places a patient or public at risk of harm; or a personal relationship that violates professional boundaries of nurse/patient relationship. A Second Tier Offense for a violation of § 301.452(b)(13) requires a finding of nursing practice below standard with patient harm or risk of patient harm. The evidence does not support such findings in this case for either violation.

The patient did not testify at the hearing. There was no evidence of harm or risk of harm from Mr. Alvarez-Bernal's conduct. The undisputed evidence established that the patient refused to give Mr. Alvarez-Bernal the money, suggesting that the patient felt no risk of harm or other repercussions due to the refusal. While there was no evidence of a risk of harm to the patient from the conduct, it is within the realm of possibility. However, the facts should dictate the basis for the punishment, not the results that could have occurred. There were no repeated acts of unprofessional conduct by Mr. Alvarez-Bernal, and no suggestion that the public was at any risk from him. Moreover, there was no evidence of a personal relationship between Mr. Alvarez-Bernal and the patient.

Instead, this appears to be a one-time occurrence from an experienced health care provider under extreme financial stress, not repeated unethical behavior that would warrant the consequences of a Second Tier, Sanction Level 1 disciplinary order that would include indirect supervision, quarterly performance evaluations, continuing education, informing all employers of the incident, and a fine of $250, as requested by Staff. Mr. Alvarez-Bernal credibly and repeatedly expressed great remorse for his conduct. He drove from El Paso to personally attend the hearing so that his demeanor could be observed. Noting that "papers can say beautiful words," Mr. Alvarez-Bernal emphasized the importance of observing and listening to him in

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[12] Sanction Level 1 for a Second Tier Offense under either Texas Occupations Code §§ 301.452(b)(10) or (13 is a warning or reprimand with stipulations, which may include remedial education, supervised practice, and or public service, as well as a fine of $250 or more for each violation.

person in order that an assessment of appropriate disciplinary action and his character could be made.

There was no evidence of any aggravating factors for the violations. In terms of mitigating factors, Mr. Alvarez-Bernal has no prior disciplinary history from the Board. The event was a one-time occurrence, with no evidence of harm to the patient. Mr. Alvarez-Bernal is 61 years old, has been in the health care provider profession for many years, and he was distraught at the thought that he could potentially lose his license to practice. He clearly takes great pride in his work and his skill with patients. There was no suggestion that his nursing skills are less than excellent. It is apparent that this disciplinary case has had a strong deterrent effect on him, and there is no reason to think he is likely to commit these violations again.

Having considered the evidence, the ALJ finds that Mr. Alvarez-Bernal's violations of Occupations Code § 301.452(b)(10) and (13), and related Board rules, are best characterized as a First Tier Offense, Sanction Level I violation due to the one-time act of unprofessional conduct and the lack of any evidence of a risk of harm to the patient. Sanction Level I provides for remedial education and/or a fine of $250. As result of the evidence and application of the Matrix's guidance, the ALJ recommends that the Board assess an order against Mr. Alvarez-Bernal requiring remedial education consisting of courses on jurisprudence and ethics, professional boundaries, and critical thinking. Although authorized, the ALJ does not recommend a fine of $250. While Mr. Alvarez-Bernal's current financial situation is not known, he committed these infractions when he was experiencing great personal financial stress. He will have to pay the fees for the remedial education. Assessing a fine against him would serve no real value, other than to possibly create another situation of financial stress for him, and it seems especially punitive under the facts of this case.

III. FINDINGS OF FACT

1. David Alvarez-Bernal was issued vocational nursing license (LVN) 231944 by the Texas Board of Nursing (Board).

2. In October 2017, Mr. Alvarez-Bernal was employed by El Paso Community Home Health Inc., in El Paso, Texas.

3. On October 26, 2107, Mr. Alvarez-Bernal telephoned one of his home health patients and requested to borrow $300 from the patient.

4. At the time, Mr. Alvarez-Bernal was experiencing a personal financial hardship.

5. Mr. Alvarez-Bernal has no prior disciplinary history with the Board.

6. Mr. Alvarez-Bernal is 61 years old.

7. Mr. Alvarez-Bernal has worked for over twenty years in the health care field.

8. The inappropriate conduct of Mr. Alvarez-Bernal was a one-time occurrence which is unlikely to happen again.

9. The patient did not experience harm or a risk of harm from Mr. Alvarez-Bernal.

10. Mr. Alvarez-Bernal acknowledges his lapse in judgment in asking to borrow money from the patient; the inappropriateness of his behavior in boundary crossing; and the possibility that the patient could feel threatened by his request.

11. On July 3, 2018, Staff issued its Notice of Final Hearing to Mr. Alvarez-Bernal. The notice 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 either a short, plain statement of the factual matters asserted or an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.

12. The hearing on the merits convened on September 17, 2018, before ALJ Suzanne Formby Marshall at SOAH's facilities in Austin, Texas. Assistant General Counsel Helen Kelley represented Staff. Respondent appeared represented himself. The hearing concluded and the record closed that day.

IV. 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 findings of fact and conclusions of law. Tex. Occ. Code § 301.459; Tex. Gov't Code ch. 2003.

3. Mr. Alvarez-Bernal 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. Mr. Alvarez-Bernal is subject to sanction because he exhibited unprofessional conduct that was likely to deceive, defraud, or injure a patient. Tex. Occ. Code § 301.452(b)(10); Tex. Admin. Code § 217.12(1)(A), 6(D).

6. Mr. Alvarez-Bernal is subject to sanction because he failed to conform to the minimum standards of acceptable nursing practice in a manner that exposed a patient unnecessarily to risk of harm. Tex. Occ. Code § 301.452(b)(13); Tex. Admin. Code § 217.11(1)(A), (J).

7.   The Board may impose a disciplinary sanction, which can range from remedial education to suspension of a nurse's license to revocation of a nurse's license, and may also include assessment of a fine. Tex. Occ. Code § 301.453; 22 Tex. Admin. Code § 213.33(e).

8.   To determine the appropriate disciplinary sanction to be imposed in this case, the Board must consider the factors set forth in 22 Texas Administrative Code § 213.33 and the Board's Disciplinary Matrix. 22 Tex. Admin. Code § 213.33(b).

V. RECOMMENDATION

Based on the above findings of fact and conclusions of law, the ALJ recommends that the Board enter a remedial order against Mr. Alvarez-Bernal requiring continuing education courses in professional boundaries, jurisprudence and ethics, and critical thinking skills.

SIGNED November 14, 2018.

SUZANNE FORMBY MARSHALL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS