

DOCKET NUMBER 507-11-1719

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 157034
ISSUED TO
CAROL ANN HERNANDEZ

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS



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.
Patricia P. Roman
Executive Director of the Board

OPINION AND ORDER OF THE BOARD

TO: CAROL ANN HERNANDEZ
c/o LOUIS LEICHTER
LEICHTER LAW FIRM
1602 EAST 7th STREET
AUSTIN, TX 78702

CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on April 28-29, 2011, the Texas Board of Nursing (Board) considered the following items: (1) The Proposal for Decision (PFD) regarding the above cited matter; (2) Staff's recommendation that the Board adopt the PFD regarding the vocational nursing license of Carol Ann Hernandez with changes; and (3) 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 Respondent's presentation during the open meeting, if any, adopts all of the findings of fact and conclusions of law of the ALJ contained in the PFD as if fully set out and separately stated herein, except for Conclusion of Law Number 7, which is not

adopted by the Board and is hereby re-designated as a recommendation. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

Conclusion of Law Number 7

The Board declines to adopt Conclusion of Law Number 7 because it is a recommended sanction and not a proper conclusion of law. The Government Code §2001.058(e) authorizes the Board to change a finding of fact or conclusion of law made by the ALJ, or to vacate or modify an order issued by the ALJ if the Board determines that the ALJ did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions. The ALJ did not properly apply or interpret applicable law in this matter when she included her recommended sanction as a conclusion of law. A recommendation for a sanction is not a proper conclusion of law. An agency is the final decision maker regarding the imposition of sanctions. Once it has been determined that a violation of the law has occurred, the sanction is a matter for the agency's discretion. The choice of penalty is vested in the agency, not in the courts. The agency is charged by law with discretion to fix the penalty when it determines that the statute has been violated. Thus, the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact and conclusions of law. Further, the mere labeling of a recommended sanction as a conclusion of law or as a finding of fact does not change the effect of the ALJ's recommendation...[T]he Board, not the ALJ, is the decision maker concerning sanctions. See *Texas State Board of Dental Examiners vs. Brown*, 281 S.W. 3d 692 (Tex. App. - Corpus Christi 2009, pet. filed); *Sears vs. Tex. State Bd. of Dental Exam'rs*, 759 S.W.2d 748, 751 (Tex.App.-Austin 1988, no pet); *Firemen's & Policemen's Civil Serv. Comm'n vs. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984); *Granek vs. Tex. State Bd. of Med. Exam'rs*,

172 S.W.3d 761, 781 (Tex.App.-Austin 2005, pet. denied). Pursuant to applicable law, the Board re-designates Conclusion of Law Number 7 as a recommendation.

IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 157034, previously issued to CAROL ANN HERNANDEZ, to practice nursing in the State of Texas be, and the same is hereby, REVOKED.

IT IS FURTHER ORDERED that Permanent Certificate Number 157034, previously issued to CAROL ANN HERNANDEZ, upon receipt of this Order, be immediately delivered to the office of the Texas Board of Nursing.

IT IS FURTHER ORDERED that this Order SHALL be applicable to Respondent's multi-state privilege, if any, to practice nursing in the State of Texas.

Entered this 28th day of April, 2011.

TEXAS BOARD OF NURSING



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

Attachment: Proposal for Decision; Docket No. 507-11-1719 (February 24, 2011).

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

February 24, 2011

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

VIA INTER-AGENCY

**RE: Docket No. 507-11-1719, Texas Board of Nursing, Petitioner v.
Carol Ann Hernandez, Respondent**

Dear Ms. Thomas:

Please find enclosed a Proposal for Decision Disposing of Case by Summary Disposition 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(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script that reads "Catherine C. Egan".

Catherine C. Egan
Administrative Law Judge

CCE:ml

Enclosures

XC: Jena Abel, Assistant General Counsel, TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - VIA INTER-AGENCY
Dina Flores, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - VIA INTER-AGENCY
Louis Leichter, Leichter Law Firm, 1602 East 7th Street, Austin, TX 78702 - VIA REGULAR MAIL

**SOAH DOCKET NO. 507-11-1719
(PERMANENT CERTIFICATE NO. 157034)**

TEXAS BOARD OF NURSING, Petitioner	§ § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
V.		
CAROL ANN HERNANDEZ, Respondent		

**PROPOSAL FOR DECISION
DISPOSING OF CASE BY SUMMARY DISPOSITION**

Staff of the Texas Board of Nursing (Staff/Board) seeks to revoke Carol Ann Hernandez's (Respondent's) vocational nursing license issued under certificate number 157034 because of her criminal history and her failure to disclose her criminal history on her renewal application. On January 11, 2011, Staff filed a motion for summary disposition (the motion) with the State Office of Administrative Hearings (SOAH) in compliance with SOAH Rule 155.505,¹ asking for a determination in its favor as a matter of law.

On January 31, 2011, Respondent filed a concession to the motion stating that the motion accurately reflected the applicable law governing Respondent's criminal history. Respondent requested that the Administrative Law Judge (ALJ) issue a proposal for decision consistent with Staff's pleadings and the motion. Based on the pleadings, the motion and the attached documents, and Respondent's response to the motion, the ALJ recommends that Respondent's license be revoked.

¹ 1 TEX. ADMN. CODE (TAC) § 155.505(a) provides:

Final decision or proposal for decision on summary disposition. The judge may issue a final decision or a proposal for decision on all or part of a contested case without an evidentiary hearing. The evidence must show that there is no genuine issue as to any material fact and that a party is entitled to a decision in its favor as a matter of law.

I. REASONS FOR DECISION

A. Criminal History and Staff's Position

According to the motion and the attached documents, on April 12, 2010, Respondent entered a plea of "guilty" to the second degree felony offense of "Aggravated Assault--Deadly Weapon Threat," before the 137th District Court of Lubbock County under Cause No. 2009-423,951. As a result of Respondent's plea, the District Court deferred the proceedings against Respondent without entering an adjudication of guilt and placed her on probation for ten years. Respondent was also ordered to pay court costs. Staff argues that the Board must revoke the license of any nurse who pleads guilty to the offense of "Aggravated Assault" in accordance with the TEX. OCC. CODE (the Code) § 301.4535(b).

B. The Applicable Law

The Board is required under the Code § 301.4535(b) to revoke a nurse's license on proof that the nurse has been convicted of, or pled guilty or nolo contendere to, aggravated assault under Section 22.02 of the Penal Code. Specifically, Section 301.4535 states in pertinent part:

- (a) The board shall suspend a nurse's license or refuse to issue a license to an applicant on proof that the nurse or applicant has been initially convicted of:

(6) aggravated assault under Section 22.02, Penal Code;

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- (b) On final conviction or a plea of guilty or nolo contendere for an offense listed in Subsection (a), the board, as appropriate, may not issue a license to an applicant, shall refuse to renew a license, or shall revoke a license.

Section 22.02 of the Penal Code defines aggravated assault in pertinent part as:

- (a) A person commits an offense if the person commits assault as defined in Sec. 22.01 and the person:

(1) causes serious bodily injury to another, including the person's spouse; or

(2) uses or exhibits a deadly weapon during the commission of the assault.

(b) An offense under this section is a felony of the second degree.

According to Section 22.01 of the Penal Code, a person commits the criminal offense of "assault" if the person "intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse."

C. ALJ's Analysis and Recommendation

As noted above, an ALJ may issue a proposal for decision on all or part of a contested case without an evidentiary hearing under SOAH Rule 155.505 where there is no genuine issue of material fact and a party is entitled to a decision in its favor as a matter of law. As pointed out by Staff and conceded by Respondent, Respondent entered a plea of guilty for aggravated assault—deadly weapon threat under Section 22.02 of the Penal Code. Therefore, in accordance with the Code § 301.4535(b), the Board must revoke Respondent's vocational nursing license.

Because the Board must revoke Respondent's vocational license under the Code as a result of her guilty plea to aggravated assault—deadly weapon threat, the ALJ will not address the remaining charge regarding her alleged failure to report her criminal history on her renewal application. Accordingly, the ALJ recommends that Respondent's vocational nursing license be revoked.

II. FINDINGS OF FACT

1. Carol Ann Hernandez (Respondent) is a licensed vocational nurse under permanent certificate number 157034 issued by the Texas Board of Nursing (Board).
2. On December 20, 2010, Staff for the Board (Staff) sent Respondent an Amended Notice of Hearing and Second Amended Formal Charges. Respondent timely filed an answer.
3. The notice of hearing 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 a short, plain statement of the matters asserted.

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PROPOSAL FOR DECISION

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4. On January 11, 2011, Staff filed a Motion for Summary Disposition (Staff's motion) asserting that there is no genuine issue as to any material fact and that Staff is entitled to a decision in its favor as a matter of law.
5. On January 25, 2011, Respondent filed a motion to extend the time to reply to Staff's motion.
6. On January 31, 2011, Respondent filed a concession to Staff's motion, stating that after reviewing the statutes, rules, and arguments presented by Staff, she agreed with Staff and asked that a proposal for decision be entered consistent with Staff's pleading and motion for summary disposition.
7. On April 12, 2010, Respondent pled guilty to the second degree felony charge of Aggravated Assault-Deadly Weapon Threat in Cause No. 2009-423,951, *State of Texas v. Carol Hernandez-Villarreal*, before the 137th District Court of Lubbock County, Texas, for an offense she committed on May 25, 2009.
8. On April 12, 2010, the 137th District Court of Lubbock County, Texas, entered an order of deferred adjudication in Cause No. 2009-423,951, *State of Texas v. Carol Hernandez-Villarreal* (the Order), deferring proceedings without entering an adjudication of guilt against Respondent for the second degree felony of Aggravated Assault-Deadly Weapon Threat. The Order places Respondent on community supervision for ten years so long as Respondent abides by and does not violate the terms and conditions of community supervision.

III. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to TEX. OCC. CODE ANN. ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper and timely notice of the hearing. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. A contested case may be disposed of by summary disposition without an evidentiary hearing if the pleadings, affidavits, materials obtained by discovery, admissions, matters officially noticed, stipulations, or evidence of record show that there is no genuine issue as to any material fact and that a party is entitled to a decision in its favor as a matter of law. 1 TEX. ADMIN. CODE § 155.505.
5. Aggravated Assault--Deadly Weapon Threat, a second degree felony, is a violation of Section 22.02 of the Texas Penal Code.

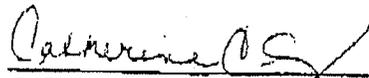
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PROPOSAL FOR DECISION

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6. Based on the Findings of Fact and Conclusions of Law, the Board must revoke Respondent's vocational nursing license pursuant to TEX. OCC. CODE ANN. § 301.4535(b).
7. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's vocational nursing license issued under permanent certificate number 157034 should be revoked.

Signed February 24, 2011.



CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS