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Stephanie A. Morrison
Executive Director of the Board

DOCKET NUMBER 507-20-2505

IN THE MATTER OF § BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE § OF
NUMBER 593764, §
ISSUED TO
MICHELE LYNN FISCHER § ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

TO: MICHELE LYNN FISCHER
C/O ELIZABETH HIGGINBOTHAM,
ATTORNEY
1100 NW LOOP 410
SUITE 700
SAN ANTONIO, TX 78213

REBECCA S. SMITH
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; Respondent's exceptions to the PFD; Staff's response to Respondent's exceptions to the PFD; the ALJ's final letter ruling dated March 8, 2021; 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. Respondent filed exceptions to the PFD on January 29, 2021. Staff filed a response to Respondent's exceptions to the PFD on January 29, 2021. On March 8, 2021, the ALJ issued a final letter ruling, in which she found the Respondent's exceptions to the PFD untimely filed. Further, even if Respondent's exceptions were to be considered by the ALJ, the ALJ declined to recommend any changes to the PFD.

The Board, after review and due consideration of the PFD; Respondent's exceptions to the PFD; Staff's response to Respondent's exceptions to the PFD; the ALJ's final letter ruling dated March 8, 2021; 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)(10), (12) & (13)¹. A Warning with Stipulations or a Reprimand with Stipulations is authorized by the Board's Disciplinary Matrix for a second tier, sanction level I sanction². The Board agrees with the ALJ that a Reprimand with Stipulations is the most appropriate sanction in this case.

Regardless of the reason, the Respondent was not fit to take care of patients or safely perform nursing care when she reported for work on May 9, 2018³. Respondent's condition created a potential risk of harm for vulnerable patients⁴. Respondent has also been previously disciplined by the Board⁵. Regarding mitigating factors, the patient's outcome was not a result of care; the Respondent has successfully responded to treatment; and the Respondent worked successfully as a nurse after this incident⁶.

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), that a Reprimand with Stipulations is the most appropriate sanction in this case.

Consistent with the ALJ's recommendation, the Board finds that the Respondent should be required to complete a nursing jurisprudence and ethics course, a professional accountability course, and a critical thinking course⁷. 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 practice should be supervised. 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. These supervisory requirements are intended to prevent additional violations from occurring and to ensure that any

¹ See pages 9-10 of the PFD.

² 22 Tex. Admin. Code §213.33(b).

³ See adopted Finding of Fact Number 8.

⁴ See adopted Conclusion of Law Number 9 and page 11 of the PFD.

⁵ See *id*

⁶ See *id*.

⁷ 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.

deficiencies in the Respondent's practice can be discovered quickly and remediated appropriately. The Board also agrees with the ALJ 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. Because the ALJ found insufficient evidence to support abstention and drug testing requirements, the Board declines to impose such stipulations. The remaining requirements are consistent with 22 Tex. Admin. Code §213.33(e)(4)⁸.

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

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. 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,

⁸ 22 Tex. Admin. Code §213.33(e)(4), 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.

documentation of care, principles of nursing ethics, confidentiality, professional boundaries, and the Board's Disciplinary Sanction Policies regarding: Sexual Misconduct; Fraud, Theft, and Deception; Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder; and Lying and Falsification. Courses focusing on malpractice issues will not be accepted. Home study and video programs will not be approved.

- B. **The course "Sharpening Critical Thinking Skills,"** a 3.6 contact hour online program provided by the National Council of State Boards of Nursing (NCSBN) Learning Extension.
- C. **The course "Professional Accountability ...,"** a 5.4 contact hour online program provided by the National Council of State Boards of Nursing (NCSBN) Learning Extension.

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

IV. EMPLOYMENT REQUIREMENTS

In order to complete the terms of this Order, RESPONDENT must work as a nurse in the State of Texas, providing direct patient care in a clinical healthcare setting, for a minimum of sixty-four (64) hours per month for eight (8) quarterly periods [two (2) years] of employment. This requirement will not be satisfied until eight (8) quarterly periods of employment as a nurse have elapsed. 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 eight (8) quarters [two (2) years] of employment as a nurse.

V. RESTORATION OF UNENCUMBERED LICENSE(S)

Upon full compliance with the terms of this Order, all encumbrances will be removed from RESPONDENT'S license(s) to practice nursing in the State of Texas and, subject to meeting all existing eligibility requirements in Texas Occupations Code Chapter 304, Article III, RESPONDENT may be eligible for nurse licensure compact privileges, if any.

Entered this 22nd day of April, 2021.

TEXAS BOARD OF NURSING



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

Attachment: Proposal for Decision; 507-20-2505 (January 13, 2021)

ACCEPTED
507-20-2505
01/13/2021 11:55 AM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Donnie Roland, CLERK

FILED
507-20-2505
1/13/2021 11:39 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. 507-20-2505; Texas Board of Nursing v.
Michele Lynn Fischer**

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,



Rebecca S. Smith
Administrative Law Judge

RS/tt

xc: Helen Kelley, 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**
Elizabeth Higginbotham, RN, JD, 1100 NW Loop 410, Suite 700, San Antonio, TX 78213 – **VIA EFILE TEXAS**

SOAH DOCKET NO. 507-20-2505

**TEXAS BOARD OF NURSING,
Petitioner**

v.

**MICHELE LYNN FISCHER, RN,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Board of Nursing (Board) seeks to sanction the Registered Nurse (RN) credential held by Michele Lynn Fischer (Respondent) based on allegations that she reported for duty while exhibiting signs of impaired behavior. Staff argues Respondent should be sanctioned with a Reprimand and a two-year Order with stipulations. The Administrative Law Judge (ALJ) concludes that Staff proved its allegations by a preponderance of the evidence and recommends the Board issue a Reprimand and Order with terms described below.

I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

ALJ Rebecca S. Smith convened a hearing via Zoom videoconference on November 19, 2020. Assistant General Counsel Helen Kelley represented Staff, and attorney Elizabeth Higginbotham represented Respondent. The hearing ended and the record closed the 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. APPLICABLE LAW

The Texas Nursing Practice Act, found in chapter 301 of the Texas Occupations Code (Code), empowers the Board to discipline licensees for, among other things, unprofessional conduct (Code § 301.452(b)(10)), lack of fitness to practice because of a mental or physical health condition (Code § 301.452(b)(12)), or practice below minimum standards of acceptable nursing practice (Code § 301.452(b)(13)). Staff asserted that Respondent's conduct is grounds for

disciplinary action under each of these Code provisions, as well as pursuant to a number of Board rules.¹ With respect to unprofessional conduct, Staff asserts Respondent failed to comply with:

- **Board Rule 217.12(1)(A):** careless or repeated failure or inability to practice in conformity with minimum standards set out in Board Rule 217.11.²
- **Board Rule 217.12(1)(B):** failure to conform to generally accepted nursing standards in applicable practice settings.
- **Board Rule 217.12(1)(E):** accepting the assignment of nursing functions when the acceptance of the assignment could be reasonably expected to result in unsafe or ineffective client care.
- **Board Rule 217.12(4):** conduct that may endanger a client's life, health, or safety.
- **Board Rule 217.12(5):** demonstration of actual or potential inability to practice nursing with reasonable skill and safety to clients by reason of illness; use of alcohol, drugs, chemicals, or any other mood-altering substances; or as a result of any mental or physical condition.

With respect to minimum standards of nursing practice, Staff alleges Respondent did not comply with provisions that require a nurse to:

- **Board Rule 217.11(1)(B):** implement measures to promote a safe environment for clients and others.
- **Board Rule 217.11(1)(T):** accept only those nursing assignments that take into consideration client safety and that are commensurate with the nurse's educational preparation, experience, knowledge, and physical and emotional ability.

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

¹ For ease of reference, the Board's rules, found in title 22, chapters 211 to 228 of the Texas Administrative Code, shall be referred to as "Board Rule ____."

² Board Rule 217.12 was amended effective October 17, 2019. Citations to the rule are to the version in effect on May 9, 2018, when the conduct at issue occurred.

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

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, and Respondent has the burden of proving mitigating factors, if any.⁵

III. DISCUSSION

Staff called five witnesses, including Respondent. Staff's eleven exhibits were admitted without objection. Staff's single charge in this case, Charge 1, alleges that on May 9, 2018, Respondent lacked fitness to practice and showed signs of impaired behavior when she reported to work at the Connally Memorial Medical Center in Floresville, Texas (Facility).

A. Evidence

1. Testimony of Caitlyn Thayer, RN

Ms. Thayer is an RN and on May 9, 2018, was the emergency room (ER) supervisor at the Facility. She had not worked with Respondent before that date. She testified that on that date, a patient was being moved from the ER to the Facility's intensive care unit (ICU). Before the patient was moved, Ms. Thayer received a call from Letty Rangel, who told her they had a problem in the ICU.

Ms. Thayer testified that she went to the ICU's floor, where she saw Ms. Rangel and Respondent both sitting down. Ms. Rangel told her that they had a problem and that Respondent felt anxious that day. Respondent indicated that she needed her routine intravenous immunoglobulin (IVIG) infusion. Ms. Thayer testified that after being around Respondent for a few minutes, she decided to make a video recording of Respondent because she was concerned about Respondent's behavior.

⁴ 22 Tex. Admin. Code § 213.33(c).

⁵ 1 Tex. Admin. Code § 155.427.

Ms. Thayer described this behavior as alarming. Respondent would answer some questions, but not appropriately, and her speech was slurred and delayed. Respondent would follow up by saying she was sorry and that she loved Ms. Rangel. Respondent then got verbally aggressive, cursed, and called other nurses "bitches." Respondent said her eyes were very dry. Respondent removed her contact lenses and put them in her mouth, before putting them back in her eye. She added that Respondent wiped her nose with her finger and then tried to use that to moisten her contact lens.

Respondent told Ms. Thayer about her condition: the disease affects the autonomic nervous system, and it causes dry eyes and mouth. Ms. Thayer testified that she asked Respondent if she needed treatment, and Respondent said she would get it that night. Ms. Thayer performed a visual assessment, but did not take Respondent's vital signs.

According to Ms. Thayer, Facility staff attempted to get Respondent home safely. (Ms. Thayer had taken Respondent's keys because she was concerned about her safety.) She said that Respondent could not give her the names of anyone who could pick her up. Respondent's daughter offered to get her, but Respondent rejected that offer. Similarly, Ms. Rangel originally offered to take her home, but changed her mind as Respondent became increasingly difficult to deal with.

Ms. Thayer thought something was going on and wanted to give Respondent a drug test. Respondent stated that she needed her IVIG infusion, and that she was not on drugs. Ms. Thayer testified that Respondent first agreed to give a sample and then said her attorney told her to never give a sample. There was also some question about whether Respondent's hands could hold the urine-specimen cup. Ms. Thayer noted that she did not smell alcohol on Respondent's breath.

Ms. Thayer testified that she had no way to know what caused Respondent's symptoms that day, but that Respondent was not fit to perform her job duties, for whatever reason. She added that she has worked with nurses before and that they usually do not present to work if they are not feeling well, in order to protect patients. She was so alarmed that she reported Respondent to the Board. She also testified that the patient who was supposed to be moved to the ICU was not taken there because there was no nurse available to provide care.

2. Testimony of Leticia Rangel, RN

Leticia Rangel is an RN and is the director of the medical surgical ward at the Facility. On May 9, 2018, she was also the director of the ICU. Ms. Rangel testified that she had worked with Respondent, who was an agency nurse, before that date. Respondent was not on contract with the Facility, but she was one of the regular agency nurses they used. Ms. Rangel had not previously noticed any problems with Respondent.

In the afternoon of May 9, 2018, Ms. Rangel called Respondent, who was scheduled on-call for that day, and Respondent, an agency nurse, agreed to come in and take care of the patient who was being moved to the ICU.

When Respondent reported for work at the Facility on the medical floor, she indicated that she was anxious. She immediately started talking a lot, which made other staff members nervous about her behavior. Ms. Rangel took Respondent to the ICU. She told the nurses to call the ER and tell them to hold the patient.

Ms. Rangel described Respondent's conduct as abnormal for her; almost from the beginning, Ms. Rangel could tell something was going on. Respondent began by being upset, mentioning that she was rushing and got a ticket. When Ms. Rangel asked what was going on, Respondent began to cry, mentioned a broken air conditioner, and said that she was tired and did not sleep. Ms. Rangel testified that Respondent stated, "I know you think I'm impaired." Ms. Rangel described Respondent as very emotional and noted that she would start rambling about different subjects. Respondent also provided a demonstration of how she intended to take care of patients.

Ms. Rangel testified that Respondent was not consistent or clear in what she was saying and made comments that seemed to come out of nowhere. Respondent did not want to be taken care of or taken home; she seemed to think she was fine. Ms. Rangel also testified that Respondent wiped her nose and used what came out of her nose to rub into her contact. She testified that Respondent's pants fell down, and she did not seem to notice.

At some point, Ms. Rangel called Ms. Thayer and also asked her night shift to come in early to help. Ms. Rangel believed that it was not safe for Respondent to take care of patients that day. She added that the patient going to the ICU would need to be monitored carefully and that Respondent would be in the ICU by herself. She spoke with the Chief Nursing Officer, who instructed Ms. Rangel and Ms. Thayer to obtain a drug screen of Respondent. Ms. Rangel testified that this was hospital policy for someone who may be impaired.

Ms. Rangel also described the efforts Facility staff made to find someone to drive Respondent home. Ms. Rangel testified that Respondent turned down her daughter's offer to drive her and that Respondent's infusion nurse was not able to come pick her up. Ms. Rangel offered to drive Respondent home herself.

Ms. Rangel was concerned that Respondent's behavior was reflective of a cognitive or mental issue, not a physical one. Respondent did not appear to have low blood sugar; she was not groggy or jittery. Instead, she was hyperactive and incoherent.

3. Testimony of Amanda Sralla, RN

Ms. Sralla is the Chief Nursing Officer at the Facility and held that position on May 9, 2018. She had already left work for the day when Respondent arrived at the Facility. She returned to the Facility after she was called and told that an agency nurse was exhibiting odd behavior. She testified that she had never met Respondent before that day.

When she returned to the Facility, she saw Ms. Rangel, Ms. Thayer, and Respondent in the lobby, tucked out of the way of the public. She testified that Respondent was erratic, aggressive, and cursing. Respondent said that things were growing on her face and then started picking at her face. She testified that regardless of the reason, Respondent was impaired and should have known that.

Ms. Sralla had the police called because of her concern. An officer helped Respondent call her family members and asked Respondent to ask for a ride. Respondent would get on the phone and discuss other things but would not ask for a ride. Ultimately, the officer got frustrated and arrested Respondent.

4. Respondent's Testimony

In 2011, Respondent was diagnosed with chronic inflammatory demyelinating polyneuropathy.⁶ She described it as a rare disease, and one that is frequently misdiagnosed. It affects her nervous system.

She testified that she was scheduled to be on-call from 7 a.m. to 7 p.m. on May 9, 2018, and that she presented to the Facility in scrubs on that day. She had been delayed by highway construction, thought she was going to get a ticket, and was flustered from the heat. She added that she was fine, except for being overheated, when she arrived. She announced her arrival and intended to take patients. She testified that the other nurses told her no because they thought her flustered and flushed state was a sign that she was impaired.

According to Respondent, she was offered but refused treatment on arrival at the Facility because all she needed to do was sit down. She indicated that she was not given that opportunity. She testified that no one offered her fluids or food, asked her assessment questions, or offered her treatment again once her condition deteriorated. She agreed that at some point, she became unfit to practice after all the accusations and attacks on her. She testified that if she had been treated differently, her condition would not have gotten that bad. She added that she would not have gone to work if she had felt the way she did later in the evening.

She admits that during the incident, she said, "I hear myself and I sound crazy" and "I can't even talk straight." She added that she did not realize that her pants had fallen down because she has numbness. She testified that one of her symptoms is dysphonia, which is difficulty speaking, like laryngitis. Her voice would come and go. She testified that this is why some of her speech sounds strange on the video Ms. Thayer made.

She described how she became anxious while at the Facility because she needed to get home to receive her treatment, which would be provided by the infusion nurse who came to her house. She could not believe they would not let her leave. She testified that she attempted to provide a urine sample, but was told that it was not enough. She found it very frustrating. She

⁶ Staff Ex. 11 at 243.

started feeling cornered in the Facility's lobby and panicked. Her panic increased when she was taken away in handcuffs. She also testified that other nurses at the Facility bullied her, and that caused the exacerbation of her symptoms.

Respondent currently has a job in Austin with a hospital that is aware of her medical condition. She testified that she has never had another flare up like the one on May 9, 2018. She currently does exercises for physical therapy and occupational therapy. Her condition is well-controlled now that she can give herself infusions subcutaneously, rather than needing to receive them intravenously. She testified that she was drug-tested before working in Austin and that she has never had a positive drug screen.

She agreed there was a period, not long before the May 9, 2018 incident, when she had not received her infusion for six weeks due to her insurance company's refusal to cover it.

5. Testimony of Elise McDermott, RN

Ms. McDermott is a Nursing Consultant for Practice at the Board and was accepted by the ALJ as an expert on the Board's rules and policies.⁷ She testified as to the sanctions the Board may consider in this case, based on the assumption that the ALJ would find Staff met its burden to establish the underlying facts. Among other things, Ms. McDermott pointed out that discipline could be authorized on the basis of either Code § 301.452(b)(10) (unprofessional conduct), (b)(12) (lack of fitness because of a mental or physical health condition), or (b)(13) (practice below minimum standards of acceptable nursing practice). Correspondingly, several Board rules would be implicated based on the misconduct at issue. Ms. McDermott testified that, in a situation involving multiple violations, the Board's Matrix directs the ALJ and the Board to consider the most serious conduct and the more severe sanction.

Ms. McDermott testified that a nurse should ensure patient safety when coming onto a shift and should reflect on his or her fitness to practice. She testified that such reflection was a constant requirement that continued throughout an assignment. She added that the important issue is not what causes a nurse's impairment, but rather whether the nurse has the ability to practice safely.

⁷ Ms. McDermott's curriculum vitae is contained in Staff Ex. 8.

Under either Code § 301.452(b)(10), (12), or (13), Ms. McDermott opined that a Second Tier, Sanction Level I disciplinary action would be appropriate, with issuance of a Reprimand and a two-year Order with stipulations..

B. Analysis

1. Conduct Established

The ALJ finds that Staff proved its Formal Charge by a preponderance of the evidence. The evidence was clear that on May 9, 2018, Respondent reported for work and was prepared to take a patient when she was not in a condition to safely perform nursing work. Respondent testified her condition deteriorated the longer she was at the Facility,⁸ but based on Ms. Rangel's description of how quickly she became concerned about Respondent's abnormal behavior, the evidence establishes that Respondent lacked fitness when she arrived for work.

The ALJ finds that Staff proved conduct that fell below the standards of nursing practice in Board Rule 217.11(1)(B) and (T), and constituted unprofessional conduct as defined in Board Rule 217.12(1)(A), (B), (E), (4), and (5). Therefore, Respondent is subject to disciplinary action pursuant to Code § 301.452(b)(10) and (13). The evidence also established that, on May 9, 2018, Respondent lacked fitness to practice because of a physical or mental health condition that could have resulted in injury to her patient or the public, so she is additionally subject to disciplinary action pursuant to Code § 301.452(b)(12).

2. Sanction Analysis

Whether Respondent's most serious conduct is analyzed as unprofessional conduct that is sanctionable pursuant to Code § 301.452(b)(10), lack of fitness to practice because of a mental or physical health condition that is sanctionable pursuant to Code § 301.452(b)(12), or as a failure to meet the minimum practice standards that is sanctionable pursuant to Code § 301.452(b)(13), a Second Tier, Sanction Level I classification is appropriate under the Matrix. The First Tier of the Matrix addresses isolated failures to comply with Board rules concerning unprofessional conduct with no patient risk or adverse effects (Code § 301.452(b)(10)), a physical or mental condition

⁸ The ALJ notes that the appropriateness of involving the police, or of the police's conduct, is not at issue here.

without patient involvement or harm (Code § 301.452(b)(12)); and practice below the standard of care with a low risk of patient harm (Code § 301.452(b)(13)). Here, however, there was a risk of patient harm. Respondent reported to work, intending to care for an ICU patient. As a result of her inability to work safely, the patient had to remain in the ER. Thus, Respondent's conduct exceeds the First Tier.

The Third Tier under Code § 301.452(b)(10) encompasses unprofessional behavior that results in serious harm to a patient or the public; under Code § 301.452(b)(12), it covers a lack of fitness with evidence of patient harm, significant risk of harm, or other serious practice violations; and the Third Tier under Code § 301.452(b)(13) is meant to address substandard practice with a serious risk of harm or death that is known or should be known or a significant demonstration of incompetence. The evidence does not show actual, serious harm as Respondent was intercepted by coworkers before she saw a patient. Although the risk of harm to the vulnerable ICU patient was elevated, Staff did not establish that Respondent's one-time conduct reached the level of the significant, sustained risk for discipline under the Third Tier. Thus, the Third Tier under any of these Code sections is inappropriate.

Within the Second Tier, Sanction Level I is the best fit for the conduct shown. Sanction Level II under any of the Code provisions at issue contemplates license denial, suspension, or revocation, and Staff did not contend that level of disciplinary action is required. Sanction Level I proposes a Warning or Reprimand with stipulations. Respondent has one prior disciplinary action, and thus a Reprimand is appropriate.⁹ With respect to the stipulations accompanying the Reprimand, the ALJ agrees with Ms. McDermott's recommendation: classes in jurisprudence, critical thinking, and professional accountability; a requirement that Respondent provide a copy of the Reprimand to her employer; quarterly reports from her employer; and a period of supervision.

On the other hand, the ALJ does not recommend requiring drug testing of Respondent. Although Staff argues that drug use cannot be ruled out, this argument shifts the burden of proof to Respondent. Although Respondent's conduct was concerning, Staff presented no evidence suggesting that it was the result of illicit drug use, as opposed to a flare up of Respondent's

⁹ Respondent was previously disciplined for not reporting a conviction for blocking a highway.

condition. Staff argued that the Board needed to ensure that Respondent would not self-medicate based on a notation in Respondent's medical records that at one point, she had self-prescribed steroids. In light of Respondent's testimony that her condition is well-controlled and that she can self-administer the infusions, Staff did not establish that this is a current risk.

The ALJ finds the following aggravating factors may be considered by the Board: the evidence of potential harm, prior complaint, impairment at the time of the incident, and patient vulnerability. In addition, the ALJ finds the following mitigating factors apply: the patient's outcome was not a result of care; Respondent has successfully responded to treatment; and Respondent worked successfully as a nurse after this incident. Although Respondent raised the systems dynamics as a mitigating factor, the ALJ does not find that she established this factor.

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

IV. FINDINGS OF FACT

1. Michele Lynn Fischer (Respondent) was issued Registered Nurse (RN) License No. 593764 by the Texas Board of Nursing (Board) in 1993.
2. On May 9, 2018, Respondent, who was employed by a staffing agency, reported for work at the Connally Memorial Medical Center in Floresville, Texas (Facility). She announced her arrival and indicated she was prepared to take a patient.
3. On that date, Respondent was called in to work in the intensive care unit (ICU).
4. Respondent had a stressful drive getting to the Facility and was flustered and flushed when she arrived at the Facility.
5. Facility employees were concerned about Respondent's condition.
6. Respondent was behaving erratically from the time her arrival. She did not answer questions appropriately, became verbally aggressive, cursed, and called other nurses "bitches." At one point, she wiped her nose and rubbed what she had wiped from her nose into her contact lens in an attempt to moisten the contact.
7. Respondent's condition continued to devolve to the point where she did not know her pants had fallen down and she could not provide a urine specimen.
8. Respondent was not fit to take care of patients or to safely perform nursing when she reported for work at the Facility on May 9, 2018.

9. In 2011, Respondent was diagnosed with chronic inflammatory demyelinating polyneuropathy, which affects her autonomic nervous system.
10. On May 9, 2018, Respondent was due for an intravenous immunoglobulin (IVIG) infusion as treatment for her condition.
11. Respondent's condition is currently under better control because she can now give herself subcutaneous treatment, rather than requiring IVIG infusion.
12. The staff (Staff) of the Board opened an investigation of Respondent's conduct. On October 23, 2020, Staff sent Respondent a Second Amended 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.
13. Administrative Law Judge Rebecca S. Smith convened the hearing via Zoom videoconference on November 19, 2020. Assistant General Counsel Helen Kelley represented Staff, and attorney Elizabeth Higginbotham represented Respondent. The hearing ended and the record closed the same day.

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 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, and Respondent had the burden of establishing any mitigating factors. 1 Tex. Admin. Code § 155.427.
5. Respondent committed unprofessional conduct, demonstrated inability to practice nursing with reasonable skill and safety to clients by reason of illness or any mental or physical condition, and practiced below minimum standards of nursing care by reporting for work, ready to accept patients while being unfit to safely care for patients. 22 Tex. Admin. Code §§ 217.11(1)(B), (T), .12(1)(A), (B), (E), (4), (5).
6. Respondent's conduct is subject to sanction pursuant to Texas Occupations Code § 301.452(b)(10), (12), and (13).

7. 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).
8. To determine the appropriate disciplinary sanction to be imposed in this case, the Board must consider the factors set forth in 22 Texas Administrative Code § 213.33(c) and the Board's Disciplinary Matrix, 22 Texas Administrative Code § 213.33(b).
9. The Board may consider as aggravating factors Respondent's prior Board discipline, the evidence of potential harm, impairment at the time of the incident, and patient vulnerability. 22 Tex. Admin. Code § 213.33(b)-(c).
10. The Board may consider as mitigating factors that the patient's outcome was not a result of care; Respondent's successful response to treatment; and that Respondent worked successfully as a nurse after this incident. 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 two-year Order with a Reprimand and stipulations including: completion of classes in jurisprudence, critical thinking, and professional accountability; a requirement that Respondent provide a copy of the Reprimand to her employer; quarterly reports from her employer; and such period of supervision that the Board deems fit.

SIGNED January 13, 2021.


REBECCA S. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS BOARD OF NURSING,
Petitioner

v.

MICHELE LYNN FISCHER, RN,
Respondent

§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

MS. FISCHER'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

To the HON. Rebecca Smith

COMES NOW, Ms. Michele Fischer, RN and files this, her Exceptions to the Proposal for Decision and pleads as follows:

Staff's single charge in this case, Charge 1, alleges that on May 9, 2018, Respondent lacked fitness to practice and showed signs of impaired behavior when she reported to work at the Connally Memorial Medical Center in Floresville, Texas (Facility).

Respondent objects to the Following Findings of Fact in RED and requests the addition of the findings in *bolded italic and to strike or modify the FoF and CoLs in ALL CAPS.*:

I. APPLICABLE LAW

TITLE II OF THE ADA APPLIES TO STATE AGENCIES

Title II of the Americans with Disabilities Act, applies to the operations of State and local governments.

Title II This technical assistance manual¹ addresses the requirements of title II of the Americans with Disabilities Act, which applies to the operations of State and local governments. It is one of a series of publications issued by Federal agencies under section 506 of the ADA to assist individuals and entities in understanding their rights and duties under the Act. conducted by the Department of Justice to promote voluntary compliance with the requirements not only of title II, but also of title III of the ADA, which applies to public accommodations, commercial facilities, and private entities offering certain examinations and courses.

THE ADA and STEREOTYPING

¹ <https://www.ada.gov/taman2.html> last accessed 01/28/2021

II-2.0000 QUALIFIED INDIVIDUALS WITH DISABILITIES

II-2.5000 Record of a physical or mental impairment that substantially limited a major life activity. The ADA protects not only those individuals with disabilities who actually have a physical or mental impairment that substantially limits a major life activity, but also those with a record of such an impairment. This protected group includes --

- 1) A person who has a history of an impairment that substantially limited a major life activity but who has recovered from the impairment. Examples of individuals who have a history of an impairment are persons who have histories of mental or emotional illness, drug addiction, alcoholism, heart disease, or cancer.
- 2) Persons who have been misclassified as having an impairment. Examples include persons who have been erroneously diagnosed as mentally retarded or mentally ill.

II-2.6000 "Regarded as." The ADA² also protects certain persons who are regarded by a public entity as having a physical or mental impairment that substantially limits a major life activity, whether or not that person actually has an impairment. Three typical situations are covered by this category:

- 1) An individual who has a physical or mental impairment that does not substantially limit major life activities, but who is treated as if the impairment does substantially limit a major life activity;

ILLUSTRATION: A, an individual with mild diabetes controlled by medication, is barred by the staff of a county-sponsored summer camp from participation in certain sports because of her diabetes. Even though A does not actually have an impairment that substantially limits a major life activity, she is protected under the ADA because she is treated as though she does.

- 2) An individual who has a physical or mental impairment that substantially limits major life

² <https://www.ada.gov/taman2.html#II-2.6000> last accessed 01/28/2021

activities *only* as a result of the attitudes of others towards the impairment;

ILLUSTRATION: B, a three-year old child born with a prominent facial disfigurement, has been refused admittance to a county-run day care program on the grounds that her presence in the program might upset the other children. B is an individual with a physical impairment that substantially limits her major life activities only as the result of the attitudes of others toward her impairment.

II-3.5200 Safety³. A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on real risks, not on speculation, stereotypes, or generalizations about individuals with disabilities.

THIS IS THE CASE---and she was not “impaired” until they beat her down over a period of 5 hours then called the police.

ILLUSTRATION: A county recreation program may require that all participants in its scuba program pass a swimming test, if it can demonstrate that being able to swim is necessary for safe participation in the class. This is permitted even if requiring such a test would tend to screen out people with certain kinds of disabilities.

3) An individual who has no impairments but who is treated by a public entity as having an impairment that substantially limits a major life activity.

ILLUSTRATION: C is excluded from a county-sponsored soccer team because the coach believes rumors that C is infected with the HIV virus. Even though these rumors are untrue, C is protected under the ADA, because he is being subjected to discrimination by the county *based on the belief that he has an impairment that substantially limits major life activities (i.e., the belief that he is infected with HIV)*,

³ Id.

II-2.7000 Exclusions. The following conditions are specifically excluded from the definition of "disability": transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs.

II-2.8000 Qualified individual with a disability. In order to be an individual protected by title II, the individual must be a "qualified" individual with a disability. To be qualified, the individual with a disability must meet the essential eligibility requirements for receipt of services or participation in a public entity's programs, activities, or services with or without --

- 1) Reasonable modifications to a public entity's rules, policies, or practices;
- 2) Removal of architectural, communication, or transportation barriers; or
- 3) Provision of auxiliary aids and services.

The "essential eligibility requirements" for participation in many activities of public entities may be minimal. For example, most public entities provide information about their programs, activities, and services upon request. In such situations, the only "eligibility requirement" for receipt of such information would be the request for it. However, under other circumstances, the "essential eligibility requirements" imposed by a public entity may be quite stringent.

ILLUSTRATION: The medical school at a public university may require those admitted to its program to have successfully completed specified undergraduate science courses.

Can a visitor, spectator, family member, or associate of a program participant be a qualified individual with a disability under title II? Yes. Title II protects any qualified individual with a disability involved in

any capacity in a public entity's programs, activities, or services.

ILLUSTRATION: Public schools generally operate programs and activities that are open to students' parents, such as parent-teacher conferences, school plays, athletic events, and graduation ceremonies. A parent who is a qualified individual with a disability with regard to these activities would be entitled to title II protection.

Can health and safety factors be taken into account in determining who is qualified? Yes. An individual who poses a direct threat to the health or safety of others will not be "qualified."

What is a "direct threat"? A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity's modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services. The public entity's determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.

How does one determine whether a direct threat exists? The determination must be based on an individualized assessment that relies on current medical evidence, or on the best available objective evidence, to assess --

- 1) The nature, duration, and severity of the risk;
- 2) The probability that the potential injury will actually occur; and,
- 3) Whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk.

Making this assessment will not usually require the services of a physician. Medical guidance may be obtained from public health authorities, such as the U.S. Public Health Service, the Centers for Disease

Control, and the National Institutes of Health, including the National Institute of Mental Health.

ILLUSTRATION: An adult individual with tuberculosis wishes to tutor elementary school children in a volunteer mentor program operated by a local public school board. Title II permits the board to refuse to allow the individual to participate on the grounds that the mentor's condition would be a direct threat to the health or safety of the children participating in the program, if the condition is contagious and the threat cannot be mitigated or eliminated by reasonable modifications in policies, practices, or procedures.

II. DISCUSSION

Staff called five witnesses, including Respondent. Staff's eleven exhibits were admitted without objection.

A. Evidence

I. Testimony of Caitlyn Thayer, RN

1. *Ms. Thayer was told by Ms. Rangel and by Ms. Fischer that Ms. Fischer had CIDP and she needed her routine intravenous immunoglobulin (IVIG) infusion.*
2. *Ms. Thayer testified that she did not know what CIDP was and did not try and discover what it was.*
3. *Ms. Thayer testified that she decided to make a video recording of Respondent because she was concerned about Respondent's behavior.*
4. *Ms. Thayer did not receive consent from Ms. Fischer to make a videorecording of her.*
5. *Ms. Thayer testified that the videotape did not record continuously and did not show much of what was in her sworn statement to include pants falling down.*
6. *Ms. Thayer testified that Ms. Fischer was there more than 5 hours and the police were called.*
7. *Ms. Thayer testified that she did not release the tape before November 2020 because she was concerned about legality.*
8. *Ms. Thayer was unable to testify about the branches of the autonomic nervous system,*

the body system affected by Ms. Fischer's disease process.

9. *Ms. Thayer made a video of Ms. Fischer without her knowledge or consent.*
10. *She testified that she didn't turn it over because she was concerned about legality.*
11. *Ms. Thayer testified that she sent Ms. Rangel home.*

2. Testimony of Leticia Rangel, RN

1. *When Ms. Fischer responded to Ms. Rangel's question "what is going on with you?" Ms. Fischer felt safe to respond honestly.*
2. *Ms. Rangel testified that she took Ms. Fischer to the ICU because the other nurses were talking about her.*
3. *Ms. Fischer was not videotaped until Ms. Thayer appeared in her office.*
4. The Court notes: "Ms. Rangel testified that Respondent stated, "I know you think I'm impaired." Ms. Rangel described Respondent as very emotional and noted that she would start rambling about different subjects. Respondent also provided a demonstration of how she intended to take care of patients."

The sad fact is that people who have been discriminated against **know** when it is happening; they live inside the body that is judged. Respondent testified that she *became* unfit after being accused of being under the influence and treated like a criminal by her colleagues.

Ms. Rangel can only make a nursing diagnosis.

3. Testimony of Amanda Sralla, RN

1. *Testified that hospital calls the police to pick up patients who don't have a ride home that arrive by ambulance*
2. *Testified that she did not call Ms. Fischer's agency and could have.*

4. Respondent's Testimony

She also testified that she considered not going in because of the hour but elected to do so as it indicated to her that the hospital had a great need.

She admits that during the incident, she said, "I hear myself and I sound crazy" and "I can't even talk straight." She added that she did not realize that her pants had fallen down because she has numbness IN HER EXTREMITIES BECAUSE OF NERVE DAMAGE AND THAT HER SCRUBS WERE LOOSE. She testified that one of her symptoms is dysphonia, which is difficulty speaking, like laryngitis. Her voice would come and go. She testified that this is why some of her speech sounds strange on the video Ms. Thayer made. *Her medical records corroborate this.*

5. Testimony of Elise McDermott, RN

Please accept my representation of Kristen Benton's testimony that deferred is not a PRACTICE issue with regard to Sanction. See Exhibit A.

1. *Ms. McDermott acknowledged the fact of lateral violence and retaliation in nursing.*
2. *Ms. McDermott had no explanation for why the reporting nurse did not know the physiology of the nervous system.*
3. *Ms. McDermott persisted with her stereotype of Ms. Fischer as impaired by alcohol or illegal drugs,*

Sanction Analysis

If Ms. Fischer is guilty, The First Tier of the Matrix addresses isolated failures to comply with Board rules concerning unprofessional conduct with no patient risk or adverse effects a physical or mental condition without patient involvement or harm (Code § 301.452(b)(12));

III. FINDINGS OF FACT

12. Michele Lynn Fischer (Respondent) was issued Registered Nurse (RN) License No. 593764 by the Texas Board of Nursing (Board) in 1993.
13. On May 9, 2018, Respondent, who was employed by a staffing agency, reported for work at the Connally Memorial Medical Center in Floresville, Texas (Facility). She announced her arrival and indicated she was prepared to take a patient.
14. On that date, Respondent was called in to work in the intensive care unit (ICU) *9 hours into the shift.*
15. Respondent had a stressful drive getting to the Facility and was flustered and flushed when she arrived at the Facility.
16. Facility employees were concerned about Respondent's condition *and attributed it to impairment by alcohol or drugs.*
17. **THE FOLLOWING FINDINGS OF FACT SHOULD BE ADDED.**
18. *Ms. Thayer was told by Ms. Rangel and by Ms. Fischer that Ms. Fischer had CIDP and she needed her routine intravenous immunoglobulin (IVIG) infusion.*
19. *Ms. Thayer testified that she did not know what CIDP was and did not try and discover what it was.*
20. *Ms. Thayer testified that she decided to make a video recording of Respondent because she was concerned about Respondent's behavior.*

21. *Ms. Thayer did not receive consent from Ms. Fischer to make a videorecording of her.*
22. *Ms. Thayer testified that the videotape did not record continuously and did not show much of what was in her sworn statement to include pants falling down.*
23. *Ms. Thayer testified that Ms. Fischer was there more than 5 hours and the police were called.*
24. *Ms. Thayer testified that she did not release the tape before November 2020 because she was concerned about legality.*
25. *Ms. Thayer was unable to testify about the branches of the autonomic nervous system, the body system affected by Ms. Fischer's disease process.*
26. RESPONDENT WAS BEHAVING ERRATICALLY FROM THE TIME HER ARRIVAL. SHE DID NOT ANSWER QUESTIONS APPROPRIATELY, BECAME VERBALLY AGGRESSIVE, CURSED, AND CALLED OTHER NURSES "BITCHES." AT ONE POINT, SHE WIPED HER NOSE AND RUBBED WHAT SHE HAD WIPED FROM HER NOSE INTO HER CONTACT LENS IN AN ATTEMPT TO MOISTEN THE CONTACT.
27. RESPONDENT'S CONDITION CONTINUED TO DEVOLVE TO THE POINT WHERE SHE DID NOT KNOW HER PANTS HAD FALLEN DOWN AND SHE COULD NOT PROVIDE A URINE SPECIMEN.
28. *Respondent has a peripheral neurologic condition corroborated by her medical records that affects her ability to sense urinary need and fine motor coordination.*
29. Respondent became unfit to care for patients or to safely perform nursing after she reported for work at the Facility on May 9, 2018.
30. In 2011, Respondent was diagnosed with chronic inflammatory demyelinating polyneuropathy, which affects her autonomic nervous system.
31. On May 9, 2018, Respondent was due for an intravenous immunoglobulin (IVIG) infusion as treatment for her condition.
32. Respondent's condition is currently under better control because she can now give herself subcutaneous treatment, rather than requiring IVIG infusion.
33. *Respondent's medical records corroborate her disease.*
34. *Respondents current employer vouched for her safe and competent practice.*

IV. CONCLUSIONS OF LAW

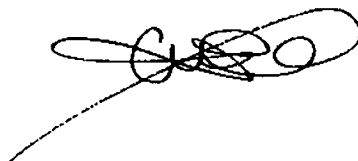
1. The Board has jurisdiction over the licensing and discipline of nurses. Tex. Occ. Code ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over contested cases referred by the Board, including the authority to issue a proposal for decision with findings of fact

- 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, and Respondent had the burden of establishing any mitigating factors. 1 Tex. Admin. Code § 155.427.
 5. Respondent's conduct is not subject to sanction pursuant to Texas Occupations Code § 301.452(b)(10)(12) or (13).
 6. *The Board may impose a condition of practice under Section 301.453 and in accordance with all applicable laws, to include the ADA to ensure safety.*
 7. *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 Texas Administrative Code § 213.33(b) as well as Federal law which must be complied with.*
 8. *The Board may consider all mitigating factors that the patient's outcome was not a result of care; Respondent's successful response to treatment; and that Respondent worked successfully as a nurse after this incident and any other matter that the law requires. 22 Tex. Admin. Code § 213.33(b)-(c); Title II ADA.*

WHEREFORE PREMISES CONSIDERED, Respondent prays that the Honorable Administrative Judge revise the PFD as specified in this pleading and for such other and further relief at law or in equity as may be appropriate by the ALJ in this matter.

Respectfully submitted,

HIGGINBOTHAM & ASSOCIATES LLC



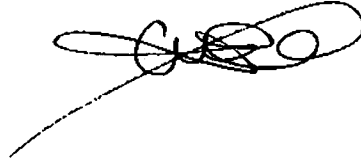
By: _____

Elizabeth L. Higginbotham, RN, JD
State Bar No. 00787694
One Castle Hills
1100 NW Loop 410. Suite 700
San Antonio, Texas 78213
Tel. (210) 366-8871
Fax. (866) 250-4443

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been forwarded by electronic transmission to Ms. Helen Kelley, Assistant General Counsel via Facsimile (512) 305-8101, Texas Board of Nursing on this 29th day of January 2021.

A handwritten signature in black ink, appearing to read 'ELH', with a long horizontal line extending to the left from the bottom of the signature.

ELIZABETH L. HIGGINBOTHAM, RN, JD

ACCEPTED
507-20-2505
01/29/2021 1:29 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Donnie Roland, CLERK



FILED
507-20-2505
1/29/2021 12:33 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Donnie Roland, CLERK

Texas Board of Nursing

333 Guadalupe Street, Ste. 3-460, Austin, Texas 78701
Phone: (512) 305-7400 Fax: (512) 305-7401 www.bon.texas.gov
Katherine A. Thomas, MN, RN, FAAN
Executive Director

January 29, 2021

The Honorable Rebecca S. Smith, Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

Via Electronic Filing

Re: In the Matter of Permanent Certificate No. RN 593764
Issued to: **MICHELE LYNN FISCHER**
SOAH Docket No. **507-20-2505**

Dear Judge Smith:

Enclosed is *Staff's Response to Respondent's Untimely Exceptions to the Proposal for Decision.*

Sincerely,

A handwritten signature in cursive script that reads "Helen Kelley". The signature is written in black ink and is positioned above a horizontal line.

Helen Kelley
Assistant General Counsel

Electronically Signed as Authorized by
Tex. Bus. & Comm. Code §322.007

HK:cjl
Enclosure

cc: Elizabeth L. Higginbotham, RN, Attorney, via email: texasnurselaw@outlook.com

SOAH DOCKET NO. 507-20-2505

IN THE MATTER OF	§	BEFORE THE
PERMANENT CERTIFICATE	§	
NO. RN 593764	§	STATE OFFICE
ISSUED TO	§	
MICHELE LYNN FISCHER	§	ADMINISTRATIVE HEARINGS

**STAFF’S RESPONSE TO RESPONDENT’S UNTIMELY EXCEPTIONS TO
THE PROPOSAL FOR DECISION**

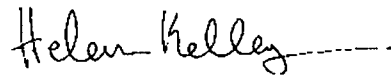
COMES NOW, Staff of the Texas Board of Nursing (hereinafter “Staff” or “Board”), and respectfully files this, Staff’s Response to Respondent’s Untimely Exceptions to the Proposal for Decision (“PFD”) issued in this matter on January 13, 2021, as follows:

Pursuant to SOAH rule of Procedure 155.507, exceptions to proposals for decision “shall be filed within 15 days after the date the proposal for decision is issued.” 1 Tex. Admin. Code § 155.507(b)(1). The PFD in this case was issued on January 13, 2021. Fifteen (15) days after that date was January 28, 2021. Accordingly, Respondent’s exceptions filed on January 29, 2021, are untimely and therefore cannot be considered.

Use of “shall” in rule 155.507 “imposes a duty” on those wanting to file exceptions to do so within the time period described. 1 Tex. Admin. Code § 155.507(b)(1); Tex. Gov’t Code §§ 311.002(4), 311.016(2). Additionally, Respondent failed to file a timely, agreed motion showing good cause to change the deadline, which is the only exception to rule 155.507 that would allow an ALJ the discretionary authority to “change the time to file exceptions.” 1 Tex. Admin. Code § 155.507(b)(3), Tex. Gov’t Code § 311.016(1). Having shown that Respondent’s filing is untimely and no exception exists by which Respondent’s filing can be considered, Staff requests that the honorable ALJ not consider Respondent’s untimely exceptions, and instead issue a letter to the Board stating that the PFD issued on January 13, 2021, is ready for the Board to consider as written.

Respectfully submitted,

TEXAS BOARD OF NURSING



Helen Kelley, Assistant General Counsel
State Bar No. 24086520
333 Guadalupe, Tower III, Suite 460
Austin, Texas 78701
P: (512) 305-8658; F: (512) 305-8101
Helen.Kelley@bon.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Staff's Response to Respondent's Untimely Exceptions to Proposal for Decision* was provided by email on this, the 29th day of January 2021, to: Elizabeth L. Higginbotham, RN, Attorney, via email: texasnursclaw@outlook.com.



Helen Kelley, Assistant General Counsel

ACCEPTED
507-20-2505
03/08/2021 11:45 AM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Carol Hale, CLERK



FILED
507-20-2505
3/8/2021 11:32 AM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Carol Hale, CLERK

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

March 8, 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. 507-20-2505; Texas Board of Nursing v.
Michele Lynn Fischer**

Dear Ms. Thomas:

On January 13, 2021, the undersigned Administrative Law Judge (ALJ) issued a Proposal for Decision (PFD) in this case. Exceptions were due on January 28, 2021. Respondent Michele Lynn Fischer filed exceptions on January 29, 2021. She did not file a motion to extend the filing deadline. Staff of the Texas Board of Nursing filed a response to the exceptions, including an objection to their untimeliness.

The ALJ agrees with Staff that Respondent's objections are untimely and should be overruled on that basis. However, even were the ALJ to consider Respondent's exceptions, those exceptions would not lead the ALJ to recommend revising the PFD.

Respectfully, the ALJ disagrees with Respondent's presentation of the evidence in her exceptions. For example, contrary to Respondent's assertions, the ALJ found that Respondent was not in a condition to safely perform nursing work when she reported for work, not beginning five hours later, as asserted in her exceptions. Respondent's exceptions present no convincing basis to change that finding. This finding also renders irrelevant Respondent's request for additional findings about her treatment at the Facility. Finally, the ALJ disagrees with Respondent's assertion that there was no risk of patient harm; Respondent reported for work at an ICU when she was physically incapable of caring for a patient there.