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*Patricia P. Thomas*  
Executive Director of the Board

**DOCKET NUMBER 507-10-4467**

**IN THE MATTER OF  
PERMANENT CERTIFICATE  
NUMBER 204147  
ISSUED TO  
LAKESHIA MARIE GARDERE**

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**BEFORE THE STATE OFF  
OF  
ADMINISTRATIVE HEARIN**

**OPINION AND ORDER OF THE BOARD**

**TO: LAKESHIA MARIE GARDERE  
1500 SCOTS WOOD DRIVE  
ARLINGTON, TX 76015**

**ROY G. SCUDDAY  
ADMINISTRATIVE LAW JUDGE  
300 WEST 15TH STREET  
AUSTIN, TEXAS 78701**

At the regularly scheduled public meeting on January 27-28, 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 Lakeshia Marie Gardere with changes; and (3) Respondent's recommendation to the Board regarding the PFD and order, if any.

The Board finds that after proper and timely notice was given, the above styled case was heard by an Administrative Law Judge (ALJ) who made and filed a PFD containing the ALJ's findings of facts and conclusions of law. The PFD was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed by any party.

The Board, after review and due consideration of the PFD, Staff's recommendations, and Respondent's presentation during the open meeting, if any, adopts all of the findings of fact and conclusions of law of the ALJ contained in the PFD as if fully set out and separately stated herein, with the exception of Conclusion of Law Number 7,

which is not adopted by the Board because it is not a proper conclusion of law. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

#### Conclusion of Law Number 7

The 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 7 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 believes that disciplinary action in this matter is warranted based upon the adopted Findings of Facts and Conclusions of Law Numbers 4 and 6. The Board agrees with the ALJ that the Respondent's license should be suspended and subject to probationary stipulations. However, the ALJ erred in applying applicable law and the Board's rules, written policies, and prior administrative decisions when he recommended that the imposition of such probationary stipulations should not limit the Respondent's practice. The Board finds that the Respondent's license should be suspended, that the suspension should be fully probated, and that probationary stipulations, including those that limit the Respondent's practice, should be imposed.

The Board's Disciplinary Guidelines for Criminal Conduct initially provide for the revocation of the Respondent's license because she received a deferred adjudication order less than three years ago for a felony offense involving a false report or statement. However, the Board agrees that the mitigating factors set forth in the adopted Findings of Fact support a probated suspension of the Respondent's license instead of a license revocation. While the Board agrees that these mitigating factors support a lesser disciplinary sanction, the Board does not agree that these factors eliminate the need for probationary stipulations that limit the Respondent's practice. The Board's Disciplinary Guidelines for Fraud, Theft, and Deception provide that the minimum allowed sanction for offenses involving fraud, deceit, or deception that results in harm or potential harm to another person will be the individual's removal from practice in an independent setting, supervised practice, employer reporting, and a punitive fine. Further, 22 Tex. Admin. Code §213.33(e)(6)(E) specifically authorizes the imposition of reasonable probationary stipulations, such as supervised practice, in matters involving the suspension of a license. Finally, the imposition of these probationary stipulations are consistent with the Board's

prior administrative decisions in disciplinary matters involving similar facts. As such, the Board finds that the imposition of probationary stipulations that limit the Respondent's practice, such as supervised practice and employer reporting, are appropriate and necessary in this matter.

IT IS THEREFORE ORDERED, that Vocational Nurse License Number 204147, previously issued to LAKESHIA MARIE GARDERE, to practice vocational nursing in Texas is hereby SUSPENDED for a period of one (1) year, with the suspension STAYED and Respondent is hereby placed on PROBATION for one (1) year 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 entry of this Order, 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>.

(3) RESPONDENT SHALL pay a monetary fine in the amount of two hundred fifty dollars (\$250). RESPONDENT SHALL pay this fine within forty five (45) days of entry of this Order. Payment is to be made directly to the Texas Board of Nursing in the form of cashier's check or U.S. money order. Partial payments will not be accepted.

**IT IS FURTHER ORDERED, SHOULD RESPONDENT CHOOSE TO WORK AS A NURSE IN TEXAS, RESPONDENT WILL PROVIDE DIRECT PATIENT CARE AND PRACTICE IN A HOSPITAL, NURSING HOME, OR OTHER CLINICAL SETTING A MINIMUM OF SIXTY-FOUR (64) HOURS PER MONTH UNDER THE FOLLOWING STIPULATIONS FOR ONE (1) YEAR OF EMPLOYMENT. THE LENGTH OF THE STIPULATION PERIOD WILL BE EXTENDED UNTIL SUCH TWELVE (12) 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 STIPULATION PERIOD:**

(4) RESPONDENT SHALL notify each present employer in nursing of this Order of the Board and the stipulations 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 stipulations 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.

(5) 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.

(6) For the duration of the stipulation period, RESPONDENT SHALL be supervised by a Registered or 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 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 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 one (1) year of employment as a nurse.

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 28<sup>th</sup> day of January, 2011.

TEXAS BOARD OF NURSING

Katherine A. Thomas

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

Attachment: Proposal for Decision; Docket No. 507-10-4467 (September 28, 2010).

SOAH DOCKET NO. 507-10-4467

TEXAS BOARD OF NURSING,  
Petitioner

vs.

LAKESHIA MARIE GARDERE,  
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

Staff of the Texas Board of Nursing (Staff/Board) brought action against Lakeshia Marie Gardere (Respondent) for violating TEX. OCC. CODE ANN. (Code) § 301.452 and 22 TEX. ADMIN. CODE (TAC) § 217.12, based on Respondent's deferred adjudication for Securing Execution of a Document by Deception. The proposal for decision finds that Respondent's Licensed Vocational Nurse (LVN) license should be suspended for a period of one year, but that the suspension should be fully probated.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

The hearing convened September 21, 2010, before ALJ Roy G. Scudday in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. Staff was represented by R. Kyle Hensley, Assistant General Counsel. Respondent appeared on her own behalf. The record closed at the conclusion of the hearing.

Matters concerning notice and jurisdiction were undisputed. Those matters are set out in the Findings of Fact and Conclusions of Law.

**II. DISCUSSION**

**A. Background**

Respondent has been licensed in Texas as an LVN since 2006. On March 2, 2010, Staff sent Respondent a Notice of Formal Charges filed against her. On June 3, 2010, Staff sent Respondent its Notice of Hearing.

**B. Evidence**

Staff submitted multiple exhibits and the testimony of Bonnie Cone. Respondent testified on her own behalf.

**1. Undisputed Facts**

Respondent qualified for an LVN license in Louisiana in 2005, but was evacuated to Texas as a result of Hurricane Katrina. While in Texas, Respondent was receiving payments from the Federal Emergency Management Agency (FEMA) and food stamps from the State of Texas. On July 21, 2008, in Cause No. 1110936D in the 396<sup>th</sup> District Court of Tarrant County, Texas, Respondent entered a plea of guilty to the State Jail felony offense of Securing Execution of a Document by Deception in an amount greater than \$1,500 but less than \$20,000. Adjudication was deferred, and Respondent was placed on community supervision for a period of one year, and ordered to pay a fine of \$100 and court costs. On October 20, 2008, the period of community supervision was terminated and the charges were dismissed.<sup>1</sup>

Prior to receiving the deferred adjudication, Respondent paid \$4,070 in restitution. Respondent has worked as a hospice nurse for Allstar Hospice since July 2006. Other than the 2008 matter, Respondent has no criminal history.

**2. Respondent's Testimony**

Respondent, a 33-year-old single mother of three, testified that she pled guilty based on her attorney's advice although she had not intended to fraudulently receive food stamps. She paid the restitution in full prior to being granted deferred adjudication. She testified that she has never had any problems with the law before or since this incident; she was clearly remorseful. In addition, Respondent testified that she has never received any complaints from her supervisors or her hospice charges, and is dedicated to her work.

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<sup>1</sup> Bd. Ex. 6.

### 3. Bonnie Cone's Testimony

Ms. Cone has been a Registered Nurse for 20 years with experience in diverse areas including critical care, nurse education and regulation. As a Nurse Practicing Consultant for the Board, Ms. Cone assists the Enforcement and Legal Divisions with case reviews and testifies as an expert witness in State Office of Administrative Hearings (SOAH) hearings.

Ms. Cone testified that fraudulently securing food stamps is considered to be a crime of moral turpitude that reflects a lack of good professional character, and poses a threat to the public and the patients. She testified that, based on the Board's Disciplinary Matrix, the facts surrounding the criminal charges, and Respondent's obvious remorse, a probated suspension of Respondent's license with limitations was warranted. That sanction would preclude Respondent from practicing in an independent setting and would limit her practice to being under the supervision of a licensed LVN or Registered Nurse (RN).

### C. Analysis

Code § 301.452(b)(3) provides that a person is subject to disciplinary action for "a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude." The Board rule at 22 TAC § 213.27(b)(3) provides that one of the factors to consider in evaluating good professional character in disciplinary matters is any "conviction for a felony or for a misdemeanor involving moral turpitude or order of probation with or without an adjudication of guilt for an offense that would be a felony or misdemeanor involving moral turpitude if guilt were adjudicated." The rule at 22 TAC § 213.28(b)(4)(A)(i) lists "False Report or Statement" as being an offense that directly relates to and affects the practice of nursing.

The Disciplinary Matrix of the Board found at 22 TAC § 213.33(b) provides that discipline for placement on deferred adjudication for a felony will be reviewed under the Board's Disciplinary Guidelines for Criminal Conduct. Those Guidelines provide that, for the crime of false report or statement involved in this case, the proper sanction, if the licensee is not on felony

probation, is to issue the license with stipulations. The Guidelines set forth on page 18 the reasoning for these sanctions as follows:

Offense Against Property that involves intentionally or knowingly making a false material representation to obtain money or property. Professional character is required in nursing and the nurses must exhibit behaviors indicating honesty, accountability, trustworthiness, reliability, and integrity. Patients frequently bring valuables (medications, money, jewelry, items of sentimental value, checkbook, or credit cards) with them to a health care facility. Nurses frequently provide care in private homes and home-like settings where all of the patient's property and valuables are accessible to the nurse and there would be constant opportunity to commit similar offenses as a nurse. Fraud and intent to deceive raise serious concerns about a person's professional character and whether the nurse can be trusted to respect a patient's property/possessions.

It is clear from the Board rules and Guidelines that Respondent's deferred adjudication is a basis for a probated suspension of her license with limitations. However, as stated in the Guidelines, each case must be considered on its own merits.

Respondent's offense was the result of an apparent failure to report FEMA payments in her application for food stamps, rather than a deliberate attempt to deceive. Respondent paid the full amount of restitution and the charges against her were dismissed well before the scheduled end of the community supervision period. She has no other criminal history, nor is there any record of complaints from her supervisors or hospice charges during the four years she has worked as a hospice nurse. Her unblemished history as a hospice nurse indicates that Staff's concern that her prior offense shows an inclination to steal from her patients is misplaced. In addition, her accessibility to patients' property and possessions would not offer an opportunity to commit an offense similar to the one to which she pled guilty, which offense was in no way related to patient care or theft from patients.

### III. RECOMMENDATION

Based upon the above discussion, the ALJ recommends that Respondent's LVN license be suspended for a period of one year, but that the suspension be probated subject to such

conditions as required by the Board, which conditions should not include limitations on her practice.

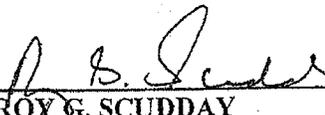
#### IV. FINDINGS OF FACT

1. Lakeshia Marie Gardere (Respondent) has been licensed as a Licensed Vocational Nurse (LVN) by the Texas Board of Nursing (Staff/Board) since 2006.
2. On March 2, 2010, Staff sent Respondent a Notice of Formal Charges filed against her.
3. On June 3, 2010, Staff mailed its Notice of Hearing to Respondent.
4. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. The hearing convened September 21, 2010, in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas.
6. On July 21, 2008, in Cause No. 1110936D in the 396<sup>th</sup> District Court of Tarrant County, Texas, Respondent entered a plea of Guilty to the State Jail felony offense of Securing Execution of a Document by Deception in an amount greater than \$1,500 but less than \$20,000. Adjudication was deferred, and Respondent was placed on community supervision for a period of one year, ordered to pay a fine of \$100 and court costs.
7. On October 20, 2008, Respondent's period of community supervision was terminated and the charges against her were dismissed.
8. Respondent paid \$4,070 of restitution prior to the deferred adjudication proceedings, and the charges against her were dismissed well before the scheduled end of the community supervision period.
9. Respondent has no other criminal history, nor is there any record of complaints from her supervisors or hospice charges during the four years she has worked as a hospice nurse.
10. Respondent's accessibility to patients' property and possessions would not offer an opportunity to commit an offense similar to the one to which she pled guilty, which offense was in no way related to patient care or theft from patients.

## V. CONCLUSIONS OF LAW

1. The Texas Board of Nursing (Board) has jurisdiction over this matter pursuant to TEX. OCC. CODE ANN. (Code) ch. 301.
2. The State Office of Administrative Hearings has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing on the merits was provided as required by Code § 301.454 and by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Respondent is subject to disciplinary action by the Board pursuant to Code § 301.452(b)(3).
5. Staff had the burden of proof by a preponderance of the evidence.
6. Based on Findings Nos. 6-10, Staff proved that Respondent's previous criminal conduct supports the probated suspension of her license pursuant to 22 TEX. ADMIN. CODE §§ 213.27 and 28.
7. Based upon Findings of Fact Nos. 6-10 and Conclusion of Law No. 6, the Board should suspend Respondent's LVN license for a period of one year, but fully probate the suspension subject to such conditions as required by the Board, which conditions should not include limitations on her practice.

SIGNED September 28, 2010.

  
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ROY G. SCUDDAY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS