



Board of Nurse Examiners For the State of Texas

Location Address: William P. Hobby Building, Ste. 3-460, 333 Guadalupe Street, Austin, Texas 78701
Phone: (512) 305-7400 Fax: (512) 305-7401 Web: www.bne.state.tx.us

Katherine A. Thomas, MN, RN
Executive Director

May 16, 2007

I do hereby certify this to be a complete, accurate, and true copy of the document which is on file or is of record in the offices of the Texas Board of Nursing.
Katherine A. Thomas
Executive Director of the Board

Jesus Orlando Pena
c/o Sharon Trigo
Attorney at Law
1417 Mier Street
Laredo, TX 78040

Regular Mail

Re: In the Matter of Application for Initial Licensure
Made by Jesus Orlando Pena
SOAH Docket No. 507-06-1027

Dear Mr. Pena:

Enclosed please find an Order of the Board approved on April 19, 2007.

The disposition will be forwarded to the National Council of State Boards of Nursing, Inc., and to the Healthcare Integrity and Protection Data Bank (HIPDB). The results of any disciplinary action are public information.

You have a right to seek judicial review of this Order under the authority of Texas Occupations Code, Section 301.555 and Texas Government Code, Section 2001.171.

Sincerely,

Katherine A. Thomas
Katherine A. Thomas, MN, RN
Executive Director

KAT/cil

Enclosure: Order of the Board and Proposal for Decision dated October 4, 2006

cc: Michael J. Borkland, Administrative Law Judge

Members of the Board

| | | | | |
|---------------------------------|---------------------------------------|--|--|---|
| Joyce Adams, PhD, RN Houston | Deborah Bell, CLU, ChFC Abilene | George Buchenau, Jr., BSN, RN, MBA Amarillo | Virginia Campbell, BSN, RN, CNOR Mesquite | Blanca Rosa Garcia, PhD, RN Corpus Christi |
| Richard Gibbs, LVN Mesquite | Rachel Gomez, LVN Harlingen | Brenda Jackson, PhD, RN San Antonio | Beverley Jean Nutall, LVN Bryan | |
| Anita Palmer, ME, MA Olney | Phyllis Rawley, CPC Vice-President | Linda Rounds, PhD, FNP, RN President | Frank Sandoval, Jr., J.D. San Antonio | |

DOCKET NUMBER 507-06-1027

**JESUS ORLANDO PENA
APPLICANT FOR INITIAL LICENSURE**

V.

STATE BOARD OF NURSE EXAMINERS

§
§
§
§
§

BEFORE THE STATE OFFICE

OF ADMINISTRATIVE HEARINGS

AND BOARD OF NURSE EXAMINERS

OPINION AND ORDER OF THE BOARD

**TO: JESUS ORLANDO PENA
C/O SHARON TRIGO, ATTORNEY
1417 MIER STREET
LAREDO, TEXAS**

**MICHAEL J. BORKLAND
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701**

At the regularly scheduled public meeting on April 19-20, 2007, the Board considered the following items: (1) The Proposal for Decision issued by MICHAEL J. BORKLAND, Administrative Law Judge, regarding the application for a Texas registered nurse license by examination; (2) Staff's Exceptions to the Proposal for Decision; (3) the Administrative Law Judge's response to Staff's Exceptions; (3) Staff's recommendation that the Board accept an Order vacating the Proposal for Decision and remanding this matter back to the State Office of Administrative Hearings for review and receipt of evidence; and (4) oral presentation by Sharon Trigo, attorney of record for Petitioner, Jesus Orlando Pena.

The Board of Nurse Examiners finds that after proper and timely notice was given, the above-styled case was heard by an Administrative Law Judge who made and filed a Proposal for Decision containing the Administrative Law Judge's Findings of Facts and Conclusions of Law. The Proposal for Decision was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein.

Petitioner appeared at the open meeting on April 19-20, 2007 by and through his attorney of record, Sharon Trigo, and provided testimony to the Board.

The Board has authority to modify and vacate the Proposal for Decision in accordance with Texas Government Code §2001.058(e). The Board of Nurse Examiners, after review and due consideration of the Proposal for Decision, the Staff's exceptions, the Administrative Law Judge's responses and the testimony of Petitioner during open meeting, has determined that the Administrative Law Judge did not properly apply or interpret applicable law. The Nursing Practice Act allows the Board to amend the Petition for Declaratory Order and include additional grounds for potential ineligibility at any time before a final determination is made. See Tex. Occ. Code Ann. §301.257(d). The Board finds that an unrestricted recommendation for licensure is not in compliance with Board rules, and that Petitioner and Petitioner's attorney acknowledged that reasonable monitoring of Petitioner's licensure would be appropriate. Therefore, the Board finds that the current Proposal for Decision should BE MODIFIED under the authority of Texas Government Code, Section 2001.058(e) and that Jesus Orlando Pena be CONDITIONALLY ELIGIBLE to sit for the National Council Licensure Examination for Registered Nurses (NCLEX-RN® Examination) with STIPULATIONS consistent with the opinions expressed in this Order.

PROPOSAL FOR DECISION IS ADOPTED WITH CHANGES

IT IS, THEREFORE, ORDERED THAT the Proposal for Decision, signed October 4, 2006, is hereby MODIFIED under the authority of Texas Government Code, Section 2001.058(e), for reasons outlined above in that the Administrative Law Judge did not

properly apply or interpret applicable law and that the Administrative Law Judge's Findings of Fact and Conclusions of Law are in conflict with prior agency decisions and Board rules. Findings of Fact Nos. 9 and 12 are VACATED.

IT IS FURTHER ORDERED THAT the Proposal for Decision signed October 4, 2006 should be and is ADOPTED as MODIFIED under the authority of Texas Government Code, Section 2001.058(e) and incorporated herein by reference for all purposes and that Jesus Orlando Pena be CONDITIONALLY ELIGIBLE to sit for the National Council Licensure Examination for Registered Nurses (NCLEX-RN® Examination) with STIPULATIONS consistent with the opinions expressed in this Order.

STIPULATIONS

IT IS ORDERED THAT PETITIONER, JESUS ORLANDO PENA, IS CONDITIONALLY ELIGIBLE TO SIT FOR THE NATIONAL COUNCIL LICENSURE EXAMINATION FOR REGISTERED NURSES (NCLEX-RN® EXAMINATION), SUBJECT TO THE FOLLOWING RESTRICTIONS AND STIPULATIONS:

(1) PETITIONER SHALL meet all requirements for graduation and pay any required fees. PETITIONER SHALL NOT be eligible for temporary authorization or practice as a Graduate Nurse in the State of Texas. PETITIONER shall comply in all respects with the Nursing Practice Act, Revised Civil Statutes of Texas as amended, Texas Occupations Code §§301.001, *et seq.*, the Rules and Regulations Relating to Professional Nurse Education, Licensure and Practice, 22 TEX. ADMIN. CODE §211.01, *et seq.*, and this Order. This Order shall be applicable to PETITIONER'S multistate licensure privilege, if any, to practice professional nursing in the State of Texas. While PETITIONER'S license

is encumbered by this Order, the PETITIONER may not work outside the State of Texas pursuant to a multistate licensure privilege without the written permission of the State of Texas and the Board of Nursing in the party state where PETITIONER wishes to work.

Upon attaining a passing grade on the NCLEX-RN®, PETITIONER shall be issued a license to practice professional nursing in the State of Texas which shall bear the appropriate notation, and PETITIONER shall be subject to the following stipulations:

(2) PETITIONER SHALL, within one (1) year of initial licensure, successfully complete a course in Texas nursing jurisprudence and ethics. PETITIONER SHALL obtain Board approval of the course prior to enrollment only if the course is not being offered by a pre-approved provider. Home study courses and video programs will not be approved. In order for the course to be approved, the target audience shall include nurses. It shall be a minimum of six (6) contact 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 Chemical Dependency, and Lying and Falsification. Courses focusing on malpractice issues will not be accepted. PETITIONER SHALL CAUSE the sponsoring institution to submit a Verification of Course Completion form, provided by the Board, to the Office of the Board to verify PETITIONER's successful completion of the course. This course shall be taken

in addition to any other courses stipulated in this Order, if any, and in addition to any continuing education requirements the Board has for relicensure. *Board-approved courses may be found at the following Board website address:*

<http://www.bne.state.tx.us/about/stipscourses.html>.

IT IS FURTHER ORDERED THAT SHOULD PETITIONER PRACTICE AS A REGISTERED NURSE IN THE STATE OF TEXAS, PETITIONER WILL PROVIDE DIRECT PATIENT CARE AND PRACTICE IN A HOSPITAL, NURSING HOME, OR OTHER CLINICAL SETTING AND PETITIONER MUST WORK IN SUCH SETTING A MINIMUM OF SIXTY-FOUR (64) HOURS PER MONTH UNDER THE FOLLOWING STIPULATIONS FOR TWO (2) YEARS OF EMPLOYMENT. THE LENGTH OF THE STIPULATION PERIOD WILL BE EXTENDED UNTIL SUCH TWENTY-FOUR (24) MONTHS HAVE ELAPSED. PERIODS OF UNEMPLOYMENT OR OF EMPLOYMENT THAT DO NOT REQUIRE THE USE OF A REGISTERED NURSE (RN) LICENSE WILL NOT APPLY TO THIS STIPULATION PERIOD:

(3) PETITIONER SHALL notify each future employer in professional nursing of this Order of the Board and the stipulations and conditions on PETITIONER's license. PETITIONER SHALL present a complete copy of this Order and all Proposals for Decision issued by the Administrative Law Judge to each future employer prior to accepting an offer of employment.

(4) PETITIONER SHALL CAUSE each future employer to submit the Notification of Employment form, which is provided to the PETITIONER by the Board, to the Board's office within five (5) days of employment as a professional nurse.

(5) For the first year of employment as a Registered Nurse under this Order, PETITIONER SHALL be directly supervised by a Registered Nurse. Direct supervision requires another professional nurse to be working on the same unit as PETITIONER and immediately available to provide assistance and intervention. PETITIONER SHALL work only on regularly assigned, identified and predetermined unit(s). The PETITIONER SHALL NOT be employed by a nurse registry, temporary nurse employment agency, hospice, or home health agency. PETITIONER SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

(6) For the remainder of the stipulation period, PETITIONER SHALL be supervised by a Registered Nurse who is on the premises. The supervising nurse is not required to be on the same unit or ward as PETITIONER, 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 experience in the same or similar practice setting to which the PETITIONER is currently working. PETITIONER SHALL work only regularly assigned, identified and predetermined unit(s). PETITIONER SHALL NOT be employed by a nurse registry, temporary nurse employment agency, hospice, or home health agency. PETITIONER SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

(7) PETITIONER SHALL CAUSE each employer to submit, on forms provided to the PETITIONER by the Board, periodic reports as to PETITIONER'S capability to practice nursing. These reports shall be completed by the Registered Nurse who supervises the PETITIONER. These reports shall be submitted by the supervising nurse to the office of

the Board at the end of each three (3) months for two (2) years of employment as a nurse.

(8) PETITIONER SHALL participate in therapy with a "professional counselor" possessing credentials approved by the Board. PETITIONER SHALL CAUSE the therapist to submit written reports, on forms provided by the Board, as to the PETITIONER's progress in therapy, rehabilitation and capability to safely practice Professional nursing. The report must indicate whether or not the PETITIONER's stability is sufficient to provide direct patient care safely. Such reports are to be furnished each and every month for three (3) months. If therapy is recommended for beyond three (3) months, the reports shall then be required at the end of each three (3) month period for the duration of the stipulation probation period, or until PETITIONER is dismissed from therapy.

BOARD OF NURSE EXAMINERS FOR THE
STATE OF TEXAS

Entered and effective this 16th day of May, 2007.

BY: Katherine A. Thomas
KATHERINE A. THOMAS, MN, RN
EXECUTIVE DIRECTOR
FOR THE BOARD

Attachment: Proposal for Decision - Docket No. 507-06-1027 (October 4, 2006)

DOCKET NO. 507-06-1027

**IN THE MATTER OF
APPLICATION FOR
INITIAL LICENSURE
MADE BY
JESUS ORLANDO PENA**

§
§
§
§
§

**BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

Jesus Orlando Pena (Applicant) filed an Application by NCLEX-RN Examination for Registered Nurses (Application) with the Board of Nurse Examiners for the State of Texas (Board). Board staff (Staff) notified Applicant that he was ineligible for licensure based on his criminal history. This proposal for decision recommends that Applicant be permitted to take the examination required for licensure.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

No party contested notice or jurisdiction, therefore, those issues are addressed in the findings of fact and conclusions of law without further discussion here.

The notice of hearing issued in this case does not cite to TEX. OCC. CODE ANN. (Code) ch. 53. The notice referred to the November 29, 2005 letter sent to Applicant, which purportedly contained the particular sections of statutes and rules involved. Regarding Code ch. 53, the only reference in the letter reads "TEX. OCC. CODE ch. 53 [is] incorporated herein and can be located on the board's website at www.bne.state.tx.us." According to the Administrative Procedure Act, TEX. GOV'T CODE ANN. § 2001.052, a notice of hearing must refer to the particular sections of the statutes and rules involved. Staff's notice of hearing and the letter of November 29, 2005, failed to refer to the particular sections of Code ch. 53 that apply to this hearing, making the notice of hearing defective. However, this defect is harmless because it was not objected to at hearing by Applicant and, more importantly, Applicant has not been prejudiced because he prevailed at the hearing.

The hearing commenced April 3, 2006, before Administrative Law Judge (ALJ) Mike Rogan. Applicant appeared and was represented by Sharon Trigo, Attorney. Staff was represented by James W. Johnston, General Counsel. Following the retirement of ALJ Rogan, this case was transferred

to ALJ Michael J. Borkland, who reviewed the tapes and exhibits in the preparation of this proposal for decision. The record of the hearing was closed August 21, 2006.

II. REASONS FOR DECISION

A. Allegations

In a letter dated November 29, 2005, Katherine A. Thomas, MN, RN, the Board's Executive Director, notified Applicant that he was ineligible for licensure on the following grounds:

1. On June 21, 1999, Applicant pled guilty to the misdemeanor offenses of Violation of a Protective Order and Criminal Mischief in the County Court at Law of Webb County, Texas. Applicant was sentenced to two years probation and assessed a fine and court costs of \$680.00. On February 2, 2001, the Court revoked Applicant's probation and assessed punishment of 150 days confinement in the county jail.
2. On December 16, 1999, Applicant pled guilty in the County Court at Law of Webb County, Texas, to the misdemeanor offense of Violation of a Protective Order and was assessed punishment of 250 days in the county jail.¹
3. On December 16, 1999, Applicant was convicted by the County Court at Law of Webb County, Texas, of the misdemeanor offenses of Violation of a Protective Order and Assault and sentenced to confinement of 250 days in the county jail.
4. On December 16, 1999, Applicant pled guilty in the County Court at Law of Webb County, Texas, to the misdemeanor offense of Violation of a Protective Order and assessed punishment of 250 days in the county jail.²
5. On May 26, 2000, Applicant was charged with two counts of the misdemeanor offense of Assault Causing Bodily Injury and one count of the misdemeanor offense of Assault Causing Bodily Injury to a Family Member. On April 21, 2001, the County Court at Law of Webb County, Texas, dismissed the charges and records noted that Applicant paid restitution of \$3,639.00.

¹ Applicant was charged with this offense on March 22, 1999.

² Applicant was charged with this offense on April 23, 1999.

6. A Forensic Psychological Examination performed by Matthew L. Ferrara, Ph.D., Clinical and Forensic Psychology, Austin, Texas, indicated that Applicant could have difficulty consistently conforming his behavior to the Nursing Practice Act, Board Rules and regulations, and generally accepted standards of nursing practice.

B. Analysis of Legal Standards

The Board has jurisdiction over this matter pursuant to the Nursing Practice Act (Act), Code ch. 301. The Board may refuse to issue a license to an Applicant who has been convicted of a misdemeanor involving moral turpitude or whose conduct resulted in the revocation of probation for a misdemeanor involving moral turpitude. Code § 301.452. The Code does not provide for automatic application denial for conviction of a misdemeanor offense, making the Board's action discretionary. Thus, the Board is required to consider the provisions of Code ch. 53, *Consequences of Criminal Convictions*.³ Pursuant to § 53.021(a) of the Code, the Board may refuse to grant a license to an applicant who has been convicted of misdemeanor that directly relates to the duties and responsibilities of a registered nurse. Code §§ 53.022 and 53.023 provide a list of factors for the licensing agency to consider in determining whether a conviction relates to an occupation and whether an applicant is fit to perform the duties and discharge the responsibilities of the licensed occupation.⁴

³ Op. Tex. Att'y Gen. No. JM-482. This opinion discusses Article 6252-13c, V.T.C.S., the predecessor to Code ch. 53. The opinion stated that a licensing authority is subject to the act unless it is one of the few that are excepted - the Supreme Court and persons licensed under its authority, and persons who are or who seek to become licensed peace officers.

⁴ § 53.022. FACTORS IN DETERMINING WHETHER CONVICTION RELATES TO OCCUPATION. In determining whether a criminal conviction directly relates to an occupation, the licensing authority shall consider:

- (1) the nature and seriousness of the crime;
- (2) the relationship of the crime to the purposes for requiring a license to engage in the occupation;
- (3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and
- (4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.

§ 53.023. ADDITIONAL FACTORS FOR LICENSING AUTHORITY TO CONSIDER.

- (a) In determining the fitness to perform the duties and discharge the responsibilities of the licensed occupation

C. Analysis of Documentary Evidence

Staff submitted 13 exhibits:

1. State's Exhibit 1 is Applicant's application for licensure.
2. State's Exhibit 2 is Applicant's response to Staff discussing the allegations set forth above. This exhibit was not offered or admitted for the truth of the matters asserted.
3. State's Exhibit 3 is Staff's letter of November 29, 2005, informing Applicant that he was ineligible for licensure.

of a person who has been convicted of a crime, the licensing authority shall consider, in addition to the factors listed in Section 53.022:

- (1) the extent and nature of the person's past criminal activity;
 - (2) the age of the person when the crime was committed;
 - (3) the amount of time that has elapsed since the person's last criminal activity;
 - (4) the conduct and work activity of the person before and after the criminal activity;
 - (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and
 - (6) other evidence of the person's fitness, including letters of recommendation from:
 - (A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;
 - (B) the sheriff or chief of police in the community where the person resides; and
 - (C) any other person in contact with the convicted person.
- (b) The applicant has the responsibility, to the extent possible, to obtain and provide to the licensing authority the recommendations of the prosecution, law enforcement, and correctional authorities as required by Subsection (a)(6).
- (c) In addition to fulfilling the requirements of Subsection (b), the applicant shall furnish proof in the form required by the licensing authority that the applicant has:
- (1) maintained a record of steady employment;
 - (2) supported the applicant's dependents;
 - (3) maintained a record of good conduct; and
 - (4) paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted.

4. State's Exhibit 4 is a certified copy of the August 24, 1999, Probated Judgment issued by the County Court at Law No. 1 of Webb County, Texas, in Cause No. 98CRB00383 L1, in the case styled *State of Texas vs. Jesus Orlando Pena*. Applicant pled guilty to the misdemeanor offenses of Violation of Protective Order and Criminal Mischief and was assessed punishment of a \$500.00 fine and confinement in the Webb County Jail for one year, plus costs, with the imposition of sentence suspended. Applicant was placed on probation for two years.
5. State's Exhibit 5 is a printout of the Webb County Judicial System Docket for Case Number 1998CRB000838 L1, pertaining to Pena, Jesus, Orlando. The document states that Applicant entered a plea of guilty to two counts on June 21, 1999, and that he was assessed punishment of one year probated for two years with the remaining counts dismissed. Further, the document indicates that Applicant's probation was revoked on February 2, 2001.
6. State's Exhibit 6 is a printout of the Webb County Judicial System Docket for Case Number 1999CRB000493 L2, pertaining to Pena, Jesus, Orlando. This document indicates that Applicant pled guilty on December 16, 1999, to assault and violation of a protective order. Further, the document states that Applicant's sentence of 250 days in jail ran concurrently with other cases and that several cases were dismissed.
7. State's Exhibit 7 is a printout of the Webb County Judicial System Docket for Case Number 1999CRB000490 L2, pertaining to Pena, Jesus, Orlando. This documents shows that Applicant pled guilty on December 16, 1999, to violation of a protective order, the sentence ran concurrent with other cases, and other counts and cases were dismissed.
8. State's Exhibit 8 is a printout of the Webb County Judicial System Docket for Case Number 1999CRB000489 L2, pertaining to Pena, Jesus, Orlando. This document indicates that Applicant pled guilty on December 16, 1999, to violation of a protective order, the sentence ran concurrent with other cases, and other counts and cases were dismissed.
9. State's Exhibit 9 is a printout of the Webb County Judicial System Docket for Case Number 1999CRB000931 L2, pertaining to Pena, Jesus, Orlando. This document shows that the case was dismissed.
10. State's Exhibit 10 is a printout of the Webb County Judicial System Docket for Case Number 2001CRB000109 L1, pertaining to Pena, Jesus, Orlando. This document indicates that the case was dismissed on April 24, 2001, and that Applicant paid restitution of \$3,639.13.
11. State's Exhibit 11 is a letter of reference from Robert Ochoa, Dean of Student Development, Laredo Community College, advising the Board that Applicant grabbed the arm of Maricela Molina, Applicant's wife, at school but that Applicant did not use excessive force. Following the incident, Applicant complied with all disciplinary conditions and completed all degree requirements. Dean Ochoa recommended that Applicant be allowed to complete the requirements for licensure.

12. State's Exhibit 12 is a printout of the Webb County Judicial System Docket for Case Number 2003CRB000076 L1, pertaining to Pena, Jesus, Orlando. The exhibit contained an order granting the State's motion to dismiss the case for insufficient evidence.
13. State's Exhibit 13 is a Forensic Evaluation on Applicant completed by Matthew L. Ferrara, Ph.D. Dr. Ferrara concluded that Applicant could have difficulty consistently conforming his behavior to the Nursing Practice Act, Board rules and regulations, and generally accepted standards of nursing practice. He recommended that Applicant not be considered for licensure.

The ALJ finds that only State's Exhibits 4, 11, 12, and 13 have probative value for determining whether Applicant is eligible for licensure. Exhibit 4, as a certified copy of a court judgment, established that Applicant received probation in 1999 for two misdemeanor offenses, Violation of a Protective Order and Criminal Mischief. State's Exhibit 11, an unsworn hearsay statement, was not objected to and was admitted. The exhibit established that Applicant grabbed his wife on the arm and was required to complete disciplinary measures by Laredo Community College. Additionally, State's Exhibit 11 established that Applicant completed his degree requirements and it contained the Dean's recommendation that Applicant be allowed licensure. State's Exhibit 12 contained a court order dismissing a case brought against Applicant for insufficient evidence, but the remainder of the exhibit lacked probative value for the reasons set forth below. State's Exhibit 13, the Forensic Evaluation, provided an expert opinion that Applicant could have difficulty conforming his behavior to Board standards.

State's Exhibits 5, 6, 7, 8, 9, 10, and 12 failed to establish that Applicant was convicted of criminal offenses. Docket sheets cannot be used to prove the existence of an order or judgment. *Guyot v. Guyot*, 3 S.W.3d 243 (Tex.App.-Fort Worth 1999, no pet.) Thus, without certified copies of the actual judgments from the criminal prosecutions, Staff failed to establish with its documentary evidence that Applicant committed any crimes other than noted above in State's Exhibit 4.⁵

⁵ The printouts of the Webb County Judicial System Docket were provided to Staff by Applicant as information pertaining to his criminal history.

Applicant submitted four exhibits:

1. Applicant's Exhibit 1 is a letter from Maricela Molina, the purported victim in crimes listed in the allegations. Ms. Molina stated that she and Applicant are not currently having any problems and that she does not believe that Applicant will cause harm to anyone in the future. She supported Applicant's licensure as a registered nurse.
2. Applicant's Exhibit 2 is a letter of recommendation from Arely Lara, the faculty secretary at the Camilo Prada Child Development Center. Ms. Lara stated that she supervised Applicant when he was a biology and reading tutor at the learning center. According to Ms. Lara, Applicant performed his duties responsibly, and he was quiet, polite and well-behaved.
3. Applicant's Exhibit 3 is a letter of recommendation from Juan Garza, the former Sheriff of Webb County. Mr. Garza stated that Applicant was a model inmate, did not fit the profile of the criminal element, and was assigned special duties as a trustee. He concluded by stating that he believed Applicant would be an asset to the nursing community.
4. Applicant's Exhibit 4 contained letters of recommendation from James Dunn, Biology Instructor, Laredo Community College; Jose A. Martinez, RN, MSN, Laredo Community College; Ramon de la Torre, RN, MD, Human Anatomy & Physiology Instructor, Laredo Community College; and a Certificate of Appreciation from Laredo Community College for Applicant's leadership and dedication as vice president of the Student Nurses Association.

D. Oral Testimony

Applicant appeared and testified, primarily about his past criminal conduct.⁶ In his testimony, he generally confirmed the convictions and dismissals referred to in Exhibits 4 - 10 and 12. He stated that he was approximately 21 years old when the conduct occurred and that it was triggered from jealousy when he discovered his wife with other men. Applicant testified that he has worked as a waiter, nurse aide in nursing homes and hospitals, automobile mechanic, and tutor, and that he has never been fired from a job or had personality conflicts or verbal or physical altercations

⁶ Applicant's testimony, especially under cross-examination by Staff, was difficult to follow on the tape. Applicant spoke softly, making him difficult to understand, and he did not remember many of the details from the events involving his ex-wife, Maricela Molina. It is clear to the ALJ from the testimony that Applicant had a stormy and destructive relationship with Ms. Molina from around 1997 to 2000.

with co-workers and supervisors. He stressed in his testimony that he never struck or threatened Ms. Molina. He admitted that he grabbed her arms, pushed her, and destroyed property.

Applicant testified that the period of criminal conduct with his ex-wife is behind him now. He said those problems will not occur again because he has changed and matured by learning how to deal with emotional situations.

Dr. Ferrara is a clinical psychologist and the parties stipulated to his qualifications. On September 26, 2005, he completed a forensic evaluation on Applicant, which consisted of an interview, testing, and polygraph examination. The purpose of the evaluation was to determine whether Applicant's pattern of behaviors conformed to the requirements of the Act for licensure.

Dr. Ferrara administered the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) test to Applicant. According to Dr. Ferrara, the test is a reliable predictor of behaviors for persons with criminal orientation and aggression. Dr. Ferrara testified that the test showed Applicant has an anti-social orientation, which means he has difficulty accepting responsibility, and that he has an aggression problem. While Dr. Ferrara conceded that Applicant knows right from wrong and that he thinks rationally, he stressed that Applicant is at risk for not keeping promises and honoring obligations, would have difficulty honoring interpersonal boundaries and self-reporting errors and omissions, and is not accountable for his behavior. As a result, in Dr. Ferrara's opinion, nursing patients would be at risk.

The results from the polygraph examination also concerned Dr. Ferrara. According to Dr. Ferrara, the polygraph examiner found that Applicant was not candid when questioned about being violent towards women other than Ms. Molina. Dr. Ferrara admitted that polygraphs are not 100% accurate but he stressed that he would have come to the same conclusion about Applicant even if Applicant did not appear deceptive in his answer.

In conclusion, Dr. Ferrara gave Applicant credit for obtaining a nursing degree and found that he is responsible in some areas, such as caring for his child. However, he believes that Applicant

would benefit from a course of treatment for anti-social behavior. Following treatment, Dr. Ferrara believes that Applicant should be re-evaluated to determine if his patterns of behavior conformed to the requirements of the Act for licensure.

Melinda Hester, RN, has been licensed as a Registered Nurse in Texas for 27 years. She is currently working for the Board as a nurse practice consultant. In this position, she answers questions about the Act from the public and teaches the Board's jurisprudence course. Ms. Hester reviewed all of the case exhibits in preparation for her testimony.

Ms. Hester stated that she has grave concerns about Applicant and recommended that he be denied eligibility to take the nursing examination because, based on the Board's rule,⁷ he lacks good professional character. Specifically, she testified that due to Applicant's criminal conduct, it is her opinion that he is unable to distinguish right from wrong, unable to keep promises and obligations, is not accountable for his behavior, is unable to practice nursing in an autonomous role, is unable to honor and recognize interpersonal boundaries, and is unable to self-disclose facts and errors and omissions when it would enhance the health status of a patient. Ms. Hester was also concerned that Applicant committed violent crimes of moral turpitude because it is the Board's duty to protect the public. She emphasized that her opinion was not modified by the length of time since Applicant's last crime because she simply did not have enough information to review, such as his nursing school transcript and grade point average, faculty letters, work history with evaluations. For an agreed order settling this case, Ms. Hester stated that Applicant would need to attend a rehabilitative program, undergo another evaluation by Dr. Ferrara, and periodically report to the Board. She admitted on questioning from ALJ Rogan that she would be concerned with the Applicant's convictions even if they were 25 years old.

In response to Ms. Hester's desire to see additional information, Applicant filed a letter from the local district attorney stating that Applicant has no pending charges with that office, a letter from former Sheriff Juan Garcia stating that he strongly believed that Applicant has turned his life around,

⁷ 22 TEX. ADMIN. CODE § 213.27.

letters of recommendation from a supervisor and several nursing school instructors, and his nursing school transcript.

E. Analysis and Recommendation

The evidence established that Respondent was convicted on August 23, 1999, of a violation of a protective order and criminal mischief following a guilty plea, both misdemeanors. Documentation alluding to additional convictions was submitted and to some extent verified by Applicant. However, the court judgments were not submitted, and the ALJ was not able to determine the exact number of convictions and the class of crimes committed. For purposes of this proposal for decision, the ALJ accepts as true that Applicant was convicted several times for various misdemeanor offenses, with the last conviction in 1999.

Ms. Hester stated that Applicant was convicted of a crime of moral turpitude, namely assault. Generally, misdemeanor assault is not a crime of moral turpitude. Staff failed to establish the offense classification of the assault and the evidence established that any assaults leading to a conviction involved actions on Ms. Molina's boyfriends rather than against her. Thus, it was not established that Respondent committed a crime of moral turpitude.⁸

The evidence offered to establish that Applicant's convictions directly related to the occupation of Registered Nurse was not overwhelming. The ALJ agrees with Staff that the crimes committed by Applicant should be considered serious because the offense of violation of a protective order possibly had elements of violent behavior directed at Ms. Molina and her gentlemen friends. Additionally, Ms. Hester explained that the Board is concerned with such crimes because nurses have access to patients who are often in vulnerable positions. However, Staff did not offer any evidence that a nursing license would give Applicant an opportunity to commit similar criminal activity. The evidence showed that Applicant's criminal behavior was related to his relationship with Ms. Molina, and Staff did not prove that Applicant is a risk for committing violent acts on others. Further, Staff did not establish that Applicant's crimes would prevent him from performing

⁸ See *Lopez v. State*, 990 S.W.2d (Tex.App.-Austin 1999). A misdemeanor assault conviction not shown to be committed upon a female is not one involving moral turpitude.

the duties and discharging the responsibilities of a registered nurse. On balance, the ALJ finds that Applicant's criminal behavior is not directly related to the practice of nursing.

Evidence pertaining to the additional Chapter 53 factors established that Respondent was around 21 years old when the criminal conduct began, that he has not been convicted of a crime in at least six years, and that his convictions were solely related to his relationship with Ms. Molina. Further, following the period of criminal activity, Applicant has shown rehabilitative effort by completing nursing school, resolving his issues with Ms. Molina as shown by her letter, and successfully working several different jobs without conflicts with supervisors and co-workers. Additionally, he provided letters of recommendation from a law enforcement officer who had custodial responsibility for Applicant, a supervisor, and several nursing school instructors.

Staff also cited Dr. Ferrara's report as ground for denial of licensure. A report from a forensic psychologist may be an important piece of the puzzle, however, nothing in the Act, Chapter 53, or the Board's rules provides that the opinion of a forensic psychologist can be used as the primary basis for denial of licensure. The report did not establish that Applicant lacked good professional character, and such a report cannot override the provisions of Chapter 53.

Based on the factors set forth in Chapter 53, Applicant established that he is fit to perform the duties and discharge the responsibilities of a Registered Nurse. Additionally, Staff has not proven that Applicant's convictions from 1999 show that he lacks good professional character today. One of the purposes for licensing statutes is to protect the public from unqualified or dangerous individuals. Applicant's crimes are not related to the licensed occupation, and Staff failed to prove that the public will be at greater risk, or even at any risk, if Applicant is allowed to work as a Registered Nurse. Therefore, it is recommended that the Board allow Applicant to take the examination required for licensure as a Registered Nurse.

III. FINDINGS OF FACT

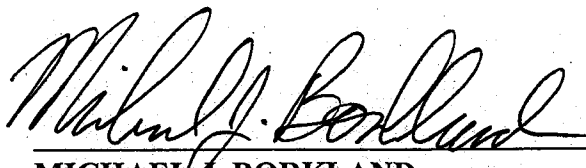
1. Jesus Orlando Pena (Applicant) filed an Application by NCLEX-RN Examination for Registered Nurses (Application) with the Board of Nurse Examiners for the State of Texas (Board) on May 2, 2005.
2. On August 24, 1999, in Cause No. 98CRB00383 L1, in the County Court at Law No. 1 of Webb County, Texas, in the case styled *State of Texas vs. Jesus Orlando Pena*, Applicant pled guilty to the misdemeanor offenses of Violation of Protective Order and Criminal Mischief and was assessed punishment of a \$500.00 fine and confinement in the Webb County Jail for one year, plus costs, with the imposition of sentence suspended and probated for two years.
3. Applicant's probation referred to in Finding of Fact No. 2 was revoked and Applicant was remanded to the Webb County Jail to serve a sentence of 250 days.
4. Applicant was discharged from the Webb County Jail after completing his sentence.
5. The case referred to in Finding of Fact No. 2 resulted from Applicant's conduct directed at Maricela Monlina, his wife at the time.
6. Applicant admitted that there were other misdemeanor cases, some resulting in guilty pleas and others dismissed, based on conduct directed at Ms. Molina and her gentlemen friends.
7. A Forensic Psychological Examination performed by Matthew L. Ferrara, Ph.D., Clinical and Forensic Psychology, Austin, Texas, indicated that Applicant could have difficulty consistently conforming his behavior to the Nursing Practice Act, Board Rules and regulations, and generally accepted standards of nursing practice.
8. Based on Findings of Fact Nos. 2 - 7, Staff of the Board (Staff) denied the application referred to in Finding of Fact No. 1.
9. Staff failed to establish that Applicant assaulted Ms. Molina.
10. The types of criminal acts committed by Applicant are serious.
11. In issuing licenses, the Board is concerned with the types of crimes committed by Applicant because nurses have access to patients who are often in vulnerable positions.
12. Staff failed to establish a license would offer Applicant an opportunity to engage in further criminal activity of the same type referred to in Findings of Fact Nos. 2, 5, and 6.
13. Applicant was 21 years old when he committed the acts referred to in Findings of Fact Nos. 2, 5, and 6.

14. Other than traffic offenses, all of Applicant's convictions stemmed from his relationship with Ms. Molina.
15. Applicant has not been convicted since 1999.
16. Applicant has worked as a waiter, nurse aide in nursing homes and hospitals, automobile mechanic, and tutor.
17. Applicant has never been fired from a job or had personality conflicts or verbal or physical altercations with co-workers and supervisors.
18. Applicant has shown rehabilitative effort following his convictions by completing nursing school, resolving his issues with Ms. Molina, and by working several different jobs.
19. Applicant submitted letters of recommendation from a law enforcement officer who had custodial responsibility for Applicant, a supervisor, and several nursing school instructors.
20. At the time of hearing, Applicant did not have any pending criminal charges in Webb County.
21. The record indicates that Applicant can:
 - a. Distinguish right from wrong;
 - b. Keep promises and honor obligations;
 - c. Be accountable for his behavior;
 - d. Practice nursing in an autonomous role;
 - e. Recognize and honor interpersonal boundaries; and
 - f. Promptly and fully self-disclose facts, circumstances, events, or errors and omissions when disclosure could enhance the health status of patients.
22. Staff sent Applicant notice of hearing containing a statement of the time, place, and nature of the hearing as well as a statement of the legal authority under which the hearing was to be held, a reference to the particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted.
23. All parties appeared and participated in the hearing held April 3, 2006. The record of the hearing closed on August 21, 2005.

IV. CONCLUSIONS OF LAW

1. The Board of Nurse Examiners for the State of Texas State (Board) has jurisdiction over this matter pursuant to the Nursing Practice Act, TEX. OCC. CODE ANN. (Code) ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a contested case in this matter, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, under TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice was effected upon Applicant pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
4. Applicant had the burden of proof in this proceeding.
5. Applicant did not commit a crime of moral turpitude.
6. Based on Finding of Fact No. 21, Applicant established that he has good professional character as required by 22 TEX. ADMIN. CODE § 213.27.
7. Applicant's misdemeanor convictions are not directly related to the occupation of Registered Nurse, as contemplated by Code § 53.022.
8. Based on Findings of Fact Nos. 12 - 20, Applicant demonstrated he is presently fit to perform the duties and discharge the responsibilities of a Registered Nurse, pursuant to Code § 53.023.
9. Based on Findings of Fact Nos. 9 and 12 - 20 and Conclusions of Law Nos. 4, 5, and 8, the Board is not justified in denying Applicant's application for initial licensure, as contemplated by Code §§ 53.021 and 301.452.
10. Based on the above Findings of Fact and Conclusions of Law, the Board should find that Applicant is eligible for initial licensure.

SIGNED October 4, 2006.



MICHAEL J. BORKLAND
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS