



I do hereby certify this to be a complete, accurate, and true copy of the document which is on file or is of record in the offices of the Texas Board of Nursing.
Patricia P. Roman
Executive Director of the Board

CAUSE NO. C-2541-10-B

**BERNARDINO PEDRAZA, JR.,
Petitioner**

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§

IN THE DISTRICT COURT

VS.

93RD JUDICIAL DISTRICT

**TEXAS STATE BOARD OF NURSING,
Respondent**

HIDALGO COUNTY, TEXAS

ORDER

TEMPORARILY STAYING ENFORCEMENT OF ORDER REVOKING LICENSE

On this the 21 day of January, 2011 came to be considered the verified petition of BERNARDINO PEDRAZA, JR. pursuant to §301.555 of the Texas Occupations Code for an order staying the operation of order No. 507-09-1567 issued by Texas State Board of Nursing dated July 23, 2010, which order revokes the license of Petitioner to practice vocational nursing, effective on August 12, 2010; the Court having examined the evidence proffered and having heard arguments of counsel and being fully advised, as allowed by law finds that:

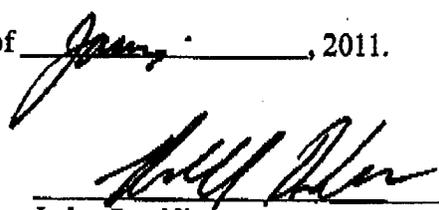
1. Immediate and irreparable loss and damage will result to Petitioner before Petitioner's application for a stay of Respondent's order revoking Petitioner's license to practice nursing can be heard on notice and has no adequate remedy at law;
2. Pending a hearing on Petitioner's application, an order should be granted to Petitioner against the Texas State Board of Nursing, temporarily staying the revocation of Petitioner's license and from enforcing its order revoking Petitioner's license;
3. A hearing on Petitioner's application for a stay of Respondent's order has been held on January 19, 2010.
4. Petitioner has a meritorious defense.

THEREFORE, IT IS ORDERED that:

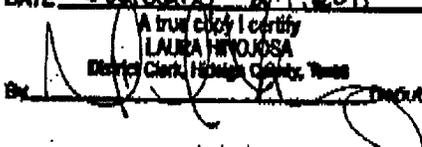
1. The Texas Board of Nursing be, and it is, temporarily stayed and enjoined from enforcing its order revoking the license of Bernardino Pedraza, Jr., Petitioner, to practice nursing, LVN; and

2. The Texas Board of Nursing shall take any and all steps to reinstate Petitioner Bernardino Pedraza, Jr., Vocational Nurse License No. 155171 as a practicing nurse, LVN and SHALL reinstate Petitioner INSTANTER; and
3. The effect of this order is to inure to all agencies having to give effect to the actions of the Texas Board of Nursing;
4. Texas State of Nursing shall refrain from making any defamatory or derogatory remarks either orally or in writing.
5. This order shall remain in effect during the pendency of this case and until further notice from the Court.
6. The bond required is set for \$100.00 U.S.D.
7. It is further Ordered that the Board is hereby responsible to send a copy of this order to all entities or individuals that received from the Board, a copy of the order revoking Petitioner's license.
8. It is further Ordered that this Order is hereby made applicable to Bernardino Pedraza's multi-state privileges, if any, to practice nursing in the State of Texas.
9. Pre-Trial shall be set for June 8, 2011 and Trial on the merits is hereby set for June 20, 2011 in the courtroom of this court. Both are set @ 9:00 Am.
10. This shall be a trial by jury on all issues of a fact.

Signed for Entry on this the 21 day of Jan, 2011.



Judge Presiding

DATE JANUARY 24 2011
A true copy I certify
LAURA WOODS
District Clerk, High Court, Texas
By  DMC/AY

cc: Raul A. Guajardo, Law Office of Raul A. Guajardo, P.L.L.C., 706 E. University Drive, Edinburg, TX 78539
Kevin Heyburn, Assistant Attorney General, Office of The Attorney General of Texas, P. O. Box 12548, Capital Station, Austin, TX 78711-2548

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ROGELIO VALDEZ

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LINDA REYNA YAÑEZ
NELDA V. RODRIGUEZ
DORI CONTRERAS GARZA
GINA M. BENAVIDES
ROSE VELA

CLERK
DORIAN E. RAMIREZ



Court of Appeals
Thirteenth District of Texas

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December 30, 2010

Hon. Kevin Heyburn
Environmental Protection and Admin. Law Div.
P.O. Box 12548
Austin, TX 78711-2548

RECEIVED

JAN 03 2011

EPAL

Re: Cause No. 13-10-00676-CV
Tr.Ct.No. C-2541-10-B
TEXAS BOARD OF NURSING
v.
BERNARDINO PEDRAZA, JR.

Dear Mr. Heyburn:

Appellant's motion for extension of time to file appellant's notice of interlocutory appeal and motion for temporary relief and emergency stay of enforcement of trial court's order in the above cause were this day GRANTED WITH ORDER by this Court. A copy of the order is enclosed.

Very truly yours,

Dorian E. Ramirez

Dorian E. Ramirez, Clerk

DER/sc
Enclosure

cc: Hon. Raul A. Guajardo
Hon. Rodolfo Delgado, Presiding Judge
Hon. Laura Hinojosa, District Clerk



NUMBER 13-10-00676-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

TEXAS BOARD OF NURSING,

APPELLANT,

v.

BERNADINO PEDRAZA, JR.,

APPELLEE.

On appeal from the 93rd District Court
of Hidalgo County, Texas.

ORDER

Before Justices Garza, Benavides, and Vela
Order Per Curiam

Appellant, Texas Board of Nursing, filed a "Motion for Extension of Time to File Appellant's Notice of Interlocutory Appeal," a "Notice of Accelerated Appeal," and a "Motion for Temporary Relief and Emergency Stay of Enforcement of Trial Court's Order" on December 17, 2010. The Court requested that appellee, Bernardino Pedraza, Jr., file a response to the motion for temporary relief and emergency stay. On December 28, 2010,

Pedraza filed a "Response to Appellant's Motion for Extension fo Time to File Appellant's Notice of Accelerated Appeal and Appellee's Objection."

The Court, having examined and fully considered the notice of accelerated appeal, the motion for extension of time to file the notice of appeal, the motion for temporary relief and stay, and the responses filed by appellee, hereby makes the following orders.

The Court GRANTS appellant's "Motion for Extension of Time to File Appellant's Notice of Interlocutory Appeal."

The Court GRANTS appellant's "Motion for Temporary Relief and Emergency Stay of Enforcement of Trial Court's Order" and STAYS the "Order Temporarily Staying Enforcement of Order Revoking License" issued by the trial court on November 12, 2010. This stay shall remain in effect pending further order of this Court, and this appeal shall proceed pursuant to the deadlines applicable in the Texas Rules of Appellate Procedure.

IT IS SO ORDERED.

PER CURIAM

Delivered and filed the
30th day of December, 2010.

FILED
IN THE 13TH COURT OF APPEALS
CORPUS CHRISTI

DEC 30 2010

Shirley S. Ramirez
CLERK

DOCKETING NUMBER 13-10-00676-CV

IN THE COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI, TEXAS

TEXAS BOARD OF NURSING,

APPELLANT

VS.

BERNARDINO PEDRAZA, JR.,

APPELLEE

**Original Proceeding Arising Out of the 93rd Judicial District Court
of Hidalgo County, Texas
Cause No. C-2541-10-B**

**APPELLEE'S, BERNARDINO PEDRAZA, RESPONSE TO APPELLANT'S
MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S NOTICE OF
ACCELERATED APPEAL AND APPELLEE'S OBJECTION**

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State Bar No. 24029214

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BERNARDINO PEDRAZA, JR.

DELIVERED

DEC 28 2010

13th COURT OF APPEALS

COPY

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ISSUES PRESENTED

- I. Did the trial court have jurisdiction to issue its order temporarily enjoining the Board's revocation of Pedraza's license?
- II. Is the decision in a contested case before a state agency final on the date the agency order overruling the motion for rehearing is rendered or on the date the motion for rehearing is overruled by operation of law.
- III. Is the temporary injunction void due to the lack of a trial date setting or a bond setting?
- IV. Is the Board the only authority to reinstate a Nursing License?
- V. Does the trial court have jurisdiction?

DOCKETING NUMBER 13-10-00676-CV

IN THE COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI, TEXAS

TEXAS BOARD OF NURSING,

APPELLANT

VS.

BERNARDINO PEDRAZA, JR.,

APPELLEE

**Original Proceeding Arising Out of the 93rd Judicial District Court
of Hidalgo County, Texas
Cause No. C-2541-10-B**

**APPELLEE'S, BERNARDINO PEDRAZA, RESPONSE TO APPELLANT'S
MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S NOTICE OF
ACCELERATED APPEAL AND APPELLEE'S OBJECTIONS**

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW Appellee, Bernardino Pedraza, and presents this his Response to Appellant's Motion for Extension of Time to File Appellant's Notice of Accelerated Appeal and Objections in the above styled and numbered cause and requests that Appellee's objections be granted and Appellant's motion be denied.

I.

OBJECTIONS

Appellee has no alternative but to object to Appellant's approach to its position. There is a procedural problem being created by utilizing two (2) separate and distinct procedural systems. First, Appellant invoked the jurisdiction of this court by its notice of appeal, (§51.014(b) of the Texas Civil Practice and Remedies Code by way of an accelerated appeal (App. I).

Irrespective of that statute, Appellant has now presented an approach invoking Rule 52 of the Texas Rules Appellate Procedure. Since the beginning, Appellant labeled its documentation as "original proceeding." Hence, ab initio, the confusion and contradiction has been incurred.

If it is an original proceeding, then the parties would have a different nomenclature, i.e., the relator, the respondent, and the real party in interest. One could wonder, what difference this would make?

Rule 52 is for the purpose of issuing a writ of habeas corpus, mandamus, prohibition, injunction, or quo warranto. This is a procedural rule.

Section 51.014 of the Texas Civil Practice and Remedies Code is a statute which specifically addresses temporary injunctions. Therefore, a court of appeals would have difficulty analyzing this fact scenario when these two (2) separate and distinct procedural vehicles are being used in combination. Texas Civil Practice and Remedies Code §51.014(b) allows the trial court to continue the trial. Therefore, in that a temporary injunction is not a final order, the trial court may vacate, modify, correct or reform its orders and judgments as

long as the court has jurisdiction and thereby has plenary power (Rule 329a of the Texas Rules of Civil Procedure).

It is Appellee's contention that this Court would find it impossible to come to a definite conclusion as long as Appellant has not elected which procedure is to be used.

II.

INTRODUCTION

This is a case in which the trial court issued a temporary injunction on the order of the Nursing Board ordering Mr. Bernardino Pedraza, Jr. to not use his license as a licensed vocational nurse (LVN) (App. II). Now, the Board is requesting this court of appeals to stay the order of the trial court which allowed Mr. Bernardino Pedraza, Jr. to practice his vocation as an LVN while the case is pending review in the trial court of the action taken by the Board.

III.

UNDERLYING FACTS

The Texas Board of Nursing (the Board) accepted an independent investigation from hospital personnel and brought an action to revoke Mr. Bernardino Pedraza, Jr.'s license as a licensed vocational nurse (LVN). Due to such unprofessional manner of conducting the investigation, the evidence adduced at the quasi-trial in front of an administrative law judge, (ALJ), did not produce the ultimate effect the Board thought should have been obtained.

By way of example, one witness could neither identify the accused nor could remember if the accused was male or female. The next one, by way of example, the witness could not accept that what she was saying to have happened and what the medical record

showed, were totally diametrically opposed. The triage nurse had written that the pain was an epigastric pain (which means it is an acute pain in the bottom part of the sternum or the upper abdomen). While at trial, she claimed she complained of a lower abdomen pain. At the time of her getting to the emergency room, she could not remember what strong medicine she had taken from Mexico; however, while at trial, she stated she had always known she had taken a weak antibiotic. The third complainant also had to testify against what the medical record stated. This was because had she agreed with the written record, the accused could not have physically been able to get to her proximity.

Based on this, the ALJ issued its ruling (App. III) and her conclusion of law which was that Bernadino Pedraza, Jr. was to receive a two year probated sentence. The part of the ruling which this lawsuit is based, was what the Board did with the Conclusion of Law No. 7. Said conclusion states in its pertinent parts a follows:

“7....the Board should suspend Respondent’s license for a period of two years with the suspension being fully probated...”

This brief discussion is being offered not of the purpose of seeking resolution to this matter. It is done solely for the purpose of giving this court the background by presenting sufficient facts so as to allow this court to have a better understanding as to why the trial court did not hesitate to sign the temporary injunction.

Without discussion and without any rationale given, the Board ruled to delete the Conclusion of Law No. 7 and thereby revoked Petitioner’s license.

The statutory law is most clear in this area. It is found in two (2) distinct places.

The Texas Government Code, §2001.058 states the following:

- (e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:
- (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection C, or prior administrative decisions.
 - (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
 - (3) that a technical error in a finding of fact should be changed .”

“The agency shall state in writing the specific reason and legal basis for a change made under this subsection.”

Another statutory mandate is found in 22 Texas Administrative Code §213.23 which states the following:

“§213.23. Decision of the Board

- (f) If the Board modifies, amends, or changes the recommendation order of the judge, an order shall be prepared reflecting the Board’s changes as stated in the record of the meeting and stating the specific reason and legal basis for the changes made according to subsection (e) of this section.
- (g) An order of the Board shall be in writing and may be signed by the executive director on behalf of the Board.
- (h) A copy of the order shall be mailed to all parties and to the party’s last known employer as a nurse.
- (i) The decision of the Board is immediate, final, and appealable upon the signing of the written order by the executive director on behalf of the Board where:
 - (1) the Board finds and states in the order that an imminent peril to the public health, safety, and welfare requires immediate effect of the order; and
 - (2) the order states if is final and effective on the date rendered.”

In the case at bar, the Board totally ignored the ALJ's conclusion of law and gave no reason for its denial. The reason given on the bottom of the order is that the Board changed the conclusion because it was a recommendation. The law does not allow recommendations only allows findings of fact and conclusions of law. Therefore, this rationale should not be allowed. No explanation was given as required by statute.

This case has now developed sufficiently in order to undergo the scrutiny of a district court. These stated facts should allow this court to be in a position to make a decision.

"The proper objective... is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction," (Rule One, Texas Rules of Civil Procedure).

ISSUE NO. ONE

Did the trial court have jurisdiction to issue its order temporarily enjoining the Board's revocation of Pedraza's license?

FACTS PERTINENT TO THIS ISSUE

Having received his orders revoking his license as an LVN, Mr. Bernardino Pedraza, Jr. sought the intervention of the district court. He filed his petition and also filed a motion for stay of order pending review.

The Board was given notice of such action and it filed an answer.

ARGUMENT AND AUTHORITIES

Beginning from the basic foundation, the legislature established the jurisdiction of

administrative agencies, Igal v. Brightstar Information Technology Group, Inc., 250 S.W. 3d 78 (Tex.2008). When reading the statutes concerning the agency's authorities, the plain and common meaning of the words is to be used, Pruett v. Harris County Bail Bond Board, 249 S.W. 3d 447 (Tex. 2008).

It is imperative to understand what is being created. An administrative agency is a creature of the Legislature, with no inherent authority of its own, (Texas National Resources Conservation Commission v. Lakeshore Utility Co., Inc.), 164 S. W. 3d 368 (Tex. 2005) (reh'g den. June 24, 2005).

The statute that controls the nursing industry is Texas Occupations Code, Chapter 301.

Specifically, §301.555 states the following:

§301.555. Appeal

- (a) A person against whom the board has taken adverse action under this chapter may appeal to a district court in the county of the person's residence or to Travis County.
- (b) The board's decision may not be enjoined or stayed except on application to the district court after notice to the board.

Therefore, the trial court may enjoin the Board while the trial is pending.

ISSUE NO. TWO

Is the decision in a contested case before a state agency final on the date the agency order overruling the motion for rehearing is rendered or on the date the motion for rehearing is overruled by operation of law.

FACTS PERTINENT TO THIS ISSUE

The Board issued its order revoking Mr. Bernardino Pedraza, Jr.'s license as an LVN

on the 23rd of July, 2010. On the 12th of August, 2010, Mr. Bernardino Pedraza, Jr. filed his motion for rehearing on the opinion and order of the Texas Board of Nursing. He then filed his original petition and application for injunction relief. His original petition not only sought to nullify the Board's order, it also sought various independent causes of action against the actions of the Board.

The basic law is that the motion for rehearing is overruled by operation of law within forty-five (45) days from the signing of the order. Also, the Board staff informed Mr. Pedraza's attorney that the Board would not meet for another three (3) months.

The temporary injunction was signed on the 12th of November, 2010. This action was taken past the forty-five (45) days for the overruling by operation of law.

On page 2 of Appellant's motion for extension of Time to file Appellant's Motion of Interlocutory Appeal, Appellant states the following:

"The Board contends that Appellee's license should remain revoked in the interest of public health and safety."

This statement does not appear in the order however, it is being argued as a matter of fact and of law. Therefore, it is most difficult to understand the Board's position and that results in Appellee's taking all precautions to avoid the greater of the damage that is unjustly being done to him.

ARGUMENT AND AUTHORITIES

The law does not require a frivolous or an idle act. The Board should have filed a plea of abatement the court should apply the same rule as stated in the premature filings of the notice of appeals (Rule 27 of the Texas Rules of Appellate Procedure).

This issue has been the concern of several cases. The basic case is, Marble Falls Indep. School Dist. Vs. Scott, 275 S.W. 3d 558 (Tex.Civ.App.-Austin 2008) (pet. denied.). There, the court gives in its dicta when an individual may seek the overturning of an administrative decision. The court stated the following:

“...citing to American Motorists Insurance Co. v. Fodge, 63 S.W. 3d 801 (Tex.2001), among others. *In Fodge*, the supreme court held:

“If a claim is not within a court’s jurisdiction, and the impediment to jurisdiction, cannot be removed, then it must be dismissed; but if the impediment to jurisdiction could be removed, then the court may abate proceedings to allow a reasonable opportunity for the jurisdictional problem to be cured”. Several cases have followed *Fodge*, holding that abatement to allow an opportunity to cure should be afforded to parties seeking judicial review of an agency’s administrative determination. See, e.g., Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 227-28 (Tex.2002) (op. on reh’g); DeSoto Wildwood Dev., Inc. v. City of Lewisville, 184 S.W.3d 814, 827 (Tex. App.-Fort Worth 2006, no pet.); In re Texas Mut. Ins. Co., 157 S.W.3d 75, 82-83 (Tex.App.-Austin 2004, orig. proceeding). However, in those cases, the appealing parties were attempting to bring common-law claims in addition to seeking judicial review of an administrative decision. Subaru of Am., 84 S.W.3d at 217 (dealer sued for motor vehicle code violations, violations of Deceptive Trade Practices Act, and breach of contract and duty of good faith and fair dealing); Fodge, 63 S.W.3d at 802-03 (insured sought workers’ compensation benefits and sued for insurance code and DTPA violations, breach of duty of good faith and fair dealings, negligence, and fraud); DeSoto Wildwood Dev., 184 S.W.3d at 819 (developer sued city for return of fees, breach of

contract, and takings); *In re Texas Mut. Ins.*, 157 S.W.3d at 77 (insured sued for breach of contract and negligence in relation to attempts to obtain worker's compensation policy.)”

In that in the case at bar, Mr. Bernadino Pedraza, Jr. plead other cases of action, he is able to remain in the suit and not be dismissed for want of jurisdiction.

Therefore, the Board's arguments that Mr. Pedraza's motion for rehearing had not been overruled by operation of law or by an order of the Board, are moot and of no legal ramification. His alleged failure to exhaust his administrative remedies would have been futile in that the Board's next meeting was going to be too late for the Board to have acted. In other words, it was only the mere passage of time requirement with no opportunity for the Board to have acted on the motions. It was a useless act to have waited the extra forty-five (45) days knowing that the Board was not meeting again until three (3) months later. This would be a futile and idle act upon which the law does not encourage.

If the Board expects for the license to be immediately revoked and remain revoked, then the order became final on July 23, 2010.

Texas Government Code

Sec. 2001.144. DECISIONS; WHEN FINAL. (a) A decision in a contested case is final:

(1) if a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing;

(2) if a motion for rehearing is filed on time; on the date:

(A) the order overruling the motion for rehearing is rendered; or

(B) the motion is overruled by operation of law;

(3) if a state agency finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a decision or order, on the date the decision is rendered; or

(4) on the date specified in the order for a case in which all parties agree to the specified date in writing or on the record, if the specified date is not before the date the order is signed or later than the 20th day after the date the order was rendered.

(b) if a decision or order is final under Subsection (a) (3), a state agency must recite in the decision or order the finding made under Subsection (a) (3) and the fact that the decision or order is final and effective on the date rendered.

Again, this is another example in which Appellee has had to cover opposing bases in that it has been impossible to identify the in test of the Board. The law here states that the order must state that the "public health, safety" is at stake.

ISSUE NO. THREE

Is the temporary injunction void due to the lack of a trial date setting or a bond setting?

FACTS PERTINENT TO THIS ISSUE

The amount of the bond and the trial setting was inadvertently left out from the temporary injunction. However, thus, error would only be fatal if it were on a contempt stage. It should be a matter of requesting another one with the proper language and with the fulfillment of the requirement of a bond. That should pose no impediment.

ARGUMENT AND AUTHORITIES

There seems to be a dicotomy of the relief being requested. The Board is asking for

this court to order the trial court not to issue a temporary injunction. The Board is attempting to guise its real request by showing that this temporary injunction is unenforceable.

Back to the basic problem: is this an original proceeding? Or, is it an accelerated appeal?

If this is an accelerated appeal, Mr. Pedraza needs to go immediately to the trial court and set up a hearing to obtain another temporary order. Texas Civil Practice and Remedies Code §51.014(b) allows the trial court to go forward with the trial proceedings. In that the trial court still has plenary power to vacate, modify, correct or reform any order, this action in the court of appeals should not impede the trial court from proceeding forward.

If this is an original proceeding, then this court will be supervising the trial court's proceedings and in essence would be taking over the role of the trial court.

Waiting for the 45 days to expire would be merely a ritual of no legal significance.

Vernon's Annotated, Rules of Civil Procedure, pocket part, 2010, states the following:

"Rule 683. Form and Scope of Injunction or Restraining Order

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.'

Dec. 5, 1983, eff. April 1, 1984.

¹ See V.T.C.A., Civil Practice and Remedies Code §51.014(b) added by Acts 1997, 75th Leg., ch. 1296, § 1, effective June 20, 1997.”

In said volume, it makes a reference to §51.014. How difficult is it to show grounds for a granting a temporary injunction? The court in *Easton v. Brash*, 277 S.W.3d 558 (Tex.Civ.App.-Houston, Dist 1-2009) to obtain a temporary injunction, applicant must plead and prove three (3) specific elements:

- (1) a cause of action against Defendant;
- (2) a probable right to relief sought; and
- (3) a probable and imminent and irreparable injury in the interim.

Therefore, in the case at bar, it is of no difficulty in fulfilling all of these elements.

As to the bond requirement, Rule 684 of the Texas Rules of Civil Procedure states the following:

“...Where the temporary restraining order or temporary injunction is against the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and is such that the State, municipality, State agency, or subdivision of the State in its governmental capacity has no pecuniary interest in the suit and no monetary damages can be shown, the bond shall be allowed in the sum fixed by the judge, and the liability of the applicant shall be for its face amount if the restraining order or temporary injunction shall be dissolved in whole or in part. The discretion of the trial court in fixing the amount of the bond shall be subject to review. Provided that under equitable circumstances and for good cause shown by affidavit or otherwise the court rendering judgment on the bond may allow recovery for less than its full face amount, the action of the court to be subject to review,” (Emphasis ours).

This rule specifically states that the bond in fixing the amount, is a subject to review.

Therefore, this rule gives the trial court the flexibility to go back and correct the deficiency.

The Board cites two (2) cases i.e., *Inter First Bank San Felipe, N.A. v. Pay*

Construction Co., 715 S.W.2d 640 (Tex. 1986) and Lancaster v. Lancaster, 291 S.W.2d 303 (Tex. 1956). However, both of these cases can not be applied as a matter of law. At the times these case occurred, §51.014 of the Texas Civil Practice and Remedies Code had not yet been made into law.

This matter is an abuse of discretion, therefore, the trial court may try again to correct any abuse and it is not a fatal blow to the trial courts jurisdiction. Therefore, the Board is back to square one, (Tanguy v. LAUX, 259 S.W.3d 851, Tex.Civ.App.-Houston[1st Dist.]2008).

ISSUE NO. FOUR

Is the Board the only authority to reinstate a Nursing License?

FACTS PERTINENT TO THIS ISSUE

The Board issued an order to revoke Mr. Pedraza's license as an LVN. He appealed and filed a lawsuit against the Board. The Court issued a temporary injunction ordering the Board to return the license temporality while pending review.

ARGUMENT AND AUTHORITIES

There are two (2) statutes governing the issuance of reinstating a license.

Texas Occupations Code

§ 301.467. Reinstatement

(a) On application, the board may reinstate a license to practice professional nursing or vocational nursing to a person whose license has been revoked, suspended, or surrendered.

(b) An application to reinstate a revoked license:

(1) may not be made before the first anniversary of the date

of the revocation; and

(2) must be made in the manner and form the board requires.

(c) If the board denies an application for reinstatement, it may set a reasonable waiting period before the application may reapply for reinstatement.

§ 301.555. Appeal

(a) A person against whom the board has taken adverse action under this chapter may appeal to a district court in the county of the person's residence or in Travis County.

(b) The board's decision may not be enjoined or stayed except an application to the district court after notice to the board.

In the case at bar, the court is not reinstating. It is merely ordering a temporary injunction on the revocation of a license.

Therefore, the Board is incorrect in stating that in the case at bar, the license is being reinstated at this time.

ISSUE NO. FIVE

Does the trial court have jurisdiction?

FACTS PERTINENT TO THIS ISSUE

On page 2 of the Board's motion for temporary relief and the motion to extend time to file notice of appeal, there is a Plea to the Jurisdiction filed in the trial court. The hearing is set for the 19th of January, 2011, (Page 2 of the motion for extension of time to file Appellants' notice of appeal).

By these documents filed by the Board, there seems to be a request for this court of appeals to rule on the plea to the jurisdiction of the trial court.

The Board is wanting to have this appeals court to order that trial court to grant the plea to the jurisdiction. There is nothing wrong to allow a little of time for a hearing on the plea to the jurisdiction. However, according to the Board's prayer, it wants for this court to decide for the trial court. If such is going to be allowed then one must close down the trial courts.

ARGUMENT AND AUTHORITIES

The problem for this court of appeals to decide is what are the compelling nuances of all of the statutes and rules surrounding the case at bar. This court does not have the flexibility that a trial court has to discover the facts. The question is, does the trial court have authority to find out on what facts is the trial court basing its decision?

If the judge takes his job seriously, said judge will want to see the facts; all of the facts and not rely on a pleading which is replete with unreliable information.

One must see the prayer in order to determine what does the one pleading really for. Here, one can see that the Board is requesting this appeal court to order the district court to grant the Plea to the Jurisdiction.

According to Rule 43.2 of the Texas Rules of Appellate Procedure, there are six (6) alternatives given to the court of appeals. None of them allow the appeals court to tell the trial court what to decide before the trial court has reached a decision.

IV.

In order for Appellee to address this matter before this Court, it is of utmost importance to have Appellant replead so that it would declare as to what it is seeking.

V.

It is incumbent to point out that the Texas Civil Practice and Remedies Code §51.014(b) states that an appeal based on §(a)(4), as is in this case, a trial in the trial court pending resolution of the appeal may not be stayed, (§51.014(b)).

WHEREFORE, PREMISES CONSIDERED, Appellee prays that this Court allow Appellant to specify its procedure or in the alternative, not grant its motion in that it is seeking an extrajudicial act not allowed by law.

Respectfully Submitted,

Law Office of Raul A. Guajardo, P.L.L.C.
706 E. University Drive
Edinburg, Texas 78539
Telephone (956) 318-3200
Fax (956) 318-3205

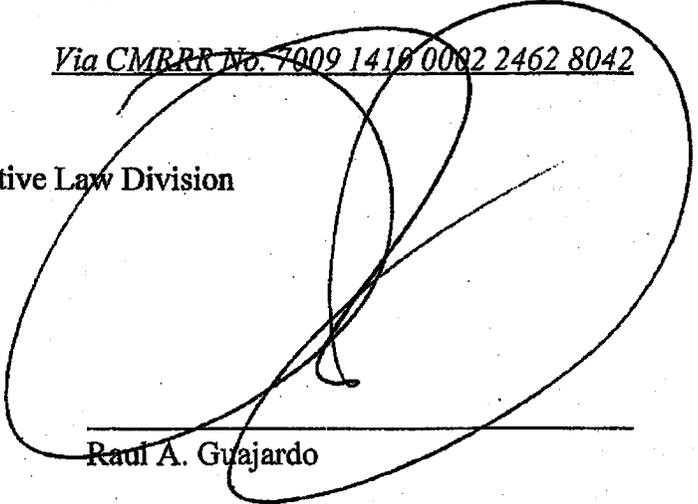
Hon. Raul A. Guajardo
State Bar No. 24029214
ATTORNEY FOR APPELLEE,
BERNARDINO PEDRAZA

CERTIFICATE OF SERVICE

I certify that on this 28th day of December, 2010 a true and correct copy of the above foregoing instrument, Response to Appellant's Motion for Extension of Time to File Appellant's Notice of Accelerated Appeal and Appellee's Objections was served to:

Kevin Heyburn
Assistant Attorney General
Office of The Attorney General of Texas
Environmental Protection and Administrative Law Division
P. O. Box 12548
Capital Station
Austin, Texas 78711-2548

Via CMBRR No. 7909 1410 0082 2462 8042

A large, stylized handwritten signature in black ink, which appears to be "Raul A. Guajardo". The signature is written over a horizontal line and extends upwards and to the left, partially overlapping the text "Via CMBRR No. 7909 1410 0082 2462 8042".

Raul A. Guajardo

DOCKETING NUMBER 13-10-00676-CV

IN THE COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI, TEXAS

TEXAS BOARD OF NURSING,

APPELLANT

VS.

BERNARDINO PEDRAZA, JR.,

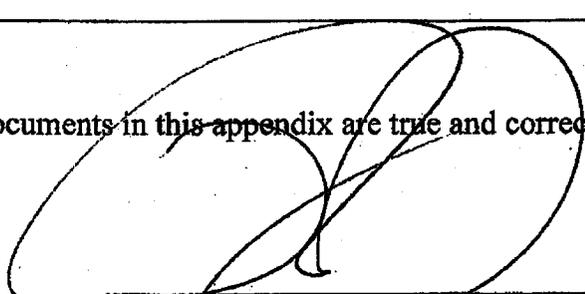
APPELLEE

**Original Proceeding Arising Out of the 93rd Judicial District Court
of Hidalgo County, Texas
Cause No. C-2541-10-B**

APPENDIX

I certify all of the copies of the documents in this appendix are true and correct.

Dated 12/22/10



RAUL A. GUAJARDO

INDEX OF APPENDIX

App. I Notice of Appeal

App. II Order Staying Enforcing Revocation Orders

App. III Order from Board Changing Conclusion of Law from ALS's Order

App. IV Appellant's Motion for Temporary Relief and Emergency Stay of Enforcement of
Trial Court's Order

CAUSE NO. C-2541-10-B

BERNARDINO PEDRAZA, JR.,
Plaintiff,

IN THE DISTRICT COURT OF

v.

HIDALGO COUNTY, TEXAS

TEXAS STATE BOARD OF
NURSING,

Defendant.

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§

93RD JUDICIAL DISTRICT

DEFENDANT TEXAS BOARD OF NURSING'S
NOTICE OF ACCELERATED APPEAL

TO THE HONORABLE COURT:

1. Defendant Texas Board of Nursing (the Board) gives notice of its intent to appeal the trial court's judgment rendered on November 12, 2010. The trial issued an Order Temporarily Staying Enforcement of Order Revoking License of the Plaintiff in this case, Bernadino Pedraza. This appeal is taken to the Thirteenth Court of Appeals in Corpus Christi, Texas.
2. This notice of an interlocutory appeal is filed within the time to file a motion for extension of time to file a notice of appeal, and a copy of the motion for an extension of time filed with the court of appeals is included with this notice of appeal. See Tex. R. App. P. 26.3, 28.2(a).
3. A copy of this notice of appeal has been served on all parties to the trial-court proceeding, and a copy of this notice has been filed in the court of appeals. See Tex. R. App. P. 25.1(e), 28.2(a), (b).

APP. I.

4. The parties to the trial-court proceeding and their trial and appellate attorneys are the following:

Kevin Heyburn
Bar No. 00790876
Assistant Attorney General
Environmental Protection and
Administrative Law Division
Office of the Attorney General of Texas
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 475-4300
(512) 320-0167 Fax.
Attorneys for Defendant/Appellant
Texas Board of Nursing

Raul A. Guajardo
Bar No. 24029214
Law Office of Raul A. Guajardo, PLLC
706 E. University Drive
Edinburg, Texas 78539
Telephone: (956) 318-3200
Facsimile: (956) 318-3205
Attorney for Plaintiff/Appellee
Bernadino Pedraza, Jr.

5. The issue presented in this appeal is whether the trial court, under the facts of this case, had jurisdiction to issue an order temporarily enjoining enforcement of the Board's order revoking Plaintiff's license, and if it did have jurisdiction, was the order issued by the trial court valid. The Board contends that the trial court did not have jurisdiction over this case, and therefore did not have jurisdiction to issue the order. However, even if the trial court did have jurisdiction, the Board contends that the trial court's order, as a temporary

injunction, is void on its face because it does not set a bond or a trial date. For the same reasons, the trial court's order, if deemed a temporary restraining order, would also be void, and would subject the trial court to a possible mandamus action unless corrected by the trial court.

6. An immediate appeal may materially advance the ultimate termination of this litigation because if the trial court lacked jurisdiction to issue the temporary injunction, then the case should be dismissed. *Tex. R. App. P. 28.2(c)(7)*; *see Tex. Civ. Prac. & Rem. Code §54.014(d)(2)*.

7. The appeal of this case is an accelerated appeal. *Tex. R. App. P. 25.1(d)(6)*.

8. A copy of the Board's Motion for Extension of Time to File Appellant's Notice of Appeal (Exhibit "A") and a copy of the order from which appeal is taken, signed on November 12, 2010, are attached. (Exhibit "B"). *Tex. R. App. P. 28.2(c)(2), (3)*.

9. If the court of appeals determines that jurisdiction has not been sufficiently demonstrated in this notice of appeal, the Board asks the Court of Appeals to order the filing of an amended notice of appeal or a brief addressing the issue of jurisdiction. *See Tex. R. App. P. 28.2(d)*.

10. The Defendant requests that the Court of Appeals stay enforcement of the trial court's order and all further trial court proceedings pending resolution of this interlocutory appeal. *See Tex. Civ. Prac. & Rem. Code §51.014(e)*; *Tex. R. App. P. 28.2(f)*.

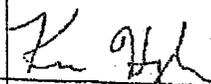
Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

BARBARA B. DEANE
Chief, Environmental Protection
and Administrative Law Division



KEVIN HEYBURN
Assistant Attorney General
Environmental Protection and
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Bar No. 00790876
P. O. Box 12548, Capitol Station
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(512) 475-4300
(512) 320-0167 Fax.
Attorneys for Defendant

DOCKET NUMBER 507-09-1567

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 155171
ISSUED TO
BERNARDINO PEDRAZA, JR.

§
§
§
§
§

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

TO: BERNARDINO PEDRAZA, JR.
C/O RAUL GUAJARDO
LAW OFFICE OF RAUL GUAJARDO
706 E. UNIVERSITY DRIVE
EDINBURG, TX 78539

AMI L. LARSON
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on July 22-23, 2010, 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 Bernardino Pedraza, Jr. 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. Both Staff and the Respondent timely filed exceptions to the PFD. The ALJ issued a ruling on May 21, 2010, declining to make any changes to the PFD based upon the filed exceptions.

The Texas Board of Nursing, after review and due consideration of the PFD, Staff's

App. II.

exceptions, Respondent's exceptions, Staff's recommendations, and Respondent's presentation during the open meeting, if any, adopts all of the findings of fact and conclusions of law of the ALJ contained in the PFD as if fully set out and separately stated herein, with the exception that Conclusion of Law Number 7 is re-designated as a recommendation.* All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 155171, previously issued to BERNARDINO PEDRAZA, JR., to practice nursing in the State of Texas be, and the same is hereby, REVOKED.

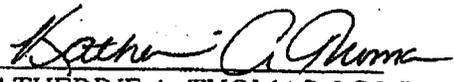
IT IS FURTHER ORDERED that Permanent Certificate Number 155171, previously issued to BERNARDINO PEDRAZA, JR., upon receipt of this Order, be immediately delivered to the office of the Texas Board of Nursing.

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



Entered this 2nd day of July, 2010.

TEXAS BOARD OF NURSING


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

Attachment: Proposal for Decision; Docket No. 507-09-1567 (April 12, 2010).

* This re-designation is authorized under the Government Code §2001.058(e). Authority is also found in *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).

V. FINDINGS OF FACT

1. Bernadino Pedraza (Respondent), is licensed as a vocational nurse and holds License Number 155171 issued by the Texas Board of Nursing (Board).
2. On October 3, 2006, Board Staff (Staff) sent Respondent notice that it had filed Formal Charges against Respondent. On December 10, 2008, Staff sent Respondent its First Amended Formal Charges and Notice of Hearing.
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 held on August 7, 2009, before Administrative Law Judge (ALJ) Ami L. Larson, at the McAllen Municipal Court Building, 1601 N. Bicentennial, McAllen, Hidalgo County, Texas. All parties appeared and participated in the hearing. The record closed at the conclusion of the hearing on that date.
5. Respondent has worked as a Licensed Vocational Nurse for 14 years and was employed at Knapp Medical Center, in Westlaco Texas, between August 2004 and July 2006.
6. On or about August 24, 2004, while working as a LVN at Knapp Medical Center emergency room, Respondent treated the minor son of B.S. While in the exam room with B.S., Respondent pulled B.S.'s bra strap and patted her on the buttocks.
7. B.S. reported the incident to hospital personnel and issued a written statement shortly after the incident occurred.
8. B.S. was upset and disgusted by Respondent's behavior.
9. On November 4, 2004, while working as a LVN in the emergency room of Knapp Medical Center, Respondent treated the minor child of O.C. While in the exam room with O.C., Respondent touched her exposed underwear.
10. O.C. was upset by Respondent's conduct.
11. Respondent was suspended for three days as the result of his behavior toward O.C.
12. On July 4, 2006, J.M., who has worked as a registered nurse for 22 years, sought treatment at the emergency room of Knapp Medical Center and presented there with sharp abdominal pain and difficulty urinating.

APP. III

13. J.M. was first seen in the emergency room by a triage nurse, who asked her questions, took her blood pressure, and directed her to return to the waiting room.
14. The triage nurse documented that J.M. had epigastric pain, and noted that she had patent airway, clear lungs and regular circulation. She also documented that J.M. was alert and that her skin was warm and dry. The triage nurse did not indicate that J.M. had any chest pain, breast pain, difficulty breathing, or cardiac issues.
15. Respondent conducted a full breast exam of J.M. and asked her whether she had breast implants or nipple discharge.
16. Respondent rubbed J.M.'s sternum back and forth with his hand.
17. J.M. did not report any chest pain, breast pain, or difficulty breathing to anyone at Knapp Medical Center on July 4, 2006.
18. Respondent admitted conducting an exam of Respondent's chest above and below her breasts.
19. Respondent did not document anything about Respondent having any chest, breast, or flank pain in his nursing notes and did not document having done any exam of her chest area.
20. It was not medically necessary for Respondent to perform a breast exam of J.M. or to otherwise palpate her chest or sternum.
21. Before administering an injection into the upper quadrant of J.M.'s gluteal muscle, Respondent pulled her underwear down to expose her entire buttock, which was farther than was necessary to administer the injection.
22. Respondent's actions made J.M. feel humiliated and uncomfortable because she was exposed, and she knew his actions were not necessary.
23. Respondent was alert and aware of Respondent's behavior toward her.
24. J.M. underwent a laproscopic appendectomy on July 5, 2006.
25. On July 6, 2006, J.M. reported Respondent's conduct to hospital personnel, who met with her and made a written report of J.M.'s complaint.
26. Respondent was terminated from Knapp Medical Center as a result of J.M.'s report in combination with the prior reports from B.S. and O.C.
27. Board Staff did not file an emergency action to suspend Respondent's vocational nursing license in response to J.M.'s allegations.

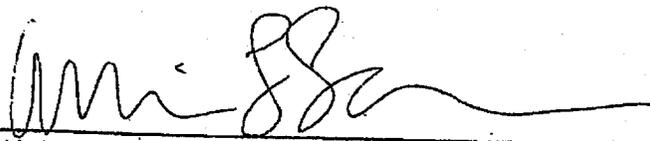
28. Respondent has been employed by Herlinda Salazar as a home health care nurse for her business, Healing Angel Health Care, since 2004.
29. Ms. Salazar is very happy with Respondent's work, as are his current patients.
30. Ms. Salazar would like to continue to employ Respondent and would ensure that his work is supervised at all times if required by the Board.
31. Respondent has not been previously sanctioned by the Board.
32. Staff offered no evidence in support of the imposition of the administrative costs of this proceeding.
33. Respondent poses a low risk of reoffense and, with counseling and monitoring, can conform his behavior to the standards of professional nursing practice.

VI. 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 formal charges and 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. Staff had the burden of proving the case by a preponderance of the evidence.
5. Based on the above Findings of Fact and Conclusions of Law, Respondent engaged in unprofessional conduct and violated the minimum standards of nursing practice by failing to recognize and maintain professional boundaries of the nurse-client relationship contrary to 22 TEX. ADMIN. CODE (TAC) §§ 239.11(22), (23), and (27)(L), 217.11(1)(B) and (J), and 217.12 (6)(C), (D), and (E).
6. Based on the above Findings of Fact and Conclusions of Law, Respondent is subject to disciplinary action by the Board pursuant to Code § 301.452(b)(10) and (13).

7. Based upon the above Findings of Fact and Conclusions of Law, and the factors for consideration of sanctions set forth in 22 TAC § 213.33, and Code § 301.4531 the Board should suspend Respondent's license for a period of two years with the suspension being fully probated subject to terms and conditions established by the Board.
8. Based upon the above Findings of Fact and Conclusions of Law, administrative costs of this proceeding should not be imposed on Respondent.

SIGNED April 12, 2010.



AMI L. LARSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

COPY

No. _____

IN THE THIRTEENTH COURT OF APPEALS
AT CORPUS CHRISTI, TEXAS

Texas Board of Nursing
Appellant

v.

Bernadino Pedraza, Jr.
Appellee

Original Proceeding Arising Out of the 93rd Judicial District
Court of Hidalgo County, Texas; Cause No. C-2541-10-B
The Honorable Rudolfo "Rudy" Delgado, Presiding.

**APPELLANT'S MOTION FOR TEMPORARY RELIEF AND
EMERGENCY STAY OF ENFORCEMENT OF TRIAL COURT'S ORDER**

TO THE HONORABLE JUSTICES OF THE THIRTEENTH COURT OF APPEALS:

Appellant, the Texas Board of Nursing, asks this Court to grant temporary relief by granting an emergency stay of the November 12, 2010 Order Temporarily Staying Enforcement of Order Revoking License issued by the 93rd district court, pending this Court's consideration of the Appellant's Appeal.

A. Introduction

Appellant is the Texas Board of Nursing (the Board), the defendant in the underlying proceeding. The Appellee is Bernadino Pedraza, Jr., the plaintiff in the underlying proceeding.

The Board filed its Notice of Appeal and now subsequently files this Motion for Temporary Relief and Emergency Stay of Enforcement of the trial court's Order.

APP-10

Counsel for Appellant attaches a certificate of compliance certifying that on December 16, 2010, he notified Appellee, by telephone and/or fax that a Motion for Temporary Relief and Emergency Stay of Trial Court Order would be filed.

Tex. R. App. P. 52.10(a).

B. Argument & Authorities

The Court may grant temporary relief pending its determination of an original proceeding. Tex. R. App. P. 52.10(b).

^{sup} # 1 The trial court lacked jurisdiction to issue its Order temporarily enjoining the Board from enforcing the board's revocation of Pedraza's license. (Exhibit A) The

Board previously argued that the trial court did not have jurisdiction to issue its Order in the Board's First Amended Original Answer and Plea to the Jurisdiction. (Exhibit B) The

Board has exclusive jurisdiction to determine the eligibility of nurses to practice in Texas.

At the time Pedraza filed his lawsuit, the Board had not issued a final order in this case.

Consequently Pedraza had not exhausted his administrative remedies at the Board.

^{sup} # 2 A decision in a contested case before a state agency is final on the date the agency order overruling the motion for rehearing is rendered or on the date the motion for

rehearing is overruled by operation of law. Tex. Gov't Code § 2001.144. In Section V of

his Original Petition, Pedraza acknowledged that he filed his Motion for Rehearing with the Board on August 12, 2010 and that Board action was pending on that motion at the

time he filed this lawsuit. Indeed he filed his Original Petition with the trial court

(Exhibit C) and his Motion for Rehearing with the Board (Exhibit D) on the same day.

When Pedraza filed his lawsuit, the Board still had jurisdiction over his case.

Pedraza's Motion for Rehearing had neither been overruled by an order of the Board or by operation of law. Pedraza's failure to exhaust his administrative remedies at the Board prior to seeking judicial review deprived the trial court of jurisdiction over Pedraza's lawsuit. *See Marble Falls Indep. Sch. Dist. v. Scott*, 275 S.W.3d 558, 568 (Tex. App.—Austin 2008, *pet. denied*) (Failure of a school district to satisfy the jurisdictional prerequisite of awaiting for a final agency decision before filing suit resulted in a lack of jurisdiction in the trial court that could not be cured.) Consequently the trial court lacked jurisdiction over Pedraza's case and therefore should not have issued its Order against the Board.

Even if the trial court had jurisdiction over the case, the trial court erred by issuing an order that is void as a temporary injunction. The Order is void as a temporary

3 injunction because it does not set the case for trial on the merits or set a bond. The Texas Rules of Civil Procedure require that an order granting a temporary injunction set the cause for trial on the merits and fix the amount of security to be given by the applicant.

See Tex. R. Civ. P. 683, 684. These procedural requirements are mandatory, and an order granting a temporary injunction that does not meet them is subject to being declared void and dissolved. *See InterFirst Bank San Felipe, N.A. v. Paz Constr. Co.*, 715 S.W.2d 640, 641 (Tex. 1986) (stating that requirements of Rule 683 are mandatory and must be strictly followed). Furthermore a temporary injunction is void when there was no bond. *See Lancaster v. Lancaster*, 155 Tex. 528, 291 S.W.2d 303, 308 (1956) (holding that bond

provisions of Rule 684 are mandatory).

Finally, the trial court exceeded its jurisdiction by ordering the reinstatement of Pedraza's license, an action that only the Board can take. Only the Board has the authority to reinstate a nursing license. Texas Occupations Code §301.467.

In summary, the trial court's Order should not remain in effect during this Court's review of this appeal. The trial court did not have jurisdiction to issue the Order. Furthermore the Order is void on its face because it sets no trial date or bond and because it improperly ordered reinstatement of Pedraza's license.

C. Conclusion

This Court should enter an Order granting an emergency stay of enforcement of the trial court's Order Temporarily Staying Enforcement of Order Revoking License while this Court determines whether the trial court had jurisdiction to issue the Order and whether the Order is void on its face.

PRAYER

For the reasons stated in this Motion, the Appellant Texas Board of Nursing asks the Court to grant its Motion for Temporary Relief and Emergency Stay of Enforcement of the trial court's Order while this Court completes its consideration of the the Board's Appeal.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DOCKET NUMBER 507-09-1567

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 155171
ISSUED TO
BERNARDINO PEDRAZA, JR.

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BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

OPINION AND ORDER OF THE BOARD

TO:

BERNARDINO PEDRAZA, JR.
C/O RAUL GUAJARDO
LAW OFFICE OF RAUL GUAJARDO
706 E. UNIVERSITY DRIVE
EDINBURG, TX 78539

AMI L. LARSON
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on July 22-23, 2010, 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 Bernardino Pedraza, Jr. 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. Both Staff and the Respondent timely filed exceptions to the PFD. The ALJ issued a ruling on May 21, 2010, declining to make any changes to the PFD based upon the filed exceptions.

The Texas Board of Nursing, after review and due consideration of the PFD, Staff's

exceptions, Respondent's exceptions, Staff's recommendations, and Respondent's presentation during the open meeting, if any, adopts all of the findings of fact and conclusions of law of the ALJ contained in the PFD as if fully set out and separately stated herein, with the exception that Conclusion of Law Number 7 is re-designated as a recommendation.* All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 155171, previously issued to BERNARDINO PEDRAZA, JR., to practice nursing in the State of Texas be, and the same is hereby, REVOKED.

IT IS FURTHER ORDERED that Permanent Certificate Number 155171, previously issued to BERNARDINO PEDRAZA, JR., upon receipt of this Order, be immediately delivered to the office of the Texas Board of Nursing.

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



Entered this 23rd day of July, 2010.

TEXAS BOARD OF NURSING

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

Attachment: Proposal for Decision; Docket No. 507-09-1567 (April 12, 2010).

* This re-designation is authorized under the Government Code §2001.058(e). Authority is also found in *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).

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 12, 2010

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. 507-09-1567; Bernadino Pedraza, Jr.

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,

A handwritten signature in black ink, appearing to read "Ami L. Larson".

Ami L. Larson
Administrative Law Judge

ALL/ds
Enclosures

XC: R. Kyle Hensley, Staff Attorney TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - VIA INTER-AGENCY
Dina Flores, Legal Assistant TBN, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - (with 2 CD(s); Certified Evidentiary Record) - VIA INTER-AGENCY
Raul Guajardo, Law Office of Raul Guajardo, 706 E. University Drive, Edinburg, TX 78539 VIA REGULAR MAIL

SOAH DOCKET NO. 507-09-1567

IN THE MATTER OF PERMANENT § BEFORE THE STATE OFFICE
 CERTIFICATE NO. 155171 §
 ISSUED TO § OF
 §
 BERNADINO PEDRAZA, JR. § ADMINISTRATIVE HEARINGS

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PROPOSAL FOR DECISION

Staff of the Texas Board of Nursing (Staff/Board) brought this action against Bernadino Pedraza, Jr., (Respondent) to revoke his vocational nursing license pursuant to the Nursing Practice Act¹ and the Board's rules.² Staff alleged that Respondent violated the Board's rules by engaging in sexually inappropriate contact with three women³ and by performing a comprehensive exam of a patient that exceeded his qualifications. Staff alleged that the alleged conduct occurred in 2004 and 2006, while Respondent was employed as a Licensed Vocational Nurse (LVN) at Knapp Medical Center in Weslaco, Texas.

The Administrative Law Judge (ALJ) finds that the preponderance of the evidence establishes that Respondent violated the Board's rules and is, therefore, subject to disciplinary sanctions. However, based on the evidence presented, the ALJ does not recommend revocation of Respondent's LVN license. Instead, the ALJ recommends that the Board suspend Respondent's LVN license for a period of two years, and that the suspension be fully probated, subject to Respondent's compliance with terms and conditions established by the Board.

Staff also sought to impose the costs of the proceedings against Respondent, but offered no evidence regarding this issue. Accordingly, the ALJ does not recommend that the Board assess those costs against Respondent.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing convened August 7, 2009, before ALJ Ami L. Larson at the McAllen Municipal Court Building, 1601 N. Bicentennial, McAllen, Hidalgo County, Texas. Staff was represented by R. Kyle Hensley, Assistant General Counsel. Respondent appeared and was

¹ TEX. OCC. CODE (Code) ch. 301 *et seq.*

² 22 TEX. ADMIN. CODE (TAC) ch. 211 *et seq.*

³ The women are identified only by their initials in this Proposal consistent with Staff's complaint and in an effort to protect their privacy.

represented by attorney Raul Guajardo. The record closed on February 12, 2010, at the conclusion of the briefing schedule established by the ALJ.⁴

Matters concerning notice were not disputed and are set out in the Findings of Fact and Conclusions of Law. On May 27, 2009, Respondent filed a Motion to Dismiss for Want of Jurisdiction. Staff filed a written response on May 28, 2009. On June 29, 2009, the ALJ issued an order denying Respondent's motion.⁵

II. APPLICABLE LAW

LVNs are subject to disciplinary action by the Board, including license suspension or revocation,⁶ for engaging in unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public.⁷ Additionally, the Board may take disciplinary action against an LVN who fails to care adequately for a patient or conform to the minimum standards of acceptable nursing practice in a manner that, in the Board's opinion, exposes a patient or other person unnecessarily to a risk of harm.⁸

The Board's rules have defined unprofessional conduct for which LVNs may be disciplined to include: causing or permitting physical, emotional, or verbal abuse or injury or neglect to the client or the public;⁹ violating professional boundaries of the nurse/client relationship including physical, sexual, or emotional exploitation;¹⁰ or engaging in sexual conduct with a client, touching a client in a sexual manner, or requesting or offering sexual favors by language or suggestive behavior.¹¹

⁴ No briefs were filed other than Staff's initial closing brief, which was filed and faxed to Respondent on December 29, 2009.

⁵ Order No. 10, signed June 29, 2009.

⁶ Code § 301.453(a).

⁷ Code § 301.452(10).

⁸ Code § 301.452(13).

⁹ 22 TAC § 217.12(6)(C).

¹⁰ 22 TAC § 217.12(6)(D).

¹¹ 22 TAC § 217.12(6)(E).

The Board's prior rules, in effect until September 28, 2004,¹² similarly defined unprofessional conduct to include: knowingly causing or permitting physical or emotional injury to any person,¹³ engaging in sexual contact with a patient/client;¹⁴ or physically or emotionally exploiting a patient/client.¹⁵

The Board's rules also provide for disciplinary sanctions against LVNs who fail to conform to the minimum standards of acceptable nursing practice, regardless of whether actual injury to any person was sustained. These minimum standards require that LVNs recognize and maintain professional boundaries of the nurse-client relationship,¹⁶ and that they implement measures to promote a safe environment for clients and others.¹⁷

The Board is required to adopt a schedule of disciplinary sanctions to ensure that the severity of sanctions imposed is appropriate to the type of violation or conduct that is the basis for disciplinary action.¹⁸ In determining the appropriate disciplinary action, the Board is required to consider whether previous disciplinary action has been imposed, whether multiple violations were committed, the seriousness of the violation(s), the threat to public safety, and any mitigating factors.¹⁹ A history of disciplinary action or the commission of multiple violations may warrant the imposition of more severe sanctions, including license revocation.²⁰ The Board's rules set forth additional factors to be considered by the Board in determining appropriate sanctions, including:

- 1) evidence of actual or potential harm to patients, clients, or the public;
- 2) evidence of a lack of truthfulness or trustworthiness;

¹² Applicable to the allegations made by B.S. from August 2004.

¹³ 22 TAC § 239.11(22).

¹⁴ 22 TAC § 239.11(22).

¹⁵ 22 TAC § 239.11(23).

¹⁶ 22 TAC § 217.11(1)(J) (effective September 28, 2004); 22 TAC § 239.11(27(L)) (effective until September 28, 2004).

¹⁷ 22 TAC § 217.11(1)(B). (effective beginning September 28, 2004).

¹⁸ Code § 301.4531(a).

¹⁹ Code § 301.4531(b).

²⁰ Code § 301.4531(c).

- 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.²¹

III. SUMMARY OF ALLEGATIONS AND EVIDENCE²²

Staff made multiple allegations against Respondent concerning his interactions with three women while he was working as an LVN at Knapp Medical Center in Weslaco, Texas, in 2004 and 2006.²³

A. B.S.²⁴

1. Allegations

Staff alleged that, on August 24, 2004, while working as an LVN, Respondent violated the Board's rules with respect to his interactions with B.S., the mother of a minor patient. Specifically, Staff alleged that Respondent looked at B.S.'s breasts, pulled her bra strap, and tapped her on the

²¹ 22 TAC § 213.33.

²² This is not an exhaustive description of all evidence presented, but rather a summary of the relevant evidence that the ALJ found to be significant in making the findings, conclusions, and recommendations contained in this Proposal for Decision.

²³ The hearing on the merits was based on the allegations set forth in Staff's First Amended Formal Charges. Staff's Exhs. 3A and 4.

²⁴ Staff's First Amended Formal Charges refers to this person as V.S. Apparently, that is a typographical error since the evidence demonstrates that her initials are B.S.

buttocks. Staff further alleged that Respondent's conduct caused emotional harm to B.S., and that his behavior constitutes grounds for the Board to take disciplinary action against Respondent.²⁵

2. Evidence

a. B.S.'s Account

B.S. testified at the hearing and also submitted a written statement dated August 24, 2004,²⁶ to personnel at Knapp Medical Center about Respondent's interactions with her at the Knapp Medical Center emergency room on August 24, 2004.²⁷

1) Written Statement

B.S. issued a written statement the day after the events she complained of took place.²⁸ According to her written statement, B.S. brought her 16-year-old son to the emergency room on the evening of August 23, 2004, and, while she and her son were waiting in an exam room to be evaluated by a doctor, Respondent entered and exited the room at various times. At one point, Respondent stood against a cabinet and looked at B.S.'s breast. The doctor then entered the exam room, evaluated her son, and instructed Respondent to apply a half-splint. At that point, the doctor and Respondent left the room. When Respondent returned with supplies, he asked B.S. if she would help him apply the half-splint, which she did. After that, Respondent applied an ace bandage to B.S.'s son and left the room, informing B.S. that he would return with discharge instructions.

When Respondent returned, he asked her to get up from the chair in which she was sitting to sign the discharge papers. B.S. stated that her son was lying in the bed with a baseball cap on his face at that time. She indicated that, when she got up to sign the discharge papers, Respondent

²⁵ Code § 301.452(b)(10) and (13); 22 TAC § 239.11(22),(23), and (27)(L).

²⁶ Staff's Exh. 6, page 1.

²⁷ The record is unclear about whether the events underlying Staff's allegations concerning B.S. occurred on August 22, 23, or 24, 2004. Staff alleges that the conduct occurred on or about August 24, 2004, however, and the exact date is not consequential to the claims, defenses, or ultimate determination in this matter, based on the totality of the evidence presented.

²⁸ The statement is dated August 24, 2004, and refers to events that took place the preceding night.

“grabbed my bra strap and pulled it a little and then gently let it go.” She reported that she then said “excuse me” and “pulled away with an expression on my face.” B.S. recounted in her statement that Respondent then looked at her and smiled, at which point her son looked up and said, “what?” B.S. told her son that they should go and, as she helped him into a wheel chair and pulled the room curtain open, Respondent “tapped me on my butt twice as I walked out of the room.”

B.S.’s written statement further indicated that, as she was leaving the trauma room with her son, she saw the hospital “house supervisor” walking up the hallway and she pointed out Respondent to him, and asked what Respondent’s name was. The supervisor then told her Respondent’s name and asked her what had happened. B.S. told the house supervisor what had occurred, and he advised her to write a report and call in the morning.²⁹ B.S. also noted in her written statement that Respondent referred to her as “mamita.”

2) Testimony

At the hearing, B.S. testified that she was employed at Knapp Medical Center, and had worked there for the past eleven years. In August 2004, she was working as a wound care specialist, and she currently works as a Certified Nurse’s Assistant.

B.S. testified that, on the evening of August 24, 2004, she took her son, who was approximately 14-years-old,³⁰ to the emergency room at Knapp Medical Center because he had dislocated his shoulder while playing football.

She stated that she knew Respondent was an employee at Knapp, and she had seen him in the halls before, but had never spoken to him prior to that evening. After she and her son went through the triage process, they were assigned to a room at the back of the emergency department. The room to which they were assigned had both a glass door and a curtain.

²⁹ B.S.’s written statement has several names completely redacted, making it impossible for the ALJ to determine the people mentioned, including the person B.S. was advised to call.

³⁰ B.S.’s testified that her son had been 16, but in her written statement indicated that he had been about 14 years old.

Upon entering the room, her son lay on the bed and was assessed and positioned by a nurse other than Respondent, in preparation for the conscious sedation technique used to treat her son's dislocated shoulder. After that nurse left, Respondent entered the room and asked if everything was okay. B.S. testified that she said "yes" and, as she was standing at the foot of her son's bed, Respondent came over to her, stood on her left side, and adjusted her bra strap by picking it up, moving it, and letting it go. She stated that "you could actually hear the little snap."

B.S. testified that she was wearing a big T-shirt and warm-up pants at that time, as she always did after finishing work. She denied, however, that her bra strap was showing or that she ever asked Respondent to adjust her bra strap. B.S. testified that she believed Respondent's behavior was not appropriate from a nurse and that it made her feel very uncomfortable. B.S. testified that she was very upset, angry, and disgusted by Respondent's behavior.

According to B.S., after Respondent snapped her bra strap, she jerked back and said, "what the 'F' are you doing," at which point her son, who was lying on the bed, looked at her and asked what had happened. B.S. told him that nothing had happened and that it would be okay, and Respondent then left the room.

When her son was ready to be discharged, a nurse other than Respondent gave them their prescriptions and discharge forms, which B.S. signed. Then Respondent re-entered the room with a wheelchair and indicated to the other nurse that he would take over and handle the situation.

B.S. stated that, since she worked at Knapp and knew the procedures there, she took it upon herself to get her son and leave. As she was putting her son into the wheelchair, Respondent was holding the wheelchair arm. She testified that, as she bent over to help her son get out of bed and into the wheelchair, "I got three taps on my butt." B.S. denied the possibility that Respondent was trying to help her or that he put his hand on her lower back, hip or thigh, rather than her buttocks. She also denied ever asking Respondent to do that or engaging in any banter or flirting with Respondent. She stated that Respondent's behavior toward her was not welcome.

As she was leaving the room, B.S. saw the house supervisor coming around the corner. She testified that she told him, "Bernie just adjusted my bra strap and, as I was leaving right now with my son, he tapped me, you know, on my butt three times." She then told the house supervisor to "handle it" because she had to take her son home.

B.S. did not initially mention anything at the hearing about Respondent looking at her breasts, but when asked by Staff whether that had occurred, she said "at one time, I believe his eyes did go down" and that they stopped mid-torso. She testified that it made her uncomfortable, but she could not recall whether it had occurred before or after Respondent snapped her bra strap and tapped her bottom. Staff also asked B.S. whether Respondent called her "mamita" that night, but she testified that she could not recall.

B.S. stated that there were several nurses in her son's room that evening at various times, including a Phillipino nurse. She denied, however, that any of the other nurses looked like Respondent and stated that she knew it was Respondent, and not the other nurses, who had touched her bra and buttocks. She testified that Respondent was wearing a name tag that night, which said, "Bernie Pedraza, LVN."

A couple of days later, B.S. was "called in to risk management" at the hospital and asked what had happened. She explained what had occurred and was told that the hospital would take care of it from there. She was also asked to write down what happened so she completed the written statement that was admitted as evidence³¹ According to B.S., Knapp personnel never followed up with her and Respondent continued to work at the Knapp emergency room. She denied having met with Respondent after the incident, and testified that she has been very embarrassed and humiliated by her experience with him since it happened.

At the hearing, B.S. denied that Respondent ever asked her to help him apply a half-splint for her son, and insisted that they were there for her son's shoulder injury. She acknowledged that a half-splint is only used on an ankle and agreed that her written statement refers to a half-splint. She

³¹ Staff Exh. 6, page 1.

testified that nonetheless, she believed her son was there that night for a shoulder injury. She noted, however, that she has several boys, all of whom are athletic and have sustained various injuries playing sports over the years. She stated that she has made multiple trips to the emergency room with them and that one of her sons has dislocated his shoulder three times before. She testified that, although there is a possibility that she was mistaken about the nature of her son's injury on the evening at issue, she has remained, and continues to be, clear about Respondent's conduct toward her that night.

b. Respondent's Account

Respondent also completed a written statement and testified about the events complained of by B.S.³² At the hearing, Respondent agreed that it would be sexually inappropriate for a nurse to snap the bra strap or touch the buttocks of a patient's mother. He denied ever having done either of those things to B.S., however.

Respondent's written statement is not dated, but was evidently written after he was notified that B.S. had made a complaint against him.³³ In his written statement, Respondent recalled that a patient complaining of foot pain, accompanied by his mother, had been assigned to one of his rooms shortly after midnight on August 22, 2004. Respondent noted that he recognized the patient's mother from a previous visit, at which time she had mentioned that she was a Knapp employee. Accordingly, Respondent tried to speed the process along. He explained that he believed his interaction with B.S. was more like coworker- to-coworker than nurse-to-patient.

Once the doctor evaluated B.S.'s son and prescribed a plan of care, Respondent and the doctor left the room. Respondent then returned with the needed supplies and began to apply a splint to the affected leg. Because B.S. was a coworker, he asked her to help him apply the splint to her son's leg. According to Respondent, B.S. held the patient's leg with both hands while

³² Staff's Exh. 6, pages 2-3. It is not clear from the record when this statement was written by Respondent.

³³ Staff's Exh. 6, pages 2-3.

Respondent wrapped it with a bandage. Respondent stated that he was concentrating on applying the bandage properly and denied ever having stared at B.S.'s breasts. After wrapping and positioning the injured leg, Respondent explained to B.S. and her son that he would return shortly with a wheelchair and discharge instructions.

When he returned to the room, Respondent assisted the patient into the wheelchair. He then placed the clipboard with instructions at the foot of the stretcher and asked B.S. to come around the stretcher to sign and receive a copy of the instructions. After Respondent went over the instructions with B.S. and she signed them, B.S. tried to back up her son's wheelchair. Respondent testified that she bumped into the stretcher and chair as she went backward.

Respondent asserted that he "then placed my hand on her back to offer help, however simultaneously she backed up successfully [sic]." B.S. then attempted to open the curtain to the room, but was unable to open it fully. Respondent stated that he then placed his hand on her shoulder to gesture her aside so that he could open the curtain for her. According to Respondent, B.S. then exited the room, pushing her son's wheelchair. Respondent said, "good luck and good bye mamita" to her because he could not remember her name, and he gave her "a friendly pat on the shoulder." B.S. then said good bye and thank you.

Respondent included his written statement concerning B.S. in a letter he sent to the Board in 2006, concerning a different allegation.³⁴ At the conclusion of his 2006 letter to the Board, Respondent referenced the allegations that had been made by B.S. and stated, that the accuser in that case "backtracked her accusations and later denied any misconduct in the presence of Mary Humphreys, Nurse Manager, at that time in a sit down meeting stating that it was a misunderstanding on her part also apologizing for any problems she may have caused [sic]."

³⁴ Staff Exh. 5.

B. O.C.**1. Allegations**

Staff alleged that, on November 4, 2004, while working as an LVN, Respondent violated the Board's rules by touching the exposed underwear of O.C., the mother of a minor patient. Staff further alleged that Respondent's conduct caused emotional harm to O.C. and that his behavior constitutes grounds for the Board to take disciplinary action against Respondent.³⁵

2. Evidence**a. O.C.'s Account**

In November 2004, O.C. brought her 27-month-old son to the Knapp Medical Center emergency room because he had a high fever, was lethargic, and she was concerned because he had been born with a heart abnormality. After waiting for some period of time at the emergency room, a nurse came to get O.C. and her son. O.C. testified that the nurse was male, but she stated that she did not know his name. Several males then came into the room to check her son, including the nurse, a doctor, and another person who took blood from her son.

O.C. testified that, at some point, a male nurse asked her some questions about her son and told her that he was retarded. She also testified that later, in the exam room, while she was lying down by the bed and checking on her son, her underwear was showing above the elastic waistband of the pants she was wearing. She testified that the nurse then touched her underwear.

O.C. described the nurse's action as picking up her underwear. She testified that, when he did so, it sounded like he snapped the elastic. O.C. stated that it made her feel bad when he did that, but she noted that, at the time, she was more concerned about her little boy. O.C. denied ever having flirted with the nurse or that she ever asked him to touch her underwear. She indicated that when she thinks about what happened, it makes her feel bad.

³⁵ Code § 301.452(b)(10) and (13); 22 TAC §§ 217.11(1)(B) and (J), and 22 TAC §§ 217.12(6)(C),(D), and (E).

According to O.C.'s testimony, she did not talk to anyone at Knapp Medical Center about what had happened, but submitted a letter about it. She stated that she had some relatives working at Knapp and that they told her that it was better to turn in the complaint in writing. O.C. testified that she wrote a letter in Spanish, describing what happened.³⁶ She could not recall when she wrote the letter or when she turned it in to the hospital. She testified that she did not hear from Knapp Medical Center after she wrote the letter and thought they had forgotten about it. She also testified that the nurse who touched her underwear was Hispanic, but she could not recall what he looked like or whether he had been wearing a name tag.

b. Respondent's Account

Respondent denied touching O.C.'s underwear. He acknowledged, however, that he had contact with O.C. on the night in question and that she helped him to administer an injection to her child. He asserted that, after O.C. bent over to help, "her shirt was up and her pants were down." Respondent testified that he "just pulled on her shirt to make her aware that she was exposed" because he had to leave the room to check on other patients. Respondent said that he had to leave the door to the room open after he left so that he could make sure the child was all right following the injection. He explained that he did not want O.C. to be exposed to others in the hallway with her underwear showing.

Respondent said that he tried to tell O.C. to readjust her clothing, but O.C. did not hear him because her baby was crying and she was trying to console her child. Respondent then tried to pull her shirt down by touching the bottom part of her shirt. Respondent denied that he could have

³⁶ At the hearing, a letter, which was handwritten in Spanish, ostensibly by O.C., was offered as evidence by Staff, along with an English translation. Staff Exh. 6, pages 4-9. Respondent did not object to the admission of that exhibit at the hearing and, accordingly, it was admitted by the ALJ. However, Respondent had previously filed a written objection to the exhibit, asserting that the letter was incomplete and the translation provided by Staff was not accurate. The ALJ did not rule on Respondent's objections because, at a telephonic pre-hearing conference held May 1, 2009, Staff indicated that it would not seek to offer either the letter or its translation into evidence. Based on Staff's representation, the parties agreed that the objections were moot and need not be ruled on. Although Respondent waived his objection by failing to re-urge it at the hearing when the evidence was offered by Staff, the ALJ has reviewed the letter and translation and has determined that the Spanish letter admitted into evidence is missing at least one page and is not complete. Additionally, the English translation appears to include statements that do not correspond to the portions of the Spanish letter that was offered by Staff. Moreover, the ALJ notes that the letter is not dated or signed and was not authenticated by O.C. at the hearing. Accordingly, the ALJ finds that pages 4-9 of Staff's Exh. 6 are not reliable and, therefore, are not given any weight by the ALJ.

missed her shirt and touched her underwear instead. He testified "I believe I touched her shirt, because – I mean, to touch her underwear, that's too – that's not being polite."³⁷

Respondent testified that after this incident, he recounted his version of events to hospital personnel and was told to take three days off from work.

Respondent also made a written statement, which he signed, regarding this incident.³⁸ Respondent's written statement said that he agreed with O.C.'s account of the events on the night in question "up to the point of touching her underwear." He indicated that as she helped him, her shirt and pants separated, exposing her underwear. He further noted that, when he completed the injection, he "made her aware by slightly covering her side by attempting to pull the back side of her shirt/blouse, but did not cover too much of anything due to her pants needed to be readjusted." He then indicated that, before opening the door and exposing her to the people passing by, he stood at the door for several seconds to allow her to adjust herself. Respondent asserted that he was helping her by bringing it to her attention and was not engaging in sexual harassment of any kind.

