BEFORE THE TEXAS BOARD OF NURSING

****

In the Matter of Registered Nurse	§	AGREED
License Number 712727	§	
issued to JESSE REMOR RODRIGUEZ	§	ORDER

TEXAS BOARD OF NURSING
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

On this day the Texas Board of Nursing, hereinafter referred to as the Bc considered the matter of JESSE REMOR RODRIGUEZ, Registered Nurse License Number 712 hereinafter referred to as Respondent.

Information received by the Board produced evidence that Respondent may have violated Section 301.452(b)(1),(9)&(10), Texas Occupations Code. Respondent waived informal proceedings, notice and hearing, and agreed to the entry of this Order offered on November 10, 2010, by Katherine A. Thomas, MN, RN, Executive Director, subject to ratification by the Board.

FINDINGS OF FACT

1. Prior to the institution of Agency proceedings, notice of the matters specified below in these Findings of Fact was served on Respondent and Respondent was given an opportunity to show compliance with all requirements of the law for retention of the license(s).

2. Respondent waived informal proceedings, notice and hearing, and agreed to the entry of this Order.

3. Respondent is currently licensed to practice professional nursing in the State of Texas.

4. Respondent received an Associate Degree in Nursing from University of Texas-Pan American, Edinburg, Texas on December 1, 2004. Respondent was licensed to practice professional nursing in the State of Texas on January 27, 2005.

5. Respondent's nursing employment history includes:

3/05-5/05	RN	McAllen Medical McAllen, Texas

Respondent's professional nursing employment history continued:

5/05-2/06	RN	Doctors Hospital at Renaissance Edinburg, Texas
3/06-4/07	RN	Vital Health Care Inc. Edinburg, Texas
5/07-Present	Unknown	

6. On January 22, 2010, Respondent was issued an Agreed Order by the Texas Board of Nursing which required him to participate in and successfully complete the Texas Peer Assistance Program for Nurses (TPAPN). A copy of the Findings of Fact, Conclusions of Law, and Agreed Order, dated January 22, 2010, is attached and incorporated by reference as a part of this Order.

7. On or about October 19, 2010, Respondent engaged in the intemperate use of Amphetamines in that he admitted that he had taken a 30-day supply of Vyvanse over the course of three to four days. Additionally, the Respondent submitted a specimen for drug screening which resulted positive for Amphetamines. Possession of Amphetamines is prohibited by Chapter 481 of the Texas Health & Safety Code (Controlled Substances Act). The use of Amphetamines by a Registered Nurse, while subject to call or duty, could impair the nurse's ability to recognize subtle signs, symptoms or changes in the patient's condition, and could impair the nurse's ability to make rational, accurate, and appropriate assessments, judgments, and decisions regarding patient care, thereby placing the patient in potential danger.

8. On or about October 19, 2010, Respondent became non-compliant with the Agreed Order issued to him by the Texas Board of Nursing on January 22, 2010. Non-compliance is the result of Respondent's failure to comply with Stipulation Number Three (3) of the Order which reads, in pertinent part: "RESPONDENT SHALL comply with all requirements of the TPAPN contract during its term." A copy of the January 22, 2010, Agreed Order, Findings of Fact and Conclusions of Law is attached and incorporated, by reference, as part of this pleading.

9. Respondent's last known date of sobriety is October 19, 2010, as indicated in Finding of Fact Number Eight (8).

10. The Board finds that there exists serious risks to public health and safety as a result of impaired nursing care due to intemperate use of controlled substances or chemical dependency.

CONCLUSIONS OF LAW

1. Pursuant to Texas Occupations Code, Sections 301.451-301.555, the Board has jurisdiction over this matter.

2. Notice was served in accordance with law.

3. The evidence received is sufficient to prove a violationof Section 301.452(b)(1),(9)&(10), Texas Occupations Code, and 22 TEX. ADMIN. CODE §217.12(1)(A),(1)(B), (4),(5),(9),(10)(A),(10)(D)&(11)(B).

4. The evidence received is sufficient cause pursuant to Section 301.452(b), Texas Occupations Code, to take disciplinary action against Registered Nurse License Number 712727, heretofore issued to JESSE REMOR RODRIGUEZ, including revocation of Respondent's license(s) to practice nursing in the State of Texas.

ORDER

IT IS THEREFORE AGREED and ORDERED, subject to ratification by the Texas Board of Nursing, that Registered Nurse License Number 712727, previously issued to JESSE REMOR RODRIGUEZ, to practice nursing in Texas is hereby SUSPENDED and said suspension is ENFORCED until Respondent completes a treatment program approved by the Board, provides documentation of successful completion, and has obtained twelve (12) consecutive months of sobriety. Any relapse prior to the completion of the twelve (12) consecutive months of sobriety will result in an extension of the enforced suspension until such twelve (12) consecutive months of sobriety and additional treatment have been attained.

IT IS FURTHER AGREED and 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 AGREED and ORDERED that while Respondent's license(s) is/are 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.

IT IS FURTHER AGREED, upon verification of successful completion of the approved treatment and twelve (12) consecutive months of sobriety as set out in this Order, the Suspension will be STAYED, and RESPONDENT will be placed on PROBATION for three (3) years with the following agreed terms of probation:

(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 pay all re-registration fees, if applicable, and RESPONDENT'S licensure status in the State of Texas will be updated to reflect the applicable conditions outlined herein.

(3) 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 <u>not</u> 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.*

(4) RESPONDENT SHALL, within one (1) year of the suspension being stayed, successfully complete the course "Sharpening Critical Thinking Skills," a 3.6 contact hour online program provided by the National Council of State Boards of Nursing (NCSBN) Learning Extension. In order to receive credit for completion of this program, RESPONDENT SHALL SUBMIT the continuing education certificate of completion for this program to the Board's office, to the attention of Monitoring. This course is to be taken in addition to any continuing education requirements the Board may have for relicensure. *Information regarding this workshop may be found at the following web address: http://ncsbn.hivelive.com/hives/a0f6f3e8a0/summary.*

(5) RESPONDENT SHALL pay a monitoring fee in the amount of five hundred dollars ($500). RESPONDENT SHALL pay this fine within forty-five (45) days of the suspension being stayed. 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 AGREED, 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) YEAR(S) 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 REGISTERED NURSE (RN) LICENSE WILL NOT APPLY TO THIS PROBATIONARY PERIOD:

(6) RESPONDENT SHALL notify all future employers in nursing of this Order of the Board and the probation conditions on RESPONDENT'S license(s). 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.

(7) 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.

(8) For the first year of employment as a nurse under this Order, RESPONDENT SHALL be directly supervised by a Registered Nurse. Direct supervision requires another 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.

(9) For the remainder of the probation period, RESPONDENT SHALL be supervised by a Registered Nurse who is on the premises. The supervising nurse is not required to be on the same unit or ward as 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.

(10) 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.

(11) 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.

(12) 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.

(13) 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) months for three (3) years of employment as a nurse.

(14) 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 an evaluation by a Board approved physician specializing in Pain Management or Psychiatry. The performing evaluator will submit a written report to the Board's office, including results of the evaluation, clinical indications for the prescriptions, and recommendations for on-going treatment within thirty (30) days from the Board's request.**

(15) 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(s) and nurse licensure compact privileges, if any, to practice nursing in the State of Texas.

(16) RESPONDENT SHALL participate in therapy with a "professional counselor" possessing credentials approved by the Board. RESPONDENT SHALL CAUSE the therapist to submit written reports, on forms provided by the Board, as to the RESPONDENT'S progress in therapy, rehabilitation and capability to safely practice professional nursing. The report must indicate whether or not the RESPONDENT'S stability is sufficient to provide direct patient care safely. Such reports are to be furnished each and every month for three (3) months. If therapy is

recommended for beyond three (3) months, the reports shall then be required at the end of each three (3) month period for the duration of the probation period, or until RESPONDENT is dismissed from therapy.

(17) 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) months. No duplications, copies, third party signatures, or any other substitutions will be accepted as evidence.

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

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RESPONDENT'S CERTIFICATION

I understand that I have the right to legal counsel prior to signing this Agreed Order. I have reviewed this Order. I neither admit nor deny the violations alleged herein. By my signature on this Order, I agree to the Findings of Fact, Conclusions of Law, Order, and any conditions of said Order, to avoid further disciplinary action in this matter. I waive judicial review of this Order. I understand that this Order is subject to ratification by the Board. When this Order is ratified, the terms of this Order become effective, and a copy will be mailed to me. I understand that if I fail to comply with all terms and conditions of this Order, I will be subject to investigation and disciplinary sanction, including revocation of my license(s) to practice nursing in the State of Texas, as a consequence of my noncompliance.

Signed this 6 day of Jan, 2011.

JESSE REMOR RODRIGUEZ, Respondent

Sworn to and subscribed before me this 6st day of Jan, 2011.

SEAL
MARICELA CASTILLO
NOTARY PUBLIC
STATE OF TEXAS
EXPIRES
6-2-2013

Notary Public in and for the State of Texas

Approved as to form and substance.

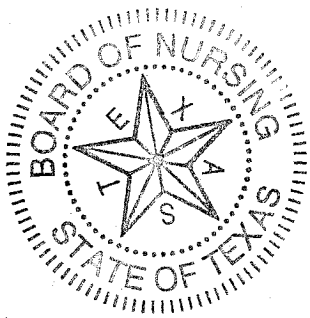
Louis Leichter, Attorney for Respondent

Signed this 6 day of Jan, 2011.

WHEREFORE, PREMISES CONSIDERED, the Texas Board of Nursing does hereby ratify and adopt the Agreed Order that was signed on the 6th day of January, 2011, by JESSE REMOR RODRIGUEZ, Registered Nurse License Number 712727, and said Order is final.

Effective this 8th day of February, 2011.

Katherine A. Thomas, MN, RN
Executive Director on behalf
of said Board



DOCKET NUMBER 507-09-3624

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE	§	
NUMBER 712727	§	OF
ISSUED TO	§	
JESSE R. RODRIGUEZ	§	ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

TO: JESSE R. RODRIGUEZ
C/O LOUIS LEICHTER
1602 EAST 7TH STREET
AUSTIN, TEXAS 78702

SHANNON KILGORE
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on January 21 - 22, 2010, the Board considered the following items: (1) The Proposal for Decision (PFD) regarding the above cited matter; (2) Staff's exceptions to the PFD; Respondent's response to Staff's exceptions to the PFD; and the Administrative Law Judge's (ALJ) decision regarding the filed exceptions and Respondent's response; (3) Staff's recommendations that the Board adopt the PFD regarding the registered nursing license of Jesse R. Rodriguez with changes; and (4) 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 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. Staff filed exceptions to the PFD on October 20, 2009. Respondent filed a response to Staff's exceptions to the PFD on November 4, 2009. On November 6, 2009, the ALJ issued a

ruling recommending no changes to the PFD. The PFD is attached hereto and incorporated herein for all purposes.

The Board, after review and due consideration of the PFD, Staff's exceptions, Respondent's response to Staff's exceptions, Staff's recommendations, and the presentation by Respondent 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. Further, all proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

Further, the Board adopts the ALJ's recommendation that the Respondent be referred to participate in the Texas Peer Assistance Program for Nurses (TPAPN). The Board declines to adopt the remainder of the ALJ's recommendation regarding the suspension of the Respondent's license, as this portion of the ALJ's recommendation does not properly apply or interpret applicable agency rules or written policies of the Board and is in conflict with prior agency decisions.

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, an agency 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. *See Texas State Board of Dental Examiners vs. Brown*, 281 S.W. 3d 692 (Tex. App. - Corpus Christi 2009, pet. filed); *Sears v. 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 v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex.1984); *Granek*

v. Tex. State Bd. of Med. Exam'rs, 172 S.W.3d 761, 781 (Tex.App.-Austin 2005, pet. denied).

Pursuant to the Board's adopted *Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or Other Substance Abuse Disorder*, in situations where the Board has determined that disciplinary action is warranted due to substance abuse, misuse, substance dependency, or other substance abuse disorders, a nurse will not be eligible to receive an unencumbered license until the nurse has successfully completed an approved treatment program and obtained twelve consecutive months of verifiable, documented sobriety, to be followed by at least three years of subsequent probationary Board monitoring. If a nurse has not obtained a consecutive twelve month period of sobriety, the Board requires the nurse's license to be suspended for at least a one year time period, in which the nurse must complete a treatment program and obtain sobriety. Further, the Board requires the nurse to undergo probationary Board monitoring for at least a three year period of time following the one year suspension period.

In this case, the ALJ recommends that the Respondent be referred to participate in TPAPN. Further, the ALJ recommends that, if the Respondent is found to be ineligible to participate in TPAPN, the Respondent's license should be suspended for a period of one year, to be followed by two years of probationary Board monitoring. The ALJ's recommendation regarding the length of time of the probationary Board monitoring following the enforced suspension does not properly apply or interpret applicable agency rules or written policies of the Board and is in conflict with prior agency decisions. As such, the Board rejects this portion of the ALJ's recommendation.

IT IS THEREFORE ORDERED THAT RESPONDENT, JESSE R. RODRIGUEZ, issued Permanent License Number 712727, shall comply with the following conditions for

such a time as is required for RESPONDENT to successfully complete TPAPN:

(1) RESPONDENT SHALL, within forty-five (45) days following the date of entry of this final Order, apply to TPAPN and SHALL, within ninety (90) days following the date of entry of this final Order, sign and execute the TPAPN participation agreement, which SHALL include payment of a non-refundable participation fee in the amount of five hundred dollars ($500.00) payable to TPAPN.

(2) Upon acceptance into the TPAPN, RESPONDENT SHALL waive confidentiality and provide a copy of the executed TPAPN participation agreement to the Texas Board of Nursing.

(3) RESPONDENT SHALL comply with all requirements of the TPAPN participation agreement during its term and SHALL keep his license to practice nursing in the State of Texas current.

(4) RESPONDENT SHALL CAUSE the TPAPN to notify the Texas Board of Nursing of any violation of the TPAPN participation agreement.

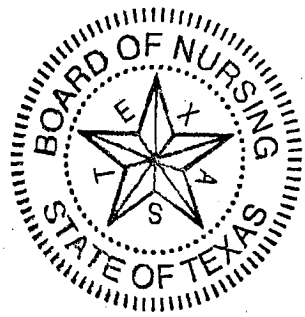
IT IS FURTHER ORDERED THAT RESPONDENT SHALL comply in all respects with the Nursing Practice Act, Texas Occupations Code, Section §§301.001 *et seq.*, the Rules and Regulations Relating to Nurse Education, Licensure and Practice, 22 TEX. ADMIN. CODE §211.1 *et seq.* and this Order.

IT IS FURTHER ORDERED that this Order SHALL be applicable to Respondent's multistate licensure 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, Respondent may not work outside the State of Texas pursuant to a multistate licensure 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.

IT IS FURTHER ORDERED, SHOULD RESPONDENT fail to comply with this Order or the terms of the participation agreement with the TPAPN, such noncompliance will result in further disciplinary action, including EMERGENCY SUSPENSION pursuant to Section 301.4551, Texas Occupations Code, or REVOCATION of Respondent's license and multistate licensure privileges, if any, to practice nursing in the State of Texas.



Entered and effective this 2nd day of January, 2010.

THE TEXAS BOARD OF NURSING

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

Attachment: Proposal for Decision; Docket No. 507-09-3624 (October 5, 2009).

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

October 5, 2009

VIA INTER-AGENCY

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

RE: Docket No. 507-09-3624; In the Matter of Certificate No. 712727 Issued to Jesse R. Rodriguez

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,

Shannon Kilgore
Administrative Law Judge

SK/ap
Enclosures
XC: R. Kyle Hensley, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – **VIA INTER-AGENCY**
Carol Pepper, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 – **VIA INTER-AGENCY**
Louis Leichter, Attorney, Law Office of Louis Leichter, 1602 East 7th Street, Austin, TX 78702 – **VIA REGULAR MAIL**

Post Office Box 13025 ◆ William P. Clements Building 300 West 15th Street, Suite 502 ◆ Austin Texas 78711-3025
Fax (512) 475-4994

SOAH DOCKET NO. 507-09-3624

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
	§	
CERTIFICATE NO. 712727	§	OF
	§	
ISSUED TO JESSE R. RODRIGUEZ	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Board of Nursing (Board) brought this case seeking disciplinary action against the respondent, Jesse R. Rodriguez, a registered nurse licensed by the Board. Staff alleges that Mr. Rodriguez is subject to discipline under the Nursing Practice Act[1] (Act) in connection with positive drug screens for benzodiazepines, marijuana, and ethyl glucuronide. After considering all the evidence, the administrative law judge (ALJ) determines that Mr. Rodriguez is subject to sanction for screening positive for an illegal drug (marijuana) in December 2006. The ALJ recommends that he be ordered to participate in an approved peer assistance program. The ALJ further recommends the Board order that, if Mr. Rodriguez is determined to be ineligible for such a peer assistance program, his license be subject to an enforced suspension with practice restrictions and stipulations, as recommended by Staff.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Jurisdiction and notice were not contested, and those matters are therefore addressed only in the Findings of Fact and Conclusions of Law below.

The hearing was held July 27-28, 2009, before ALJ Shannon Kilgore at the State Office of Administrative Hearings (SOAH). Kyle Hensley, Assistant General Counsel, represented Staff. Attorney Louis Leichter represented Mr. Rodriguez. The record closed on September 4, 2009, with the filing of final written closing arguments.

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[1] TEX. OCC. CODE ch. 301 *et seq.*

II. STAFF'S CHARGES AND APPLICABLE LAW

A. Staff's Charges

Staff alleges that Mr. Rodriguez engaged in intemperate use of the following substances on four occasions, as evidenced by positive drug screens:

- August 24, 2005 – benzodiazepines and marijuana;
- December 22, 2005 – ethyl glucuronide;
- December 28, 2006 – marijuana; and
- January 3, 2006 – ethyl glucuronide.

Staff further alleges that the use of benzodiazepines, ethyl glucuronide, and marijuana by a registered nurse, while subject to call or duty, could impair the nurse's ability to recognize subtle signs, symptoms, or changes in a patient's condition, and could impair the nurse's ability to make rational, accurate, and appropriate assessments, judgments, and decisions regarding patient care, thereby placing the patient in potential danger.

B. Applicable Law

Staff asserts Mr. Rodriguez's actions constitute grounds for disciplinary action under the following provisions of the Act and the Board's rules, which authorize sanctions against a licensee for:

- Intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient. **Act § 301.452(b)(9).**
- Unprofessional or dishonorable conduct that, in the board's opinion, is likely to deceive, defraud, or injure a patient or the public. **Act § 301.452(b)(10).**
- Carelessly failing, repeatedly failing, or exhibiting an inability to perform nursing in conformity with the standards of minimum acceptable level of nursing practice set out in Rule 217.11 (setting forth numerous nursing practice standards, such as the correct administration of treatments and medications, and the correct

documentation of patients' conditions and treatments received). **22 TEX. ADMIN. CODE § 217.12(1)(A).**

- Carelessly or repeatedly failing to conform to generally accepted nursing standards in applicable practice settings. **22 TEX. ADMIN. CODE § 217.12(1)(B).**

- Careless or repetitive conduct that may endanger a client's life, health, or safety. Actual injury to a client need not be established. **22 TEX. ADMIN. CODE § 217.12(4).**

- Inability to Practice Safely--demonstration of actual or potential inability to practice nursing with reasonable skill and safety to clients by reason of illness, use of alcohol, drugs, chemicals, or any other mood-altering substances, or as a result of any mental or physical condition. **22 TEX. ADMIN. CODE § 217.12(5).**

- Use of any controlled substance or any drug, prescribed or unprescribed, or device or alcoholic beverages while on duty or on call and to the extent that such use may impair the nurse's ability to safely conduct to the public the practice authorized by the nurse's license. **22 TEX. ADMIN. CODE § 217.12(10)(A).**

- A positive drug screen for which there is no lawful prescription. **22 TEX. ADMIN. CODE § 217.12(10)(D).**

- Violating a state or federal narcotics or controlled substance law. **22 TEX. ADMIN. CODE § 217.12(11)(B).**[2]

III. EVIDENCE

A. Overview of Staff's Evidence

Staff introduced agency licensing records showing that Mr. Rodriguez has been licensed in Texas since 2005.[3] Also in evidence are personnel records concerning Mr. Rodriguez from Doctors Hospital at Renaissance in Edinburg, Texas (Doctors Hospital);[4] lab results and related documents from the Laboratory Corporation of America and Quest Diagnostics associated with

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[2] Staff asserts that possession of benzodiazepines and marijuana is prohibited by Chapter 481 of the Texas Health and Safety Code.

[3] State's Exhibit 1.

[4] State's Exhibit 6.

drug screenings;[5] documents concerning Mr. Rodriguez from the files of the Texas Peer Assistance Program for Nurses (TPAPN);[6] Board policies relevant to the discipline of nurses;[7] and Mr. Rodriguez's May 2009 application for renewal of his nursing license.[8] In addition, Staff called four witnesses:

- Lance Presby, Ph.D., a chemist and forensic toxicologist who oversees the Quest Diagnostics toxicology laboratory in Lenexa, Kansas;
- William "Randy" Lynn, Ph.D., a chemist who directs the facility for occupational testing services of the Laboratory Corporation of America (LabCorp) in Research Triangle Park, North Carolina;
- Michael Van Doren, the program director for TPAPN; and
- Denise Benbow, RN, who is a nursing practice consultant for the Board.

B. Overview of Respondent's Evidence

Mr. Rodriguez called two witnesses: Elise Dunham Moore, a Board employee, and Diane Burell, an investigator with the Board who monitors compliance orders. In addition, Mr. Rodriguez introduced the September 2006 Substance Abuse Treatment Advisory, addressing the role of biomarkers as indicators of alcohol ingestion.

C. Charge I

Documentation from Doctors Hospital, which includes materials from Quest Diagnostics, indicates that on August 23, 2005, Mr. Rodriguez, who was employed at Doctors Hospital,

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[5] State's Exhibits 7 and 8.

[6] State's Exhibits 9 and 10. Exhibit 9, which contains documents setting forth laboratory results concerning drug screens related to Mr. Rodriguez, was admitted for the limited purpose of showing what information TPAPN had received about Mr. Rodriguez.

[7] Stare's Exhibits 11 and 12.

[8] State's Exhibit 13. This document was admitted only to the extent that it bears on the issue of what sanction, if any, is appropriate in this case.

underwent a drug screen for cause.[9] The laboratory report for the urine sample indicated positive results for benzodiazepines (lorazepam) and a marijuana metabolite.[10] The name of the laboratory on the report is Quest Diagnostics in Dallas. As a result of the positive drug screen, Mr. Rodriguez was referred to TPAPN.[11]

Dr. Presley is the lab director of the Quest Diagnostics laboratory in Lenexa, Kansas, and has been with Quest Diagnostics since 2000. He testified that the toxicology division of Quest Diagnostics performs drug tests for companies and physicians' offices around the country. He stated that Quest Diagnostics used to have a lab in Dallas, but the lab was shut down and all the functions transferred to the Lenexa lab in 2006. He noted that the laboratory procedures (for example, relating to receipt of specimens, chain of custody, confirmation tests for drugs of abuse, quality assurance and control, and reporting) that had been in place in the Dallas lab were very similar to those used now at the Lenexa lab under his direction.[12] Those procedures include steps to ensure that the specimen tested is actually the specimen provided by the customer.

Referring to the lab report for Mr. Rodriguez's August 2005 drug screen,[13] Dr. Presley explained that the customer had requested "GC/MS" confirmation on benzodiazepines and marijuana.[14] He stated that "GC/MS" stands for gas chromatography/mass spectrometry," a confirmation process approved by the federal government for identifying and quantifying drugs and drug metabolites in urine specimens. He stated that the test constitutes "proof positive"

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[9] State's Exhibit 6 at 1, 10-13, 15, 17-19. With respect to the reason for the drug screen, the Quest Diagnostics laboratory report form states, "reason for test: reasonable suspicion/cause." State's Exhibit 6 at 13. There is nothing else in evidence about the events leading to the drug screen.

[10] State's Exhibit 6 at 13.

[11] State's Exhibit 6 at 1.

[12] The Dallas lab's procedures are at State's Exhibit 8.

[13] State's Exhibit 6 at 13. The laboratory report shows results of 100 nanograms per milliliter (ng/mL) of lorazepam, and 15 ng/mL of marijuana metabolite.

[14] Dr. Presley surmised that initial screening may have been performed by the hospital, and the hospital was seeking verification of the results of the initial screening. Indeed, the hospital's documents include the results of a screening test, dated August 23, 2005, showing positive results for benzodiazepines and marijuana. State's Exhibit 6 at 16. This report states, "This is a screening test only." Because of a lack of information in the record about the source of the report and the screening methods used, it was admitted solely for the purpose of showing why the hospital sought GC/MS confirmation for benzodiazepines and marijuana.

identification of the presence of the substance in the urine. The GC/MS testing is specific enough to distinguish among different benzodiazepines. He is not aware that his lab has ever produced a false positive for marijuana.

With respect to the lab's documentation concerning Mr. Rodriguez's sample, Dr. Presley noted that the only documents in evidence are the intake form completed by the customer[15] and the final report.[16] The other internal documentation reflecting the chain of custody within the lab, he said, is housed in off-site storage and was not retrievable in time for the hearing. While he had not had an opportunity to view the chain of custody documents, and looking at them would have been helpful and would have enabled him to specifically address the handling of Mr. Rodgriguez's sample, he testified that he nonetheless had no reason to doubt that proper procedures had been followed.

Dr. Presley stated that lorazepam, also known as Atavan, generally can be found in urine two to three days after use, at the latest. He said he was not sure if a person used lorazepam, whether it could be detected in urine five days later. With respect to marijuana, Dr. Presley stated that there are various studies, one indicating that marijuana can be detected in urine 12 to 18 hours following use, and another indicating that, in chronic users, it can be detected up to one week following use.

Mr. Van Doren of TPAPN testified that it was hard to say, based on the positive drug screens, whether Mr. Rodriguez was actually impaired when the sample was taken. Mr. Van Doren also said that a person could ingest benzodiazepines or use marijuana on a Friday night, then go to work and test positive for the presence of the drug on Monday.

Ms. Benbow, a nursing consultant with the Board, stated that benzodiazepines and marijuana can impair the judgment and skills of a nurse, although she does not have knowledge about how long these substances can stay in a person's system after use. A nurse whose

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[15] State's Exhibit 6 at 12.

[16] State's Exhibit 6 at 13.

judgment is impaired, she stated, might not meet practice standards. Ms. Benbow stated that the use of marijuana, regardless of whether it affects a nurse's practice, is a violation of the Board's rules.

D. Charge II

TPAPN requested LabCorp to analyze a urine sample collected from Mr. Rodriguez on December 22, 2005.[17] Concerning the alleged positive result for ethyl glucuronide,[18] the only evidence in the record is a document from TPAPN's files purporting to show the results of testing for various substances.[19] This document, while bearing Mr. Rodriguez's name and a collection date of December 22, 2005, has no laboratory name and no information about the methodology used to analyze the specimen. Indeed, it is unclear on its face who prepared the report. Mr. Van Doren of TPAPN testified that the document is a print-out from a database managed by a company in South Carolina that had contracted with TPAPN to set up a case management system. The system's database included drug screen information about TPAPN participants entered to the database by the testing laboratories. There is no affidavit from the South Carolina company or the laboratory attesting to the authenticity of the document. The document was only admitted for the limited purpose of showing what information was provided to TPAPN, and was not admitted for its truth.

E. Charge III

Dr. Lynn, director of the LabCorp facility for occupational testing services in Research Triangle Park, North Carolina, testified with reference to a LabCorp report of testing on a urine

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[17] State's Exhibit 9 at 2.

[18] For a discussion of what ethyl glucuronide is, see the discussion of Dr. Lynn's testimony about Charge IV, below.

[19] State's Exhibit 9 at 1.

sample collected from Mr. Rodriguez on December 28, 2006.[20] The analysis was requested by TPAPN.[21] The report indicates that the sample tested positive for Cannabinoid, or marijuana.[22] It also says, "Carboxy THC GS/MS Conf." Dr. Lynn testified that Carboxy THC is the primary metabolite of marijuana. He explained that first, an initial amino assay procedure is performed. If that procedure indicates the presence of a drug above the designated cut-off concentration, then the "gold standard" GC/MS testing is performed to confirm the presence of the substance. False positives for marijuana are rare – occurring in less than about 1% of cases.

Dr. Lynn further testified that in an occasional recreational user, marijuana is detectable in urine for up to three days after use, but in a chronic user it can be detected up to two weeks (and possibly up to a month) following use. He noted that 16 ng/mL, the concentration of marijuana metabolite found in Mr. Rodriguez's sample, is a low concentration relative to some values reflected in such testing. Indeed, he stated that had the urine sample been less concentrated (*i.e.*, had the donor been better hydrated at the time of collection), the result might have been negative. Nonetheless, he stated, the test result was positive.

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[20] State's Exhibit 7 at 1-2. The report is accompanied by a chain of custody form showing that the specimen collected is the specimen received at the lab. *Id.* at 3. As to the laboratory's chain of custody protocol, the report states "Performed."

[21] State's Exhibit 9 at 6.

[22] Dr. Lynn explained that the original specimen was split, with a Bottle A and Bottle B, and the donor could have the second bottle tested at a different facility if he wished. A laboratory report from National Confederation of Professional Services in Newport News, Virginia, bears Mr. Rodriguez's name and a collection date of December 28, 2006. State's Exhibit 9 at 8. The report indicates a positive test for Carboxy THC (indicating marijuana use) through GC/MS confirmation. This appears to have been the "Bottle B." Another lab report, bearing the name of Quest Diagnostics-Philadelphia, states, "Marijuana metab retest reconfirmed. State's Exhibit 9 at 9. The collection date is also given as December 28, 2006. Mr. Rodriguez's name is written by hand on the document. This may have been a re-confirmation of the testing on the "Bottle B." However, these two test reports are part of TPAPN's files and are not accompanied by affidavits from the laboratories attesting to the genuineness of the documents. They were admitted only for the limited purpose of showing what information was provided to TPAPN, and not for their truth.

F. Charge IV

Dr. Lynn also noted that LabCorp reported a sample collected from Mr. Rodriguez on January 3, 2006, as testing positive for ethyl glucuronide (also known as ETG).[23] TPAPN had ordered this test.[24] Dr. Lynn explained that ETG is a metabolite excreted by the body following the ingestion of ethanol, or alcohol. He noted that the lab performed an initial screening test using liquid chromatography mass spectrometry, then sent the sample to United States Drug Testing Laboratories for confirmation. LabCorp's documentation stated, "After screening this specimen, the need for further testing was indicated."[25] Dr. Lynn stated that the sample was confirmed by the other lab for an ETG concentration of 10,000 ng/mL.[26] Dr. Lynn had no documents, other than the laboratory report, from United States Drug Testing Laboratories.[27]

According to Dr. Lynn, ETG levels would register as positive for three to five days following consumption of alcohol. After five days, levels would be undetectable if the ingestion had been a single event; however, in a chronic user of alcohol, levels would be detectable but below the cut-off for a positive test. Because ETG is a metabolite, a person cannot drink ETG. If a person did drink ETG, it would not make the person intoxicated. Likewise, a person cannot be "under the influence of" ETG. To Dr. Lynn, it makes no sense to say that someone "engaged in intemperate use of" ETG.

Dr. Lynn acknowledged that one of the early proponents of the ETG test has published some guidelines about the use of the ETG test, and has recommended that the ETG test be used

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[23] State's Exhibit 7 at 4-5. As to the LabCorp laboratory's chain of custody protocol, the report states "Performed."

[24] State's Exhibit 9 at 4.

[25] State's Exhibit 7 at 5.

[26] Although no laboratory report from United States Drug Testing Laboratories is in evidence, Dr. Lynn had that lab's report. Dr. Lynn testified that now, his LabCorp laboratory performs its own GC/MS confirmation testing for ETG.

[27] Dr. Lynn testified that he had the chain of custody documentation from his lab concerning the initial screening for ETG, but had no such documentation from United States Drug Testing Laboratories concerning the confirmation testing.

as a screen for alcohol consumption, but that other evidence should also be used to determine if a person has used alcohol. Dr. Lynn stated that his company now references, on its laboratory reports to customers, an advisory published by the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMSHA) concerning the use of ETG testing.[28]

Ms. Benbow testified that ETG in urine means that a person has ingested alcohol, and alcohol can impair judgment. She noted that Mr. Rodriguez had admitted to drinking in violation of his TPAPN contract. She stated that a nurse is sometimes unexpectedly called in to work.[29] However, Ms. Benbow testified that, if a nurse drank a beer on Friday night, was not on call over the weekend, and went to work on Monday, there would be no intemperate use. She acknowledged that ETG is not an illegal substance and cannot be ingested. She agreed that counsel for Mr. Rodriguez had informed Staff in 2008 that ETG was not an illegal substance, that ETG could not be intemperately used, and that Staff should amend its complaint.

G. Other Evidence, Including Evidence Relating to Sanction

In addition to the evidence relating to Staff's charges, discussed above, the record in this case includes evidence concerning Mr. Rodriguez's history with TPAPN, evidence from persons employed with the Board about disciplinary policies and practices, and Mr. Rodriguez's most recent application for renewal of his license.

TPAPN records indicate that Mr. Rodriguez entered the TPAPN program in September 2005, following the first drug screen at issue in this case.[30] As part of the terms and conditions of participation, Mr. Rodriguez agreed to undergo random drug testing and to refrain

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[28] The SAMSHA advisory is in evidence as Respondent's Exhibit 1.

[29] However, she acknowledged that a nurse, if called and requested to come to work outside of regularly scheduled work hours, could decline to do so.

[30] State's Exhibit 10 at 1-2.

from the use of all illicit substances, controlled medications, or other abuseable medications and alcohol.[31]

TPAPN case notes from September 2005, when he entered the program, indicate that Mr. Rodriguez had been under the care of a psychiatrist for years and was taking medications for depression,[32] and he also admitted to smoking marijuana at a party. A TPAPN case note from January 4, 2006, stated that Mr. Rodriguez admitted he had been "drinking with his family."[33] He made another admission of drinking on January 27, 2006.[34] At that point, TPAPN and Mr. Rodriguez's counselor recommended in-patient treatment for him; TPAPN was going to refer him to the Board if he did not agree to participate.[35] He spent several weeks in in-patient treatment in February 2006.[36] After the positive screen for marijuana in late December 2006, TPAPN terminated Mr. Rodriguez from the program and referred him to the Board.[37]

Mr. Van Doren, the program director for TPAPN, testified for Staff. He explained that TPAPN is an alternate discipline program for nurses with substance abuse or psychiatric issues that may affect their practice. He has been with TPAPN for 19 years. He further explained that, for a nurse to be accepted into the TPAPN program, the nurse must have received a positive evaluation for substance abuse or dependency. He acknowledged that, once a nurse is referred to TPAPN by a third party, the nurse must either participate in TPAPN or be referred to the Board.

Mr. Van Doren testified that Mr. Rodriguez participated in TPAPN and was required to undergo random drug tests two to three times per month, on any day of the week.

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[31] State's Exhibit 10 at 1.

[32] State's Exhibit 10 at 6. Records from Doctors Hospital include a list of Mr. Rodriguez's prescription medications in August 2005. State's Exhibit 6 at 14.

[33] State's Exhibit 10 at 8.

[34] State's Exhibit 10 at 9.

[35] State's Exhibit 10 at 9-10.

[36] State's Exhibit 10 at 10.

[37] State's Exhibit 10 at 12.

Mr. Van Doren testified that Mr. Rodriguez was taking benzodiazepines (Klonopin and Buscipone) for psychiatric diagnoses, and these medications would be of concern for his nursing practice. He noted that Mr. Rodriguez's history with TPAPN, which included admissions of drinking and positive substance screens, indicated a "relapse mode" for which he was finally discharged from the program.[38]

Ms. Benbow testified that she had considered the Board's Eligibility and Disciplinary Sanction Policy for Nurses with Substance Abuse, Misuse, Substance Dependency, or Other Substance Use Disorder (disciplinary policy);[39] Board Rule 213.29;[40] and the Board's penalty matrix[41] in fashioning a recommended sanction in this case. She recommends a one-year probated suspension of Mr. Rodriguez's license, during which time he would not be able to provide direct patient care (*i.e.*, he could only do such work as chart review). He would have to undergo treatment and maintain a full year of sobriety before being permitted to care for patients. After that first year with no direct patient care, he would have to undergo another full year of direct supervision in a restricted practice setting (with no access to controlled substances, no overtime, and no working for hospice, home health agencies, or PRN agencies). Then, he would have another full year of indirect supervision. Further, he would have to participate in support groups and random drug screens. A forensic evaluation should also, Ms. Benbow said, be part of the recommendation.

In arriving at her recommendation, Ms. Benbow said, she considered aggravating factors: Mr. Rodriguez's unsuccessful treatment and his lack of proof of sobriety. As to nurses who require long-term treatment with potentially problematic medications, she testified that they should consult with their physicians to decide if they are safe to practice, and should also consult

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[38] Mr. Van Doren also indicated that Mr. Rodgriguez admitted to having given a patient a controlled substance, in violation of Mr. Rogriguez's work agreement at the time. *See* State's Exhibit 6 at 25-27; State's Exhibit 10 at 9.

[39] State' Exhibit 11.

[40] 22 TEX. ADMIN. CODE § 213.29 (concerning intemperate use and lack of fitness in eligibility and disciplinary matters).

[41] State's Exhibit 12.

with their nurse managers so that they can watch for problems and help when dosages are changed.

Ms. Benbow indicated that it would not be reasonable to send Mr. Rodriguez back to TPAPN, since he had already failed the program once. However, she noted that the board does sometimes send nurses back through TPAPN. She also acknowledged that the Board's disciplinary policy states:

> A nurse who fails to participate in or complete the state peer assistance program for nurses and is reported to the Board for impairment in the workplace or diversion of drugs will be requested to obtain a chemical dependency evaluation from an evaluator who possesses credentials approved by the Board. . . If the person is diagnosed as chemically dependent, the nurse may be given the opportunity to enter an approved treatment facility, provide proof of verifiable, documented sobriety for the preceding twelve (12) month period, and participate in Board monitoring for at least three (3) years.[42]

She stated that, to her knowledge, Mr. Rodriguez had never been requested by Staff to undergo a chemical dependency evaluation. She agreed that there is no documentation in evidence that Mr. Rodriguez has been diagnosed by a mental health provider as having a chemical dependency disorder. Ms. Benbow stated that she had heard that some nurses participate in TPAPN only because they fear an enforcement action by the Board. She acknowledged that not everyone who tests positive in a drug screen has a problem with substance abuse, and she said that an evaluation of Mr. Rodriguez would be helpful.

Ms. Elise Moore (*née* Dunham), an investigator with the Board, was called by Mr. Rodriguez to testify. Ms. Moore had worked on Mr. Rodriguez's enforcement case. She stated that she did not request him to undergo a chemical dependency evaluation because she assumed that, since he was in TPAPN, he had a chemical dependency diagnosis. She stated that Mr. Rodriguez has never provided her with information about his sobriety or a sobriety date. With respect to suggestions that perhaps Mr. Rodriguez has a medical condition (or conditions)

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[42] State's Exhibit 11 at 2-3.

requiring the use of prescription drugs that might disqualify him from participation in TPAPN,[43] Ms. Moore testified that she has received no information from Mr. Rodriguez about any such condition – no documentation of a diagnosis, no treatment plan, no list or explanation of needed medications, and no prognosis. She said that Staff had offered Mr. Rodriguez another opportunity to participate in TPAPN, but had received no reply from him. She said that, as far as she knows, the TPAPN offer is still "on the table."

Diane Burell, an investigator with the Board who monitors all agreed orders with registered nurses who have chemical dependency issues, was also called by Mr. Rodriguez. She stated that cases involving individuals who require therapeutic but problematic medications pose a challenge for Staff. She said that she monitors the drug screens of such persons who are subject to agreed orders, looking for signs of abuse. There are, she stated, therapeutic ranges that are deemed acceptable. Sometimes, she testified, such drugs can disqualify a nurse from participation in TPAPN. When deciding how to handle a nurse who must take therapeutic drugs, Staff likes to rely on expert opinion and evaluation. Evaluations, she said, help determine whether a person needs a particular medication, what the appropriate level of use is, and whether the needed level of use would render a nurse unfit to practice. Evaluators must be approved by the Board. She has monitored orders concerning nurses who take benzodiazepines therapeutically. She is aware that nurses are sometimes given a second chance with TPAPN. She does not know whether the Board can tell TPAPN to allow a nurse who is on therapeutic medications to participate in the program.

In May 2009, Mr. Rodriguez submitted to the Board an application for renewal of his nursing license.[44] In it, he acknowledged that, within the prior five years, he had been "addicted to or treated for the use of alcohol or any other drug." He also made the following statement on his application:

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[43] Mr. Van Doren and Ms. Moore both stated that nurses participating in TPAPN may be prohibited from using some medications, even prescription drugs ordered for legitimate diagnoses.

[44] State's Exhibit 13.

> On November 3, 2007, I was arrested for driving while intoxicated. This matter is still in the courts and no ruling has been given. Despondent with a recent medical diagnosis, I drank and operated a motor vehicle. It was reckless and totally without regard for myself or others, and I am remorseful for that act. At the time, I should not have been operating a motor vehicle by neurologist's order due to difficulty with sensation and coordination related to the medical diagnosis of Transverse Myelitis.[45] Since that time, I have abstained from driving a car and from alcohol.[46]

IV. ANALYSIS AND RECOMMENDATION

A. Staff's Charges

Charge I. Staff failed to prove any basis for sanction related to this charge. First, Staff failed to prove that Mr. Rodriguez tested positive for the presence of benzodiazepines and marijuana in his urine. The alleged results of Quest Diagnostics' analysis of the sample collected on August 23, 2005, are from the files of Doctors Hospital. There is no laboratory report accompanied by an affidavit from Quest Diagnostics attesting as to the authenticity of the report. Dr. Presley did not testify that he had reviewed a laboratory copy of the report and could confirm the authenticity of the document supplied by Doctors Hospital. Indeed, he indicated that, in his testimony in this case, he was not attesting to any particular report. Without a business records affidavit from the lab or authenticating testimony from a witness with access to a laboratory copy of the report, the copy of the test in evidence is hearsay and cannot be given any weight.

Further, other than Board Rule 217.12(10)(D),[47] the statutory and regulatory provisions cited by Staff as the bases for sanction in this case require some nexus between the alleged drug

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[45] Ms. Benbow testified that tranverse myelitis is an inflammation of the myelin sheath of the spine. It can, she stated, cause muscle weakness, paralysis, and an inability to control bodily functions.

[46] Mr. Rodriguez went on to say that he was arrested for public intoxication on May 28, 2008, but that his arrest stemmed from an abnormal gait related to a medical condition, and the charge was dismissed. The order of dismissal by the criminal court is attached to the application form.

[47] 22 TEX. ADMIN. CODE § 217.12(10)(D). This rule provides that unprofessional conduct sanctionable under § 301.452(b)(10) of the Texas Occupations Code includes "a positive drug screen for which there is no lawful prescription."

use and the nurse's practice.[48] Staff offered no evidence of impairment at work or any effect on Mr. Rodriguez's practice or patients. Nor did Staff offer any evidence that Mr. Rodriguez was at work or subject to call when he allegedly used (or was under the influence of) lorazepam and marijuana. Staff therefore did not meet its burden to show that any use of lorazepam and marijuana subjects Mr. Rodriguez to sanction under Act § 301.452(b)(9) or Board Rules 217.12(1)(A)-(B), 217.12(4)-(5), or 217.10(A).[49]

Charge II. Staff failed to prove any basis for sanction related to this charge. First, there is no reliable evidence of a positive drug screen associated with the collection of a sample from Mr. Rodriguez on December 22, 2005. The only evidence in the record is the document from TPAPN's case management system showing a positive test for ETG. The document bears no laboratory name and has no information about the methodology used to analyze the specimen. There is no affidavit attesting to the authenticity of the document from the company that maintains the TPAPN case management database or from the laboratory. The document was only admitted for the limited purpose of showing what information was provided to TPAPN, and was not admitted for its truth.

Even if there were an authenticated and reliable laboratory report in evidence, there still would not be evidence of the violation of any statutory or regulatory provision as pled. First, as discussed above, Staff offered no evidence of impairment at work or any effect on Mr. Rodriguez's practice or patients. Nor did Staff offer any evidence that Mr. Rodriguez was at work or subject to call when he used (or was under the influence of) alcohol. According to Dr. Lynn, ETG levels would register as positive for three to five days following consumption of

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[48] Staff argues that the Act's definition of intemperate use does not require proof that a nurse's practice is affected by the use of alcohol or drugs. But § 301.452(b)(9) of the Act, cited by Staff in its notice of hearing as the basis for sanction concerning Mr. Rodriguez's alleged intemperate use, clearly and unambiguously requires such proof. Section 301.452(b)(9) states that a person is subject to disciplinary action for "intemperate use of alcohol or drugs that the board determines endangers or could endanger a patient."

[49] Staff also alleges that Mr. Rodriguez violated Board Rule 217.12(11)(B), which subjects a nurse to sanction if the nurse violates a state or federal controlled substance law. Although Staff alleges generally that Mr. Rodriguez violated Chapter 481 of the Texas Health and Safety Code, Staff has never specifically alleged which section of Chapter 481 was violated. The ALJ therefore does not reach the question whether this Board rule could provide an additional basis for sanction in this case.

alcohol. There is therefore no proven connection between any alcohol consumption by Mr. Rodriguez and his practice as a nurse.

Second, Staff pled that Mr. Rodriguez intemperately used ETG. All experts who testified in the hearing agreed that it is nonsensical to say that a person ingested, was intoxicated by, or intemperately used ETG. Despite ample opportunity, Staff declined to amend its pleadings to allege a provable violation. Third, it is unclear that alcohol is a "drug" for which, without a valid prescription, a positive screen is a sanctionable event; alcohol is neither illegal nor prescribable.

For these various reasons, Staff has failed to carry its burden as to Charge II.

Charge III. Staff proved that Mr. Rodriguez is subject to sanction under Board Rule 217.12(10)(D) for testing positive for marijuana with respect to a sample collected on December 28, 2006. The evidence shows that LabCorp, after following its chain of custody procedures, used GC/MS analysis to confirm the presence of Carboxy THC, the primary metabolite of marijuana. However, for the reasons discussed under Charge I above – that there is no evidence of a connection between the drug use and the nurse's practice – the ALJ finds no further statutory or regulatory bases for sanction in connection with this drug screen.

Charge IV. Staff failed to prove any basis for sanction related to this charge. There is no reliable evidence of a positive drug screen associated with the collection of a sample from Mr. Rodriguez on January 3, 2006. The only documentation in evidence of the confirmation of ETG in the sample is a lab report from LabCorp that reports the results of testing done by another lab – United States Drug Testing Laboratories. There is no documentation from United States Drug Testing Laboratories of the testing procedures it used, the results obtained, or the lab's chain of custody practice. This is insufficient proof of a positive screen.

Further, for the same reasons stated in connection with Charge II above, even if there were an authenticated and reliable laboratory report in evidence, there still would not be evidence of the violation of any statutory or regulatory provision as pled. Again, Staff offered no evidence of any relationship between Mr. Rodriguez's work and any alcohol use. The evidence

shows that person can test positive for ETG days after consumption of alcohol. Second, Staff pled that Mr. Rodriguez intemperately used ETG, which is not an understandable or provable allegation. Finally, it is unclear that alcohol is a "drug" for which, without a valid prescription, a positive screen in a sanctionable event, as alcohol is neither illegal nor prescribable.

B. Sanction

Staff seeks a three-year order against Mr. Rodriguez that requires (among other things) a full year of demonstrated sobriety before he can resume direct patient care. Mr. Rodriguez argues that he should be referred to a chemical dependency evaluator or to TPAPN.

First, the ALJ notes that, although there is no evidence of an actual diagnosis of chemical dependency or substance disorder, there is ample circumstantial evidence that Mr. Rodriguez has a problem with drugs and/or alcohol:

- in August 2005 he admitted to illegal drug (marijuana) use;
- he was a participant in TPAPN, and some kind of positive evaluation for substance abuse or dependency (although not necessarily an actual diagnosis) is a precondition for participation in the program;[50]
- while in the TPAPN program and subject to possible referral to the Board for violations of his participation agreement, he twice admitted to violating the agreement by consuming alcohol;
- he was referred to in-patient care by his counselor in the TPAPN program;
- while in the TPAPN program and subject to possible referral to the Board for violations of his participation agreement, he engaged in illegal drug (marijuana) use in December 2006; and
- he admitted to drinking and driving in November 2007.

[50] There was testimony at hearing suggesting that perhaps some nurses falsely admit to drug problems in order to be accepted into TPAPN and avoid referral to the Board. There is no evidence in the record that Mr. Rodriguez made any such false admission.

Next, the ALJ looks to the Board's penalty matrix. Under the matrix, intemperate use of alcohol or drugs by a nurse[51] who did not put patients at risk but who has a previous history of peer assistance program participation warrants one of two sanctions: Board-ordered participation in peer assistance, or license suspension for one year with various probationary stipulations thereafter. Because Mr. Rodriguez has had no previous disciplinary actions brought against him by the Board and only one basis for sanction has been proven, the less severe of the two sanctions is more appropriate.[52] He should be referred back to TPAPN for participation in peer assistance. If he is deemed ineligible for participation in TPAPN, he should be required to undergo the one-year probated suspension with stipulations, followed by further stipulations and practice restrictions, recommended by Ms. Benbow.

The ALJ notes that the Board's disciplinary policy for nurses with drug issues states that a nurse who fails to complete a peer assistance program and is reported to the Board will be requested to obtain a chemical dependency evaluation, which, if positive, will result in the nurse's being given an opportunity to participate in treatment.[53] The ALJ is unsure how this disciplinary policy meshes with the penalty matrix. Ms. Benbow indicated that she thought that a chemical dependency evaluation would be of use in this case, but did not explain how the results of an evaluation would affect the very specific three-year set of sanctions she was recommending. Mr. Rodriguez complains that he has never been requested by Staff to undergo an evaluation. However, it seems that, if he believed that an evaluation would be negative, he could at any time have obtained one and presented the results to Staff. The ALJ declines to recommend an evaluation, but notes that the Board may determine to include a requirement for an evaluation in the order in this case.

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[51] As discussed above, Staff did not prove intemperate use in this case. However, Staff did prove that Mr. Rodriguez had a positive drug screen for a drug for which there was no valid prescription, which subjects a nurse to sanction under Board Rule 217.12(10)(D). The penalty matrix offered in evidence by Staff does not include a penalty for a positive drug screen. State's Exhibit 12. Intemperate use is the violation included in the penalty matrix that most closely matches the basis for sanction proven in this case.

[52] *See* 22 TEX. ADMIN. CODE § 213.33(a).

[53] State's Exhibit 11 at 2-3.

Staff's Notice of Hearing also seeks over $1,200.00 in costs associated with the hearing. However, as Staff offered no evidence of any such costs, the ALJ has no basis to recommend their assessment against Mr. Rodriguez.

V. FINDINGS OF FACT

1. Jessie R. Rodriguez holds permanent certificate number 712727 issued by the Texas Board of Nursing (Board).

2. On April 15, 2009, the staff of the Board (Staff) sent its Notice of Hearing to Mr. Rodriguez by certified mail addressed to his attorney of record. The notice was received on April 18, 2009.

3. The Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the matters asserted.

4. The hearing on the merits was convened on July 27-28, 2009, at the State Office of Administrative Hearings (SOAH), William P. Clements Office Building, 300 West 15th Street, Austin, Texas.

5. Staff appeared at the hearing through its assistant general counsel, R. Kyle Hensley. Mr. Rodriguez appeared through his attorney, Louis Leichter. The record closed on September 4, 2009.

6. On December 28, 2006, Mr. Rodriguez provided a sample of urine that tested positive for marijuana.

7. Marijuana is an illegal drug in Texas for which there can be no valid prescription.

8. There is no evidence of impairment at work or any effect on Mr. Rodriguez's practice or patients of his marijuana use. Nor is there any evidence that Mr. Rodriguez was at work or subject to call when he used (or was under the influence of) marijuana.

9. In 2005 and 2006, Mr. Rodriguez voluntarily participated in the Texas Peer Assistance Program for Nurses (TPAPN), including in-patient treatment.

10. A positive evaluation for substance abuse or dependency (although not necessarily an actual diagnosis) is a precondition for participation in TPAPN.

11. In August 2005, Mr. Rodriguez admitted to illegal drug (marijuana) use.

12. While in the TPAPN program and subject to possible referral to the Board for violations of his participation agreement, Mr. Rodriguez twice admitted to violating the agreement by consuming alcohol.

13. Mr. Rodriguez's illegal use of marijuana in December 2006 occurred while he was in the TPAPN program and subject to possible referral to the Board for violations of his participation agreement, which prohibited him from using illegal drugs.

14. Mr. Rodriguez admitted to drinking and driving in November 2007.

15. Mr. Rogriguez has had no previous disciplinary actions brought against him by the Board.

VI. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. TEX. OCC. CODE ch. 301.

2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law. TEX. GOV'T CODE ch. 2003.

3. Proper and timely notice of the hearing was provided. TEX. GOV'T CODE ch. 2001; 22 TEX. ADMIN. CODE § 213.10.

4. A nurse is subject to discipline for unprofessional conduct likely to deceive, defraud, or injure clients or the public. TEX. OCC. CODE § 301.452(b)(10).

5. Unprofessional conduct likely to deceive, defraud, or injure clients or the public includes a nurse's having a positive drug screen for which there is no lawful prescription. 22 TEX. ADMIN. CODE § 217.12(10)(D).

6. The foregoing Findings of Fact and Conclusions of Law indicate that the Board is authorized to sanction Mr. Rodriguez.

7. Under the Board's penalty matrix, intemperate use of alcohol or drugs by a nurse who did not put patients at risk, but who has a previous history of peer assistance program participation, warrants one of two sanctions: Board-ordered participation in peer assistance, or license suspension for one year with various probationary stipulations thereafter.

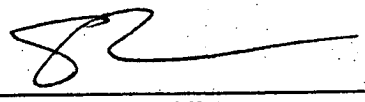
8. The following factors shall be used by SOAH when recommending a sanction and the Board in determining the appropriate penalty/sanction in disciplinary cases: (1) evidence of actual or potential harm to patients, clients, or the public; (2) evidence of a lack of truthfulness or trustworthiness; (3) 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; (4) evidence of practice history; (5) evidence of present fitness to practice; (6) evidence of previous violations or prior disciplinary history by the Board or any other health care licensing agency in Texas or another jurisdiction; (7) the length of time the licensee has practiced; (8) the actual damages, physical, economic, or otherwise, resulting from the violation; (9) the deterrent effect of the penalty imposed; (10) attempts by the licensee to correct or stop the violation; (11) any mitigating or aggravating circumstances; (12) the extent to which system dynamics in the practice setting contributed to the problem; and (13) any other matter that justice may require.

VII. RECOMMENDATION

The Board should order that Mr. Rodriguez be referred to participate in TPAPN. The Board should further order that, if Mr. Rodriguez is determined not to be eligible to participate in TPAPN, he should be subject to a one-year probated suspension of Mr. Rodriguez's license, during which time he would not be able to provide direct patient care. He would have to undergo treatment and maintain a full year of sobriety before being permitted to care for patients. After that first year with no direct patient care, he would have to undergo another full year of direct supervision in a restricted practice setting (with no access to controlled substances, no overtime, and no working for hospice, home health agencies, or PRN agencies). Then, he would have another full year of indirect supervision. Further, he would have to participate in support groups and random drug screens.

SIGNED October 5, 2009.



SHANNON KILGORE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS