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*Stephanie C. Morris*  
Executive Director of the Board

**DOCKET NUMBER 507-21-0448**

<b>IN THE MATTER OF</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>PERMANENT CERTIFICATE</b>		
<b>NUMBER 198828,</b>	<b>§</b>	<b>OF</b>
<b>ISSUED TO</b>		
<b>ELETHA LASHONE AUSTIN</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**OPINION AND ORDER OF THE BOARD**

TO: ELETHA LASHONE AUSTIN  
6130 LAGO MAR, APT 6204  
TEXAS CITY, TX 77591

SARAH STARNES  
ADMINISTRATIVE LAW JUDGE  
300 WEST 15TH STREET  
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on April 22-23, 2021, 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 warrants a second tier, sanction level I sanction for her violations of §301.452(b)(1)<sup>1</sup>. Further, the ALJ found that the Respondent's conduct warrants a second tier, sanction level II sanction for her violations of §301.452(b)(10)<sup>2</sup>. The Board agrees with the ALJ that licensure suspension is the most appropriate sanction in this case.

The Respondent entered into an Agreed Order with the Board on April 6, 2020, that required her to abstain from drugs and alcohol<sup>3</sup>. The Agreed Order prohibited the Respondent from consuming alcohol as a measure intended to address and remediate the competency issue raised when she was found drinking on duty in 2019<sup>4</sup>. The Respondent's violation of the 2020 Board Order constitutes a failure to comply with a substantive requirement of the Order.<sup>5</sup> Additionally, the Respondent violated the Agreed Order more than once<sup>6</sup>. Further, the Respondent has not shown that she experienced any unforeseen financial or health issues or that she stopped practicing nursing during the stipulation period<sup>7</sup>. The Board agrees with the ALJ that because the Respondent did not prove any mitigating circumstances, the next-highest sanction in the Disciplinary Matrix<sup>8</sup> should be imposed against the Respondent<sup>9</sup>.

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 an Enforced Suspension is the most appropriate sanction in this matter.

The Respondent did not successfully complete her April 2020 Board Order. The Board is cognizant that Respondent's prior conduct must be remediated, in addition to the new violations. The Board therefore finds that the Respondent's license should be suspended until she can demonstrate twelve months of verifiable sobriety, to be followed by three years of probationary requirements and Board monitoring. The probationary requirements should include a nursing jurisprudence and ethics course and a critical thinking course<sup>10</sup>. These courses are 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 also agrees with the ALJ that the Respondent's nursing practice should be supervised. Specifically, the Board finds that the Respondent's

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<sup>1</sup> See pages 9-10 of the PFD and adopted Conclusion of Law Number 7.

<sup>2</sup> See *id.*

<sup>3</sup> See adopted Finding of Fact Number 3 and page 3 of the PFD.

<sup>4</sup> See *id.*

<sup>5</sup> See page 9 of the PFD.

<sup>6</sup> See adopted Findings of Fact Numbers 6 and 7.

<sup>7</sup> See page 9 of the PFD.

<sup>8</sup> 22 Tex. Admin. Code §213.33(b).

<sup>9</sup> See *id.*

<sup>10</sup> 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.

practice should be directly supervised for the first year of the Order and indirectly supervised for the remainder 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 appropriately. The Board also finds that the Respondent should be required to inform her 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. Finally, the Board finds that the Respondent should be subject to abstention and random drug testing requirements for the duration of the Order. These requirements are consistent with 22 Tex. Admin. Code §213.33(e)(6)<sup>11</sup> and are warranted by the nature of the new violations and the unfulfilled requirements of the prior Board Order.

IT IS THEREFORE ORDERED that Vocational Nurse License Number 198828, previously issued to ELETIA LASHONE AUSTIN, to practice nursing in the State of Texas is/are hereby **SUSPENDED** and said suspension is **ENFORCED** until RESPONDENT:

- A. Obtains twelve (12) consecutive months of sobriety, which may be demonstrated by monthly urine drug screens consistent with the "DRUG AND ALCOHOL RELATED REQUIREMENTS" of this Order.

**Any relapse prior to the completion of the required twelve (12) consecutive months of sobriety will result in revocation or, at a minimum, an extension of the enforced suspension until such twelve (12) consecutive months of sobriety and additional treatment have been attained.**

IT IS FURTHER ORDERED, upon verification of successful completion of the above requirements, the Suspension will be **STAYED**, and RESPONDENT will be placed on **PROBATION** for a minimum of three (3) years **AND** until RESPONDENT fulfills the additional requirements of this Order.

- B. RESPONDENT SHALL pay all re-registration fees, if applicable, and RESPONDENT'S licensure status in the State of Texas will be updated to reflect the applicable conditions outlined herein.
- C. 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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<sup>11</sup> 22 Tex. Admin. Code §213.33(e)(6), which authorizes the probation of a license, either probated or enforced, to be followed by reasonable probationary stipulations that may include remedial education courses and practice for not less than two years under the direction of a nurse designated by the Board, as well as limitations on nursing activities/practice settings and random drug testing.

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

#### II. SUPERSEDING ORDER

IT IS FURTHER ORDERED that the sanction and conditions of this Order SHALL supersede all previous stipulations required by any Order entered by the Texas Board of Nursing.

#### 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 suspension being stayed, 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.

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](http://www.bon.texas.gov/compliance).*

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

## VI. 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 monthly 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.

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
Butabarbital	Butalbital	Pentobarbital
Phenobarbital	Secobarbital	Codeine
Hydrocodone	Hydromorphone	Methadone
Morphine	Opiates	Oxycodone
Oxymorphone	Propoxyphene	Cannabinoids

Cocaine  
Heroin  
Meperidine  
Nalbuphine

Phencyclidine  
Fentanyl  
Carisoprodol  
Ketamine

Ethanol  
Tramadol  
Butorphanol  
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.

## **VII. 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.

## **VIII. 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 22<sup>nd</sup> day of April, 2021.

TEXAS BOARD OF NURSING

A handwritten signature in black ink, appearing to read "Katherine A. Thomas". The signature is fluid and cursive, with the first name being the most prominent.

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

Attachment: Proposal for Decision; Docket No. 507-21-0448 (January 13, 2021)

ACCEPTED  
507-21-0448  
01/13/2021 12:11 PM  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Donnie Roland, CLERK

FILED  
507-21-0448  
1/13/2021 11:49 AM  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Donnie Roland, CLERK

# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

January 13, 2021

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. 507-21-0448; Texas Board of Nursing v.  
Eletha Austin**

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](http://www.soah.texas.gov).

Sincerely,



Sarah Starnes  
Administrative Law Judge

SS/tt

xc: John Vanderford, 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**  
Eletha Austin, 6130 Lago Mar, Apt. 6204, Texas City, TX 77591 – **VIA REGULAR MAIL**

**SOAH DOCKET NO. 507-21-0448**

<b>TEXAS BOARD OF NURSING,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>v.</b>	§	<b>OF</b>
	§	
<b>ELETHA LASHONE AUSTIN, LVN,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The staff (Staff) of the Texas Board of Nursing (Board) seeks to impose disciplinary sanctions against licensed vocational nurse (LVN) Eletha Lashone Austin (Respondent), alleging that she violated a Board Order requiring her to abstain from the use of alcohol. The Administrative Law Judge (ALJ) concludes that Staff met its burden to prove the allegation by a preponderance of the evidence and recommends that the Board suspend Respondent's license until she achieves one year of verified sobriety, to be followed by a three-year probated suspension with stipulations.

**I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE**

On October 20, 2020, the Board issued an order temporarily suspending Respondent's license pursuant to Texas Occupations Code (Code) § 301.4551. On the same date, Staff filed formal charges at the State Office of Administrative Hearings (SOAH) and sent Respondent notice of a probable cause hearing, which convened on November 4, 2020, before ALJ Ross Henderson. On November 10, 2020, the ALJ issued Order No. 1 finding probable cause that Respondent's continued practice of nursing constituted a continuing and imminent threat to the public welfare. Order No. 1 continued the temporary suspension of Respondent's license and set the hearing on the merits.

The hearing on the merits convened via Zoom videoconference on December 3, 2020, before ALJ Sarah Starnes in Austin, Texas. Assistant General Counsel John Vanderford represented Staff, and Respondent appeared on her own behalf. The hearing concluded and the record closed that same day.

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

## II. STAFF'S FORMAL CHARGES AND APPLICABLE LAW

The Texas Nursing Practice Act (Act), found in chapter 301 of the Code, authorizes the Board to take disciplinary action against a nurse who has violated an order of the Board.<sup>1</sup> Disciplinary action may also be taken for “unprofessional conduct in the practice of nursing that is likely to deceive, defraud, or injure a patient or the public.”<sup>2</sup> In its rules, the Board has determined that violating a Board order constitutes unprofessional conduct.<sup>3</sup>

When a nurse has violated the Act or related Board rules, the Board is required to impose a disciplinary sanction, which can range from the issuance of a written warning to revocation of the person's license.<sup>4</sup> The Board has a Disciplinary Matrix that the Board and SOAH are required to use in all disciplinary matters.<sup>5</sup> The Disciplinary 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. The Disciplinary Matrix also lists certain aggravating and mitigating factors that must be considered. Board Rule 213.33 includes 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 and evidence of present fitness to practice.<sup>6</sup>

Staff had the burden of proving its allegations by a preponderance of the evidence.<sup>7</sup>

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<sup>1</sup> Tex. Occ. Code § 301.452(b)(1).

<sup>2</sup> Tex. Occ. Code § 301.452(b)(10).

<sup>3</sup> 22 Tex. Admin. Code § 217.12(11)(B). 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 \_\_\_\_.”

<sup>4</sup> Tex. Occ. Code § 301.453.

<sup>5</sup> 22 Tex. Admin. Code § 213.33(b).

<sup>6</sup> 22 Tex. Admin. Code § 213.33(c).

<sup>7</sup> 1 Tex. Admin. Code § 155.427.

### III. EVIDENCE

#### A. Background

Respondent has been licensed as an LVN in Texas since June 2005.<sup>8</sup> On April 6, 2020, Respondent signed an Agreed Order with the Board, which became effective May 12, 2020.<sup>9</sup> The Agreed Order found that, on or about November 4, 2019, Respondent had engaged in the intemperate use of alcohol by drinking wine while on duty working as an in-home care nurse for a pediatric patient.<sup>10</sup> Respondent was given a reprimand with stipulations and a fine.<sup>11</sup> The stipulations included certain employment requirements, including direct supervision for one year and indirect supervision for the following year.<sup>12</sup> The Agreed Order also required Respondent to abstain from the use of alcohol, nalbuphine, propofol and all controlled substances, except as prescribed by a licensed practitioner for a legitimate purpose, and to submit to random periodic screens for those substances.<sup>13</sup>

On October 20, 2020, the Board temporarily suspended Respondent's nursing license based on evidence she had produced urine specimens that tested positive for metabolites of alcohol on five occasions in July and August 2020. At the hearing, Staff withdrew its claims regarding two of those tests and now alleges that Respondent is subject to disciplinary action based on drug screen samples produced on July 14, July 24, and August 11, 2020.

At the probable cause hearing, Staff offered twelve exhibits, which were admitted, and presented testimony from Respondent and from toxicologist Mitchell LeBard. Respondent had one exhibit admitted into evidence and testified on her own behalf. By agreement of the parties, all of

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<sup>8</sup> Staff Ex. 1.

<sup>9</sup> Staff Ex. 12.

<sup>10</sup> Staff Ex. 12 at 2.

<sup>11</sup> Staff Ex. 12 at 3.

<sup>12</sup> Staff Ex. 12 at 5-6.

<sup>13</sup> Staff Ex. 12 at 7.

the exhibits and testimony from the probable cause hearing were admitted at the hearing on the merits, and both parties presented additional testimony from Respondent.

**B. Mr. LeBard's Testimony**

Mitchell LeBard is the associate director of forensic toxicology for MedTox Laboratories (MedTox) in Saint Paul, Minnesota. Mr. LeBard has worked as a MedTox toxicologist for over twenty years, and his practice focuses on workplace drug testing. MedTox performed testing on Respondent's urine drug screens, and Mr. LeBard testified regarding the results from Respondent's August 11, 2020 drug screen.<sup>14</sup>

Mr. LeBard explained that ethyl glucuronide (ETG) and ethyl sulfate (ETS) are metabolites, or breakdown products, of alcohol in the body. They are present as a result of exposure to ethyl alcohol and can be detected for up to 84 hours after alcohol is ingested. With Respondent's August 11, 2020 sample, initial immunoassay testing suggested a positive result for ethyl alcohol, and confirmatory testing showed 1384 nanograms per milliliter (ng/ml) of ETG and 598 ng/ml of ETS.<sup>15</sup> According to Mr. LeBard, a "presumptively positive" sample will have 500 ng/ml or higher of ETG. Further, research has shown an ETG value above 1000 ng/ml is indicative of alcohol consumption, and a result that high cannot be obtained from incidental or extraneous exposure to an alcohol-containing product. Therefore, in Mr. LeBard's opinion, the ETG value shown in Respondent's August 11, 2020 sample was the result of alcohol consumption.

Mr. LeBard did not think that diabetes or a history of gastric bypass would affect the alcohol metabolites present in Respondent's urine. If Respondent had a urinary tract infection (UTI) with yeast, the yeast could combine with sugar to produce alcohol in the bladder, and when absorbed in the body that alcohol would produce low levels of ETG or ETS. However, according to Mr. LeBard, the ETG or ETS levels that would result from a yeast infection would only be in

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<sup>14</sup> Staff Ex. 10.

<sup>15</sup> Staff Ex. 10 at 5-6. Mr. LeBard testified that the test also showed Respondent's creatinine level—which reflects hydration state—was within normal limits, which indicated her urine was sufficiently concentrated for testing purposes.

the range of “detectability” and would not be as high as the levels shown in Respondent’s August 11, 2020 sample.

Respondent’s test results could only be caused by the recent consumption of alcoholic beverages, according to Mr. LeBard. He conceded that a test sample could not establish exactly when or how much alcohol Respondent consumed, or whether she was impaired or intoxicated. He testified that the August 11, 2020 test results are generally consistent with light drinking on the day of the test, or heavy drinking in the day or two before the test.

Though not separately addressed in Mr. LeBard’s testimony, Staff also presented MedTox laboratory reports for two other samples:

- On July 14, 2020, Respondent produced a urine specimen that showed the presence of 507 ng/ml of ETG and 473 ng/ml of ETS;<sup>16</sup> and
- On July 24, 2020, Respondent produced a urine specimen that showed the presence of .052 grams per deciliter (g/dl) of ethanol, but a negative result for ETG.<sup>17</sup>

### **C. Respondent’s Testimony**

Respondent has worked as a nurse since 2005, and has held positions in pediatric home health nursing, adult and elderly care nursing, and correctional-care nursing. Her most recent position was with the University of Texas Medical Branch’s correctional managed care program with the Texas Department of Criminal Justice (TDCJ).

Addressing the circumstances that led to the Agreed Order, Respondent explained that she was working in a patient’s home and could tell that her blood sugar was getting low, and so she went to the family’s refrigerator and took what looked like a can of soda. She testified that she did not realize the can contained wine, not soda, until she had finished most of the contents. Respondent said she panicked and put the can in a drawer to hide it from the patient’s mother,

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<sup>16</sup> Staff Ex. 5, Staff Ex. 7 at 5-6.

<sup>17</sup> Staff Ex. 8 at 5-6.

intending to pour the rest out and throw the can away later. She denied drinking enough of the wine to impair her during her shift. Although she contended that she had not intentionally consumed alcohol while working, Respondent nonetheless understood that she had committed a serious error in doing so, and said she entered into the Agreed Order to show that she accepted responsibility. She now regrets not fighting harder to show the Board that it was an innocent mistake.

Although the Agreed Order required Respondent to abstain from the use of alcohol, she testified that she did not fully understand that when she signed the order. In a written statement to the Board, she wrote that she “signed [the] order concentrating on the list of noted substances instead of the alcohol levels in the urine or completely understanding what the levels indicated.”<sup>18</sup> She testified that she understood only that she was “limited” in how much she was allowed to drink while subject to the Agreed Order. Still, Respondent acknowledged that after signing the Agreed Order in April 2020, and continuing after the Agreed Order went into effect in May, she had an occasional glass of wine after work. She denied drinking daily or heavily, and denied ever abusing alcohol. Respondent said she never consumed alcohol at a time or in a way that impacted her ability to work safely as a nurse.

Respondent did not dispute the test results that indicated alcohol metabolites were present in her urine on several occasions in July and August 2020, but she did deny that the positive results were all due to alcohol consumption. Respondent admitted that, at some point in mid-July 2020, she had attended a friend’s party and drank punch she only realized later was “spiked” with alcohol. She could not recall the date of the party, but acknowledged that the incident could have caused a positive alcohol screen during that time period. She emphasized that she had not intended to consume the alcohol but admitted it was in her system. Respondent denied consuming alcohol at any other point in the summer of 2020. She could not explain why other urine specimens during that period would have tested positive for alcohol consumption, but suggested that her health history might have impacted the results. Respondent has been diabetic since childhood and has also had gastric bypass surgery, both of which she believes could make alcohol stay in her system

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<sup>18</sup> Resp. Ex. 1 at 6.



longer or affect her differently than other people. Respondent also had a UTI and had to take antibiotics during the summer, which she also thought could have triggered one or more of the positive test results, particularly in combination with her other health conditions. Further, Respondent uses alcohol-containing hand sanitizers at work, which she contends could have skewed her test results.

Respondent said she now understands that she is required to abstain entirely from alcohol and will not violate the Agreed Order again. Respondent contends she is a good nurse and her drinking has never affected her work or harmed any patients. She said she has no prior disciplinary history with her employers or the Board, and she believes she can continue to work safely.

Respondent submitted a letter of recommendation from Taree Suchikul, a former coworker at TDCJ, who described Respondent as a “very hard working, responsible, and reliable” nurse who could be counted on to take good care of patients and help her co-workers.<sup>19</sup>

#### IV. ANALYSIS

The Agreed Order required Respondent to abstain entirely from alcohol, and the preponderance of the evidence shows that she violated that order on at least two occasions. First, Respondent admitted that she consumed “spiked” punch at a party in mid-July 2020. This corresponds with the laboratory report showing that a urine specimen Respondent gave on July 14, 2020 had 507 ng/ml of ETG,<sup>20</sup> a level that Mr. LeBard testified was “presumptively positive” for alcohol consumption. The preponderance of the evidence also shows that Respondent consumed alcohol again prior to her August 11, 2020 urine test. Mr. LeBard testified that the August 11, 2020 test results—which showed 1384 nanograms per milliliter (ng/ml) of ETG and 598 ng/ml of ETS<sup>21</sup>—were so high that they could not have been caused by incidental or extraneous exposure to an alcohol-containing product and were not attributable to Respondent’s

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<sup>19</sup> Resp. Ex. 1 at 5.

<sup>20</sup> Staff Ex. 5, Staff Ex. 7 at 5-6.

<sup>21</sup> Staff Ex. 10 at 5-6.

underlying health conditions, and must have resulted from alcohol consumption within a day or two of providing the specimen. Although Respondent denied consuming alcohol again after the mid-July party, her denial was not credible when measured against Mr. LeBard's testimony, particularly given Respondent's admission that she continued consuming wine after work even after entering into the Agreed Order. Respondent was also not credible in her testimony that she had consumed alcohol only accidentally during the workplace incident that led to the Agreed Order, and prior to the July 14, 2020 urine test. Therefore, the ALJ finds that Staff met its burden of proving, by a preponderance of the evidence, that Respondent violated the Agreed Order by consuming alcohol on two occasions.<sup>22</sup> For violating the Agreed Order, Respondent is subject to disciplinary action pursuant to Code § 301.452(b)(1) and (10).

As a sanction, Staff proposes an enforced suspension of Respondent's nursing license until she has shown 12 months of verifiable sobriety and completed an alcohol treatment program. Following the enforced suspension, Staff would impose a probated suspension for three years, with stipulations including a requirement to complete classes in nursing jurisprudence, ethics and critical thinking. The other stipulations proposed by Staff are consistent with the stipulations that were included in the Agreed Order, such as requirements to notify present and future employers of the Board's order; have employers notify the Board of all employment changes; submit to direct and then indirect supervision; and have employers provide her performance evaluations to the Board. Staff would also extend the drug and alcohol restrictions in the Board Order, so that Respondent would continue to be prohibited from using alcohol and controlled substances and would be required to submit to periodic drug screens to test her compliance. Staff would also require Respondent to attend sobriety support group meetings during the term of the Board's order. Respondent argued that a reprimand would be the most appropriate sanction, but indicated that she would not oppose most of the other stipulations proposed by Staff. However, she does not think that her license should be suspended.

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<sup>22</sup> The third test at issue—which showed the presence of .052 grams per deciliter (g/dl) of ethanol, but a negative result for ETG, in a sample given on July 24, 2020—was not addressed in Mr. LeBard's testimony. Because there was no evidence explaining the significance of this result, Staff has not met its burden of proving this test result established a third violation of the Agreed Order. Staff Ex. 8 at 5-6.

Under the Disciplinary Matrix, a failure to comply with a substantive requirement in a prior Board order—that is, those stipulations designed to remediate, verify, or monitor the competency issue raised by the document violation—constitutes a second-tier violation of Code § 301.452(b)(1).<sup>23</sup> Respondent's violations fall within this category. The Agreed Order prohibited her from consuming alcohol as a measure intended to address and remediate the competency issue raised when she was found drinking on duty. Thus, her violation of that stipulation constituted a failure to comply with a substantive requirement.

Within the second tier, Sanction Level I specifies that “[v]iolations of stipulations that are related to alcohol or drug misuse will result in the next higher administrative sanction.” In Sanction Level II, a sanction of license suspension or revocation could be imposed.<sup>24</sup> Staff's evidence has established one of the aggravating circumstances that could warrant a higher sanction—the evidence shows that there were multiple violations of the Agreed Order. Respondent has not shown that she experienced any unforeseen financial or health issues or that she stopped practicing nursing during the stipulation period, so there are no mitigating circumstances that tend to support a reduced sanction.

Because the Disciplinary Matrix suggests “the next higher administrative sanction” should be imposed in cases like this one, and because there no mitigating circumstances, the reprimand proposed by Respondent would not be appropriate because she was already reprimanded in the Agreed Order. Instead, as indicated by the Disciplinary Matrix, the next-highest sanction should be imposed. The Disciplinary Matrix goes on to specify that, for a violation related to alcohol misuse, the next-highest sanction is an enforced suspension for one year until the nurse receives treatment and obtains one year of sobriety, and then probation of the license for three years, with stipulations.<sup>25</sup> This is the sanction proposed by Staff, which the ALJ agrees is appropriate in this case.

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<sup>23</sup> 22 Tex. Admin. Code § 213.33(b).

<sup>24</sup> 22 Tex. Admin. Code § 213.33(b).

<sup>25</sup> 22 Tex. Admin. Code § 213.33(b).

Further, while the above discussion addresses the section of the Disciplinary Matrix for sanctions imposed pursuant to Code § 301.452(b)(1) (applicable to violations of Board orders), the same sanction is also appropriate if imposed pursuant to Code § 301.452(b)(10) (applicable to unprofessional conduct, which includes violations of Board Orders). For unprofessional conduct, the Disciplinary Matrix specifies that the first tier applies only to “isolated” failures to comply with the Board’s rules, while the third tier applies to violations that result in actual harm to patients or the public.<sup>26</sup> Here, Respondent committed multiple violations but did not cause any actual harm, so her violations do not fit either the first or third tier, and instead fall within the second tier. Within this tier, Sanction Level I suggests a warning or reprimand with stipulations, while Sanction Level II suggests suspension or revocation of a license.<sup>27</sup> This is the same general range of sanctions available under the Disciplinary Matrix section for sanctions pursuant to Code § 301.452(b)(1), which more squarely addresses the specific type of violation at issue here.

In conclusion, the ALJ finds that Staff has shown two violations of the Agreed Order, both of which involved Respondent’s use of alcohol when she was required to abstain. For these violations, the Board may impose sanctions pursuant to Code § 301.452(b)(1) and/or (10). The ALJ recommends that the Board impose an enforced suspension of Respondent’s license until she establishes one year of verified sobriety, and then impose a three-year probated suspension with stipulations. The stipulations should include requirements to abstain from alcohol and controlled substances and submit to periodic drug screens to test her compliance; complete classes in nursing jurisprudence, ethics, and critical thinking; notify present and future employers of the Board’s order; have employers notify the Board of all employment changes; submit to direct and then indirect supervision; and have employers provide her performance evaluations to the Board.

In support of the recommended sanction, the ALJ makes the following findings of fact and conclusions of law.

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<sup>26</sup> 22 Tex. Admin. Code § 213.33(b).

<sup>27</sup> 22 Tex. Admin. Code § 213.33(b).

## V. FINDINGS OF FACT

1. Eletha Lashone Austin (Respondent) holds licensed vocational nurse (LVN) License No. 198828 by the Texas Board of Nursing (Board) on June 16, 2005.
2. Respondent has worked as a nurse since 2005, and has held positions in pediatric home health nursing, adult and elderly care nursing, and correctional-care nursing.
3. On April 6, 2020, Respondent signed an Agreed Order with the Board, which became effective May 12, 2020. The Agreed Order required Respondent to abstain from the use of alcohol, nalbuphine, propofol, and all controlled substances, except as prescribed by a licensed practitioner for a legitimate purpose, and to submit to random periodic screens for those substances.
4. Other than the Agreed Order, Respondent does not have prior disciplinary history with the Board.
5. In mid-July 2020, Respondent consumed alcohol-containing punch at a friend's party.
6. On July 14, 2020, Respondent produced a urine sample that showed the presence of 507 nanograms per milliliter (ng/ml) of ethyl glucuronide (ETG) and 473 ng/ml of ethyl sulfate (ETS).
7. On August 11, 2020, Respondent produced a urine sample that indicated a positive result for ethyl alcohol, and confirmatory testing showed 1384 ng/ml of ETG and 598 ng/ml of ETS.
8. ETG and ETS are metabolites, or breakdown products, of alcohol in the body.
9. The ETG values shown in the July 14, 2020 and August 11, 2020 samples were the result of alcohol consumption by Respondent.
10. The positive test results for alcohol metabolites on Respondent's urine drug screens were not caused by her diabetes, her gastric bypass, or by a urinary tract infection.
11. Respondent did not accidentally consume the alcohol that was detected on the July 14, 2020 and August 11, 2020 urine drug screens.
12. On October 20, 2020, the Board issued an order temporarily suspending Respondent's license pursuant to Texas Occupations Code § 301.4551.
13. The staff (Staff) of the Board filed formal charges at the State Office of Administrative Hearings (SOAH) and sent Respondent notice of a probable cause hearing, which convened on November 4, 2020.

14. On November 10, 2020, Administrative Law Judge (ALJ) Ross Henderson issued Order No. 1 finding probable cause that Respondent's continued practice of nursing constituted a continuing and imminent threat to the public welfare. Order No. 1 continued the temporary suspension of Respondent's license and set the hearing on the merits.
15. On November 18, 2020, Staff sent Respondent a Notice of Final Hearing. 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 incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.
16. On December 3, 2020, ALJ Sarah Starnes convened the hearing on the merits via Zoom videoconference before SOAH in Austin, Texas. Assistant General Counsel John Vanderford represented Staff, and Respondent appeared on her own behalf. The hearing concluded and the record closed that same day.


## VI. CONCLUSIONS OF LAW

1. The Board has jurisdiction over the licensing and discipline of nurses. Tex. Occ. Code ch. 301.
2. SOAH has jurisdiction over contested cases referred by the Board, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 301.459; Tex. Gov't Code ch. 2003.
3. Respondent received adequate and proper notice of the hearing on the merits. Tex. Occ. Code § 301.454; Tex. Gov't Code §§ 2001.051-.052.
4. Staff had the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
5. Respondent is subject to sanction because she violated a Board order. Tex. Occ. Code § 301.452(b)(1), (10); 22 Tex. Admin. Code § 217.12(11)(B).
6. 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.
7. Respondent's conduct most appropriately falls within the Second Tier, Sanction Level I of the Disciplinary Matrix under Texas Occupations Code § 301.452(b)(1); or the Second Tier, Sanction Level II of the Disciplinary Matrix under Texas Occupations Code § 301.452(b)(10). 22 Tex. Admin. Code § 213.33(b).

## VII. RECOMMENDATION

Based on the above findings of fact and conclusions of law, the ALJ recommends that the Board impose an enforced suspension of Respondent's LVN license until she achieves one year of verified sobriety, to be followed by a three-year probated suspension with stipulations. The stipulations should include requirements to abstain from alcohol and controlled substances and submit to periodic drug screens to test her compliance; complete classes in nursing jurisprudence, ethics, and critical thinking; notify present and future employers of the Board's order; have employers notify the Board of all employment changes; submit to direct and then indirect supervision; and have employers provide her performance evaluations to the Board.

**SIGNED January 13, 2021.**

  
**SARAH STARNES**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

ACCEPTED  
507-21-0448  
2/2/2021 3:27 PM  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Jodi Brown, CLERK

FILED  
507-21-0448  
2/2/2021 3:08 PM  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS  
Jodi Brown, CLERK

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Account Number: 4119

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# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

February 2, 2021

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. 507-21-0448; Texas Board of Nursing v.  
Eletha Austin**

Dear Ms. Thomas:

I issued a Proposal for Decision (PFD) in this case on January 13, 2021. Please be advised that the time period to file exceptions to the PFD has expired and neither party filed exceptions. Therefore, the PFD is ready for your review, and I recommend it be adopted as written.

Sincerely,



Sarah Starnes  
Administrative Law Judge

SS/tt

xc: John Vanderford, 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 – **VIA EFILE TEXAS**  
Eletha Austin, 6130 Lago Mar, Apt. 6204, Texas City, TX 77591 – **VIA EFILE TEXAS**