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.
Executive Director of the Board

DOCKET NUMBER 507-10-5631

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE	§	
NUMBER 163844	§	OF
ISSUED TO	§	
MARSHA HANDLON	§	ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

TO: MARSHA HANDLON
4909 ANGUS #C
ODESSA, TX 79764

HUNTER BURKHALTER
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 Marsha Handlon 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. Board Staff filed exceptions to the PFD on January 26, 2011. The Respondent did not file any exceptions to the PFD, nor did she file a response to Staff's exceptions. The ALJ issued a final letter ruling on February 11, 2011, in which he made a minor change to Finding of Fact Number 16. The ALJ, declined, however, to make any changes to his recommendation.

The Board, after review and due consideration of the PFD, Staff's exceptions, 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, including the modifications made by the ALJ in his letter ruling of February 11, 2011, with the exception of Conclusion of Law Number 14, which is not adopted by the Board. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

Conclusion of Law Number 14

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 he included his 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).

The Board rejects Conclusion of Law Number 14 because it is a recommended sanction and not a proper conclusion of law. Further, the Board retains the authority to determine the final sanction in this matter. The Board declines to adopt the ALJ's recommendation that the Respondent's license should be suspended for a period of two years, with the suspension stayed, and subject to probationary stipulations for a period of two years. The Board finds that the ALJ erred in applying applicable law and the Board's rules, written policies, and prior administrative decisions in formulating his recommendation. Based upon applicable law, the Board's rules, written policies, and prior administrative decisions, the Board finds that the Respondent's license should be suspended for a period of three years, with the suspension stayed, and that the Respondent should be subject to probationary stipulations for a period of three years.

The Board agrees with the ALJ that the Respondent violated the Occupations Code §301.452(b)(10) and that, pursuant to the Board's Disciplinary Matrix, located at 22 Tex. Admin. Code §213.33(b), this violation constitutes a sanction at the second tier, sanction II level. The Board's Disciplinary Matrix recommends either the denial of licensure or the suspension of revocation of licensure at the second tier, sanction I level. Based upon the mitigating factors discussed in the PFD and the adopted findings of fact and conclusions of law, the Board agrees with the ALJ that the Respondent' license should be suspended in lieu of license revocation. Further, the Board agrees with the ALJ that the suspension of the Respondent's license should be probated. However, the Board disagrees that the probated suspension should be for a period of two years, as recommended by the ALJ, instead of a three year period, as is required by the Board's adopted *Eligibility and*

Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder.

For a second tier, sanction level II violation of the Occupations Code §301.452(b)(10), the Board's Disciplinary Matrix specifically states that a probated suspension should be for a minimum of two (2) or three (3) years, with Board monitored and supervised practice, depending on applicable Board policy. The applicable Board policy in this matter is the Board's adopted *Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder.* This policy requires a three year period of monitoring for nurses with an established history of chemical dependency or substance abuse. Specifically, the policy provides that, in situations where a nurse's conduct warrants disciplinary action, the nurse will not be eligible for an unencumbered license until the nurse has successfully completed an approved treatment program, plus a year of verifiable, documented sobriety and subsequent probationary monitoring by the Board for a minimum of three years. The Board finds that the ALJ has either ignored or misapplied the Board's written policy by recommending in Conclusion of Law Number 14 that the Respondent should be subject to Board monitoring for a period of two years instead of three years.

Further, although the ALJ recommends that the Board institute monitoring and periodic Board review of the Respondent's practice, the ALJ omits specific reference to several relevant probationary stipulations in his recommendation, such as stipulations that would require the Respondent to: (i) notify her current and future employers of the final Board Order in this matter; (ii) submit periodic reports from her probation officer to the Board for the duration of her felony probation; and (ii) continue in her support group meetings. These probationary stipulations are necessary for the Board to properly monitor and review the Respondent's nursing practice and continued sobriety. Further, these additional probationary

stipulations are authorized by 22 Tex. Admin. Code §213.33(e), which provides that, for the sanction level of suspension, the Respondent may be subject to supervised practice stipulations, and are consistent with the Board's prior administrative decisions in other disciplinary matters with similar facts. The Board finds that the ALJ erred in applying applicable law and the Board's rules, written policies, and prior administrative decisions when he failed to include these additional probationary stipulations as part of his recommendation in this matter. Further, the Board finds that the ALJ misapplied the Board's rules by not recommending that the Respondent complete a course in nursing jurisprudence and ethics, which is required pursuant to 22 Tex. Admin. Code §213.33(f).

IT IS THEREFORE ORDERED that Vocational Nurse License Number 163844, previously issued to MARSHA HANDLON, to practice vocational nursing in Texas is hereby SUSPENDED for a period of THREE (3) years with the suspension STAYED and Respondent is hereby placed on PROBATION for THREE (3) YEARS with the following terms of probation:

IT IS FURTHER ORDERED that this Order SHALL be applicable to Respondent's nurse licensure compact privileges, if any, to practice nursing in the State of Texas.

IT IS FURTHER ORDERED that while Respondent's license is encumbered by this order, the Respondent may not work outside the State of Texas pursuant to a nurse licensure compact privilege without the written permission of the Texas Board of Nursing and the Board of Nursing in the party state where Respondent wishes to work.

(1) RESPONDENT SHALL comply in all respects with the Nursing Practice Act, Texas Occupations Code, §§301.001 *et seq.*, the Rules and Regulations Relating to Nurse Education, Licensure and Practice, 22 TEX. ADMIN. CODE §211.1 *et seq.* and this Order.

(2) RESPONDENT SHALL, within one (1) year of the suspension being stayed, successfully complete a course in Texas nursing jurisprudence and ethics. RESPONDENT 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) 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. RESPONDENT 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 RESPONDENT'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.bon.state.tx.us/disciplinaryaction/stipscourses.html.*

IT IS FURTHER ORDERED, SHOULD RESPONDENT PRACTICE AS A NURSE IN THE STATE OF TEXAS, RESPONDENT WILL PROVIDE DIRECT PATIENT CARE AND PRACTICE IN A HOSPITAL, NURSING HOME, OR OTHER CLINICAL SETTING AND RESPONDENT MUST WORK IN SUCH SETTING A MINIMUM OF SIXTY-FOUR (64) HOURS PER MONTH UNDER THE FOLLOWING PROBATION CONDITIONS FOR THREE (3) YEARS OF EMPLOYMENT. THE LENGTH OF THE PROBATIONARY PERIOD WILL BE EXTENDED UNTIL SUCH THIRTY SIX (36) MONTHS HAVE

ELAPSED. PERIODS OF UNEMPLOYMENT OR OF EMPLOYMENT THAT DO NOT REQUIRE THE USE OF A VOCATIONAL NURSE (LVN) LICENSE WILL NOT APPLY TO THIS PROBATIONARY PERIOD:

(3) RESPONDENT SHALL notify each present employer in nursing of this Order of the Board and the probation conditions on RESPONDENT'S license. RESPONDENT SHALL present a complete copy of this Order and all Proposals for Decision issued by the Administrative Law Judge, if any, to each present employer within five (5) days of receipt of this Order. RESPONDENT SHALL notify all future employers in nursing of this Order of the Board and the probation conditions on RESPONDENT'S license. RESPONDENT SHALL present a complete copy of this Order and all Proposals for Decision issued by the Administrative Law Judge, if any, to each future employer prior to accepting an offer of employment.

(4) RESPONDENT SHALL CAUSE each present employer in nursing to submit the Notification of Employment form, which is provided to the Respondent by the Board, to the Board's office within ten (10) days of receipt of this Order. RESPONDENT SHALL CAUSE each future employer to submit the Notification of Employment form, which is provided to the Respondent by the Board, to the Board's office within five (5) days of employment as a nurse.

(5) For the first year of employment as a Nurse under this Order, RESPONDENT SHALL be directly supervised by a Registered Nurse or a Licensed Vocational Nurse. Direct supervision requires another professional or vocational nurse 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). The 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.

(6) For the remainder of the probation period, RESPONDENT SHALL be supervised by a Registered Nurse or 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 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.

(7) RESPONDENT SHALL NOT practice as a nurse on the night shift, rotate shifts, work overtime, accept on-call assignments, or be used for coverage on any unit other than the identified, predetermined unit(s) to which Respondent is regularly assigned for one (1) year of employment as a nurse.

(8) RESPONDENT SHALL NOT practice as a nurse in any critical care area for one (1) year of employment as a nurse. Critical care areas include, but are not limited to, intensive care units, emergency rooms, operating rooms, telemetry units, recovery rooms, and labor and delivery units.

(9) RESPONDENT SHALL NOT administer or have any contact with controlled substances, Nubain, Stadol, Dalgan, Ultram, or other synthetic opiates for one (1) year of employment as a nurse.

(10) 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 Registered Nurse or Licensed Vocational Nurse who supervises the RESPONDENT. These reports shall be submitted by the supervising nurse to the office of the Board at the end of each three (3) month period for three (3) years of employment as a nurse.

(11) RESPONDENT SHALL abstain from the consumption of alcohol, Nubain, Stadol, Dalgan, Ultram, or other synthetic opiates, and/or the use of 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 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.**

(12) RESPONDENT SHALL submit to random periodic screens for controlled substances, tramadol hydrochloride (Ultram), and alcohol. For the first three (3) month period, random screens shall be performed at least once per week. For the next three (3) month period, random screens shall be performed at least twice per month. For the next six (6) month period, random screens shall be performed at least once per month. For the remainder of the probation period, random screens shall be performed at least once every three (3) months. All random screens SHALL BE conducted through urinalysis. Screens obtained through urinalysis are the sole method accepted by the Board.

Specimens shall be screened for at least the following substances:

Amphetamines	Meperidine
Barbiturates	Methadone
Benzodiazepines	Methaqualone
Cannabinoids	Opiates
Cocaine	Phencyclidine
Ethanol	Propoxyphene
tramadol hydrochloride (Ultram)	

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.

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 probation period.

Any positive result for which the nurse does not have a valid prescription or failure to report for a drug screen, which may be considered the same as a positive result, will be regarded as non-compliance with the terms of this Order and may subject the nurse to further disciplinary action including EMERGENCY SUSPENSION pursuant to Section 301.4551, Texas Occupations Code, or REVOCATION of Respondent's license and nurse licensure compact privileges, if any, to practice nursing in the State of Texas.

(13) RESPONDENT SHALL attend at least two (2) support group meetings each week, one of which must be for substance abuse and provided by Alcoholics Anonymous, Narcotics Anonymous, or another comparable recovery program that has been pre-approved by the Board. RESPONDENT SHALL provide acceptable evidence of attendance. Acceptable evidence shall consist of a written record of at least: the date of each meeting; the name of each group attended; and the signature and printed name of the chairperson of each group attended by RESPONDENT. RESPONDENT SHALL submit the required evidence on the forms provided by the Board at the end of every three

(3) month period. No duplications, copies, third party signatures, or any other substitutions will be accepted as evidence.

(14) RESPONDENT SHALL CAUSE her probation officer to submit written reports on forms provided to the Respondent by the Board. The reports shall indicate the RESPONDENT'S compliance with the court ordered probation. The reports shall be furnished each and every three (3) month period until RESPONDENT is released from probation.

IT IS FURTHER ORDERED that if during the period of probation, an additional allegation, accusation, or petition is reported or filed against the Respondent's license, the probationary period shall not expire and shall automatically be extended until the allegation, accusation, or petition has been acted upon by the Board.

IT IS FURTHER ORDERED, that upon full compliance with the terms of this Order, all encumbrances will be removed from RESPONDENT'S license to practice nursing in the State of Texas and RESPONDENT shall be eligible for nurse licensure compact privileges, if any.

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. 507-10-5631 (January 11, 2011).

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge
January 11, 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. 507-10-5631; Texas Board of Nursing v. Marsha Darlene Handlon

Dear Ms. Thomas:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE/MEDIATOR
STATE OFFICE OF ADMINISTRATIVE HEARINGS

HB/slc
Enclosures
XC: John F. Legris, 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 – (with 1 CD) – **VIA INTER-AGENCY**
Marsha Handlon, 4909 Angus #C, Odessa, TX 79764-**VIA REGULAR MAIL**

DOCKET NO. 507-10-5631

TEXAS BOARD OF NURSING	§	BEFORE THE STATE OFFICE
	§	
V.	§	OF
	§	
MARSHA DARLENE HANDLON	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Board of Nursing (Staff, Board) brought this action seeking to impose disciplinary sanctions against Marsha Darlene Handlon (Respondent or Ms. Handlon) based on allegations that she failed to comply with the standards of the Nursing Practice Act.[1] Staff sought to revoke Ms. Handlon's license. The Administrative Law Judge (ALJ) finds that Staff proved the allegations against Respondent, but recommends lesser sanctions than license revocation.[2]

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The parties did not challenge the issues of jurisdiction or notice. Those matters will be addressed in the findings of fact and conclusions of law.

On November 16, 2010, ALJ Hunter Burkhalter convened the hearing on the merits at the State Office of Administrative Hearings' (SOAH) Austin facility. Counsel for Staff was John F. Legris. Respondent appeared *pro se*. The hearing adjourned the same day. The administrative record was held open through November 17, 2010, to allow the parties to submit briefing on an issue requested by the ALJ. Staff submitted such briefing. Ms. Handlon did not. The record closed on November 17, 2010.

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[1] TEX. OCC. CODE ch. 301.

[2] The Formal Charges against Respondent stated that Staff would also be seeking recovery of Staff's administrative costs, "in an amount of at least one thousand two hundred dollars ($1,200.00)." However, at the hearing, Staff did not request recovery of these costs, nor did Staff present any evidence of costs. Accordingly, this Proposal for Decision does not recommend the recovery of costs.

II. DISCUSSION

A. Evidence and Argument

The evidentiary record consists of 17 exhibits from Staff and four exhibits from Ms. Handlon. Staff called two witnesses: Ms. Handlon and Denise Benbow. Ms. Handlon's husband, Robert Handlon, testified on her behalf.

In 1997, the Board issued Licensed Vocational Nurse (LVN) license number 163844 to Respondent.[3] Respondent has been known by both her birth name (Marsha Darlene Byerly) as well as her first husband's surname (Marsha Darlene Moore). Respondent is currently married to Mr. Handlon.[4]

1. Ms. Handlon's Criminal History

a. Misdemeanor Conviction

On April 18, 2006, in Cause No. 9428A in the County Court of Dawson County, Texas, Ms. Handlon pled guilty to and was convicted of the Class B misdemeanor offense of "driving while license invalid," in violation of TEX. TRANSP. CODE § 601.231. She was ordered to be jailed for five days, and to pay a $100 fine plus court costs of $215. In addition, her driver's license was suspended for 90 days. The underlying crime occurred on December 29, 2005.[5]

b. Felony Conviction

On June 5, 2007, in Cause No. 7:07-CR-00034-002 RAJ, in the United States District Court for the Western District of Texas, Ms. Handlon pled guilty to and was convicted of the

[3] Staff Ex. 1.

[4] Staff Exs. 6 and 7. Testimony of Respondent.

[5] Staff Ex. 6.

first degree felony offense of "aiding and abetting distribution of a controlled substance, heroin," in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 18 U.S.C. § 2. She was placed on probation for a term of five years, ordered to reside in a community corrections center (halfway house) for six months, and ordered to pay a monetary penalty of $100 and a special assessment of $100. The underlying crime occurred on November 29, 2006.[6]

2. Ms. Handlon's Testimony

Ms. Handlon testified about the circumstances behind her felony conviction. She explained that she and her boyfriend at the time were both addicted to heroin. She was caught selling a small amount, roughly $100 worth, to an undercover police officer. She claimed that it was her boyfriend who was primarily engaged in selling the drug, but acknowledged that she had helped. Ms. Handlon is still on probation for the felony conviction. That probation lasts until June 2012.

Ms. Handlon first became an LVN in 1997. In February 2007, her license became delinquent.[7] She explained that she had let her license lapse into delinquency because she was addicted to heroin at the time. She also testified that she had not worked as a nurse for more than one year prior to the date her license went delinquent, and had never worked as a nurse while she was using heroin.

In order to bring her license back into active status, Ms. Handlon, on December 28, 2008, completed and sent to the Board a "License Renewal Form." On that form, she answered "yes" to the question: "Have you, within the past 24 months or since your last renewal, for any criminal offense . . . been convicted of a misdemeanor [or] felony?"[8] She disclosed her felony conviction, but not her misdemeanor conviction. She explained that she did not think she was

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[6] Staff Ex. 7.

[7] Staff Ex. 9.

[8] Staff Ex. 8.

required to disclose the misdemeanor because it had not occurred within the prior 24 months. However, at the hearing, she conceded that the misdemeanor conviction occurred after her last license renewal (which took place in February 2005). Thus, she admitted that she should have disclosed the misdemeanor on her renewal application, but she failed to do so because she misunderstood the question on the form. She insisted that she was not attempting to be misleading on the form.

On the December 2008 License Renewal Form, Ms. Handlon also answered "yes" to the question: "In the past five years, have you been addicted or treated for the use of alcohol or any other drug?"[9] At the hearing, she acknowledged that she had a problem with heroin and explained that she had attended court-ordered drug counseling. Ms. Handlon maintains she is no longer addicted to heroin, having stayed "clean" since 2007. She is subject to random drug testing as a term of her probation and has never failed any of the tests.

During 2008 and 2009, Ms. Handlon sent various letters to the Board in which she openly discussed the circumstances surrounding her renewal application. In a February 8, 2008 letter, she acknowledged the heroin conviction and claimed: "I have been released from the halfway house, and am currently residing with family. . . I am currently complying with my probation by attending counseling for my drug addiction, and have paid all of my fees. . . . [S]ince my release, I have been working with counselors to overcome my addiction."[10] In a March 4, 2009, letter to the Board, Ms. Handlon stated:

> I answered yes to the drug and alcohol question because in 2006 I had a drug addiction problem. In 2007 I successfully completed 6 months drug counseling and N.A. [narcotics anonymous] in a halfway house. Upon release from there in 2008 I successfully completed another year of drug counseling and remain drug and alcohol free without any problems to this date.[11]

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[9] Staff Ex. 8.

[10] Staff Ex. 5.

[11] Staff Ex. 5a.

At the hearing, Ms. Handlon explained that she attended Narcotics Anonymous once per week while she was in the halfway house. She also met with a drug counselor every other week. According to Ms. Handlon, she successfully completed her court-ordered drug treatment. Her probation officer conferred with her drug counselor and they jointly determined that she had completed the requirement.

Since her release, she has continued to regularly see a licensed chemical dependency counselor (LCDC), Beverly Bridgestock. Ms. Handlon produced a letter from Ms. Bridgestock dated November 1, 2010. In the letter, Ms. Bridgestock states, in relevant part:

> I have been very blessed to observe Marcia's commitment to our local group of AA. . . . Marcia has shown her dedication to serving people in the community at our group level, she attends meetings regularly and is a vital member in our fellowship. She participates in all areas of our group. She is truly an asset to the fellowship as well as to our local community.[12]

Since her release from the halfway house, Ms. Handlon has regularly attended Alcoholics Anonymous (AA) meetings, and she sees her AA sponsor twice per month.[13] She denied ever having any issues with alcohol abuse. Rather, she explained that AA helps her with her heroin issues just as well as attending NA meetings would.

Prior to her felony drug conviction, Ms. Handlon testified, she had made an attempt, albeit unsuccessful, to overcome her heroin addiction by voluntarily submitting to methadone treatment. This mode of treatment was not helpful.

Ms. Handlon's December 2008 license renewal application was granted by the Board and her license was renewed, effective January 7, 2009.[14] She testified that she has worked as an LVN for almost two years since her license was renewed without any problems. She produced

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[12] Ex. H-3.

[13] *See also* Ex. H-4, a sign-in sheet for AA meetings, showing Ms. Handlon's regular attendance.

[14] Staff Ex. 1.

letters of recommendation from her employers that corroborate this testimony. Ms. Handlon's current supervisor, Lynette Sotelo, an RN and the Director of Nurses at Deerings Nursing & Rehabilitation in Odessa, Texas, stated:

> Marsha has worked as a charge nurse in this facility for about 2 years. As the Director of Nurses I have supervised Marsha for about 1 ½ years. Marsha is a very caring nurse and treats the residents, families and staff with the greatest respect. She is very attentive to her patients and is a compassionate nurse. Marsha is a team player, her residents really love her. We are fortunate to have Marsha employed as a nurse in our facility.[15]

Ms. Handlon continues to work at the Deerings facility. She is also currently employed in a "moonlighting" capacity by HomeCare Connections (HomeCare), a home healthcare agency. Sue Swindell, her supervisor at HomeCare for the past year, also wrote in support of Ms. Handlon:

> Marsha worked for us as a field LVN, giving excellent care to her patients; her patients all loved her and spoke very highly of her care of them. Marsha's paperwork was always exceptional, it was always neat, detailed, correct, and turned in on time. . . . Marsha is an excellent nurse and is eligible for re-hire any time she may want a job. Her skills are kept up to date and she is a great patient advocate.[16]

Ms. Handlon testified that HomeCare has recently offered her a full-time job.

3. Robert Handlon's Testimony

Ms. Handlon's husband of two years, Robert Handlon, testified on her behalf. He asserts that she completed a drug counseling program while she was staying at the halfway house, which he described as being almost like a drug treatment center. He reiterated that, since her license was renewed, Ms. Handlon has worked for two years as an LVN and received nothing but high

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[15] Ex. H-1.

[16] Ex. H-2.

marks. Mr. Handlon expressed the opinion that his wife has paid her dues for the matters for which she was convicted. He urged the Board to avoid a ruling that would penalize her further.

4. Denise Benbow's Testimony

Denise Benbow testified on behalf of the Board. She is a licensed Registered Nurse employed by the Board. She has extensive professional experience working as an RN.[17] Consistent with Staff's allegations, Ms. Benbow testified as to why Ms. Handlon's actions violated multiple statutory provisions, as summarized below.

a. TEX. OCC. CODE § 301.452(b)(2)

Staff alleges that Ms. Handlon provided false and deceptive information to the Board when she submitted her 2008 License Renewal Form but failed to disclose her misdemeanor conviction on the form.[18] Ms. Benbow opined that the failure to disclose the conviction constitutes a violation of TEX. OCC. CODE § 301.452(b)(2), which provides that a licensee is subject to disciplinary action for engaging in "fraud or deceit in procuring or attempting to procure a license to practice . . . vocational nursing." Ms. Benbow asserts that the violation should be considered a "First Tier Offense" because Ms. Handlon's failure to disclose the conviction was not intentional. She also opined that the sanction should be assessed at "Sanction Level I" because only a single, minor criminal conviction was not disclosed. Accordingly, Ms. Benbow testified that the Charge IV violation, standing alone, would only justify imposition of a monetary fine and/or a requirement that Ms. Handlon undergo remedial education, and would not justify license revocation.

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[17] *See also* Staff Ex. 10.

[18] Staff Ex. 4.

b. TEX. OCC. CODE § 301.452(b)(3)

Staff alleges that Ms. Handlon's felony conviction constitutes grounds for disciplinary action pursuant to TEX. OCC. CODE § 301.452(b)(3), which provides that a licensee is subject to disciplinary action if he or she is convicted of a felony.[19] The Board's Disciplinary Matrix provides that discipline for such violations is to be determined pursuant to the Board's "Disciplinary Guidelines for Criminal Conduct." Ms. Benbow testified that, because the conviction was for a drug-related felony and was imposed less than four years ago, the appropriate sanction for the Subsection (b)(3) violation, according to the Disciplinary Guidelines for Criminal Conduct, should be to "deny, revoke, or suspend" Ms. Handlon's license. She also stated that it would not be possible to issue Ms. Handlon a license for this violation, due to the concern that, by nature of the license, Ms. Handlon would have access to controlled substances. Ms. Benbow also asserted that the Board has a policy banning licensure of persons, such as Ms. Handlon, who are currently on probation.

c. TEX. OCC. CODE § 301.452(b)(9)

Staff alleges that Ms. Handlon's heroin addiction constitutes grounds for disciplinary action pursuant to TEX. OCC. CODE § 301.452(b)(9).[20] That subsection provides that a licensee is subject to disciplinary action for engaging in "intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient." Ms. Benbow testified that the violation of Subsection (b)(9) should be considered a "Second Tier Offense" under the Board's Disciplinary Matrix because: (1) Ms. Handlon abused heroin "without patient interaction" and without "risk of patient harm or adverse patient effects;" and (2) there are aggravating factors, such as the criminal conviction, that preclude a First Tier Offense. She also opined that the sanction should be assessed at "Sanction Level II" because of aggravating circumstances, such as the fact that heroin is an illegal substance.

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[19] Staff Ex. 4.

[20] Staff Ex. 4.

d. TEX. OCC. CODE § 301.452(b)(10)

Subsection (b)(10) provides that a licensee is subject to disciplinary action for engaging in "unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public." Staff alleges that Ms. Handlon violated Subsection (b)(10) in four different ways: (1) by receiving the misdemeanor conviction; (2) by receiving the felony conviction; (3) by being addicted to heroin; and (4) by failing to disclose the misdemeanor conviction on her 2008 License Renewal Form.[21] Ms. Benbow testified that the violation of Subsection (b)(10) should be considered a "Second Tier Offense" under the Board's Disciplinary Matrix because: (1) there were multiple violations, rather than an "isolated event." She also opined that the sanction should be assessed at "Sanction Level II" because of aggravating circumstances, such as the fact that illegal drugs and criminal conduct were involved.

e. TEX. OCC. CODE § 301.452(b)(12)

Subsection (b)(12) provides that a licensee is subject to disciplinary action if he or she "lack[s] . . . fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public." Staff alleges that Ms. Handlon violated Subsection (b)(12) by nature of her addiction to heroin.[22] Ms. Benbow asserted that she had not heard sufficient evidence to conclude that Ms. Handlon has successfully completed a drug treatment program. Ms. Benbow testified that the violation of Subsection (b)(12) should be considered a "First Tier Offense" at "Sanction Level II" under the Board's Disciplinary Matrix.

Based upon the above analysis, Ms. Benbow concluded that Ms. Handlon's license should be revoked.

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[21] Staff Ex. 4.

[22] Staff Ex. 4.

B. ALJ's Analysis and Recommendation

Staff's position in this case is rather awkward. If Staff had denied Ms. Handlon's December 2008 renewal application and the hearing on the proposed denial was held two years ago, it would be fairly easy to recommend that the denial be upheld. However, developments over the intervening years now make a decision to revoke Ms. Handlon's license much more difficult.

The Board's own license renewal form requires applicants to disclose any substance abuse or criminal history. In early 2008, Ms. Handlon completed the form and, on it, frankly and honestly disclosed her felony conviction and heroin addiction to the Board. The Board then renewed her license. This indicates that the Board considered the addiction and criminal conviction and deemed them insufficient to warrant denial of the license renewal.[23]

In the two years since her license has been renewed, Ms. Handlon has worked as an LVN without incident. Indeed, according to her employers, she has been an outstanding nurse. Moreover, Ms. Handlon has presented substantial and uncontroverted evidence that she has conquered her addiction. Nevertheless, the Board now seeks to revoke her license based primarily upon the felony conviction and past heroin addiction.[24]

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[23] At the hearing, Staff's counsel contended that license renewal is a ministerial act, such that the Board had no discretion to do anything other than to grant Ms. Handlon's renewal application. For two reasons, this contention is not credible. First, because the Board specifically asks each renewal applicant to disclose any criminal history or substance abuse issues, common sense suggests that the Board intended to consider such information when deciding whether or not to renew a license. Second, the Board's own rules *require* consideration of criminal history and substance abuse issues in the license renewal context. *See, e.g.*, 22 TEX. ADMIN. CODE § 213.28(a) (identifying "the considerations and criteria in determining the effect of criminal convictions on the eligibility of a person to . . . renew a license as a . . . licensed vocational nurse"); 22 TEX. ADMIN. CODE § 213.29(h)(requiring consideration of "chemical dependency" issues in "renewal matters").

[24] At the hearing, Staff's counsel conceded that Ms. Handlon's misdemeanor conviction, and her failure to disclose that conviction on her 2008 license renewal application, were not significant issues and, standing alone, do not justify license revocation.

1. Analysis of the Alleged Violations

Each alleged violation will be discussed in turn.

a. Staff failed to prove a violation of TEX. OCC. CODE § 301.452(b)(2).

Pursuant to TEX. OCC. CODE § 301.452(b)(2), a licensee may be disciplined for engaging in "fraud or deceit in procuring or attempting to procure a license to practice . . . vocational nursing." Staff alleges that Ms. Handlon's failure to disclose the misdemeanor conviction on her 2008 License Renewal Form constituted such fraud or deceit. The ALJ disagrees.

"Fraud" is defined as an "intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right."[25] "Deceit" is defined as "a fraudulent and deceptive misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon."[26] Thus, in order to engage in fraud or deceit there must be a *knowing and intentional* misrepresentation of the true facts.

Ms. Handlon testified, convincingly, that her failure to disclose her misdemeanor conviction was the result of mere inadvertence and her misunderstanding of the question asked on the form. Ms. Benbow agreed, stating her belief that the omission was not intentional. This conclusion is buttressed by examining what *was* disclosed on Ms. Handlon's 2008 License Renewal Form. On the form, she disclosed information that was very prejudicial to her: (1) that she had been convicted of a felony for heroin distribution; and (2) that she had had a problem with heroin addiction. If Ms. Handlon's intent had been to deceive the Board about her past, it seems likely that she would have withheld these two facts, rather than hiding a relatively

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[25] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 490 (1988); *see also* BLACK'S LAW DICTIONARY 336 (5th Ed. 1983).

[26] BLACK'S LAW DICTIONARY 210 (5th Ed. 1983).

insubstantial and dated misdemeanor conviction. For these reasons, the ALJ concludes that Staff failed to prove a violation of TEX. OCC. CODE § 301.452(b)(2).

b. Staff proved a violation of TEX. OCC. CODE § 301.452(b)(3).

Pursuant to TEX. OCC. CODE § 301.452(b)(3), a licensee may be disciplined if he or she has been convicted of a felony. There is no dispute about Ms. Handlon's felony conviction. Thus, the ALJ agrees with Staff's witness, Ms. Benbow, that Respondent's conviction runs afoul of Section 301.452(b)(3), thereby justifying the imposition of sanctions against her.

c. Staff failed to prove a violation of TEX. OCC. CODE § 301.452(b)(9).

Pursuant to TEX. OCC. CODE § 301.452(b)(9), a licensee may be disciplined for engaging in "intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient." There is no dispute that Ms. Handlon has, in the past, been addicted to heroin. However, there is absolutely no evidence in the record to suggest that she used heroin while working as an LVN. Even Ms. Benbow testified that Ms. Handlon's past heroin abuse involved no patient interaction and posed no risk of patient harm or adverse patient effects.

There is also substantial evidence indicating that Ms. Handlon's problems with heroin are a thing of the past. Her testimony and the letters from her drug counselor and employers indicate that she has overcome her addiction and is no longer a user of heroin. Staff presented no evidence to the contrary. Moreover, the Board has authorized her to work as an LVN for almost two years during which time she has, by all accounts, done an outstanding job. Thus, there is insufficient evidence in the record to conclude that Ms. Handlon's past heroin abuse endangers or could endanger a patient.

Staff repeatedly asserted that there was no verifiable evidence of current sobriety that dates back a minimum of 12 months. However, this is not accurate. It is true that the Board's

"Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder" policy (Drug Eligibility Policy) places importance on "evidence of current sobriety that dates back a minimum of twelve (12) consecutive months." However, the types of evidence that the Drug Eligibility Policy "highly recommends" to prove 12 months of sobriety – "random drug screens, letters, and evaluations from present and past employers, and signed logs of support group attendance"[27] – are precisely the kinds of evidence that Ms. Handlon produced to prove her sobriety over the last two years.

Staff also expressed reservations about the adequacy of the drug treatment that Ms. Handlon received. Yet her treatment appears to be consistent with the treatment endorsed by the Board's Drug Eligibility Policy. The evidence demonstrates that Ms. Handlon successfully completed a six-month long, court-ordered drug treatment program while at a halfway house. In the Drug Eligibility Policy, the Board specifically states that "a halfway house" constitutes an "approved treatment facility."[28] Thereafter, Ms. Handlon successfully completed another year of drug counseling and remains drug and alcohol free without any problems to date. She continues to regularly see a counselor and regularly attends AA meetings. She has passed all random drug screens.

It is worth noting that the Drug Eligibility Policy draws a distinction between "nurses who have active substance dependence" and "nurses who are in active recovery."[29] Perhaps the most relevant provision in the Drug Eligibility Policy reads as follows:

> The Board's responsibility towards the nurse is to recognize that person's past service in the provision of patient care and give that person an opportunity to seek treatment at an approved treatment facility for the substance use disorder and then return to providing patient care when able to submit verifiable, documented proof that he/she has a year of sobriety and is in stable recovery.[30]

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[27] Drug Eligibility Policy at 1, 5.

[28] Drug Eligibility Policy at 2 n. 2.

[29] Drug Eligibility Policy at 1.

[30] Drug Eligibility Policy at 2.

During the hearing, even Ms. Benbow conceded that the purpose of the Board's Disciplinary Matrix is to both protect the public "and remediate the nurse." In this case, Ms. Handlon successfully completed treatment at an approved treatment facility and submitted verifiable, documented proof that she has more than a year of sobriety and is in stable recovery. Thus, revocation would be inconsistent with the stated goal of the Drug Eligibility Policy.

There is insufficient evidence in the record to conclude that Ms. Handlon's past heroin abuse endangers or could endanger a patient. Accordingly, Staff did not prove a violation of TEX. OCC. CODE § 301.452(b)(9).

d. Staff proved one violation (out of four alleged) of TEX. OCC. CODE § 301.452(b)(10).

Subsection (b)(10) provides that a licensee is subject to disciplinary action for engaging in "unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public." Staff alleges that Ms. Handlon violated Subsection (b)(10) in four different ways: (1) by receiving the misdemeanor conviction; (2) by receiving the felony conviction; (3) by being addicted to heroin; and (4) by failing to disclose the misdemeanor conviction on her 2008 License Renewal Form.

i. The misdemeanor conviction does not violate TEX. OCC. CODE § 301.452(b)(10).

The ALJ cannot conclude that, by receiving a misdemeanor conviction for driving without a license, Ms. Handlon engaged in unprofessional or dishonorable conduct that was likely to deceive, defraud, or injure a patient or the public. By rule, the Board has identified a number of "unprofessional or dishonorable behaviors of a nurse," including "criminal conduct . . . involving a crime or criminal behavior or conduct that could affect the practice of nursing."[31] In this instance, there is no evidence to suggest that, when Ms. Handlon drove without a valid

[31] 22 TEX. ADMIN. CODE § 217.12(13).

driver's license, she was doing so in her capacity as a nurse. Likewise, there is no suggestion or logical way to conclude that Ms. Handlon's traffic violation relates in any way to the practice of nursing or to the nursing profession. Moreover, there no evidence to demonstrate that her driving violation was likely to deceive, defraud, or injure a patient or the public. Thus, the ALJ concludes that Ms. Handlon's misdemeanor conviction does not constitute "unprofessional or dishonorable conduct," nor was it "likely to deceive, defraud, or injure a patient or the public."

ii. The felony conviction violates TEX. OCC. CODE § 301.452(b)(10).

The ALJ concludes that, by receiving a felony conviction for distributing heroin, Ms. Handlon engaged in unprofessional or dishonorable conduct that was likely to deceive, defraud, or injure a patient or the public. As noted above, "criminal conduct . . . involving a crime or criminal behavior or conduct that could affect the practice of nursing" constitutes "unprofessional or dishonorable behaviors of a nurse"[32] In this instance, a crime involving an illicit drug could affect the practice of nursing because nurses have access to drugs. Thus, a nurse "who has engaged in behaviors in violation of controlled substances laws raises concerns about the ability to practice nursing safely. A nurse license provides access and opportunity to repeat this type of criminal conduct."[33] Thus, the ALJ concludes that Ms. Handlon's felony conviction constitutes unprofessional or dishonorable conduct that was likely to deceive, defraud, or injure a patient or the public, in violation of TEX. OCC. CODE § 301.452(b)(10).

iii. Ms. Handlon's past heroin addiction does not constitute a current violation of TEX. OCC. CODE § 301.452(b)(10).

Ms. Handlon's past heroin addiction does not currently qualify as "unprofessional or dishonorable conduct," as that term is defined by the Board's rules. The Board has identified "unprofessional or dishonorable" behavior to include" "Inability to Practice Safely – demonstration of actual or potential inability to practice nursing with reasonable skill and safety

[32] 22 TEX. ADMIN. CODE § 217.12(13).

[33] Disciplinary Guidelines for Criminal Conduct at 7.

to clients by reason of . . . drugs, chemicals, or any other mood-altering substances."[34] In this instance, Staff has failed to prove a *present or potential* inability to practice due to drugs. As discussed above, the preponderance of the evidence demonstrates that Ms. Handlon is no longer addicted to heroin and is able to carry out her duties as an LVN in a capable and even exemplary way. Moreover, the Board has already allowed her to do so for roughly two years, despite having knowledge of her prior problem with drugs. Thus, Staff failed to meet its burden to demonstrate "actual or potential inability to practice nursing with reasonable skill and safety to clients by reason of drugs" on Ms. Handlon's part.

iv. The failure to disclose the misdemeanor conviction on Ms. Handlon's 2008 License Renewal Form does not violate TEX. OCC. CODE § 301.452(b)(10).

The ALJ cannot conclude that, by inadvertently failing to disclose the misdemeanor conviction on her 2008 License Renewal Form, Ms. Handlon engaged in unprofessional or dishonorable conduct that was likely to deceive, defraud, or injure a patient or the public as defined by the Board's rules. By rule, the Board has identified a number of "unprofessional or dishonorable behaviors of a nurse," including "misconduct" such as "failing to answer specific questions or providing false or misleading answers *that would have affected the decision to license, employ, or certify or otherwise utilize a nurse*."[35] In this instance, Ms. Handlon inadvertently failed to disclose the fact of her misdemeanor conviction when she applied to renew her license. Although this failure was not intentional, it might have been misleading to the Board. However, counsel for Staff conceded at the hearing this failure was not a "biggie" and would not have affected the decision of the Board as to whether or not to renew her license. As such, it does not run afoul of TEX. OCC. CODE § 301.452(b)(10).

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[34] 22 TEX. ADMIN. CODE § 217.12(5).

[35] 22 TEX. ADMIN. CODE § 217.12(6)(I)(emphasis added).

e. Staff failed to prove a violation of TEX. OCC. CODE § 301.452(b)(12).

Subsection (b)(12) provides that a licensee is subject to disciplinary action if he or she "lack[s] . . . fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public." Staff alleges that Ms. Handlon violated Subsection (b)(12) by nature of her addiction to heroin. The ALJ concludes that Staff failed to prove this violation for the same reason that it failed to prove a violation of TEX. OCC. CODE § 301.452(b)(9). There is no question that, at the time Ms. Handlon was addicted to heroin, she lacked fitness to practice and she might have posed a risk to patients if she had worked as an LVN at that time. However, the preponderance of the evidence indicates that Ms. Handlon no longer suffers from any such lack of fitness, nor is there any evidence of a risk of injury to patients or the public.

2. Analysis of Appropriate Sanctions

Having proven violations of TEX. OCC. CODE § 301.452(b)(3) and (b)(10), Staff established that the Board is entitled to impose sanctions on Ms. Handlon. Additional analysis must be undertaken, however, to determine whether the sanction sought by Staff, license revocation, is warranted. Pursuant to 22 TEX. ADMIN. CODE § 213.33(a), the Board and SOAH "shall" utilize the Board's "Disciplinary Matrix" in "all disciplinary . . . matters." That matrix is found as an attached graphic at 22 TEX. ADMIN. CODE § 213.33(b). For violations of Section 301.452(b)(3), the Disciplinary Matrix provides that discipline is to be determined by the Board's "Disciplinary Guidelines for Criminal Conduct" (Criminal Guidelines). Additionally, the Board's rules and the Criminal Guidelines both list a variety of factors that must be considered when assessing penalties.

Pursuant to 22 TEX. ADMIN. CODE § 213.33(c), the Board and SOAH "shall" consider the following 17 factors "in conjunction with the Disciplinary Matrix" when determining the sanction to be imposed upon a nurse, including when determining the "sanction level" under the Disciplinary Matrix:

1. Evidence of actual or potential harm to patients, clients, or the public

There is no evidence that Ms. Handlon's actions caused harm to patients or clients. However, the illegal selling of heroin undoubtedly had a deleterious, but unquantified, effect on public welfare.

2. Evidence of a lack of truthfulness or trustworthiness

Other than the underlying illegal activity, there is no evidence that Ms. Handlon behaved untruthfully. She forthrightly disclosed her felony conviction and drug addiction to the Board. She only inadvertently failed to disclose the misdemeanor conviction.

3. Evidence of misrepresentation(s) of knowledge, education, experience, credentials, or skills which would lead a member of the public, an employer, a member of the health-care team, or a patient to rely on the fact(s) misrepresented where such reliance could be unsafe

No allegation was made, or evidence produced, to suggest that Ms. Handlon behaved in this manner.

4. Evidence of practice history

There is no evidence of prior misbehavior by Ms. Handlon. She has been an LVN since 1997. Since renewal of her license roughly two years ago, she has performed well as an LVN.

5. Evidence of present fitness to practice

Outside of the events at issue in this case, there is no other evidence indicating unfitness to practice. On the contrary, there is ample evidence indicating current fitness to practice.

6. Evidence of previous violation s or prior disciplinary history by the Board or any other health care licensing agency in Texas or another jurisdiction

There is no evidence of any prior disciplinary history by Respondent.

7. The length of time the licensee has practiced

Respondent has been a licensed nurse since at least 1997, with a hiatus of unknown length during the time of her addiction.

8. The actual damages, physical, economic, or otherwise, resulting from the violation

There are no allegations or evidence of any such damages.

9. The deterrent effect of the penalty imposed

Certainly, if revocation is imposed, the deterrent effect upon Ms. Handlon will be complete, because she will be unable to practice as a nurse.

10. Attempts by the licensee to correct or stop the violation

Ms. Handlon's criminal action was stopped only because she was caught by law enforcement.

11. Any mitigating or aggravating circumstances

Because Ms. Handlon's crime involved the distribution of heroin to others, it is a more serious and harmful crime than if she had merely been caught using heroin herself.[36]

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[36] Drug Eligibility Policy at 4.

12. The extent to which system dynamics in the practice setting contributed to the problem

Because no evidence was introduced on this point, the ALJ will assume that system dynamics did not contribute to the problem.

13. Whether the person is being disciplined for multiple violations of the Act or its derivative rules and orders

The Respondent is being disciplined for a single event, the felony conviction, which constituted two violations of the Act.

14. The seriousness of the violation

Any felony conviction is a serious violation.

15. The threat to public safety

The violation created a threat to public safety, but no present threat exists.

16. Evidence of good professional character

The evidence indicates that, since the conviction, Respondent has been practicing as an LVN in an exemplary manner. She has also diligently and consistently pursued treatment and rehabilitation with respect to her addiction problem.

17. Any other matter that justice may require

Staff is seeking license revocation, the most draconian sanction the Board can impose. The ALJ is convinced that a lesser sanction is warranted. Staff did not present evidence demonstrating that Respondent is beyond reform as a nurse. Moreover, this is the first enforcement action against Respondent, a nurse who is apparently now performing quite well as an LVN. Rather than revocation, the ALJ believes that imposition of a lesser array of sanctions is more appropriate. The violations committed by Ms. Handlon are of the type that might be avoided in the future if she were subjected to lesser sanctions.

The Disciplinary Guidelines state that each case is "considered on its own merits," and also requires that the following factors be considered in the "case-by-case analysis" for determining sanctions:

1. The nature and seriousness of the crime, *i.e.*, absence of criminal plan or premeditation, presence of contributing influences, evidence of immature thought process/judgment at the time of activity, etc.

The felony conviction is a serious one and appears to have been premeditated. There is some indication that Ms. Handlon was under the influence of a controlling boyfriend. However, the ALJ gives this little weight, because she was an adult at the time and should have known better.

2. Failure to disclose criminal offense to the Board

Ms. Handlon fully disclosed the offense to the Board.

3. The actual damages, physical or otherwise, resulting from the criminal activity

There are no allegations or evidence of damages.

4. The extent and nature of the person's past criminal activity

Other than the felony, Ms. Handlon has only one misdemeanor conviction for a traffic violation.

5. Conduct evidences a lack of truthfulness or trustworthiness

Ms. Handlon's actions following the crime indicate trustworthiness. She has been honest with the Board and she is trusted by her employers.

6. The age of the person when the crime was committed

Ms. Handlon was 35 at the time of her crime, thus it was not a youthful indiscretion.

7. The amount of time that has elapsed since the person's last criminal activity

Slightly more than four years has elapsed.

8. Work activity of the person before and after the criminal activity

Although there is little evidence of Ms. Handlon's work history prior to the crime, she appears to have been in good standing with the Board during that time. Since the crime, the evidence indicates that she has performed quite well as an LVN.

9. Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release

Ms. Handlon completed court-ordered drug treatment while in a halfway house. She has continued with drug counseling since leaving the halfway house and appears to have conquered her addiction. She has continued to see an LCDC counselor, attends AA regularly, and sees her AA sponsor twice monthly. She also has maintained employment and is valued by her employers.

10. A record of steady employment and has supported his or her dependents

Ms. Handlon has maintained employment and is valued by her employers. It is unknown whether she has dependents.

11. Other evidence of the person's present fitness, including letters of recommendation from: prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person; the sheriff or chief of police in the community where the person resides; and any other persons in contact with the person

There are no records from law enforcement personnel. However, letters from Ms. Handlon's drug counselor and employers are highly supportive of her.

12. Paid all outstanding court costs, supervision fees, fines, and evidence of restitution to both victim and community

Ms. Handlon testified that she has paid all such costs.

13. Whether conduct indicates inability to practice nursing in an autonomous role with patients/clients, their families and significant others and members of the public who are or who may become physically, emotionally or financially vulnerable

The fact that Ms. Handlon has been working as an LVN successfully for roughly two years indicates that this is not the case.

14. Evidence of remorse

Ms. Handlon appeared to be appropriately contrite and remorseful about the mistakes of her past.

15. Evidence of current maturity and personal accountability

Ms. Handlon seems committed to avoiding past mistakes and acting responsibly.

16. Evidence of having learned from past mistakes

Ms. Handlon seems committed to avoiding past mistakes and acting responsibly.

17. Evidence of current support structures that will prevent future criminal activity

Ms. Handlon is now in what appears to be a supportive marriage and is valued in her work environment.

18. Evidence of current ability to practice in accordance with the Nursing Practice Act, Board rules and generally accepted standards of nursing

Ms. Handlon's work history over the past two years indicates that she is able to practice appropriately.

19. 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

As an LVN, she will presumably have access to controlled substances. It might be wise to require a degree of supervision over her to guard against any risk of relapse.

20. The relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of nursing practice

As an LVN, she will presumably have access to controlled substances.

21. Whether imprisonment followed a felony conviction, felony community supervision revocation, revocation of parole or revocation of mandatory supervision

Ms. Handlon was not imprisoned; incarceration in a halfway house does not constitute imprisonment. Op. Tex. Att'y Gen. No. GA-0064.

22. Conduct that results in the revocation of probation imposed because of criminal conduct

Not applicable.

23. Evidence of the licensee's safe practice

Her work history over the past two years provides evidence of safe practice.

24. Expunction, nondisclosure of criminal offense

Not applicable.

25. Successful completion of probation/community supervision

Ms. Handlon will not complete her probation until June 2012. She is, however, currently complying with the terms of her probation.

26. If criminal activity due to chemical dependency including alcohol, evidence of evaluation and treatment, after care and support group attendance (written verification of compliance with any treatment)

Ms. Handlon supplied substantial evidence indicating that she has successfully completed treatment.

27. If criminal activity due to mental illness, evidence of evaluation, including a prognosis, by a psychologist or psychiatrist, evidence of treatment, including any medication (written verification of compliance with any treatment).

Not applicable.

As to violations of Section 301.452(b)(3), the Criminal Guidelines provide that for a drug conviction that is less than four years old, such as Ms. Handlon's, the recommended sanction is "Deny/Revoke/Suspend." Ms. Benbow recommended revocation. She did not explain why the lesser penalty of license suspension was not acceptable. For violations of Section 301.452(b)(10), the Disciplinary Matrix lists three possible "tiers" of offenses. Ms. Benbow opined that the violation should be considered a second tier offense at Sanction Level II. The ALJ agrees, because the offense involved aggravating factors, such as involvement of illegal drugs and criminal conduct. The recommended sanction at that level is as follows:

> Denial of Licensure, Suspension, or Revocation of Licensure. . . . If violation involves . . . criminal conduct involving alcohol, drugs or controlled substances then suspension will be enforced until individual has completed treatment and one year verifiable sobriety before suspension is stayed, thereafter the stipulations will also include abstention from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis; limit specific nursing activities and/or periodic Board review.
>
> Probated suspension will be for a minimum of two (2) or three (3) years with Board monitored and supervised practice . . .

Thus, although license revocation can be imposed for either violation, it is not mandatory in either case, and the lesser sanction of license suspension may be imposed. Because most of the

factors listed above weigh in favor of Ms. Handlon, and because she has completed drug treatment and provided verifiable evidence of at least one year of sobriety, the ALJ concludes that revocation, the most punitive of possible sanctions, is not warranted based upon the evidence in the record.

The ALJ concludes that Respondent engaged in practices which were in violation of TEX. OCC. CODE §§ 301.452(b)(3) and (10). The ALJ recommends that Respondent's license not be revoked. Instead, the ALJ recommends:

- That Ms. Handlon's license be suspended for a period of two years, but that the suspension be stayed;
- That the Order against Ms. Handlon include stipulations requiring her to abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis or any other method chosen by the Board;
- That the Order against Ms. Handlon limit specific nursing activities as specified by the Board and/or periodic Board review; and
- That the Order against Ms. Handlon institute Board monitoring of her practice.

III. FINDINGS OF FACT

1. Marsha Darlene Handlon (Respondent) is a licensed vocational nurse (LVN), license number 163844, and has been licensed as an LVN in Texas since 1997.

2. On April 18, 2006, in the County Court of Dawson County, Texas, Respondent pled guilty to and was convicted of the Class B misdemeanor of "driving while license invalid," TEX. TRANSP. CODE § 601.231 (the Misdemeanor Conviction). She was ordered to be jailed for five days, and to pay a $100 fine plus court costs of $215.

3. On June 5, 2007, in the United States District Court for the Western District of Texas, Respondent pled guilty to and was convicted of the first degree felony of "aiding and abetting distribution of a controlled substance, heroin," 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 18 U.S.C. § 2 (the Felony Conviction). She was placed on probation for five years, ordered to reside in a halfway house for six months, and ordered to pay a monetary penalty of $100 dollars and a special assessment of $100. The underlying crime occurred on November 29, 2006.

4. At the time of the crime underlying the Felony Conviction, Respondent was addicted to heroin.

5. Respondent never worked as an LVN at times when she was using heroin.

6. Respondent allowed her LVN license to lapse into delinquency in February 2007, due to her addiction problems.

7. In the crime underlying the Felony Conviction, Respondent was caught selling a small amount, roughly $100 worth, of heroin to an undercover agent.

8. Respondent remains under probation for the Felony Conviction, and that probationary period runs until June 2012.

9. During her six-month residency in a halfway house, Respondent successfully completed a court-ordered drug treatment program and fully participated in narcotics anonymous counseling.

10. A halfway house constitutes an "approved treatment facility" under the "Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder" policy (Drug Eligibility Policy) adopted by the Texas Board of Nursing (Board).

11. Since her release from the halfway house, Respondent has passed all random drug tests, continues to regularly see a drug counselor, and attends an addiction support group.

12. Respondent has conquered her heroin addiction and has been drug-free since 2007.

13. Respondent has paid all the fees ordered in both of her convictions.

14. In December 2008, in order to bring her LVN license back into active status, Respondent completed and sent to the Board a "License Renewal Form" on which she disclosed the Felony Conviction and her past heroin addiction, but did not disclose the Misdemeanor Conviction.

15. Respondent failed to disclose the Misdemeanor Conviction because she misunderstood the scope of the question on the License Renewal Form. She did not intentionally or knowingly conceal the Misdemeanor Conviction from the Board.

16. In January 2009, with full knowledge of Respondent's Felony Conviction and heroin addiction, the Staff of the Board (Staff) granted Respondent's application to return her LVN license back to active status.

17. Since her LVN license was returned to active status, Respondent has worked as an LVN without adverse incident, for a period of almost two years.

18. Respondent's employers during this two-year period describe her as an excellent LVN.

19. Respondent produced letters of recommendation from her current substance abuse counselor and her two current employers. All of the letters are very supportive of Respondent.

20. Respondent's intemperate use of heroin during the time of her addiction did not endanger patients nor did it create a risk of endangering patients because she was not working as an LVN at the time.

21. Respondent provided verifiable evidence demonstrating her sobriety dating back more than 12 consecutive months.

22. There is no allegation or evidence that Respondent's actions actually caused harm to any patients or clients.

23. The evidence demonstrates that Respondent is currently fit to practice as an LVN.

24. Respondent has no previous disciplinary history with the Board.

25. Respondent has maintained steady employment since her release from the halfway house.

26. On August 19, 2010, Staff served its Notice of Hearing (NOH) on Respondent.

27. The NOH 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.

28. On November 16, 2010, Administrative Law Judge (ALJ) Hunter Burkhalter held a hearing on the merits at the State Office of Administrative Hearings (SOAH) Austin office. Counsel for Staff was John F. Legris. Respondent appeared, *pro se*. The hearing adjourned the same day, but the record was held open through November 17, 2010 to allow briefing by the parties. The record closed on November 17, 2010.

IV. CONCLUSIONS OF LAW

1. The Board has jurisdiction over the discipline of licensed nurses in Texas. TEX. OCC. CODE ch. 301.

2. SOAH has jurisdiction to conduct hearings and issue a proposal for decision in this matter. TEX. GOV'T CODE ch. 2003.

3. Notice given by Staff to Respondent was sufficient under the law. TEX. GOV'T CODE §§ 2001.051 and 2001.052.

4. When she failed to disclose the Misdemeanor Conviction on the License Renewal Form, Respondent did not engage in fraud or deceit in procuring or attempting to procure the LVN license.

5. By receiving the Misdemeanor Conviction, Respondent did not engage in unprofessional or dishonorable conduct that was likely to deceive, defraud, or injure a patient or the public.

6. By receiving the Felony Conviction, Respondent engaged in unprofessional or dishonorable conduct that was likely to deceive, defraud, or injure a patient or the public.

7. Respondent's past heroin conviction does not currently qualify as "unprofessional or dishonorable conduct" as that term is defined by the Board's rules.

8. Based on Finding of Fact No. 3, Respondent violated TEX. OCC. CODE § 301.452(b)(3).

9. Based on Finding of Fact No. 3, Respondent violated TEX. OCC. CODE § 301.452(b)(10).

10. Respondent's misdemeanor conviction described in Finding of Fact No. 2 and her conduct described in Findings of Fact Nos. 4, 5, and 15 did not violate TEX. OCC. CODE § 301.452(b)(10).

11. Based on Finding of Fact No. 15, Respondent did not violate TEX. OCC. CODE § 301.452(b)(2).

12. Based on Findings of Fact Nos. 3-5 and 9-12, Respondent did not violate TEX. OCC. CODE § 301.452(b)(9).

13. Based on Findings of Fact Nos. 3-5 and 9-12, Respondent did not violate TEX. OCC. CODE § 301.452(b)(12).

14. Based on the above Findings of Fact and Conclusions of Law, and based upon the factors referenced in 22 TEX. ADMIN. CODE § 213.33, the Board's Disciplinary Matrix, the Board's Drug Eligibility Policy, and the Board's Disciplinary Guidelines for Criminal Conduct, an Order should be issued in which:

- Respondent's license is suspended for a period of two years, but the suspension is stayed;

- Stipulations are included requiring Respondent, during the two year period, to abstain from unauthorized use of drugs and alcohol to be verified by random drug testing through urinalysis or any other method chosen by the Board;

- Respondent is limited to specific nursing activities as specified by the Board and/or periodic Board review; and

- The Board institutes monitoring of Respondent's practice.

SIGNED January 11, 2011.

HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE/MEDIATOR
STATE OFFICE OF ADMINISTRATIVE HEARINGS