

DOCKET NUMBER 507-23-24065

**IN THE MATTER OF
PERMANENT REGISTERED NURSE
LICENSE NUMBER 900865,
ISSUED TO
HAYLY DAVIS**

**§ BEFORE THE STATE OFFICE
§
§ OF
§
§ ADMINISTRATIVE HEARINGS**

OPINION AND ORDER OF THE BOARD

**TO: HAYLY DAVIS
C/O MARC M. MEYER
2300 WOODFOREST PKWY. N., STE 600
MONTGOMERY, TX 77316**

**HOLLY VANDROVEC
ADMINISTRATIVE LAW JUDGE
PO BOX 13025
AUSTIN, TX 78711-3025**

At the regularly scheduled public meeting on April 18, 2024, 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, and the Board agrees, that the Respondent's conduct constitutes a violation of §301.452(b)(1)&(10).¹ The evidence shows that Respondent October 1, 2021, Respondent entered into a warning with stipulations-level Agreed Order (2021 Order) with the Board due to allegations that she withdrew morphine for a patient, but failed to accurately document the administration of the medication or follow the facility's policy and procedures for wastage of the unused portion of the medication. The 2021 Order required Respondent to, among other things, abstain from the use of alcohol and certain other substances and to submit to drug and alcohol testing. On June 6, 2022, Respondent tested positive for metabolites of alcohol and entered into a second order on February 14, 2023, (2023 Order) as a result. The 2023 Order suspended Respondent's license, but the suspension was stayed and Respondent was placed on probation for a minimum of three years during which time she was required to again abstain from the use of alcohol and other substances and to submit to drug and alcohol testing. Respondent violated the 2023 Order by failing to check in with the testing company from April 17-May 23, 2023, and failing to submit to testing on April 19, 2023, April 24, 2023, and May 4, 2023.

The ALJ found the mitigating factors to outweigh the aggravating factors in the case. The aggravating factors were failure to respond to the Board investigator's request for the notification of employment form and multiple missed tests.² The ALJ found the mitigating factors to be: no evidence of actual harm, no misrepresentation of qualifications, no physical or economic damages, and no evidence that she consumed any drugs for which she did not have a prescription. Additionally, the ALJ found that prior excuse from checking in from April 14-16, 2023 may have given Respondent reason to believe that her testing requirements were suspended. Respondent's supervisor Lisa Do, testified that Respondent is a conscientious, dependable nurse who never showed signs of being impaired.

Therefore, after carefully reviewing and considering the aggravating and mitigating factors identified by the ALJ in this case, as well as the ALJ's recommendation for sanction, 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, followed by a three year probational period, is the most appropriate sanction in this case.

Consistent with the ALJ's recommendation, the Board finds that the Respondent's license should be suspended until Respondent is able to demonstrate one year of consecutive, verifiable sobriety. After the Respondent has complied with those requirements, the Board finds that the suspension should be probated for a three year probationary period. During that period, the Respondent should be required to complete a nursing jurisprudence and ethics course and a critical thinking course.³ The ALJ also recommends an administrative fine of \$1,000. The Disciplinary Matrix contained in Rule 213.33, Table §301.452(b)(10), Second Tier Offense, Sanction Level II, requires Respondent's nursing practice should be "monitored and supervised" during the probationary period. The Board finds that one year of direct supervision followed by two

¹ See page 18 of the PFD.

² See page 8 of the PFD.

³ 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.

years of indirect supervision should sufficiently ensure the Respondent's safe practice. Supervisory stipulations are intended to prevent additional violations from occurring by ensuring that any deficiencies in the Respondent's practice will be discovered quickly and remediated appropriately. Further, one year of direct supervision followed by one or more years of indirect supervision is consistent with the Board's precedent in cases involving a multi-year disciplinary order. 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. Further, the Board finds that the Respondent should be required to abstain from the use of alcohol and drugs and submit to random, periodic drug testing. These stipulations are consistent with 22 Tex. Admin. Code §213.33(e)(6)⁴.

IT IS THEREFORE ORDERED that Registered Nurse License Number 900865, previously issued to HAYLY DAVIS, 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, that 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.

- D. RESPONDENT SHALL submit an application for licensure renewal/reactivation, as applicable, and pay all re-registration fees, if any, and RESPONDENT'S licensure status in the State of Texas will be activated and updated to current status and to reflect the applicable conditions outlined herein.

- E. This Order SHALL apply to any and all future licenses issued to RESPONDENT to practice nursing in the State of Texas.

- F. This Order SHALL be applicable to RESPONDENT'S nurse licensure

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

compact privileges, if any, to practice nursing in the State of Texas.

- G. Until successfully completed, RESPONDENT may not practice nursing in the State of Texas except in accordance with the terms of this Order.
- H. 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. 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 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) International Center for Regulatory Scholarship (ICRS).

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. MONETARY FINE

RESPONDENT SHALL pay a monetary fine in the amount of one thousand dollars (\$1,000.00) within forty-five (45) days of the effective date of this Order. Payment is to be made directly to the Texas Board of Nursing in the form of cashier's check or U.S. money order. Partial payments will not be accepted.

V. EMPLOYMENT REQUIREMENTS

In order to complete the terms of this Order, RESPONDENT must work as a nurse in the State of Texas, providing direct patient care in a clinical healthcare setting, for a minimum of sixty-four (64) hours per month for 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 stipulation/probation period, RESPONDENT SHALL be supervised by a Registered Nurse, if licensed as a Registered Nurse, or by a Licensed Vocational Nurse or a Registered Nurse, if licensed as a Licensed Vocational Nurse, who is on the premises. The supervising nurse is not required to be on the same unit or ward as RESPONDENT, but should be on the facility grounds and readily available to provide assistance and intervention if necessary. The supervising nurse shall have a minimum of two (2) years 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 random periodic screens for alcohol, nalbuphine, propofol and all controlled substances. The Board will provide instructions on how to enroll in the Board's drug and alcohol testing program following the entry of this Order and screening will begin when RESPONDENT obtains employment and submits the Notification of Employment form to the Board.

- For the first three (3) month [1st quarter] period RESPONDENT works as a nurse under the terms of this Order, random screens shall be performed at least once per week.
- For the next three (3) month [2nd quarter] period, random screens shall be performed at least twice per month.
- For the next six (6) month period [3rd & 4th quarters], random screens shall be performed at least once per month.
- For the remainder of the probation period, if any, random screens shall be performed at least once every three (3) month quarterly period.

All random screens SHALL BE conducted through urinalysis. Any test result for a period of time in which the RESPONDENT is not working as a nurse under the terms of this Order will not count towards satisfaction of this requirement. All screens shall be properly monitored and produced in accordance with the Board's policy on Random Drug Testing. A complete chain of custody shall be maintained for each specimen obtained and analyzed. RESPONDENT SHALL be responsible for the costs of all random drug screening during the stipulation/probation period.

Specimens shall be screened for any or all of the following substances and/or their metabolites:

Amphetamine	Methamphetamine	MDMA
MDA	Alprazolam	Diazepam
Alpha-o-alprazolam	Alpha-Hydroxytriazolam	Clonazepam
Desmethyldiazepam	Lorazepam	Midazolam
Oxazepam	Temazepam	Amobarbital
Butabarbital	Butalbital	Pentobarbital
Phenobarbital	Secobarbital	Codeine
Hydrocodone	Hydromorphone	Methadone
Morphine	Opiates	Oxycodone
Oxymorphone	Propoxyphene	Cannabinoids
Cocaine	Phencyclidine	Ethanol

Heroin
Meperidine
Nalbuphine

Fentanyl
Carisoprodol
Ketamine

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 18th day of April, 2024.

TEXAS BOARD OF NURSING



KRISTIN K. BENTON, DNP, RN
EXECUTIVE DIRECTOR FOR THE BOARD

Attachment: Proposal for Decision; 507-23-24065 (December 14, 2023)

ACCEPTED
507-23-24065
12/14/2023 3:25:48 pm
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Kevin Garza, CLERK

FILED
507-23-24065
12/14/2023 3:23 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Kevin Garza, CLERK

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

December 14, 2023

JoAnna Starr
1801 Congress Avenue, Suite 10-200
Austin, TX 78601

VIA EFILE TEXAS

Marc Meyer
33300 Egypt Lane
Magnolia, TX 77354

VIA EFILE TEXAS

**RE: Docket Number 507-23-24065.TBN; TEXAS BOARD OF
NURSING v. HAYLY DAVIS**

Dear Parties:

Please find attached a Proposal for Decision in this case.

Exceptions and replies may be filed by any party in accordance with 1 Texas Administrative Code section 155.507(b), a SOAH rule which may be found at www.soah.texas.gov.

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**TEXAS BOARD OF NURSING,
PETITIONER
v.
HAYLY DAVIS,
RESPONDENT**

PROPOSAL FOR DECISION

The Staff of the Texas Board of Nursing (Board) seeks to impose disciplinary action against the registered nurse (RN) license held by Hayly Davis (Respondent), alleging she failed to comply with the terms of a 2023 Board Order (2023 Order). The Administrative Law Judge (ALJ) concludes Staff met its burden to prove that Respondent failed to comply the requirements of the 2023 Order, and recommends the Board issue an order requiring Respondent to obtain one year of sobriety during which time her license is suspended, followed by a three-year probated suspension during which time she would be under drug stipulations, and be assessed an administrative fine of \$1,000.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

Matters of notice and jurisdiction were undisputed and are therefore set out in the Findings of Fact and Conclusions of Law without further discussion. The Board temporarily suspended Respondent's license on July 24, 2023, and the matter was referred to the State Office of Administrative Hearings (SOAH) for a hearing on whether probable cause existed to continue the temporary suspension while the case was otherwise adjudicated. Respondent agreed to waive the probable cause hearing and maintain the temporary suspension pending a final hearing on the merits. SOAH ALJ Holly Vandrovec convened a videoconference hearing on the merits on October 16, 2023. The record closed that day upon the filing of exhibits admitted into evidence. Assistant General Counsel JoAnna Starr represented Staff, and attorney Marc Meyer represented Respondent.

II. APPLICABLE LAW

The Texas Nursing Practice Act (Act), found in chapter 301 of the Texas Occupations Code (Code), authorizes the Board to take disciplinary action against a nurse who has violated an order of the Board or who commits "unprofessional conduct in the practice of nursing that is likely to deceive, defraud, or injure a patient or the public."¹ By rule, the Board has determined that violating a Board order constitutes unprofessional conduct.²

¹ Tex. Occ. Code § 301.452(b)(1), (10).

² 22 Tex. Admin. Code § 217.12(11)(B).

When a nurse violates the Act or related Board rules, the Board is required to impose a disciplinary sanction, which can range from remedial education to license revocation.³ The Board has issued a Disciplinary Matrix that the Board and SOAH are directed to use in all disciplinary matters.⁴ 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. Aggravating and mitigating factors that must be considered by the Board and SOAH are contained in the Disciplinary Matrix as well as Board Rule 213.33.⁵

Staff had the burden of proving its allegations by a preponderance of the evidence, and Respondent had the burden of proving mitigating factors, if any.⁶

III. BACKGROUND AND EVIDENCE

The Board licensed Respondent as a registered nurse on June 16, 2016.⁷ On October 1, 2021, Respondent entered into an Agreed Order (2021 Order) with the Board due to allegations that she withdrew morphine for a patient, but failed to accurately document the administration of the medication or follow the facility's policy and procedures for wastage of the unused portion of the medication.⁸ The

³ Tex. Occ. Code § 301.453; 22 Tex. Admin. Code § 213.33(e).

⁴ 22 Tex. Admin. Code § 213.33(b).

⁵ 22 Tex. Admin. Code § 213.33(c). 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 ____."

⁶ 1 Tex. Admin. Code § 155.427.

⁷ Staff Ex. 1.

⁸ Staff Ex. 3 at 20.

2021 Order required Respondent to, among other things, abstain from the use of alcohol and certain other substances and to submit to drug and alcohol testing. On June 6, 2022, Respondent tested positive for metabolites of alcohol and entered into the 2023 Order on February 14, 2023 as a result.⁹ The 2023 Order suspended Respondent's license, but the suspension was stayed and Respondent was placed on probation for a minimum of three years during which time she was required to again abstain from the use of alcohol and other substances and to submit to drug and alcohol testing.

After entering into the 2023 Order, Respondent initially continued checking in and submitting to testing when requested.¹⁰ The 2023 Order also required Respondent to notify her employer of the order and for her employer to submit a "notification of employment" form to the Board acknowledging that notice had been provided.¹¹

After the 2023 Order was ratified, the following issues became apparent, and Board Staff contacted Respondent or her attorney¹² to address them:

- The Board had not received the required "notification of employment" form from her employer.

⁹ Staff Ex. 3 at 10.

¹⁰ Staff Ex. 6. Generally, persons under orders with drug stipulations must check in with the testing company each day and the company will notify the person on random days when testing is required.

¹¹ Staff Ex. 3 at 13.

¹² Staff Ex. 5. Showing that a letter was sent to Respondent on February 24, 2023, a phone call (noted as "PC") was made to Respondent on March 29, 2023, and Board Staff spoke with Respondent's counsel Marc Meyer on April 13, 2023.

- Respondent tested positive for metabolites of alcohol on February 27, 2023.¹³
- Board Staff requested Respondent submit a blood specimen for testing after the February 27 positive test, but Respondent did not do so.
- Respondent stopped checking in with the testing company from April 17-May 23, 2023, and missed several required tests during that period.

At the hearing, Board Staff had eight exhibits admitted into evidence.¹⁴ Testimony was heard from Diane Dougal, investigator at the Board; Respondent; and Lisa Do, a registered nurse and Respondent's former supervisor.

IV. ANALYSIS AND CONCLUSION

Respondent does not contest the fact that there were missed tests and check-ins, but argues that she should be placed back at the beginning of the 2023 Order—essentially a reset of the 2023 Order's original conditions plus an additional fine. Respondent bases this recommended discipline on the Disciplinary Matrix's recommendation for violations of Occupations Code section 301.452(b)(1) (violation of a Board order) at the Second Tier Offense, Sanction Level I Level.¹⁵ Respondent states that the ratified order was sent to an old address for Respondent's counsel¹⁶

¹³ The evidence indicates a positive test for alcohol metabolites, but also states "invalid." Staff Ex. 5 at 1. There was no evidence as to what "invalid" signifies. The word "invalid" also appears in Staff Exhibit 6 at 10, but pages 9-12 of the exhibit are difficult to follow because it appears certain information may be repeated and there are no dates for the ALJ to be able to match up with the testing results.

¹⁴ Staff Exs. 1, 2, 2a, 3, 3a, 3b, 5, 6.

¹⁵ Board Rule 213.33(b), Attachment at 2.

¹⁶ There was no evidence regarding what the old address versus the new address was, whether Board Staff had notice of the address change, or how out of date the old address was; however, the ALJ does not find this fact to be relevant as both Respondent and her counsel signed the 2023 Order, were aware of its requirements, knew it was scheduled to be ratified at an upcoming Board meeting, and could have accessed the document online.

and that neither Respondent nor her counsel realized that it had been ratified until April 2023. Accordingly, Respondent believed she wasn't getting credit for any of the drug testing that had been done. Respondent testified as to a drug test taken in August 2023 showing a positive test for a substance for which she had a prescription,¹⁷ and an October test for which she did not have the results. Lisa Do testified that she worked with Respondent in an emergency room setting and that she found Respondent to be dependable and helpful, had good documentation, did not have concerns with her provision of nursing care, was aware of Respondent's orders, and that there was no indication that Respondent was ever impaired.

Staff argues that Respondent should have understood how the 2023 Order works because the 2021 Order carried most of the same requirements. Staff stated that Ms. Dougal reached out to Respondent and her attorney several times with no response and argues that if there was a question as to what was expected of her or whether her order had been ratified, she could have called the Board and asked. Staff also noted that Respondent's 2023 Order was publicly available online. Staff questioned why Respondent would stop checking in with the testing company after finding out the 2023 Order had been ratified and after a more stringent test was requested in April 2023. Ultimately, Staff argues that the violations of the 2023 Order should result in the revocation of Respondent's license as a Third Tier Offense, Sanction Level I under the Board's Disciplinary Matrix.¹⁸

¹⁷ Staff argued that the positive test should be considered an aggravating factor because the Board did not have Respondent's prescriptions; however, the call notes for March 12, 2023, in Staff Exhibit 5 show that the Board was aware of Respondent's prescription for the substance.

¹⁸ Board Rule 213.33(b), Attachment at 3.

The ALJ finds that Respondent violated the 2023 Board Order when she failed to check in with the testing company from April 17-May 23, 2023, and when she failed to submit to testing on April 19, 2023, April 24, 2023, and May 4, 2023—resulting in a violation of Texas Occupations Code section 301.452(b)(1). The ALJ notes that Staff’s Formal Charges specify four dates on which Respondent missed tests—the dates listed above plus April 13, 2023.¹⁹ However, Staff Exhibit 6 does not indicate that a test was missed on April 13, 2023, so that allegation is not substantiated.²⁰ Although the exhibit indicates other dates on which testing may have been missed, those dates are not included in Staff’s charging instrument, nor are the allegations mentioned at the hearing regarding the positive/invalid test on February 27, 2023, or the lack of receipt of the notification of employment form. Therefore, the ALJ makes no findings on those matters.

The ALJ finds the violation of Occupations Code section 301.452(b)(1) the most relevant in this case because it specifically addresses violations of Board orders. The ALJ must determine whether this case should be analyzed as either a Second Tier Offense or a Third Tier Offense under the Disciplinary Matrix for section 301.452(b)(1).²¹

For a Second Tier Offense, the Disciplinary Matrix provides as follows:

Failure to comply with a substantive requirement in a prior Board order or stipulation Substantive requirements are those stipulations in a

¹⁹ Staff Ex. 3 at 7.

²⁰ Staff Ex. 6 at 8.

²¹ Board Rule 213.33(b), Attachment at 2-3.

Board Order designed to remediate, verify, or monitor the competency issue raised by the documented violation.

For a Third Tier Offense, the Disciplinary Matrix provides as follows: “Failing to comply with substantive probationary restriction required in a Board Order; for example, repeated failure to submit to random drug screens”²² At first glance, it would appear that the Third Tier language is more appropriate because it mentions repeated failure to submit to random drug screens—which the ALJ found to be true. However, the ALJ looks at the context of the missed drug screens. Staff’s evidence shows that Respondent was “excused” from checking in from April 14-16, 2023—just before her period of missed check-ins began.²³ Staff could not explain at the hearing why Respondent was excused from checking in or whether she was notified that the period of excused check-ins had ended. Therefore, Respondent may have had reason to believe that her testing requirements were suspended. Additionally, there is no evidence that Respondent consumed any drugs for which she did not have a prescription, and the positive or “invalid” test result for metabolites of alcohol on February 27, 2023, was not substantiated as previously discussed. Further, Lisa Do, a nurse and Respondent’s former supervisor, provided testimony that she had no concerns regarding Respondent’s practice and that Respondent was a conscientious, dependable nurse who never showed signs of being impaired. Although some aggravating factors do apply (failure to respond to the Board investigator’s request for the notification of employment form and multiple missed tests), the ALJ finds that the mitigating factors outweigh the aggravating factors. Therefore, the ALJ will

²² Board Rule 213.33(b), Attachment at 3.

²³ Staff Ex. 6 at 2.

analyze the offense as a Second Tier offense. The corresponding language for Second Tier, Sanction Level I provides:

Requirement to complete conditions of original Board order and a fine of \$500.00 or more for each additional violation. Respondent may be subject to next higher sanction and an extension of the stipulations. **Violations of stipulations that are related to alcohol or drug misuse will result in next higher administrative sanction** (ex: a violation of a Board approved Peer Assistance Order or a probated suspension order may result in an Enforced Suspension until the nurse receives treatment and obtains one (1) year of sobriety and then probation of the license with a fine and drug stipulations for three (3) years).²⁴

The corresponding language for Second Tier, Sanction Level II provides: “Denial of Licensure, Suspension, Revocation, or Voluntary Surrender.” The ALJ finds that the specific language in Sanction Level I regarding “violations of stipulations that are related to alcohol or drug misuse” best fits the conduct at issue.²⁵ Under Sanction Level I, the next higher administrative sanction after a suspend-probate order would be, as noted in the Disciplinary Matrix, an enforced suspension. Since the Respondent was not on a Peer Assistance Order for a diagnosed substance use disorder, the ALJ does not believe that a treatment requirement is necessary, but does believe that Respondent should obtain one year of sobriety during which her license is suspended, followed by a three-year probated suspension during which time she would be under drug stipulations. Finally, the ALJ finds that Respondent should pay an administrative fine of \$1,000.

²⁴ Board Rule 213.33(b), Attachment at 2 (emphasis added).

²⁵ Even if the ALJ analyzed this matter under Sanction Level II, one option under Level II is suspension of the license, which the ALJ is recommending here.

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

V. FINDINGS OF FACT

1. On June 13, 2016, the Texas Board of Nursing (Board) issued registered nurse (RN) license no. 900865 to Hayly Davis (Respondent).
2. October 1, 2021, Respondent entered into a warning with stipulations-level Agreed Order (2021 Order) with the Board due to allegations that she withdrew morphine for a patient, but failed to accurately document the administration of the medication or follow the facility's policy and procedures for wastage of the unused portion of the medication. The 2021 Order required Respondent to, among other things, abstain from the use of alcohol and certain other substances and to submit to drug and alcohol testing.
3. On June 6, 2022, Respondent tested positive for metabolites of alcohol and entered into a second order on February 14, 2023, (2023 Order) as a result. The 2023 Order suspended Respondent's license, but the suspension was stayed and Respondent was placed on probation for a minimum of three years during which time she was required to again abstain from the use of alcohol and other substances and to submit to drug and alcohol testing.
4. Respondent violated the 2023 Order by failing to check in with the testing company from April 17-May 23, 2023, and failing to submit to testing on April 19, 2023, April 24, 2023, and May 4, 2023.
5. Respondent was "excused" from checking in from April 14-16, 2023—just before her period of missed check-ins began. Staff could not explain why Respondent was excused from checking in or whether she was notified that the period of excused check-ins had ended.
6. Respondent is a conscientious, dependable nurse who documents her care appropriately. There is no evidence she ever practiced nursing while showing signs of impairment.

7. There is no evidence of actual harm, misrepresentation of qualifications, or physical or economic damages as a result of Respondent's failure to comply with the terms of the 2023 Order.
8. Respondent failed to respond to the Board investigator's request for the notification of employment form required by the 2023 Order.
9. Respondent missed multiple check-ins and multiple tests.
10. The Board temporarily suspended Respondent's license on July 24, 2023, and the matter was referred to the State Office of Administrative Hearings (SOAH) for a hearing on whether probable cause existed to continue the temporary suspension while the case was otherwise adjudicated.
11. Respondent agreed to waive the probable cause hearing and maintain the temporary suspension pending a final hearing on the merits.
12. On September 28, 2023, Staff sent Respondent a Notice of Hearing and Formal Charges. Together, the Notice of Hearing and Formal Charges 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. SOAH Administrative Law Judge Holly Vandrovec convened a videoconference hearing on the merits on October 16, 2023. Assistant General Counsel JoAnna Starr represented Staff, and attorney Marc Meyer represented Respondent. The record closed that day upon the filing of exhibits admitted into evidence.

VI. CONCLUSIONS OF LAW

1. The Board has jurisdiction over the licensing and discipline of nurses. Tex. Occ. Code ch. 301.

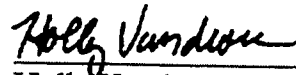
2. SOAH has jurisdiction over contested cases referred by the Board, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 301.459; Tex. Gov't Code ch. 2003.
3. Respondent received adequate and proper notice of the hearing on the merits. 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, and Respondent had the burden of establishing any mitigating factors. 1 Tex. Admin. Code § 155.427.
5. Respondent is subject to sanction pursuant to Texas Occupations Code section 301.452(b)(1) because she failed to comply with an order of the Board. The failure to comply with a Board order constitutes unprofessional conduct and subjects Respondent to sanction pursuant to Texas Occupations Code section 301.452(b)(10) and the Board's rule found at 22 Texas Administrative Code section 217.12(11)(B).
6. 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).
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).
8. 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). 22 Tex. Admin. Code § 213.33(b).

VII. RECOMMENDATION

The ALJ recommends that Respondent's license be suspended for a period of one year during which time she will be required to demonstrate sobriety, followed by a period of three years during which time the suspension of Respondent's license

would be stayed and Respondent would be on probation. During the probationary period, respondent should be subject to drug and alcohol stipulations and indirect supervision and such other restrictions as the Board sees fit (e.g., Respondent may not be employed by a nurse registry, temporary placement agency, hospice, or home health agency, and may not work for multiple employers). Finally, the ALJ recommends that Respondent be assessed an administrative fine of \$1,000.

Signed December 14, 2023



Holly Vandrovec
Administrative Law Judge

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Envelope ID: 82590133

Filing Code Description: Proposal for Decision

Filing Description: Proposal for Decision

Status as of 12/14/2023 3:26 PM CST

Associated Case Party: TEXAS BOARD OF NURSING

Name	BarNumber	Email	TimestampSubmitted	Status
Cynthia LLoCastro		cynthia.locastro@bon.texas.gov	12/14/2023 3:23:23 PM	SENT
JoAnna Starr		joanna.starr@bon.texas.gov	12/14/2023 3:23:23 PM	SENT

Associated Case Party: HAYLYDAVIS

Name	BarNumber	Email	TimestampSubmitted	Status
Marc Meyer		marc@marcmeyerlawfirm.com	12/14/2023 3:23:23 PM	SENT

STATE OFFICE OF ADMINISTRATIVE HEARINGS RECEIVED ON 1/18/2024 3:54 PM

FILED
507-23-24065
1/18/2024 3:54 PM
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
April Bermea , CLERK

ACCEPTED
507-23-24065
1/18/2024 3:56:55 pm
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
April Bermea , CLERK

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

January 18, 2024

Dr. Kristin K. Benton
Executive Director
Texas Board of Nursing

VIA EFILE TEXAS

**RE: Docket Number 507-23-24065.TBN; TEXAS BOARD OF
NURSING v. HAYLY DAVIS**

Dear Parties:

Please be advised that the time period to file exceptions to the Proposal for Decision (PFD) issued in the above-referenced hearing has expired and neither party filed exceptions. Therefore, the Administrative Law Judge recommends that the PFD be adopted as written. Because SOAH has concluded its involvement in the matter, the case is being returned to the **Texas Board of Nursing**.

CC: Service List

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Envelope ID: 83553360

Filing Code Description: No Exceptions Letter (By ALJ)

Filing Description: No Exceptions Letter (By ALJ)

Status as of 1/18/2024 3:58 PM CST

Associated Case Party: TEXAS BOARD OF NURSING

Name	BarNumber	Email	TimestampSubmitted	Status
Cynthia LLoCastro		cynthia.locastro@bon.texas.gov	1/18/2024 3:54:46 PM	SENT
JoAnna Starr		joanna.starr@bon.texas.gov	1/18/2024 3:54:46 PM	SENT

Associated Case Party: HAYLYDAVIS

Name	BarNumber	Email	TimestampSubmitted	Status
Marc Meyer		marc@marcmeyerlawfirm.com	1/18/2024 3:54:46 PM	SENT