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Pratibha J. Shenoy
Executive Director of the Board

DOCKET NUMBER 507-20-3093

IN THE MATTER OF § BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE § OF
NUMBER 132228, §
ISSUED TO
JON D. KIPLINGER § ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

TO: JON D. KIPLINGER
1101 MORNINGWOOD DR.
SAN MARCOS, TX 78666

PRATIBHA J. SHENOY
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on October 22-23, 2020, the Texas Board of Nursing (Board) considered the following items: the Proposal for Decision (PFD) regarding the above cited matter; Staff's recommendation to the Board regarding the PFD and order; and 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

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

The ALJ found that the Respondent's conduct collectively warrants a second tier, sanction level II sanction for his violation of §301.452(b)(1) and (10)¹. In pertinent part, either a suspension, enforced or probated, or licensure revocation is authorized under a second tier, sanction level II sanction². The Board agrees with the ALJ that a three-year probated suspension is an appropriate sanction in this case.

There are several aggravating factors present in this case. First, the Respondent's prior disciplinary history, and the Respondent's conscious decision to consume alcohol in violation of the Board's 2017 and 2019 Orders, is cause for concern³. The Respondent acknowledged a family history of alcoholism and was diagnosed as having "serious long-term problems with excessive use of drugs and alcohol", but denied being dependent on alcohol or drugs and felt he could drink safely when he wanted⁴. He also believed that because he had been tested four times in the preceding six months, he could take a chance on drinking alcohol without being tested⁵. Respondent's deliberate disregard for the Board's Orders and their provisions indicates a need for continuing testing and monitoring, not reducing the oversight⁶.

The Board recognizes that the ALJ also identified mitigating factors in this case. There was no evidence of actual or potential harm to patients or the public, and the Respondent was truthful in submitting a sample and acknowledging it was positive⁷. Further, Respondent's colleagues testified that Respondent is a kind, competent, and knowledgeable nurse who is an asset to the profession, despite his suspended license⁸.

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 and the Board's rules, including 22 Tex. Admin. Code §213.33(e)(6), that a three year probated licensure suspension is the most appropriate sanction in this matter.

Consistent with the ALJ's recommendation, the Board finds that the Respondent should be required to complete a nursing jurisprudence and ethics course⁹. This course is intended to inform the Respondent of the standards and requirements applicable to nursing practice in Texas and to prevent future violations from occurring. The Board finds that the Respondent's practice should be directly supervised for the first year of the Order and indirectly supervised for the remainder of the Order. The Board further finds it

¹ See page 7 of the PFD.

² See the Board's Disciplinary Matrix, located at 22 Tex. Admin. Code §213.33(b).

³ See pages 7-8 of the PFD.

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ 22 Tex. Admin. Code §213.33(f) requires every order issued by the Board to include participation in a program of education, which at a minimum, shall include a review course in nursing jurisprudence and ethics. See also page 11 of the PFD.

appropriate to prohibit the Respondent from working in independent practice settings, like home health or hospice, and from being employed temporarily by agencies during the pendency of the Order. The Board also find the Respondent should not work night shifts during the pendency of the Order. These supervisory requirements are intended to prevent additional violations from occurring and to ensure that any deficiencies in the Respondent's practice can be discovered quickly and remediated appropriately¹⁰. The Board further finds that the Respondent should be subject to random drug testing and support group meetings. These requirements were recommended by the ALJ and are reasonably related to the underlying findings in the Board's prior Orders and current issue involving the Respondent's positive drug test. Finally, the Respondent will be required to inform his employers of this Order and to submit quarterly employer reports to the Board so the Board can monitor the Respondent's progress and completion of the Order. These requirements are consistent with 22 Tex. Admin. Code §213.33(e)(6)¹¹, the terms of the Board's 2017 Order, and are supported by the evidentiary record in this case.

IT IS THEREFORE ORDERED that Registered Nurse License Number 132228, previously issued to JON D. KIPLINGER, to practice nursing in the State of Texas is hereby **SUSPENDED** and said suspension is **STAYED** and RESPONDENT is hereby placed on **PROBATION** for a minimum of three (3) years **AND** until RESPONDENT fulfills the additional 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. As a result of this Order, RESPONDENT'S license(s) will be designated "single state" as applicable and RESPONDENT may not work outside the State of Texas in another nurse licensure compact party state using a Texas compact license.

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

¹⁰ The ALJ recommended that the Respondent not be permitted to work night shifts. See page 11 of the PFD.

¹¹ 22 Tex. Admin. Code §213.33(e)(6), which authorizes reasonable probationary stipulations that may include remedial education courses and practice for at least two years under the direction of a nurse designated by the Board, as well as limitations on nursing activities/practice settings and drug testing.

II. 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.

III. REMEDIAL EDUCATION COURSE(S)

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

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

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. 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. 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 employment as a Nurse under this order, RESPONDENT SHALL be supervised by a Registered Nurse, if licensed as a Registered Nurse, or by a Licensed Vocational Nurse or a Registered Nurse, if licensed as a Licensed Vocational Nurse, who is on the premises. The supervising nurse is not required to be on the same unit or ward as RESPONDENT, but should be on the facility grounds and readily available to provide assistance and intervention if necessary. The supervising nurse shall have a minimum of two (2) years of 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 individual who supervises the RESPONDENT and these reports shall be submitted by the supervising individual 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.

V. DRUG AND ALCOHOL RELATED REQUIREMENTS

- A. While under the terms of this Order, RESPONDENT SHALL **abstain from the use of alcohol, nalbuphine, propofol 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 the 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, nalbuphine, propofol and all 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, if any, random screens shall be performed at least once every three (3) month quarterly period.

All random screens SHALL BE conducted through urinalysis. 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 any or all of the following substances and/or their metabolites:

Amphetamine	Methamphetamine	MDMA
MDA	Alprazolam	Diazepam
Alpha-o-alprazolam	Alpha-Hydroxytriazolam	Clonazepam
Desmethyldiazepam	Lorazepam	Midazolam
Oxazepam	Temazepam	Amobarbital
Butobarbital	Butalbital	Pentobarbital
Phenobarbital	Secobarbital	Codeine
Hydrocodone	Hydromorphone	Methadone
Morphine	Opiates	Oxycodone
Oxymorphone	Propoxyphene	Cannabinoids
Cocaine	Phencyclidine	Ethanol
Heroin	Fentanyl	Tramadol
Meperidine	Carisoprodol	Butorphanol
Nalbuphine	Ketamine	Propofol

Upon enrollment in the Board's drug and alcohol testing program, **RESPONDENT SHALL, on a daily basis, call or login online to the Board's designated drug and alcohol testing vendor to determine whether or not RESPONDENT has been selected to produce a specimen for screening that day** and SHALL, if selected, produce a specimen for screening that same day at an approved testing location and/or comply with any additional instructions from the vendor or Board staff. Further, **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.

C. While under the terms of this Order, RESPONDENT SHALL attend at least two (2) support group meetings each week, one of which must be for substance abuse and provided by Alcoholics Anonymous, Narcotics Anonymous, or another comparable recovery program that has been pre-approved by the Board. RESPONDENT SHALL provide acceptable evidence of attendance. Acceptable evidence shall consist of a written record of at least: the date of each meeting; the name of each group attended; and the signature and printed name of the chairperson of each group attended by RESPONDENT. RESPONDENT SHALL submit the required evidence on the forms provided by the Board at the end of every three (3) month quarterly period. No duplications, copies, third party signatures, or any other substitutions will be accepted as evidence.

VI. FURTHER COMPLAINTS

If, during the period of probation, an additional allegation, accusation, or petition is reported or filed against RESPONDENT'S license(s), the probationary period shall not expire and shall automatically be extended until the allegation, accusation, or petition has been acted upon by the Board.

VII. RESTORATION OF UNENCUMBERED LICENSE(S)

Upon full compliance with the terms of this Order, all encumbrances will be removed from RESPONDENT'S license(s) and/or privilege(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 22nd day of October, 2020.

TEXAS BOARD OF NURSING

A handwritten signature in cursive script, appearing to read "Katherine A. Thomas".

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

Attachment: Proposal for Decision; Docket No. 507-20-3093 (July 1, 2020)

ACCEPTED
507-20-3093
07/01/2020 9:40 AM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Jodi Brown, CLERK



FILED
507-20-3093
7/1/2020 9:39 AM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Jodi Brown, CLERK

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

July 1, 2020

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

VIA EFILE TEXAS

RE: **Docket No. 507-20-3093; Texas Board of Nursing v. Jon D. Kiplinger**

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,

Handwritten signature of Pratibha J. Shenoy in cursive.

Pratibha J. Shenoy
Administrative Law Judge

PS/tt
Enclosures

xc: JoAnna Starr, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Suite 460, Austin, TX 78701 – VIA EFILE TEXAS
Jena Abel, Deputy General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Suite 460, Austin, TX 78701 (with 1 CD of Hearing on the Merits) – VIA EFILE TEXAS & INTERAGENCY MAIL
Jon D. Kiplinger, 1101 Morningwood Dr., San Marcos, TX 77354 – VIA REGULAR MAIL

TEXAS BOARD OF NURSING,
Petitioner

v.

JON D. KIPLINGER, LVN,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Board of Nursing (Board) seeks to sanction the Licensed Vocational Nurse (LVN) credential held by Jon D. Kiplinger (Respondent) because he allegedly produced a drug screen specimen that was positive for alcohol while subject to an Agreed Order requiring him to abstain from alcohol. Staff argues Respondent should be required to restart the three-year term of probated license suspension imposed by the Agreed Order. The Administrative Law Judge (ALJ) concludes that Staff proved its allegations by a preponderance of the evidence and recommends the Board issue a new Agreed Order with terms described below.

I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

The Board temporarily suspended Respondent's license on March 17, 2020. Respondent waived his right to a probable cause hearing under Texas Occupations Code (Code) § 301.455(c); therefore, his license remains in suspended status until a final order is issued by the Board. ALJ Pratibha J. Shenoy convened a telephonic hearing on the merits on May 4, 2020.¹ Assistant General Counsel JoAnna Starr represented Staff, and Respondent represented himself. The record closed May 5, 2020, after Respondent's letters of recommendations were admitted.

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

¹ As required by Code § 301.455(d), the hearing on the merits was held not later than the 61st day after the day the temporary suspension order was issued. Due to public health precautions required during the COVID-19 pandemic, the hearing was convened by telephone.

II. STAFF'S FORMAL CHARGES AND APPLICABLE LAW

The Texas Nursing Practice Act, found in chapter 301 of the Code, empowers the Board to discipline licensees for, among other things, a violation of a Board order (Code § 301.452(b)(1)) or unprofessional conduct (Code § 301.452(b)(10)). Staff asserted that Respondent's conduct is grounds for disciplinary action under both Code provisions, as well as pursuant to two subsections of Board Rule 217.12, which further defines unprofessional conduct:²

- **Board Rule 217.12(10)(D):** A positive drug screen for which there is no lawful prescription; and
- **Board Rule 217.12(11)(B):** Violating an order of the Board (among other things).

Board Rule 213.33 sets out a disciplinary matrix (Matrix) intended to match the severity of the sanction imposed to the nature of the violation, taking into account mitigating and aggravating factors listed in the Matrix.³ The Matrix categorizes violations into tiers, and into sanction levels within tiers, based on the seriousness of the offense and risk of harm to patients or the public. Board Rule 213.33 includes another list of factors that the Board and the State Office of Administrative Hearings (SOAH) must consider in determining the appropriate disciplinary sanction, including evidence of potential harm to patients or the public and evidence of present fitness to practice.⁴

Staff had the burden of proving its allegations by a preponderance of the evidence.⁵

III. DISCUSSION

Staff called Respondent as a witness, and he testified on his own behalf. Staff's eight exhibits and Respondent's four recommendation letters were all admitted without objection. As set out below, the key facts in this case are undisputed. Respondent conceded he drank alcohol on

² For ease of reference, the Board's rules, found in title 22, part 11, chapters 211 to 228 of the Texas Administrative Code, shall be referred to in the text as "Board Rule _____."

³ 22 Tex. Admin. Code § 213.33; *see also* Tex. Occ. Code § 301.4531 (requiring the Board to adopt a schedule of sanctions).

⁴ 22 Tex. Admin. Code 213.33(e).

⁵ 1 Tex. Admin. Code § 155.427.

February 9, 2020, and tested positive when he was selected for a drug test on February 10, 2020. The parties disagree on the appropriate disciplinary action. Staff seeks, as mentioned previously, a restart of Respondent's current three-year Board order. Respondent argues for very limited drug testing and relief from other conditions Staff proposed, such as a ban on working night shifts.

A. Evidence

1. Prior Board Orders and February 2020 Positive Drug Screen

Respondent was licensed in Texas in 1991. On December 3, 2002, the Board and Respondent entered into an Agreed Order (2002 Order) that placed Respondent's license on a one-year probated suspension and required him to notify employers of the order, attend chemical dependency support group sessions, and submit to random urine drug screens.⁶ The underlying allegation was that Respondent had tested positive for marijuana on a drug test requested by his employer on or about February 18, 2002. Respondent successfully completed the 2002 Order.⁷

The Board and Respondent entered into a second Agreed Order (2017 Order) effective April 28, 2017. The 2017 Order states that, in March 2015, Respondent withdrew controlled substances from a dispensing system at the rehabilitation center where he was working; failed to document administration of those drugs and/or wastage of unused portions; and submitted a drug screen specimen that was positive for opiates and marijuana. Respondent underwent a psychological and chemical dependence evaluation with John K. Reid, Ph.D., a licensed psychologist, between November 2015 and January 2016. Dr. Reid found evidence Respondent had "serious long-term problems with excessive use of drugs and alcohol" but could not "determine conclusively whether [Respondent] has an active problem."⁸ Dr. Reid recommended six months to a year of psychotherapy and random drug screens for at least a year.

The 2017 Order provided that it will last for "a minimum of three (3) years AND until Respondent fulfills the requirements of this Order."⁹ In addition, the three-year probationary

⁶ Staff Ex. 3 at 32-36.

⁷ Staff Ex. 3 at 42.

⁸ Staff Ex. 3 at 21.

⁹ Staff Ex. 3 at 22 (emphasis in original).

period “shall not expire and shall automatically be extended” if, during that time, “an additional allegation, accusation, or petition is reported or filed” against Respondent’s license.¹⁰

Among other things, the 2017 Order required indirect supervision (with a supervising nurse on the premises, but not necessarily on Respondent’s unit) for eight quarters. Respondent was mandated to provide quarterly reports from his employers for a total of 12 quarters. He agreed to abstain from alcohol, opiates, and all controlled substances, and to submit to random drug tests (at least weekly in the first quarter, at least twice per month for the second quarter, at least monthly for the third and fourth quarters, and at least once per quarter for the remaining two years).¹¹

Between October 8, 2017, and November 18, 2018, Respondent allegedly missed 15 daily check-ins to see if he had been selected for a drug test. Effective March 5, 2019, the Board and Respondent entered into a third Agreed Order (2019 Order), which required Respondent to complete the terms of the 2017 Order, pay a \$500 fine, and take an online course.¹²

On February 10, 2020, Respondent was selected for a random drug screen. The specimen tested positive for metabolites of alcohol, which Respondent did not dispute.¹³

2. Respondent’s Evidence

Respondent testified that he grew up in an abusive home and that there is a history of alcoholism in his family. Despite these challenges, Respondent said, he has made a successful life for himself. He is married to a Registered Nurse (RN), and they have five children and nine grandchildren. Respondent stressed that the context for his prior Board Orders is important in understanding that he does not have an alcohol or drug problem and he is not a risk to anyone. He noted that he successfully completed the terms of his first Board order (2002 Order).

With respect to the 2017 Order, Respondent explained that the underlying events (which occurred in March 2015) were manipulated by coworkers who disliked him. He testified that he

¹⁰ Staff Ex. 3 at 28.

¹¹ Staff Ex. 3 at 22-27.

¹² Staff Ex. 3 at 15-16.

¹³ Staff Exs. 4-5.

signed out medications for patients, but he was unable to document dispensing them in the Medication Administration Record (MAR) because the facility was being audited and the MAR book had been moved to the pharmacy. Later on, Respondent was busy with other duties and forgot to update the MAR. He felt that the head nurse, who was "in a clique" with Respondent's coworkers, saw the incident as an opportunity to accuse him of misappropriation.

Respondent added that the head nurse asked him to take a drug test as part of a "set-up." He readily conceded that this March 2015 test was positive for opiates and marijuana, but noted that he was not impaired while at work and there were no signs he had issues with drugs or alcohol. Rather, he had spent the day before the test doing yard work and hurt himself, so he took two Norco (hydrocodone) tablets that had been prescribed to his wife. In addition, Respondent said, he had smoked a marijuana cigarette with some friends a few weeks prior to the test, while off duty. Respondent said marijuana is "God's herb," and he continues to use it for pain relief. He added that he cooperated with the 2015-2016 psychological evaluation by Dr. Reid, and there was no finding that he had an active problem with drugs or alcohol.

On February 9, 2020 (a Sunday), Respondent and his wife had a wedding anniversary dinner with family and friends. Respondent testified his wife knew he had been randomly drug tested four times in the previous six months, and "Everyone said, 'Go ahead, have a drink,'" to celebrate. Respondent said he "doesn't enjoy the feeling" of being drunk and he only had two glasses of wine with his meal. The next day, he was selected for a drug screen. He said he did not try to avoid the test or dispute the results. He contrasted his situation, with what he feels are onerous testing requirements, to those of other nurses he has seen who are "shooting up at work," coming to work intoxicated, and stealing drugs, but are not subject to Board orders or testing.

Recommendation letters for Respondent were submitted by Robyn Porter, LVN, Ana Vergara, RN, Cherell Reeves, RN, and Donna Davis, LVN.¹⁴ Ms. Porter's letter states that Respondent is on the night shift after her day shift, and he is knowledgeable, helpful, kind, and a team player.¹⁵ Ms. Reeves wrote that Respondent is very competent, good in emergency situations, and he was supportive and taught Ms. Reeves "a lot" when she returned to nursing after having

¹⁴ Some of the letters are handwritten and difficult to read, so the spelling of names may be incorrect. Also, only two of four letters are dated, which is discussed further below.

¹⁵ Resp. Ex. 1 at 1.

been out of the profession for some time.¹⁶ Ms. Vergara is the Director of Nursing and Ms. Davis is the Assistant Director of Nursing at San Marco Rehabilitation and Healthcare, where Respondent worked from 2018 until his license was suspended. Both praised Respondent as competent, responsible, punctual, careful in his work, and supportive of his colleagues.¹⁷

B. Analysis

Because Respondent admitted consuming alcohol on at least one occasion (February 9, 2020) while under a Board order prohibiting such consumption, there is no dispute that the Board has authority to impose a sanction pursuant to Code § 301.452(b)(1) and (10), as further specified by Board Rule 217.12. Therefore, this section focuses on the appropriate sanction.

I. Parties' Arguments

Respondent argued that he has been "treated like a piece of paper" and he should be allowed to practice with minimal restrictions. He reiterated that he had been tested excessively at the time he produced the positive sample on February 10, 2020, and added that he believes night shifts are where his skills are most needed. Respondent denied being dependent on alcohol or any other substance, and insisted he poses no risk to patients or the public.

As discussed below, a penalty of an enforced suspension up to license revocation could be imposed. However, Staff noted that Respondent had only one failed drug test since March 2015, no patient harm was at issue, and he was forthcoming and did not deny the violation. Therefore, Staff submitted that a less severe sanction is appropriate, such as permitting Respondent to restart a three-year probated suspension. Staff's proposed order would require Respondent to complete classes including nursing ethics and jurisprudence; practice under direct supervision (with a nurse on the same unit) for one year and indirect supervision for two years; attend support groups; submit to random drug testing; and work only day shifts.

¹⁶ Resp. Ex. 1 at 3.

¹⁷ Resp. Ex. 1 at 2, 4.

2. Sanction Analysis

Staff contends that, whether Respondent's conduct is analyzed as violation of a Board order under Code § 301.452(b)(1) or as unprofessional conduct under Code § 301.452(b)(10), a Second Tier, Sanction Level II classification is appropriate under the Matrix. The ALJ agrees. The First Tier is inappropriate under either Code provision because Respondent's conduct is not an isolated failure to comply with a procedural requirement of a Board order, nor an isolated instance of unprofessional conduct. Respondent had positive drug screens for marijuana in 2002, marijuana and opiates in 2017, and alcohol in February 2020. The 2019 Order is an extension of the 2017 Order, so Respondent's 15 missed daily check-ins in 2017-2018 and his 2020 positive drug test are multiple violations of the same underlying order.

Under either Code § 301.452(b)(1) or (10), Sanction Level I within the Second Tier is inappropriate. For Code § 301.452(b)(1), Respondent has already been subjected to the Second Tier, Sanction Level I action of being required to complete the terms of the original Board order and pay a fine of \$500. That is what was done in the 2017 Order. Sanction Level II requires license denial, suspension, revocation, or voluntary surrender. For Code § 301.452(b)(10), Sanction Level I potentially applies, but the aggravating factors (the number of violations at issue and the prior Board orders) elevate the disciplinary action to Sanction Level II, which requires license denial, suspension, revocation, or voluntary surrender, and, in certain circumstances, a suspension that may be enforced until the licensee shows one year of verifiable sobriety.¹⁸

Applying the aggravating and mitigating factors listed in the Matrix and Board Rule 213.33(c)(1)-(18), the ALJ finds the number of violations and Respondent's prior Board disciplinary history are aggravating circumstances. In particular, the ALJ finds Respondent's decision to drink alcohol in violation of the 2017 and 2019 Orders is cause for concern. Respondent acknowledged a family history of alcoholism and was diagnosed as having "serious long-term problems with excessive use of drugs and alcohol" but denied being dependent on alcohol or drugs and felt he could drink safely when he wanted. He also believed that because he had been tested four times in the preceding six months, he could take a chance on drinking alcohol without being

¹⁸ It is unclear whether this would apply to Respondent, because the Matrix references "mishandling of controlled substances, misdemeanor crimes or criminal conduct involving alcohol, drugs or controlled substances. . . ." No criminal conduct or crime is alleged.

tested.¹⁹ Respondent's deliberate disregard for the Orders and their provisions indicates a need for continuing testing and monitoring, not reducing the oversight.

The ALJ also finds the following mitigating factors apply: no evidence of actual or potential harm to patients or the public; a steady practice history without standard of care violations; Respondent's truthfulness in submitting a sample and acknowledging it was positive; and colleagues who vouch that Respondent is a kind, competent, and knowledgeable nurse who is an asset to the profession despite his suspended license.²⁰

In support of the recommended sanction of a new three-year probated suspension order, the ALJ makes the following findings of fact and conclusions of law.

IV. FINDINGS OF FACT

1. Jon D. Kiplinger (Respondent) was issued Licensed Vocational Nurse (LVN) License No. 132228 by the Texas Board of Nursing (Board) in 1991.
2. Effective December 3, 2002, the Board and Respondent entered into an Agreed Order (2002 Order) that placed Respondent's license on a probated suspension for one year and required him to notify any employers of the order, attend chemical dependency support group sessions, and submit to random urine drug screens, among other requirements. The underlying allegation was that Respondent tested positive for marijuana when requested to take a drug test by his employer. Respondent successfully completed the 2002 Order.
3. In March 2015, Respondent allegedly withdrew controlled substances from a dispensing system at the rehabilitation center where he was working; failed to document administration of those drugs and/or wastage of unused portions; and submitted a drug screen specimen that was positive for opiates and marijuana. The Staff of the Board investigated the allegations.
4. In late 2015 and early 2016, Respondent underwent a psychological and chemical dependence evaluation with a licensed psychologist who found that Respondent had

¹⁹ The record does not show how many quarters Respondent successfully completed under the 2017 Order, which would affect the number of tests required. Nonetheless, the 2017 Order states that testing shall be done *at least* once per quarter starting in the fifth quarter. It does not set a maximum number of times Respondent may be tested.

²⁰ Staff questioned the value of Respondent's recommendation letters, noting that none of the letters stated that the writer was aware of Respondent's substance abuse issues and prior Board orders. However, the ALJ notes that two of the letters are dated March 23, 2020, and Respondent sent all four to Staff by fax, dated March 23, 2020. Respondent's license was suspended, and he stopped working on March 17, 2020. Two of the letter writers supervised him at his most recent job, and one indicated she is a current coworker. In addition, there is no allegation that Respondent was out of compliance with the employer monitoring and reporting requirements of the 2017/2019 Orders. Based on all of these facts, it is a reasonable inference that at least three of the letter writers knew of Respondent's suspension and the nature of his Board orders. The ALJ accordingly gives the recommendation letters due weight.

serious long-term problems with excessive use of drugs and alcohol, though it could not be determined whether Respondent had an active problem at the time.

5. Based on the 2015 allegations and the psychologist's evaluation, the Board and Respondent entered into a second Agreed Order effective April 28, 2017 (2017 Order). The 2017 Order required Respondent to work under indirect supervision for two years, provide quarterly reports from his employers for three years, abstain from alcohol, opiates, and all controlled substances, and submit to random drug tests.
6. Between October 8, 2017, and November 18, 2018, while subject to the 2017 Order, Respondent missed 15 daily check-ins to see if he had been selected for a drug test. Effective March 5, 2019, the Board and Respondent entered into a third Agreed Order (2019 Order). The 2019 Order required Respondent to complete the terms of the 2017 Order, pay a \$500 fine, and take an online course.
7. On February 9, 2020, Respondent and his wife celebrated their anniversary. Respondent decided to have a drink because he had been selected for random drug screens four times in the previous six months and he thought it was unlikely he would soon be chosen again. Respondent had two glasses of wine with dinner.
8. On February 10, 2020, Respondent was selected for a random drug screen. He did not attempt to avoid the test and readily agreed that the results were positive for alcohol metabolites.
9. On March 17, 2020, the Board temporarily suspended Respondent's license. Respondent waived his right to a probable cause hearing and his license remains in suspended status.
10. On April 14, 2020, Staff sent Respondent a Notice of Hearing and Formal Charges. Together these documents 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 incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.
11. Administrative Law Judge (ALJ) Pratibha J. Shenoy convened the hearing on the merits on May 4, 2020. Due to public health precautions required during the COVID-19 pandemic, the hearing was convened by telephone. Assistant General Counsel JoAnna Starr represented Staff, and Respondent represented himself. The hearing concluded on May 4, 2020, and the record closed on May 5, 2020, after Respondent's letters of recommendation were admitted.
12. Respondent failed only one drug screen between March 2015 and February 2020, and he was forthcoming about his violation.
13. Respondent has a steady work history as a nurse without standard of care violations, and there is no evidence of harm or risk of harm to patients or the public. His supervisors and coworkers commend him as a kind, competent, and knowledgeable nurse who is an asset to the profession despite his license suspension.

14. Respondent has three prior Board orders and violated the 2017 Order (as extended by the 2019 Order) multiple times.
15. Respondent denies that he has a problem with abuse of alcohol or any other substance and believes he can safely drink when he wants.

V. CONCLUSIONS OF LAW

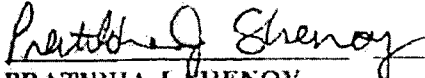
1. The Board has jurisdiction over the licensing and discipline of nurses. Tex. Occ. Code ch. 301.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over contested cases referred by the Board, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 301.459; Tex. Gov't Code ch. 2003.
3. 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. The Board shall temporarily suspend the license of a nurse who is under a Board order prohibiting the use of alcohol or a drug and the nurse tests positive for alcohol or a prohibited drug. Tex. Occ. Code § 301.4551(a)(1).
6. A licensee whose license is temporarily suspended is entitled to a probable cause hearing at SOAH; if probable cause is found and/or the probable cause hearing is waived, the license remains suspended until a final Board order is issued, provided a final hearing is held no later than the 61st day after the date of the temporary suspension. Tex. Occ. Code § 301.455.
7. Respondent is subject to sanction because he violated a Board order. Tex. Occ. Code § 301.452(b)(1).
8. Respondent is also subject to sanction because he committed unprofessional conduct by having a positive drug screen for which he had no lawful prescription and violating a Board order. Tex. Occ. Code § 301.452(b)(10); 22 Tex. Admin Code § 217.12(10)(D), (11)(B).
9. The Board may impose a disciplinary sanction, which can range from remedial education to revocation of a nurse's license, and which may include assessment of a fine. Tex. Occ. Code § 301.453; 22 Tex. Admin. Code § 213.33(e).
10. 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(c) and the Board's Disciplinary Matrix. 22 Tex. Admin. Code § 213.33(b).

11. The Board may consider as aggravating factors the number of prior violations and Respondent's prior Board orders. 22 Tex. Admin. Code § 213.33(b)-(c).
12. The Board may consider as mitigating factors the lack of actual or potential harm shown to patients or the public; Respondent's steady practice history without standard of care violations; Respondent's truthfulness in submitting a sample and acknowledging it was positive; and the positive assessments by Respondent's colleagues, who vouch that Respondent is a kind, competent, and knowledgeable nurse who is an asset to the profession despite his suspended license. 22 Tex. Admin. Code § 213.33(b)-(c).

VI. RECOMMENDATION

Based on the above findings of fact and conclusions of law, the ALJ recommends that the Board issue a three-year probated license suspension order to Respondent, with stipulations including (1) classes in nursing jurisprudence and ethics and such other subjects as the Board sees fit; (2) practice under direct supervision for one year and indirect supervision for two years; (3) attendance at support groups; (4) participation in random drug testing; (5) working only day shifts; and (6) such other stipulations as the Board deems appropriate.

SIGNED July 1, 2020.


PRATIBHA J. SHENOY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS