

DOCKET NUMBER 507-10-3528

IN THE MATTER OF  
PERMANENT CERTIFICATE  
NUMBER 738755  
ISSUED TO  
FRANCISCA MBANAJA

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BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARING



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. Thomas*  
Executive Director of the Board

OPINION AND ORDER OF THE BOARD

TO: FRANCISCA MBANAJA  
c/o FRANK SHOR, ATTORNEY AT LAW  
LAW OFFICES OF FRANK SHOR  
1620 EAST BELT LINE ROAD  
CARROLLTON, TX 75006

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 registered nursing license of Francisca Mbanaja 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. The Respondent filed exceptions to the PFD on January 27, 2011. Board Staff filed a response to the Respondent's exceptions on February 11, 2011. The ALJ issued a final letter ruling on February 14, 2011, in which he made several, minor, non-substantive changes to the PFD. The ALJ did not, however, change his recommended sanction.

The Board, after review and due consideration of the PFD, Respondent's

exceptions, Staff's response to Respondent'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, including the modifications made by the ALJ in his letter ruling of February 14, 2011, as if fully set out and separately stated herein, except for Conclusion of Law Number 5, 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 5

The Board declines to adopt Conclusion of Law Number 5 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 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). Pursuant to applicable law, the Board re-designates Conclusion of Law Number 5 as a recommendation.

IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 738755, previously issued to FRANCISCA MBANAJA, to practice nursing in the State of Texas be, and the same is hereby, REVOKED.

IT IS FURTHER ORDERED that Permanent Certificate Number 738755, previously issued to FRANCISCA MBANAJA, 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 privileges, if any, to practice nursing in the State of Texas.

Entered this 28<sup>th</sup> day of April, 2011.

TEXAS BOARD OF NURSING



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

Attachment: Proposal for Decision; Docket No. 507-10-3528 (January 12, 2011).

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

January 12, 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

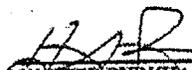
**RE: Docket No. 507-10-3528; Texas Board of Nursing v. Francisca Mbanaja**

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](http://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  
Frank Shor, Law Offices of Frank Shor, 1620 East Belt Line Road, Carrollton, TX 75006-VIA  
REGULAR MAIL

DOCKET NO. 507-10-3528

TEXAS BOARD OF NURSING

V.

FRANCISCA MBANAJA

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Board of Nursing (Staff/Board) brought this action seeking to impose disciplinary sanctions against Francisca Mbanaja (Respondent or Ms. Mbanaja) based on allegations that she failed to comply with the standards of the Nursing Practice Act.<sup>1</sup> Staff sought to revoke Ms. Mbanaja's license. The Administrative Law Judge (ALJ) finds that Staff proved the allegations against Respondent and recommends that her license be revoked.<sup>2</sup>

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 18, 2010, ALJ Hunter Burkhalter convened the hearing on the merits at the Austin office of the State Office of Administrative Hearings (SOAH). Counsel for Staff was John F. Legris. Respondent was represented by attorney Frank Shor. The hearing adjourned and the administrative record closed the same day.

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<sup>1</sup> TEX. OCC. CODE ch. 301.

<sup>2</sup> In the Formal Charges against Respondent, Staff also sought 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

Since February 20, 2007, Respondent has been licensed by the Board as a Registered Nurse (RN), holding license number 738755.<sup>3</sup>

#### 1. Ms. Mbanaja's Criminal History

Ms. Mbanaja pled guilty to and, on May 8, 2009, in Cause No. F-0701341-T, in the 283<sup>rd</sup> Judicial District Court, Dallas County, Texas, she was convicted of the first degree felony of "Medicaid fraud" in an amount exceeding \$200,000, in violation of TEX. OCC. CODE §35a.02.<sup>4</sup> The Indictment describing the crime for which she was convicted states that Ms. Mbanaja overstated:

the quantity of medical supplies provided to Medicaid patients in applications for payments under the Medicaid program, in order to permit P & F Medical Supply to receive payments under the Medicaid program that were greater than the payments that were authorized, and the value of said payments was at least \$200,000.00.<sup>5</sup>

Ms. Mbanaja was sentenced to imprisonment for a term of ten years. The sentence, however, was suspended, and she was placed on community supervision for ten years, and ordered to three days of home confinement. Ms. Mbanaja was also ordered to pay a fine of \$3,000, court costs of \$236, and restitution of \$216,875. According to the indictment, the underlying crime ended on August 1, 2006.<sup>6</sup>

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<sup>3</sup> Staff Ex. 1.

<sup>4</sup> Staff Ex. 6.

<sup>5</sup> Staff Ex. 6.

<sup>6</sup> Staff Ex. 6.

## 2. Ms. Mbanaja's Testimony

Ms. Mbanaja is 43 years old. She is unmarried and has three children between the ages of 10 and 16. She gets no financial support from the father of the children. She was born in Nigeria, and emigrated to the United States in 1996. She started attending nursing school in 2004 and graduated in 2006. She first worked as a nurse intern at Methodist Hospital in Dallas in January 2007. She became an RN in February 2007 and a charge nurse in June 2007. As a charge nurse, she had a supervisory role over other RNs. While working at the hospital, she was given an award as the "best patient care nurse."

Ms. Mbanaja quit her job at Methodist Hospital in December 2009, and has not worked as an RN since. She quit because, as a result of her fraud conviction, the federal and state governments barred her from working at any facility that deals with Medicare and Medicaid. She has never been the subject of any disciplinary action for any of her actions as a nurse.

Ms. Mbanaja testified about the circumstances behind her felony conviction. Her underlying crime took place from 2003 to 2006. During that time, she was working at a company that delivered "DME," durable medical equipment, to patients in the Dallas area. DME consists of items such as wheelchairs, canes, diapers, briefs, and liners. Ms. Mbanaja was in charge of the billing for the company. The gist of the fraud charge against her was that the company charged Medicaid for diapers and associated supplies that were not actually delivered to customers.

Ms. Mbanaja stopped working at the company prior to learning that the company was under investigation for Medicaid fraud. She stopped working there because she needed more time to study for her nursing school exams.

At the hearing, Ms. Mbanaja attempted to excuse her culpability for the fraud for which she was convicted, by contending that she simply processed the bills that were given to her, but

did not herself falsify the bills. She testified that she did the billing based on the delivery tickets that were given to her, but she did not do any investigation to determine whether the billing tickets given to her were accurate. She contended that that was not her job. Rather, "some other manager" was responsible for investigating the accuracy of the tickets.

Ms. Mbanaja also attempted to minimize the extent of the fraud. According to her, many of the diapers that were alleged to have been fraudulently charged for were, in fact, properly delivered. However, because some of the company's customers paid cash for the diapers, she lacked documentation to prove that the diapers had been delivered. Thus, she asserted that she only pled guilty to the crime because she lacked the evidence necessary to prove her innocence.

On cross-examination, it became apparent that Ms. Mbanaja's culpability for the crime was greater than she first admitted. In fact, the company where she worked, P&F Medical Supply, was actually a partnership *owned* by Ms. Mbanaja and her sister. The P and F in the company's name stands for the initials in the first names of Ms. Mbanaja and her sister. According to Ms. Mbanaja, her sister had no involvement in Medicaid billing for the company. She admitted that federal auditors determined that, during the time period from 2003 through 2006, the company had billed Medicaid for 632,606 diapers, but had only purchased 146,240 diapers.

Ms. Mbanaja remains on community supervision for the conviction until May 2019. She testified that she has been making restitution payments in compliance with her conviction order. Thus far, she has made payments totaling more than \$50,000.

Other than the conviction at issue in this case, Ms. Mbanaja has no criminal record. She acknowledged that she made a mistake with regard to her fraud conviction. Since the conviction, she testified that she is more conscious of what she does in her dealings with people. Ms. Mbanaja testified, movingly, that she loves working as an RN and she loves taking care of

patients. As she said: "If my profession is taken from me . . . a part of me will be taken from me."

Ms. Mbanaja produced a letter from Georgia Velez dated July 1, 2007. In the letter, Ms. Velez states: "Just a simple thought from me to you. I admired your HONESTY & DETERMINATION to become a nurse. Good luck to you & to your family from my family."<sup>7</sup> Ms. Mbanaja explained that she and Ms. Velez attend the same church. In the summer of 2007, Ms. Mbanaja found Ms. Velez's wallet while cleaning the church. She returned it to Ms. Velez. Ms. Velez wrote the note to Ms. Mbanaja in gratitude for her honesty regarding the wallet.

Ms. Mbanaja also produced a series of documents from her tenure as a nurse at Methodist Hospital.<sup>8</sup> These documents consist of two thank you notes from coworkers and 10 "Pat on the Back" forms completed by coworkers. The Pats on the Back are forms prepared by workers to acknowledge good work done by others. In this case, they were given to Ms. Mbanaja for various reasons. A few representative excerpts from the forms:

- "She switched her days to help with staffing issues;"
- "Great job with your admission paperwork. You are the best."
- "Great job with documentation on pt. in 5016 – keep up the good work!"
- "You are a dedicated team player!! Thanks for working on your off days"
- "She came in to work early to help out the day shift – thank you so much Franca!"
- "You are documenting pain real good and have all four elements in your assessment and reassessment."

Ms. Mbanaja's RN license was issued by the Board on February 20, 2007.<sup>9</sup> This was after the acts for which she was convicted, but prior to her conviction. Thus, the Board had no reason to be aware of her criminal activities at the time it issued her the license. Likewise, Ms. Mbanaja

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<sup>7</sup> Ex. R5 (emphasis in original).

<sup>8</sup> Ex. R6.

<sup>9</sup> Staff Ex. 1.

was not required to disclose the crime on her RN application because she had not yet been convicted of it.

### 3. Elizabeth Obiselu's Testimony

Ms. Obiselu is employed by Professional Health Care Services (PHCS) as an RN. She provides home-care visits to patients. She has been a nurse for 19 years. Ms. Obiselu has known Ms. Mbanaja since 2006. She and Mbanaja both worked at PHCS, and they are friends. During the 2007-08 time period, they would meet weekly to have "case conferences" and "share their views regarding patient care." Ms. Obiselu expressed the opinion that Ms. Mbanaja is trustworthy, caring, and a "very good nurse." She has not worked with Ms. Mbanaja since 2008.

Sometime in 2007, Ms. Mbanaja admitted to Ms. Obiselu that she had defrauded Medicaid. Ms. Obiselu maintains that Ms. Mbanaja has learned her lesson from that mistake and is now a better person. She would have no reservations about having patients, including invalid patients, receive care from Ms. Mbanaja.

### 4. Florence Eriken's Testimony

Ms. Eriken has worked as a nurse for 14 years. She and Ms. Mbanaja attend the same church, and they met at the church three years ago. She has observed Ms. Mbanaja take care of elderly church members. She has never observed Ms. Mbanaja in a work setting. Sometime in 2009, Ms. Mbanaja admitted to Ms. Eriken that she had defrauded Medicaid. Ms. Eriken would have no concerns about Ms. Mbanaja providing nursing services to patients. She stated: "When I'm sick, I just pray she takes care of me, because she's really caring."

## 5. Bonnie Cone's Testimony

Bonnie Cone testified on behalf of the Board. She is a licensed RN employed by the Board. She has extensive professional experience working as an RN.<sup>10</sup>

Staff alleges that Ms. Mbanaja'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.<sup>11</sup> Ms. Cone explained that the Board's Disciplinary Matrix directs that discipline for such violations is to be determined pursuant to the Board's "Disciplinary Guidelines for Criminal Conduct" (the Disciplinary Guidelines). Ms. Cone testified that there are also two board policies that are relevant when determining the appropriate sanction for a Subsection (b)(3) violation: the policy on Disciplinary Sanctions for Fraud, Theft, and Deception (the Fraud Policy), and the policy on Disciplinary Sanctions for Lying and Falsification (the Lying Policy). Ms. Cone offered her opinion that, as between the two policies, the Fraud Policy is more applicable to the facts of this case than the Lying Policy.

As explained by Ms. Cone, for felony convictions involving Medicaid fraud in an amount greater than \$1,500 and where the conviction order is less than four years old, the Disciplinary Guidelines prescribe the sanction as "Deny/Revoke." Therefore, Ms. Cone concluded that Ms. Mbanaja's license must be revoked. According to her, there is no "wiggle room" with regard to the sanction that must be imposed against Ms. Mbanaja. That is, it was Ms. Cone's position that the Disciplinary Guidelines *mandate* revocation in this case, and no other outcome may be considered. In his closing argument, counsel for Staff reiterated this position.

On this point, the following exchange took place between Ms. Cone and Ms. Mbanaja's counsel:

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<sup>10</sup> See also Staff Ex. 7.

<sup>11</sup> Staff Ex. 4a.

Q: Is it your testimony that because she's been convicted of a felony, Medicaid fraud in excess of \$200,000, we're done looking at this, revocation, and next case? Is that really your testimony?

A: Yes sir, it is.

She conceded that she never considered any alternative to revocation. Ms. Cone opined that the Board can rely solely on the fact that Ms. Mbanaja was convicted in order to revoke her license, and need not consider at all the various factors listed in 22 TEX. ADMIN. CODE § 213.33(c) and the Board's Disciplinary Guidelines for Criminal Conduct.

Ms. Cone acknowledged that this is the only Board disciplinary action against Ms. Mbanaja. Also, she has no evidence that Ms. Mbanaja has failed to practice nursing in accordance with the Board's standards.

#### **B. The ALJ's Analysis and Recommendation**

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. Mbanaja's felony conviction. Thus, Respondent's conviction runs afoul of Section 301.452(b)(3), thereby justifying the imposition of sanctions against her.

The ALJ rejects, however, Staff's contention that revocation is mandatory and that no additional analysis must be undertaken to determine whether revocation is warranted. For example, the Board's Fraud Policy provides: "The Board may rely solely on the conviction of a crime . . . to deny, *suspend, limit*, or revoke a license."<sup>12</sup> In other words, revocation is only the most severe of a possible range of sanctions that can be imposed upon a convicted licensee. The Fraud Policy later states: "A conviction . . . involving the criminal behaviors of fraud, theft, falsification or deception is a concern to the Board but *may not in and of itself disqualify a person*

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<sup>12</sup> Fraud Policy at 2 (emphasis added).

from licensure.”<sup>13</sup> The Fraud Policy goes on to stress three “factors related to the crime that would concern the Board the most” -- “premeditation, lack of remorse, and failure to pay restitution” – and requires evaluation of these factors “on an individual basis” in order to determine the appropriate sanction.<sup>14</sup> Additionally, Board rule 22 TEX. ADMIN. CODE § 213.33(c), and the Criminal Guidelines both list a great variety of factors that *must* be considered when assessing penalties. If, as Staff contends, all felony convictions for Medicaid fraud resulted in license revocation, then the requirements to consider the various factors listed in 22 TEX. ADMIN. CODE § 213.33(c), the Criminal Guidelines, and the Fraud Policy would be rendered meaningless.<sup>15</sup> Accordingly, it is necessary to conduct a review and analysis of the required factors.

#### 1. The Section 213.33(c) Factors

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:

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

Ms. Mbanaja’s criminal actions occurred at a time when she was not a nurse. Thus, she did not cause harm to any of her patients. Nevertheless, she caused harm in excess of \$200,000 to the public.<sup>16</sup>

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<sup>13</sup> Fraud Policy at 2 (emphasis added).

<sup>14</sup> Fraud Policy at 2.

<sup>15</sup> Additionally, over the objections of Staff, Respondent had admitted in the record copies of Agreed Orders executed between the Board and other licensees who had been convicted of felonies and who received much lighter sanctions than revocation. Resp. Exs. R3 and R4. Although these exhibits are of limited probative value in determining what the appropriate sanction should be for Ms. Mbanaja, they refute Ms. Cone’s contention that a felony conviction necessarily results in license revocation.

<sup>16</sup> The exact amount of harm is apparently \$216,875, because this is the amount of restitution she was ordered to pay.

**b. Evidence of a lack of truthfulness or trustworthiness**

The evidence on this factor is significant. Ms. Mbanaja engaged in fraudulent activities over the course of four years and in an amount involving hundreds of thousands of dollars. Additionally, her claims of innocence during the hearing were unconvincing and disingenuous. The fact is that she pled guilty and was convicted of the crime. She was also a part owner in a company that profited greatly from the crime over a period of years. Her claims that she was only the "billing person" and did not know what was going on were not credible.

**c. 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, on this point.

**d. Evidence of practice history**

There is no evidence of misbehavior by Ms. Mbanaja as a nurse.

**e. Evidence of present fitness to practice**

Besides the events at issue in this case, there is no other evidence indicating unfitness to practice.

**f. Evidence of previous violations 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 regarding Respondent.

**g. The length of time the licensee has practiced**

She has only been an RN since 2007, and has not practiced since late 2009.

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

She caused harm in excess of \$200,000 to the public.

**i. The deterrent effect of the penalty imposed**

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

**j. Attempts by the licensee to correct or stop the violation**

There is no evidence that Ms. Mbanaja made any attempt to stop the ongoing criminal enterprise. She only quit her job at P&F Medical Supply because she needed additional time to study for her nursing exams. It is unknown whether she continued to profit from the crime as an owner of the company.

**k. Any mitigating or aggravating circumstances**

Ms. Mbanaja was convicted less than two years ago and she remains on community supervision until 2019. An insufficient amount of time has passed for her to establish a successful track record of compliance with the law.

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

Because her wrongdoing did not occur in a nursing setting, system dynamics did not contribute to the problem.

**m. 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. However, the underlying felony consisted of many multiple instances of fraud occurring over a period of years.

**n. The seriousness of the violation**

Any felony conviction is a serious violation.

**o. The threat to public safety**

The commission of Medicaid fraud raises serious concerns whether similar misconduct will be repeated with respect to Ms. Mbanaja's nursing patients' property and possessions.<sup>17</sup>

**p. Evidence of good professional character**

The evidence indicates that Ms. Mbanaja has been practicing as an RN in an acceptable manner. However, she has a fairly scant work history as an RN.

**q. Any other matter that justice may require**

Ms. Mbanaja testified convincingly of her love for nursing and her ardent desire to continue in the profession. She also appears committed to turning her life around.

**2. The Disciplinary Guideline Factors**

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

- a. 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.**

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<sup>17</sup> Disciplinary Guidelines at 11.

The felony conviction is a serious one and appears to have been premeditated and carried out over multiple years.

**b. Failure to disclose criminal offense to the Board**

This is not an issue in this case.

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

She caused harm in excess of \$200,000 to the public.

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

Other than the felony, Ms. Mbanaja has no known criminal history.

**e. Conduct evidences a lack of truthfulness or trustworthiness**

The evidence on this factor is significant. Ms. Mbanaja engaged in fraudulent activities over the course of four years and in an amount involving hundreds of thousands of dollars. Additionally, her claims of innocence during the hearing were unconvincing and disingenuous. She pled guilty and was convicted of the crime. She was also a part owner in a company that profited greatly from a crime over a period of years. Her claims that she was only the "billing person" and did not know what was going on were not credible.

**f. The age of the person when the crime was committed**

Ms. Mbanaja was in her thirties at the time of her crime. The crime was not one of youthful indiscretion.

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

Slightly more than four years has elapsed since the last criminal activity.

**h. Work activity of the person before and after the criminal activity**

There is no evidence of Ms. Mbanaja's work history prior to the crime. Between February 2007 and December 2009, the evidence indicates that she performed reasonably well as an RN.

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

On the one hand, Ms. Mbanaja appeared during the hearing to be appropriately remorseful about her criminal conduct and committed to correcting her past mistakes. For example, she has regularly paid restitution for her crime. On the other hand, she testified, unconvincingly, that she was innocent of the underlying crime, indicating a failure to take responsibility for her actions.

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

Ms. Mbanaja maintained employment as an RN until December 2009, when she was forced to quit due to the terms of her conviction. Her current work status is unknown. It is unclear how she is supporting her three children.

**k. 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 letters from law enforcement personnel. The note from Ms. Velez, while personally supportive of Respondent, was not particularly helpful. The "Pats on the Back" from coworkers were moderately helpful in demonstrating that Ms. Mbanaja performed as a good team player while she worked as an RN. The testimony from Ms. Mbanaja's friends, Ms. Eriken and Ms. Obiselu, was not particularly relevant in evaluating Respondent's fitness to practice.

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

Ms. Mbanaja testified that she has, thus far, paid more than \$50,000 in restitution. This evidences a strong inclination to do the right thing. It is unclear whether she has paid the fine and court costs.

**m. 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 commission of Medicaid fraud raises serious concerns whether similar misconduct will be repeated with respect to Ms. Mbanaja's nursing patients' property and possessions.<sup>18</sup>

**n. Evidence of remorse**

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

**o. Evidence of current maturity and personal accountability**

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

**p. Evidence of having learned from past mistakes**

By making restitution payments, Ms. Mbanaja seems committed to avoiding past mistakes and acting responsibly.

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

No evidence was admitted on this point.

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

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<sup>18</sup> Disciplinary Guidelines at 11.

Ms. Mbanaja's rather short work history as an RN indicates that she is able to practice appropriately.

- s. **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**

The commission of Medicaid fraud raises serious concerns whether similar misconduct will be repeated with respect to Ms. Mbanaja's nursing patients' property and possessions.<sup>19</sup>

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

The commission of Medicaid fraud raises serious concerns whether similar misconduct will be repeated with respect to Ms. Mbanaja's nursing patients' property and possessions.<sup>20</sup>

- u. **Whether imprisonment followed a felony conviction, felony community supervision revocation, revocation of parole or revocation of mandatory supervision**

Ms. Mbanaja was not imprisoned. However, she was ordered to three days of home confinement.

- v. **Conduct that results in the revocation of probation imposed because of criminal conduct**

Not applicable.

- w. **Evidence of the licensee's safe practice**

Ms. Mbanaja's rather short work history as an RN indicates that she is able to practice appropriately.

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<sup>19</sup> Disciplinary Guidelines at 11.

<sup>20</sup> Disciplinary Guidelines at 11.

x. **Expunction, nondisclosure of criminal offense**

Not applicable.

y. **Successful completion of probation/community supervision**

Ms. Mbanaja will not complete her community supervision until 2019. However, she appears to be currently complying with the terms of her community supervision.

z. **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)**

Not applicable.

aa. **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.

3. **The Fraud Policy Factors**

As explained above, the Fraud Policy stresses consideration of three primary factors, "premeditation, lack of remorse, and failure to pay restitution," in order to determine the appropriate sanction.

a. **Premeditation**

The felony was premeditated and carried out over multiple years. It involved multiple bills fraudulently claiming the use of almost 500,000 diapers.

**b. Lack of Remorse**

The evidence on this point is mixed. On the one hand, Ms. Mbanaja appeared during the hearing to be appropriately remorseful about her criminal conduct and committed to correcting her past mistakes for, by example, paying restitution for her crime. On the other hand, she contended, unconvincingly, that she was innocent of the underlying crime, indicating a failure to take responsibility for her actions.

**c. Failure to Pay Restitution**

Ms. Mbanaja testified that she has, thus far, paid more than \$50,000 in restitution. This evidences a strong inclination to do the right thing.

Because most of the factors listed above weigh against Ms. Mbanaja, the ALJ concludes that revocation is warranted based upon the evidence in the record.

**III. FINDINGS OF FACT**

1. Francisca Mbanaja (Respondent) is a registered nurse (RN), license number 738755, and has been licensed as an RN since 2007.
2. On May 8, 2009, in the 283<sup>rd</sup> District Court of Dallas County, Texas, Respondent pled guilty to and was convicted of the first degree felony of "Medicaid fraud," TEX. OCC. CODE § 35a.02. She was sentenced to ten years' imprisonment. The prison sentence was suspended, and she was placed on community supervision for ten years, ordered to three days home confinement, and ordered to pay a fine of \$3,000 dollars, court costs of \$236, and restitution of \$216,875.
3. Respondent was not working as a nurse, nor was she licensed as an RN, at the time she committed the crimes underlying her conviction.
4. The crime underlying the felony conviction occurred during the years 2003 through 2006. During that time, Respondent was the part owner of P&F Medical Supply. The company charged Medicaid for almost 500,000 diapers and associated supplies that were not actually delivered to customers.

5. Respondent remains under community supervision for the felony conviction. The community supervision period runs until 2019.
6. Respondent has, thus far, paid more than \$50,000 in restitution.
7. It is unknown whether Respondent has paid the court-ordered fine and court costs.
8. Respondent was in her thirties at the time of the crime underlying her conviction.
9. During the hearing, Respondent attempted, unconvincingly, to downplay her culpability for the crime for which she was convicted.
10. In February 2007, the Board granted Respondent's application for an RN license.
11. Between early 2007 and late 2009, Respondent worked as an RN without adverse incident.
12. Respondent has not worked as an RN since late 2009 because her conviction order bars her from working at any facility that accepts Medicaid or Medicare.
13. Respondent's coworkers during the relatively short period when she worked as an RN describe her as a team player.
14. There is no evidence of any previous disciplinary action against Respondent by the Board.
15. On July 7, 2010, the staff of the Board (Staff) served its Notice of Hearing (NOH) on Respondent.
16. 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.
17. On November 18, 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. Counsel for Respondent was Frank Short. The hearing adjourned and the administrative record closed the same day.

#### 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. The Board has authority to discipline Respondent for violating TEX. OCC. CODE § 301.452(b)(3) by receiving a felony conviction.
5. 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 Disciplinary Guidelines for Criminal Conduct, and the Board's Disciplinary Sanctions for Fraud, Theft, and Deception, Respondent's license should be revoked.

SIGNED January 12, 2011.

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