C. J.M.

1. Allegations

Staff alleged that, on July 4, 2006, while working as an LVN, Respondent violated the Board's rules by fondling the breasts and nipples of patient J.M. during a medically unnecessary breast exam, and by failing to have another staff member present and refusing to allow J.M.'s husband to be present during the exam. Staff also alleged that Respondent lowered J.M.'s "panties" more than was necessary to administer a gluteal injection and that, on two occasions, he performed unnecessary sternal rubs on J.M. by moving his hands side to side under J.M.'s gown and

³⁷ Tr. 253.

³⁸ Staff Exh. 6, page 12. It is not clear from the record when this statement was made, but it appears to have been given in response to having been informed of O.C.'s complaint against him. At the hearing, Respondent read this statement into the record because the hand-written statement is scarcely legible.

touching her breasts. According to Staff's allegations, Respondent's conduct caused physical and emotional harm to J.M.³⁹

Additionally, Staff alleged that Respondent performed a comprehensive assessment of J.M. that he was not educationally qualified to perform, and that his performance of that assessment was likely to injure J.M. and placed her at risk of inappropriate medical care.⁴⁰

2. Evidence

a. J.M.'s Account

J.M. testified at the hearing and also completed a written statement requested by the Board.⁴¹ Additionally, Mernie Lofton, a risk management employee at Knapp Medical Center, interviewed J.M. in 2006 while she was still in the hospital. Ms. Lofton documented that interview and subsequent events in writing.⁴²

1) Testimony

J.M. testified that she has worked as a registered nurse for 22 years and currently works as a school nurse and in home health care. She holds a Board-issued license that is in good standing, and she has never had any disciplinary sanctions imposed against her.

On July 3, 2006, J.M. began experiencing lower abdominal pain and difficulty urinating. Because of her history of chronic urinary tract infections (UTIs), J.M. believed that her symptoms were caused by a UTI. She attempted to treat herself at home that evening by taking some Pyridium that a doctor had prescribed to her for pain and bladder spasms. The following morning, when her pain had not been alleviated, J.M. took an injection of Gentamicin, an antibiotic. She acknowledged that the medication had not been prescribed to her, but had been given to her by a friend. With the

³⁹ Code §§ 301.452(b)(10) and (13); 22 TAC §§ 217.11(1)(B) and (J); 22 TAC §§ 217.12(6)(C),(D) and (E).

⁴⁰ Code §§ 301.452(b)(10) and (13), Code §§ 301.002(2) and (5); 22 TAC §§ 217.12(1)(E) and (4).

⁴¹ Respondent Exh. 1.

⁴² Staff Exh. 6, page 10.

help of her husband, she administered the injection to the upper quadrant of her buttocks. Notwithstanding the injection, J.M. continued to experience increasing pain.

That evening,⁴³ J.M.'s husband took her to the emergency room at Knapp Medical Center. After waiting there for some period of time, J.M. was initially seen by an admitting, or triage nurse, who asked her questions, took her blood pressure, and then directed her to return to the waiting area. J.M. testified that she told the triage nurse that she was having lower abdominal pain and difficulty urinating. J.M. denied telling the nurse that she was experiencing breast pain, nipple discharge, or anything of that nature.

Eventually, Respondent directed J.M. to an exam room with a door. Respondent instructed her to change into a gown, and left the room. J.M. indicated that she removed her bra, but kept her underwear on underneath the gown and then lay down. Respondent returned and began to assess her by asking her about the pain she was experiencing. J.M. pointed to her stomach below her navel and told him that was where she felt pain. She also told him about the antibiotic injection she had given herself earlier that day. J.M. testified that neither of the medications she took prior to her contact with Respondent that evening had impaired her ability to remember or comprehend what was taking place.

Respondent lifted J.M.'s gown over her shoulder and asked if she had any other pain anywhere such as in her ribs, and J.M. said no. He then asked her if she had any nipple discharge and whether her breasts were implants. J.M. stated that she did not complain of any breast pain or nipple discharge whatsoever.

Respondent began to do a physical assessment of J.M. and proceeded to perform a complete exam of her breasts, including her nipples. J.M. described the exam Respondent performed on her as the type of breast exam that women are instructed to do monthly on themselves. During the exam, the door was closed and no one else was in the room. After the exam, J.M. asked Respondent to call her husband, who was waiting in the lobby area with their child, into the room. Initially,

⁴³ July 4, 2006.

Respondent said that the child would probably not be allowed to come in. However, when J.M. told him that she needed to talk to her husband and would sign any necessary waivers to allow her child to be there, Respondent went to get him.

Approximately ten minutes later, J.M.'s husband and child came into her room. She testified that she told her husband what happened and that she did not feel comfortable with Respondent. She asked her husband if he thought they should leave, but at that time, her little boy was crying and her husband was trying to tend to him. She then told her husband to go outside with the child until he calmed down and they could decide what to do.

Respondent returned to the room and gave J.M. an injection of pain medication, which she thought may have been Toradol. J.M. stated that she turned over to her side and Respondent lowered her underwear. J.M. could not recall on which side Respondent administered the injection, but she recalled that Respondent lowered her underwear all the way down to expose her entire upper and lower buttock, even though the injection was administered in the upper portion of her buttock. J.M. testified that she did not believe that lowering her underwear all the way was the proper procedure or that it helped Respondent administer the injection in any way.

J.M. testified that Respondent's actions made her feel humiliated and uncomfortable because she was exposed and his actions were not necessary. She stated that Respondent did not explain why he pulled her underwear down as far as he did. She further testified that her husband and son were still in the room when the injection was administered, but that her husband did not say or do anything to Respondent at that time.

J.M. stated that she did not ask for another nurse because the doctor came in and sent her to get an x-ray, "so I was gone."⁴⁴ J.M. stated that when the doctor came in, he palpated her stomach over her gown and told her that the blood test results revealed that she had a "really high infection in

⁴⁴ Tr: 50.

the bladder.”⁴⁵ He did not ask her about nipple discharge or breast implants, and he did not do a breast exam or any exam underneath her gown.

J.M. then had a CT-scan, which took approximately 45 minutes. After that, she was returned to the emergency room, and placed in a room with a door. J.M. stated that the lights in the room were on and she was trying to get some rest. She denied feeling drowsy and stated that she had not slept during the CT-scan because she was required to be alert.

At some point, Respondent returned to J.M.’s room and started to do a chest assessment on her. Respondent placed his fist on her chest bone under her gown and “he rubbed his hand on my chest bone.”⁴⁶ She noted that he moved his hands side to side, but did not go any farther than her sternum. J.M. did not understand what Respondent was doing and she never gave him permission to touch her chest in that way. She denied that Respondent ever explained what he was doing to her.

J.M. indicated that she was familiar with the procedure known as the sternal rub, and explained that it was used to arouse a patient with some type of neurological problem. J.M. indicated that she was awake and conscious, although her eyes were closed when Respondent entered the room. She opened her eyes when Respondent began rubbing her sternum and he stopped. J.M. testified she felt confused and stunned by what Respondent had done. She told him she was having chills and asked for more blankets.

A short time later, J.M. was taken to the surgical floor, and she had surgery to remove her appendix the following morning. The day after her surgery, J.M. spoke to the head nurse on the second floor and told her that she had received an inappropriate assessment in the emergency room. J.M. told the head nurse she felt really uncomfortable with what had happened and it was really bothering her. The nurse told J.M. that she would notify her supervisor.

⁴⁵ Tr. 51.

⁴⁶ Tr. 54.

Before she was discharged from the hospital following her surgery, J.M. also spoke to the Director of Nursing, Ms. Bland, about what had happened with Respondent. Ms. Bland apologized and told J.M. that she would conduct an investigation. Following J.M.'s conversation with Ms. Bland, another woman, who J.M. believed was from the hospital's risk management department, came to her room and asked her what had happened. After J.M. told her, she stated that she would get together with Ms. Bland and investigate. J.M. could not recall her name.

After she was discharged, J.M. did not hear anything further about the incident from the hospital, but she was told before being discharged that Respondent no longer worked there. J.M. testified she felt bad when she heard Respondent had been fired, but explained that she reported him because she did not want what happened to her to happen to anyone else. She testified that she did not report the incident to the police or to the Board because she was not aware that she should.

J.M. acknowledged that she has filed a civil lawsuit against the hospital and Respondent about these incidents. She explained that she did so to protect her reputation because Respondent has falsely stated that she is crazy and was under the influence of drugs. J.M. denied having consumed alcohol or taken any drugs other than those she testified about. She further acknowledged that she was in severe pain during her interaction with Respondent, but stated that she was nonetheless fully aware of what Respondent was doing when he did it.

J.M. also acknowledged that the triage nurse documented that she was suffering from epigastric pain,⁴⁷ or entire-abdomen pain, even though J.M. reported only that she was suffering from lower abdominal pain. J.M. could not explain why the triage nurse made that notation based on the information she had relayed, but she agreed that Respondent would have received the information from the triage nurse indicating that J.M. had epigastric pain. She also agreed that heart problems could be one cause of epigastric pain and that such pain could also be caused by indigestion. J.M. stated that if a patient had a history of heart problems or was complaining of chest pain or trouble breathing as well as epigastric pain, it would be appropriate for a doctor or

⁴⁷ Exh. 8, page 11 (as Bates-stamped).

nurse to check the patient for potential heart issues. She noted, however, that she did not complain that day of any chest pain, shortness of breath, or breast pain.

2) J.M.'s Written Statement to the Board

J.M. also gave a written statement to the Board on January 19, 2007. She testified that she was contacted by the Board and asked to give a statement about what had occurred. Because she was uncertain about why she was being contacted by the State, she went to see a friend of hers, who is an attorney, and his secretary helped her type the statement. In that statement, J.M. described the events that took place between her and Respondent in the Knapp Medical Center emergency room on July 4, 2006.

In that statement, she asserted that Respondent palpated her right and central lower quadrant area before performing a full breast exam. She also indicated that, when Respondent pulled her underwear down to expose her entire buttock, her husband noticed and asked why he had lowered her panties so far.

Additionally, her statement noted that, on two occasions after her husband left, Respondent returned to her room and rubbed her sternum under her gown and moved his hands right and left as if to intentionally rub her breasts. She indicated that he told her it was to check her level of consciousness and she thought this was odd because she was alert and oriented.

J.M. noted that, on the day after her surgery, she reported Respondent's behavior to a person who she believed to be the charge nurse for the second floor. She later received a visit from a hospital administrator who identified herself as Ms. Blaine and who informed her that Respondent had admitted performing the breast exam and claimed that it was part of his assessment. She further informed J.M. that Respondent no longer worked at the hospital. J.M. indicated that the experience has been traumatic for her and her husband and that she is cooperating with the Board because she does not want others to be treated the way she was.

3) Mernie Lofton's Report

A written report signed by Mernie Lofton and dated July 6, 2006, was admitted into evidence without objection.⁴⁸ In that report, Ms. Lofton noted that, on July 6, 2006, she was told by the nursing supervisor that a patient had complained about a nurse who had been caring for her in the emergency room on July 4, 2006. The patient complained that the nurse had fondled her breasts during an exam.

Ms. Lofton notes in her report that she immediately went to the patient's room and took the complaint. The report describes what the patient told her about her interactions with the nurse and how he fondled her breasts and nipples and asked if she had implants. Ms. Lofton noted that the patient was very humiliated and repeatedly asked Ms. Lofton not to tell anyone. Ms. Lofton reassured her that they would not send anyone else to see her and that they would take care of the problem.

According to Ms. Lofton's report, the complaining patient did not know the nurse's name, but described him as being male, chubby, and almost bald. Ms. Lofton then determined that Respondent was the nurse who had cared for that patient and also noted that he matches the description given by the patient.

Ms. Lofton's report states that, the next morning, on July 7, 2006,⁴⁹ Respondent met with her and Ms. Klase⁵⁰ at the hospital. She stated that she reviewed the patient complaint with Respondent, without revealing the identity of the complainant.

Respondent then stated that he recalled the patient's diagnosis, and that she was also a nurse. According to Ms. Lofton's report, Respondent also acknowledged that he had lifted her gown

⁴⁸ Staff's Exh. 6, pages 10-11. Ms. Lofton did not testify at the hearing, but no objection was made to the admission of her report.

⁴⁹ Although no party mentioned this or objected to the admission of this document, the ALJ notes that this document appears to have been signed and dated July 6, 2006, but discusses a meeting that took place on July 7, 2006.

⁵⁰ It is not clear from the record who Ms. Klase is.

above her breasts and had touched her breasts as part of a complete exam. He denied fondling her, however, and stated that he was sorry that she did not understand what he was doing.

Respondent was reminded by Ms. Klase of the other two similar complaints that had been filed against him previously and Ms. Lofton reminded him "of all the time we spent with him in the first complaint, having him meet at his request with the complainant," and how he was suspended for three days for the second complaint and told that he would be fired if there was ever a hint of a complaint about him. He was then told he no longer had a job at Knapp and he left after apologizing.

b. Respondent's Account

Respondent wrote a letter to the Board investigator and also testified at the hearing about his contact with J.M. in the emergency room at Knapp on the evening of July 4, 2006.

1) Letter to the Board

Respondent prefaced his letter by noting that he was not aware of the facts of the accusation made against him because those facts had not been disclosed to him by Knapp Medical Center. He stated that, on July 4, 2006, he was asked to appear in the office of Pat Bland, which he did. Ms. Bland and Marnie Lofton [sic] then informed him only that a female patient in her 40s or 50s, who required an appendectomy, had reported that she had been touched inappropriately during her admission to the emergency room.

Respondent stated that he recalled a client who met that basic description and who had presented with severe "epigastric/abdominal/flank pain." In his letter to the Board, he described the patient's course of treatment and noted that she was "placed on a data scope monitor, including pulse oximetry and blood pressure monitor, baseline data was collected, and brief interview was done to obtain information for ERMD⁵¹ evaluation." Respondent stated that, pursuant to the doctor's

⁵¹ This notation was not defined, but presumably stands for Emergency Room Medical Doctor.

instructions, he returned to the patient's room and placed her on a heart monitor. He asserted that the patient was always kept informed of the procedures and plans for her care.

Respondent also noted that, pursuant to the doctor's orders, and while the patient's husband was present in the room, he administered an injection to the patient's left gluteus area. At that time, the patient then informed him that she had self-administered medication to her right gluteus area at home. Respondent noted that he assumed, but did not confirm, that she used a pain medication purchased in Mexico. The patient's husband then departed and an IV was initiated as ordered.

Respondent indicated that, approximately 30 minutes later, "re-evaluation was done to check effectiveness of pain medication." He noted that the patient related no relief, the doctor was notified, and he ordered that another dose of medication be administered. Respondent administered another dose of medication to the patient's left gluteus and the patient was taken to the x-ray department for her ordered scan. Approximately one hour later, the patient returned with a positive CT scan for appendicitis and she was admitted to the surgical floor where she was transported on a stretcher by an emergency room aide.

Respondent stated that he was shocked and saddened that he was placed in a situation in which he was unable to defend himself, and he believes it is unfair that he was not informed of the specifics of the accusation made against him or the identity of the accuser.

2) Testimony

Respondent testified that if a patient comes into the emergency room with epigastric pain, an emergency room nurse is "taught to look further than what they say."⁵² He noted that such pain may be caused by indigestion associated with bad food or it may also be a precursor for a heart attack.

⁵² Tr. 191.

Respondent testified that, because J.M. came in complaining of epigastric pain, he had to rule out any heart complications. By pressing with his open hand, he was able to determine that J.M. indeed had pain all over. He denied that he ever performed a breast exam on J.M., but stated that he merely palpated the top of her breasts and pressed downward to identify cardiac pain. Respondent denied ever squeezing J.M.'s nipples or asking if she had any nipple discharge or implants.

During the hearing, Respondent reviewed the letter written by Mernie Lofton to the Board, in which she indicated, related to J.M., that Respondent "stated that he was doing a breast exam, and maybe had forgotten to tell the patient this."⁵³ When asked if Ms. Lofton got that statement wrong, Respondent answered, "It's right here."

Respondent read aloud the notations he made in J.M.'s medical records, in which he documented the medications he administered to her, including two separate injections of Nubain with Phenergan given in J.M.'s left glute.⁵⁴ He described those medications as a mild painkiller and an anti-nausea drug respectively.

Respondent testified that J.M. told him that she had self-administered pain medication from Mexico and that he relayed that information to the doctor, but did not document that information in her chart as "professional courtesy" because she is a nurse.

Respondent denied having conducted a sternal rub on J.M., but claimed that he palpated her chest to assess for pain more than once. He asserted that he did not document such palpations because "it was ruled out that she didn't have chest pain."⁵⁵ He testified that he conducted the first palpation when she came in and the second one after the medication was given.

⁵³ Staff Exh. 6, pages XX.

⁵⁴ Staff Exh. 8, page 14.

⁵⁵ Tr. 212.

When asked how he generally checks for symptoms of appendicitis when someone comes in with abdominal pain, Respondent testified that appendicitis is rarely seen in middle-aged patients. He then stated that he palpated J.M.'s abdomen by pressing and holding it and, because she complained of increased pain when he let go, he was able to localize her abdominal pain to the right lower quadrant area. He testified that he did not palpate her abdomen more than once, as he did with the chest palpations, because "that's aggravating of the area that is already identified as possible appendicitis."⁵⁶

He also read his nursing notes for J.M., which did not include any mention of having palpated J.M. for chest pain. He stated that he did not include that information because "that's a routine exam that you do."⁵⁷ Respondent testified that, when someone comes in complaining of epigastric and chest pain and is an older patient, it is standard nursing practice to palpate for chest pain.

Respondent described the process he uses to palpate for chest pain as using the side of his hand to press above the breast tissue and then pressing the rib cage below inward. Respondent agreed that there would be no reason to touch a woman's breast or squeeze her nipple while checking for cardiac problems. He further agreed that there would be no reason to ask about nipple discharge or breast implants during a general exam for cardiac problems, and he denied having asked J.M. about those things.

Respondent testified that J.M., upon arriving at the emergency room, was given a form on which she recorded her complaint as "abdominal pain – sharp."⁵⁸ She was then seen by a triage nurse, who documented that "epigastric pain" was J.M.'s chief complaint.⁵⁹ Respondent testified that he receives the information from the triage nurse and is required to follow what the triage nurse

⁵⁶ Tr. 215.

⁵⁷ Tr. 202.

⁵⁸ Staff Exh. 8, page 10

⁵⁹ Staff Exh. 8, page 11.

identifies as the problem. If he did not do so, he testified, he would be "out of his scope of practice because the triage nurse is there to identify the severity of the emergency."⁶⁰

Respondent stated that, once he received the paperwork for J.M., he reviewed it and interviewed the patient to determine what to do next. Because J.M. was identified as having epigastric pain, he immediately tried to rule out everything that could cause epigastric pain. He testified that, before he conducted his assessment, J.M. told him she had pain all over and just needed something for pain. He stated that he believed, for a female patient of J.M.'s age who was complaining of epigstric pain, it was important for him to rule out a pending heart attack.

Respondent testified that, to pinpoint the source of J.M.'s epigastric pain, "we proceed to the most immediate organ, *i.e.* the heart." Therefore, he assessed the chest wall of J.M. He explained that "when you press on the chest and it hurts, that is chest wall pain and means that the muscle itself is causing the pain and not necessarily the heart." But if, upon pressing on top of the heart downward, and the patient complains of shortness of breath and sharp pain, then it is considered to be related to the heart. Respondent continued to explain that "by palpating the upper chest on both sides, she has the exact same amount of pain, so that it is not the heart, but rather any chest wall pain is coming from somewhere else."⁶¹

Respondent testified that J.M. did have pain upon his pressing and palpation of her chest. He tried to identify where the pain was coming from by moving down and palpating her abdomen, which revealed that she had severe tenderness of the lower quadrant with rebound tenderness, which is a clinical identifier of appendicitis. Respondent asserted that, after the pain medication had been administered to J.M., he palpated her chest wall again to see if the medication had alleviated the chest wall pain that she had previously been experiencing. Respondent testified that, upon re-examination, J.M. no longer had chest wall pain, but still had pain at the lower right quadrant, which indicated that she had appendicitis. He acknowledged he performed the initial chest palpation of J.M. under her gown to determine whether her skin was hot or moist. The second assessment he

⁶⁰ Tr.227.

⁶¹ Tr. 231.

claimed was done over her gown. Once he suspected that J.M. had appendicitis, he immediately informed the doctor who performed a detailed assessment of J.M.

Respondent stated that he was 36 years of age at the time J.M. was his patient and she was 45. He denied being attracted to, or sexually aroused, by her and stated he had four patient rooms assigned to him that night and was very busy. He claimed that he is often too busy at work to eat, much less get sexually aroused by patients. He testified that he knew of no reason why J.M. would make the allegations against him. He added that he felt confused because, as the nurse assistant was taking J.M. from the emergency room to the surgical floor, she stopped in front of Respondent and thanked him for his services and help.

Respondent testified that he has worked as an LVN for 14 years and is currently practicing as a home health nurse providing nursing care to older patients in their homes. During his career as an LVN, he has worked in the emergency room and has also practiced in home health and in a hospital neo-natal intensive care unit (ICU). As a neo-natal ICU nurse, Respondent's duties included receiving, assessing, and monitoring prematurely born babies, as well as instructing their mothers about various techniques for caring for their babies, such as breast feeding and mastitis prevention. He testified that, with the consent of the mothers, he demonstrated breast-feeding techniques that involved cupping the breast, and placing a couple of drops of bottled milk on the nipple area to encourage the child to latch on to the breast. Respondent testified that, during his three years in the neo-natal ICU, he did not receive any complaints about inappropriate behavior. Instead, he received letters thanking him for his work. He was also recognized by Child Protective Services for identifying a family that was being neglected by a landlord and needed help.

D. Dr. Gregorio Pina, III

Dr. Pina has been licensed as a psychologist for approximately 20 years and has an active practice working with known sex offenders and child victims of sexual abuse. Additionally, Dr. Pina regularly conducts forensic psychological evaluations and performs entrance evaluations and critical incident debriefings for various law enforcement agencies.

Based on a referral from the Board, Dr. Pina reviewed the complaint and other materials provided by both parties in this matter and conducted a forensic psychological evaluation of Respondent. He then documented his findings and conclusions in a written report.⁶² Dr. Pina testified at the hearing about his evaluation of Respondent and his opinions about whether Respondent would likely be able to consistently behave in accordance with the Nursing Practice Act and Board's rules regarding professional conduct and standards of practice.

Dr. Pina found that Respondent's test results presented a "flat profile," indicating that he was not willing to commit to psychological problems and attempted to present himself in a socially acceptable manner. The results also indicated that Respondent has a paranoid personality, and that he dampens his emotions and desires in order to reduce his anxieties and mistrust of others. Additionally, Dr. Pina stated, based on both the results of formal psychological testing as well as his own observations of Respondent, that Respondent's self-image appears to be that of being weak, unmasculine, and ineffective, although he is not likely to admit to these perceptions.

In a section of his report labeled, "Results and Interpretations," Dr. Pina included the following caveat:

A word of caution is noted in this evaluation. Risk assessment is, by its very nature, a forensic concern. In this case, this evaluator is conducting an independent evaluation for a licensing board. It is recognized that the person being assessed may pose some risk to public safety, and that the task requires this examiner to balance the legal rights of the individual and the public. The accuracy of the information gathered from psychological testing is a concern.⁶³

He explained that this statement was intended to convey that "this is what the person provided me, but I'm not taking it as gospel. I don't see the openness to admit to a lot of things. And sometimes you get the opposite, people admitting to too many headaches and other kind of problems, but I

⁶² Only one report is in evidence. Staff Exh. 9. However, Dr. Pina testified that he issued a second report, but noted that his findings and conclusions did not change relative to the first report.

⁶³ Staff Exh 9, page 4.

have a problem in sensing . . . he didn't want to divulge everything, for whatever reason, and so I'm going to be cautious about the interpretations."⁶⁴

Dr. Pina performed various risk assessment testing on Respondent to determine his risk of reoffense. He found that Respondent scored in the "low level" ranges for all of the instruments used. He further noted that, because those instruments are based on persons known to have engaged in illegal sexual conduct, a "no risk" result is not possible.

Dr. Pina expressed concern that Respondent was not able to "self-correct" his behavior even after more than one formal confrontation by his employer. He further indicated that, "by the series of complaints against him, [Respondent] has apparently demonstrated a pattern of behaviors wherein he is not able to recognize and honor the interpersonal boundaries appropriate to the therapeutic relationship he was responsible for."⁶⁵ Additionally, Dr. Pina found that "Respondent does not appear to understand or have insight as to what caused the complaints against him, much less how to prevent a further complaint."⁶⁶

Ultimately, Dr. Pina opined that Respondent "has not demonstrated that he is safe to practice nursing independently, or in a health care facility due to the sexual misconduct issues to which he appears blind to [sic]." Dr. Pina further expressed his belief that, without a period of successful treatment and monitoring, Respondent would not consistently avoid behaviors identified by the Board as constituting unprofessional conduct.

E. Melinda Hester

Ms. Hester has been a registered nurse for 30 years and, for the past four years has been employed by the Board as the lead consultant for nursing practice. She explained that her current job duties primarily consist of interpreting the nursing practice laws and rules according to questions

⁶⁴ Tr. 326-327.

⁶⁵ Staff Exh. 9, page 7.

⁶⁶ Staff Exh. 9, page 7.

that the Board receives from nurses and the public in an attempt to help them understand their responsibilities pursuant to licensure.

Ms. Hester testified that she reviewed all of Staff's allegations against Respondent and listened to the testimony presented during the hearing. She discussed the idea of professional boundaries for nurses and stated that it is never appropriate for a nurse to be "sexually aroused, attracted, or to act on those instances in a nurse/patient relationship."⁶⁷ She indicated that nurses are required to protect and promote the health and welfare of patients and others, such as family members.

Ms. Hester stated her belief that adjusting the clothing of a patient's family member is outside of a nurse's line of duty and that it constitutes a violation of the patient or family member's "personal space."⁶⁸ She further opined that all three of the women who testified that Respondent had touched them inappropriately were still very emotional and upset. She conceded, however, that none of the witnesses ever said that Respondent was sexually aroused or attracted to them.

Ms. Hester discussed the duties of LVNs as compared to RNs and stated that LVNs perform focused, topic-related assessments of the situation at hand. She also testified that, based on her experience and knowledge of nursing practice, she did not believe either a breast exam or chest palpations would be warranted for a person presenting with abdominal pain, such as J.M.

Based on the witness testimony she heard, Ms. Hester opined that Respondent's license should be revoked. She acknowledged that less severe sanctions are available to the Board, but explained that because of the pattern of behaviors and the fact that Respondent has not acknowledged or recognized the events at issue, he is not safe to practice as a nurse. She also noted that she was not aware of any mitigating evidence that would change her recommendation for revocation of Respondent's license.

⁶⁷ Tr. 343-344.

⁶⁸ Tr. 342.

Ms. Hester expressed great concern about Respondent's current position as a home health care nurse because of the vulnerability of that patient population and the autonomous role of the nurses.

F. Herlinda Salazar

Ms. Salazar is a registered nurse and the owner and administrator of Healing Angel Health Care. Ms. Salazar testified that Respondent has worked for her as an LVN since 2004, and he is the best nurse she has seen in her 29-year nursing career. She said that all of her patients love Respondent, and she is 100 percent happy with his services.

Ms. Salazar noted that she has received many compliments when supervising Respondent and that he has never behaved inappropriately at work. She stated he is very valuable to her agency and she would like to have him continue to work for her. Ms. Salazar stated that she would be willing to ensure that Respondent is supervised at all times, if necessary, and explained that either she or one of the other nurses working for her would be able to supervise him.

Ms. Salazar testified that she was aware that the Board is seeking to remove Respondent's license, but she did not know the nature of the allegations made against him in this matter.

G. Dr. John Pinkerman

Dr. Pinkerman, a licensed clinical psychologist since 1998, testified that he reviewed Dr. Pina's evaluation of Respondent and he questioned the methodology used by Dr. Pina and the reliability of his resulting findings. Specifically, Dr. Pinkerman pointed out that Dr. Pina utilized mixed methodologies and relied in part on instruments that are intended for a population of known offenders. Dr. Pinkerman expressed his belief that "there is an overprediction quality in Dr. Pina's report."⁶⁹ Dr. Pinkerman conceded that he did not review any of Dr. Pina's notes or raw data from the testing that Dr. Pina performed on Respondent.

⁶⁹ Tr. 373.

IV. ANALYSIS AND RECOMENDATION

A. Violations

The evidence in this case reveals that three different women, with no suggested ties to one another, made allegations at different times that Respondent, while working as an LVN, engaged in inappropriate and unwelcome contact with them, which made them feel uncomfortable and upset. Respondent denied all of the allegations and provided similar, but exculpatory versions of the events described by each of the women. If this were a "he-said/she-said" case, concerning a single incident, it would be much more difficult to determine whether a violation occurred. But this is a "he-said/three-said" case. And an examination of the evidence, taken as a whole, indicates that it is more likely than not that Respondent engaged in several instances of unprofessional conduct that violated the Board's rules.

In order to find otherwise, the ALJ would have to find that the witnesses who testified about Respondent's conduct were either lying or mistaken. And there is no evidence to suggest that they were either. The evidence does not substantiate any motives for any of the witnesses to lie, despite Respondent's purely speculative and unconvincing attempts to suggest such motives.⁷⁰ Respondent, however, has a clear motive to lie to protect his LVN license and career.

All three witnesses testified credibly at the hearing. Although there were several inconsistencies between their testimony and prior-issued written statements, those inconsistencies primarily concerned matters peripheral to the alleged inappropriate conduct by Respondent. And, such peripheral inconsistencies are to be expected in light of the amount of time that elapsed between the incidents and the hearing. What remained largely consistent was the witnesses' accounts of Respondent's behavior toward them and how it made them feel.

Additionally, the ALJ notes that the nature of the conduct alleged against Respondent by B.S. and O.C., although disturbing and inappropriate, is not the type of conduct one would expect a

⁷⁰ Respondent suggested, for example, that B.S. was lying in an effort to get her hospital bills reduced or forgiven and that the existence of J.M.'s civil suit means that she fabricated the allegations against Respondent in the hopes of obtaining money from him and the hospital.

person to lie about. If those witnesses had some reason to fabricate allegations against Respondent, it seems likely that they would have alleged behavior more egregious than lightly snapping a bra strap, patting a bottom two or three times, and touching the waistband of underwear. The bizarre nature, striking similarity, and proximity in time, of the conduct complained of by B.S. and O.C. also adds to the credibility of their allegations.

J.M. alleged much more serious conduct against Respondent, but also alleged that he pulled her underwear down beyond what was necessary to administer an injection. That allegation is similar to the unusual and inappropriate, but not overtly sexual behavior complained of by B.S. and O.C. Moreover, J.M. presented as a credible, if somewhat shy, witness. She did not appear to be embellishing or exaggerating her accusations against Respondent,⁷¹ and she candidly admitted that she had taken a prescription medication that had not been prescribed to her, although presumably she knew that was prohibited. Additionally, the evidence substantiates her testimony that she reported Respondent's misconduct to hospital personnel the day after her surgery, before she was discharged from the hospital.

Not only were the witnesses credible, but also Respondent's explanations were not. Respondent agreed that he had contact with all three of the complaining women and that he engaged in behavior similar to what they described. However, he asserted that each woman misunderstood and misrepresented his behavior.

1. B.S.

With respect to B.S., Respondent acknowledged that he touched her on her back and arm as he tried to help her leave the room with her son. He acknowledged that he did call her "mamita," but denied touching her bra strap or patting her on the bottom. Instead, he testified that she backed into the stretcher and chair in the room, implying that she mistakenly thought Respondent had tapped her bottom when he had not. Common sense dictates that a person can tell the difference between bumping into an inanimate object and being touched by another person. Despite her

⁷¹ For example, when testifying about Respondent's contact with her chest area following the breast exam, she stated that he moved his hands side-to-side, but did not go beyond her sternum area.

confusion about collateral matters that occurred surrounding the incident, B.S.'s testimony about Respondent's behavior was overall consistent and credible.

2. O.C.

With respect to O.C., Respondent, in his written statement, denied touching her underwear and explained that he had tried to pull O.C.'s shirt down in an effort to help her because her underwear had become exposed while she was helping him to administer an injection to her child. At the hearing, O.C. was unable to identify Respondent. She testified that a male nurse had touched her underwear after it had become exposed while she was helping her son, but she could not recall what the nurse looked like. Respondent first testified consistently with his earlier written statement, denying that he touched O.C.'s underwear, but acknowledging that he treated O.C.'s son that night and that, after she assisted him with an injection, he pulled down her shirt to try to cover her exposed underwear. He went on to testify, however, that there were several other nurses working there that night and he did not recall O.C.⁷² Respondent's testimony that he did not recall O.C. after he had just corroborated most of the events as she described them, is inconsistent and incredible. And, even if one were to believe his initial story that he did not touch her underwear but merely pulled her shirt down, that is still inappropriate and unprofessional conduct for a nurse to engage in with the mother of a patient.

3. J.M.

Respondent admitted that he touched J.M.'s chest area, but denied that he ever gave her a breast exam or asked her questions about her breasts or nipples. Instead, Respondent asserted that he simply conducted two valid assessments of her chest for pain by palpating above and below her breasts. According to Respondent's testimony, he was required to do those assessments in order to rule out a cardiac condition as the cause of her presenting epigastric pain.

Respondent's testimony does not ring true in several respects. First, although there is no dispute that the triage nurse documented that J.M. presented with epigastric pain or that a cardiac

⁷² Tr. 184.

condition may be one potential cause of epigastric pain, there is no evidence whatsoever to suggest that J.M. had any chest pain or any other symptoms consistent with a cardiac problem that would have required Respondent to assess her chest for pain as he claims he did.

The medical record completed by the triage nurse, which Respondent testified he relied on, does not reflect that J.M. had any chest pain and clearly shows that J.M.'s airway was patent, her lungs were clear, and her circulation was regular. Additionally, the triage nurse documented that J.M. was alert and that her skin was warm and dry. Clearly the triage nurse, who Respondent acknowledged is responsible for assessing the patient and determining the severity of the emergency, had already assessed J.M. and had not noted any indication to suggest that there was a potential cardiac emergency that required Respondent to further examine J.M.'s chest area.

Additionally, Respondent testified that J.M. reported having pain "all over" and at one point testified that she had "flank pain" in addition to abdominal pain. That information is not documented anywhere in Respondent's nursing notes, however, thereby casting serious doubt on its credibility particularly in the absence of any other evidence of such pain by J.M. or any other medical personnel who evaluated her.

Moreover, Respondent's assertion that J.M. simply misunderstood what he was doing is not credible. J.M., who is a nurse, would certainly know the difference between a chest palpation and a full breast exam. She testified that Respondent gave her a full breast exam, including her nipples. It is not believable that J.M., or any person, would not be able to feel the difference between someone pushing above and beneath their breasts with the side of a hand, as Respondent claimed he did, and someone performing a full gynecological breast exam, as J.M. asserted.

Respondent denied pulling J.M.'s underwear down farther than necessary to administer the injection. His nursing notes indicate that he administered two gluteal injections to J.M., and it is not clear from her testimony during which injection she was unnecessarily exposed. Again, however, the discrepancies between J.M.'s testimony at the hearing and her earlier statements concerning issues about the exact timing and sequence of events does not mitigate her credibility, but rather is

to be expected because she was testifying approximately three years after the events occurred. Accordingly the ALJ finds no reason to disbelieve J.M.'s testimony and, therefore, finds that Respondent engaged in unprofessional conduct and failed to meet the minimum standards of practice with respect to J.M.

Finally, the ALJ finds that Staff failed to meet its burden to establish, by a preponderance of the evidence, that Respondent violated the Nursing Practice Act or Board's rules by refusing to allow J.M.'s husband into her room, by not having a female nurse or other staff present for J.M.'s examination, or by performing a comprehensive rather than focused assessment that went beyond the scope of his educational training and license authority.

J.M. testified that Respondent initially told her that her husband would probably not be allowed to come into her room because he was with their young son. When J.M. insisted that her husband be admitted, however, Respondent complied with her request and allowed them in. There was no evidence presented about the hospital policy regarding children's access to patient rooms. Therefore, there is no evidence to suggest that Respondent was deliberately attempting to keep Respondent's husband from entering her room as opposed to merely following hospital policy.

Similarly, Staff alleged that Respondent failed to have a female or other person present during his exam of J.M. However, no evidence was presented to suggest that Respondent was required to have such other persons present.

And, although Respondent conducted a medically unnecessary exam of J.M.'s breasts, it is not clear from the evidence presented that the scope of the assessment Respondent performed, had it been legitimate, exceeded his qualifications and authority under his LVN license.

Based on the above analysis, the ALJ finds that the preponderance of the evidence establishes that Respondent is subject to disciplinary sanctions for committing multiple violations of the Board's rules prohibiting a nurse from violating professional boundaries of the nurse/client relationship.

B. Sanctions

Although the Board is legally authorized to revoke Respondent's LVN license based on the established violations, the ALJ does not believe that revocation is appropriate in this case, based on the evidence and the factors required to be considered by the Board.

Initially, the ALJ notes that the Board elected not to suspend Respondent's license on an emergency basis in response to the allegations brought by J.M., ostensibly indicating that Respondent's continued practice of nursing was not perceived as constituting an imminent risk of harm to the public. Moreover, Staff did not file a request to docket this case at SOAH until December 2008, and the matter did not go to hearing until August 2009. In the intervening four years since the last violation occurred, Respondent has continued to practice nursing and has not had any further complaints registered against him. In fact, his current employer testified that Respondent is the best employee she has had during her 29-year nursing career, and indicated that she would be willing to ensure that he is supervised at all times if required by the Board. His evaluations from Knapp Medical Center were positive overall as well.

Respondent's behavior toward these three women was clearly inappropriate and disturbing, and it should not be ignored or excused. The fact that he has engaged in multiple violations of professional conduct confirms the need for concern. However, it seems unfair to argue, as Staff does now, that Respondent is categorically unsafe to practice nursing and cannot retain his license, even though he has worked for the last four years without incident and has apparently established a very positive record with his employer and current patients.

Based on the totality of the evidence, including Dr. Pina's testimony and the factors to be considered by the Board, the ALJ recommends that Respondent's LVN license be suspended for a period of two years and that the suspension be fully probated subject to terms and conditions established by the Board.

V. FINDINGS OF FACT

1. Bernadino Pedraza (Respondent), is licensed as a vocational nurse and holds License Number 155171 issued by the Texas Board of Nursing (Board).
2. On October 3, 2006, Board Staff (Staff) sent Respondent notice that it had filed Formal Charges against Respondent. On December 10, 2008, Staff sent Respondent its First Amended Formal Charges and Notice of Hearing.
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 held on August 7, 2009, before Administrative Law Judge (ALJ) Ami L. Larson, at the McAllen Municipal Court Building, 1601 N. Bicentennial, McAllen, Hidalgo County, Texas. All parties appeared and participated in the hearing. The record closed at the conclusion of the hearing on that date.
5. Respondent has worked as a Licensed Vocational Nurse for 14 years and was employed at Knapp Medical Center, in Westlaco Texas, between August 2004 and July 2006.
6. On or about August 24, 2004, while working as a LVN at Knapp Medical Center emergency room, Respondent treated the minor son of B.S. While in the exam room with B.S., Respondent pulled B.S.'s bra strap and patted her on the buttocks.
7. B.S. reported the incident to hospital personnel and issued a written statement shortly after the incident occurred.
8. B.S. was upset and disgusted by Respondent's behavior.
9. On November 4, 2004, while working as a LVN in the emergency room of Knapp Medical Center, Respondent treated the minor child of O.C. While in the exam room with O.C., Respondent touched her exposed underwear.
10. O.C. was upset by Respondent's conduct.
11. Respondent was suspended for three days as the result of his behavior toward O.C.
12. On July 4, 2006, J.M., who has worked as a registered nurse for 22 years, sought treatment at the emergency room of Knapp Medical Center and presented there with sharp abdominal pain and difficulty urinating.

13. J.M. was first seen in the emergency room by a triage nurse, who asked her questions, took her blood pressure, and directed her to return to the waiting room.
14. The triage nurse documented that J.M. had epigastric pain, and noted that she had patent airway, clear lungs and regular circulation. She also documented that J.M. was alert and that her skin was warm and dry. The triage nurse did not indicate that J.M. had any chest pain, breast pain, difficulty breathing, or cardiac issues.
15. Respondent conducted a full breast exam of J.M. and asked her whether she had breast implants or nipple discharge.
16. Respondent rubbed J.M.'s sternum back and forth with his hand.
17. J.M. did not report any chest pain, breast pain, or difficulty breathing to anyone at Knapp Medical Center on July 4, 2006.
18. Respondent admitted conducting an exam of Respondent's chest above and below her breasts.
19. Respondent did not document anything about Respondent having any chest, breast, or flank pain in his nursing notes and did not document having done any exam of her chest area.
20. It was not medically necessary for Respondent to perform a breast exam of J.M. or to otherwise palpate her chest or sternum.
21. Before administering an injection into the upper quadrant of J.M.'s gluteal muscle, Respondent pulled her underwear down to expose her entire buttock, which was farther than was necessary to administer the injection.
22. Respondent's actions made J.M. feel humiliated and uncomfortable because she was exposed, and she knew his actions were not necessary.
23. Respondent was alert and aware of Respondent's behavior toward her.
24. J.M. underwent a laproscopic appendectomy on July 5, 2006.
25. On July 6, 2006, J.M. reported Respondent's conduct to hospital personnel, who met with her and made a written report of J.M.'s complaint.
26. Respondent was terminated from Knapp Medical Center as a result of J.M.'s report in combination with the prior reports from B.S. and O.C.
27. Board Staff did not file an emergency action to suspend Respondent's vocational nursing license in response to J.M.'s allegations.

28. Respondent has been employed by Herlinda Salazar as a home health care nurse for her business, Healing Angel Health Care, since 2004.
29. Ms. Salazar is very happy with Respondent's work, as are his current patients.
30. Ms. Salazar would like to continue to employ Respondent and would ensure that his work is supervised at all times if required by the Board.
31. Respondent has not been previously sanctioned by the Board.
32. Staff offered no evidence in support of the imposition of the administrative costs of this proceeding.
33. Respondent poses a low risk of reoffense and, with counseling and monitoring, can conform his behavior to the standards of professional nursing practice.

VI. 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 formal charges and 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. Staff had the burden of proving the case by a preponderance of the evidence.
5. Based on the above Findings of Fact and Conclusions of Law, Respondent engaged in unprofessional conduct and violated the minimum standards of nursing practice by failing to recognize and maintain professional boundaries of the nurse-client relationship contrary to 22 TEX. ADMIN. CODE (TAC) §§ 239.11(22), (23), and (27)(L), 217.11(1)(B) and (J), and 217.12 (6)(C), (D), and (E).
6. Based on the above Findings of Fact and Conclusions of Law, Respondent is subject to disciplinary action by the Board pursuant to Code § 301.452(b)(10) and (13).

7. Based upon the above Findings of Fact and Conclusions of Law, and the factors for consideration of sanctions set forth in 22 TAC § 213.33, and Code § 301.4531 the Board should suspend Respondent's license for a period of two years with the suspension being fully probated subject to terms and conditions established by the Board.
8. Based upon the above Findings of Fact and Conclusions of Law, administrative costs of this proceeding should not be imposed on Respondent.

SIGNED April 12, 2010.

A handwritten signature in black ink, appearing to read "Ami L. Larson", is written over a solid horizontal line.

AMI L. LARSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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