DOCKET NUMBER 507-10-4146

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE	§	
NUMBER 526357	§	OF
ISSUED TO	§	
FRANCES UNOKA NWOSUOCHA	§	ADMINISTRATIVE HEARINGS

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

OPINION AND ORDER OF THE BOARD

TO: FRANCES UNOKA NWOSUOCHA
4843 SUNSHINE DRIVE
SUGARLAND, TX 77479

PRATIBHA J. SHENOY
ADMINISTRATIVE LAW JUDGE
300 WEST 15TH STREET
AUSTIN, TEXAS 78701

At the regularly scheduled public meeting on April 28-29, 2011, the Texas Board of Nursing (Board) considered the following items: (1) The Proposal for Decision (PFD) regarding the above cited matter; (2) Staff's recommendation that the Board adopt the PFD regarding the registered nursing license of Frances Unoka Nwosuocha with changes; and (3) Respondent's exceptions to the PFD filed on February 10, 2011, and Respondent's recommendation to the Board regarding the PFD and order, if any.

The Board finds that after proper and timely notice was given, the above styled case was heard by an Administrative Law Judge (ALJ) who made and filed a PFD containing the ALJ's findings of facts and conclusions of law. The PFD was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. The Respondent filed exceptions to the PFD on February 10, 2011. Board Staff did not file a response to the Respondent's exceptions to the PFD. The ALJ issued a final letter ruling on February 28, 2011, in which she declined to make any changes to the PFD.

The Board, after review and due consideration of the PFD, 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, except for Conclusion of Law Number 12, which is not adopted by the Board and is hereby re-designated as a recommendation. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

Conclusion of Law Number 12

The Board declines to adopt Conclusion of Law Number 12 because it is a recommended sanction and not a proper conclusion of law. The Government Code §2001.058(e) authorizes the Board to change a finding of fact or conclusion of law made by the ALJ, or to vacate or modify an order issued by the ALJ if the Board determines that the ALJ did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions. The ALJ did not properly apply or interpret applicable law in this matter when he included his recommended sanction as a conclusion of law. A recommendation for a sanction is not a proper conclusion of law. An agency is the final decision maker regarding the imposition of sanctions. Once it has been determined that a violation of the law has occurred, the sanction is a matter for the agency's discretion. The choice of penalty is vested in the agency, not in the courts. The agency is charged by law with discretion to fix the penalty when it determines that the statute has been violated. Thus, the Board is not required to give presumptively binding effect to an ALJ's recommendation regarding sanctions in the same manner as with other findings of fact and conclusions of law. Further, the mere labeling of a recommended sanction as a conclusion of law or as a finding of fact does not change the effect of the ALJ's recommendation...[T]he Board, not the ALJ, is the decision maker concerning sanctions. *See Texas State Board of Dental Examiners vs. Brown*, 281 S.W, 3d 692 (Tex. App. - Corpus Christi 2009, pet. filed); *Sears vs. Tex. State Bd. of Dental Exam'rs*, 759 S.W.2d

748, 751 (Tex.App.-Austin 1988, no pet); *Firemen's & Policemen's Civil Serv. Comm'n vs. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex.1984); *Granek vs. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 781 (Tex.App.-Austin 2005, pet. denied). Pursuant to applicable law, the Board re-designates Conclusion of Law Number 12 as a recommendation.

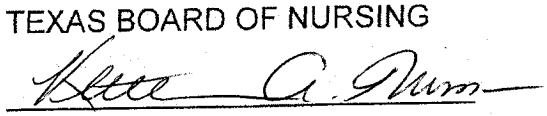
IT IS, THEREFORE, ORDERED THAT Permanent Certificate Number 526357, previously issued to FRANCES UNOKA NWOSUOCHA, to practice nursing in the State of Texas be, and the same is hereby, REVOKED.

IT IS FURTHER ORDERED that Permanent Certificate Number 526357, previously issued to FRANCES UNOKA NWOSUOCHA, 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 29th day of April, 2011.

TEXAS BOARD OF NURSING



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

Attachment: Proposal for Decision; Docket No. 507-10-4146 (January 25, 2011).

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

January 25, 2011

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. 507-10-4146; In the Matter of Permanent Certificate No. 526357 Issued to Frances Unoka Nwosuocha

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,

Pratibha J. Shenoy
Administrative Law Judge

PS/pp
Enclosures
XC: Lance R. Brenton, Assistant General Counsel, 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 1CD(s); Certified Evidentiary Record) – **VIA INTER-AGENCY**
Frances U. Nwosuocha, 4843 Sunshine Drive, Sugarland, TX 77479-**VIA REGULAR MAIL**

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SOAH DOCKET NO. 507-10-4146

IN THE MATTER OF PERMANENT	§	BEFORE THE STATE OFFICE
	§	
CERTIFICATE NO. 526357 ISSUED TO	§	OF
	§	
FRANCES UNOKA NWOSUOCHA	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Board of Nursing (Board) seeks to revoke the registered nurse (RN) license held by Respondent Frances Unoka Nwosuocha, on the basis of Ms. Nwosuocha's 2008 felony conviction for theft by a government contractor in an amount greater than $100,000 but less than $200,000. After considering the evidence, the Administrative Law Judge (ALJ) determines that Ms. Nwosuocha is subject to sanction and agrees with Staff's recommendation that Ms. Nwosuocha's license should be revoked.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Jurisdiction and notice were not contested, and those matters are addressed only in the Findings of Fact and Conclusions of Law. The hearing in this matter was set to convene in June 2010, but was continued by ALJ Michael Borkland, in part to allow for appellate review of Ms. Nwosuocha's conviction. ALJ Borkland retired in November 2010, and this docket was transferred to ALJ Pratibha J. Shenoy, who convened the hearing on the merits on December 1, 2010, in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Assistant General Counsel Lance R. Brenton represented Staff. Ms. Nwosuocha represented herself. The hearing concluded and the record closed the same day.

II. STAFF'S CHARGES AND APPLICABLE LAW

Staff asserts that, as a result of her conviction, Ms. Nwosuocha no longer is fit to practice as a nurse in the State of Texas. Specifically, Staff argues that Ms. Nwosuocha's actions

constitute grounds for disciplinary action under the Texas Nursing Practice Act (Act)[1] and the Board's rules, which authorize sanctions against a licensee for:

- Conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude. **Act § 301.452(b)(3)**;
- Unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public. **Act § 301.452(b)(10)**; and
- Criminal conduct including but not limited to conviction or probation, with or without an adjudication of guilt. **22 TEX. ADMIN. CODE § 217.12(13)**.[2]

Violation of these provisions is not automatic grounds for revocation. The Act states that upon proof of a violation, a person is subject to disciplinary action that may include: license denial, suspension or revocation; issuance of a warning or reprimand with stipulations; assessment of a fine; and/or limitation of the nurse's practice.[3] To determine the appropriate sanction for a violation, the Board has created a Disciplinary Matrix, found at Board Rule 213.33(b).

The Board and its licensees are also subject to chapter 53 of the Texas Occupations Code (Chapter 53), which addresses the effect of a criminal conviction on licenses issued by the State of Texas. Chapter 53 authorizes a licensing authority to revoke, suspend or deny a license on the basis that a person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed profession.[4] The Board's Disciplinary Sanctions for Fraud, Theft, and Deception discuss the reasons those crimes relate directly to the practice of nursing.[5] Board Rule 213.28 addresses the fitness to practice nursing of persons with criminal offenses. Chapter 53 sets forth factors to be considered when a disciplinary action is taken on the basis of criminal

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

[2] For convenience, citations to title 22, part 11 of the Texas Administrative Code will be to "Board Rule 2xx.yy."

[3] Act § 301.453.

[4] *See* TEX. OCC. CODE § 53.021. To determine whether an offense directly relates to the duties and responsibilities of the licensed profession, licensing authorities are directed to consider factors listed in TEX. OCC. CODE § 53.022.

[5] Board Rule 213.33(g) sets forth "disciplinary and eligibility sanction policies and guidelines [that] shall be used by the Board and [the ALJ] when determining the appropriate penalty/sanction in disciplinary and eligibility matters." Specifically, Board Rule 213.33(g)(5) states that for matters involving theft, the Board and the ALJ are to consider the "Disciplinary Sanctions for Fraud, Theft, and Deception approved by the Board and published on February 22, 2008 in the *Texas Register* (33 Tex. Reg. 1646) and available on the Board's website."

conduct.[6] Finally, Board Rule 213.33(c) sets forth considerations to be utilized in conjunction with the Disciplinary Matrix in determining the correct sanction.[7]

III. EVIDENCE

A. Factual and Background Evidence

On November 5, 2008, Ms. Nwosuocha was convicted of the first-degree felony offense of theft by a government contractor in an amount greater than $100,000 but less than $200,000.[8] Ms. Nwosuocha was sentenced to 10 years' confinement in the institutional division of the Texas Department of Criminal Justice. The sentence was suspended and she was placed on community supervision for 10 years.[9] Among other things, the terms of her community supervision require Ms. Nwosuocha to pay a fine of $10,000, make restitution of $151,033.58 to the federal government, pay court costs of $520.00, and perform a total of 320 hours of community service.[10] Ms. Nwosuocha also was ordered not to practice without supervision by a medical doctor licensed in Texas, and she was barred from billing the federal Medicare and Medicaid programs during her probation.[11]

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[6] TEX. OCC. CODE § 53.023(a) directs a licensing authority to consider: the extent and nature of the person's past criminal activity; the age of the person when the crime was committed; the amount of time that has elapsed since the person's last criminal activity; the conduct and work activity of the person before and after the criminal activity; evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and other evidence of the person's fitness, including letters of recommendation from: prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person, the sheriff or chief of police in the community where the person resides and any other person in contact with the convicted person.

[7] Those factors are: evidence of actual or potential harm to patients, clients, or the public; evidence of a lack of truthfulness or trustworthiness; 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; evidence of practice history; evidence of present fitness to practice; whether the person has been subject to previous disciplinary action by the Board or any other health care licensing agency in Texas or another jurisdiction and, if so, the history of compliance with those actions; the length of time the person has practiced; the actual damages, physical, economic, or otherwise, resulting from the violation; the deterrent effect of the penalty imposed; attempts by the licensee to correct or stop the violation; any mitigating or aggravating circumstances; the extent to which system dynamics in the practice setting contributed to the problem; whether the person is being disciplined for multiple violations of the Act or its derivative rules and orders; the seriousness of the violation; the threat to public safety; evidence of good professional character; and any other matter that justice may require.

[8] Case No. 1157990, in the 185th District Court of Harris County, Texas. *See* Staff Ex. 6 at 4.

[9] Staff Ex. 6 at 4.

[10] Staff Ex. 6 at 6-7.

[11] Staff Ex. 6 at 7.

On November 4, 2010, the Fourteenth Court of Appeals affirmed Ms. Nwosuocha's conviction.[12] The appeals court considered and ultimately was unconvinced by Ms. Nwosuocha's contentions that: the trial court abused its discretion by denying her last motion for continuance; she was convicted on an invalid indictment and insufficient evidence; opinion testimony was improperly admitted; and, she received ineffective assistance of counsel.[13] One member of the three-judge panel filed a dissent, opining that Ms. Nwosuocha's motion for continuance should have been granted because her 2008 trial took place less than a month after her attorney's office was damaged and his practice significantly disrupted by Hurricane Ike.[14] Ms. Nwosuocha stated that her attorney has filed pleadings seeking further review of the appellate opinion.

The jury in Ms. Nwosuocha's trial found her guilty of engaging in organized criminal activity that unlawfully appropriated Medicare and Medicaid funds.[15] Specifically, the jury found that in late 2002 and early 2003, Ms. Nwosuocha signed at least 23 certificates of medical necessity (CMNs) in which she falsely stated that the Medicare or Medicaid participants at issue required motorized wheelchairs.[16] The jury also found that in exchange for signing the CMNs, Ms. Nwosuocha was paid amounts totaling at least $5,870 by the operators of a durable medical device (DME) company.[17] The DME used the CMNs to obtain the wheelchairs and receive reimbursement totaling over $100,000 from the Medicare and Medicaid programs.[18]

Ms. Nwosuocha testified at the hearing in this matter, and called two witnesses. She maintained her innocence and argued that she did not have a fair criminal trial, citing as support the dissenting opinion of the appellate court. Ms. Nwosuocha raised several points of alleged error concerning the evidence she believes the trial court and/or majority in the appellate opinion improperly interpreted or weighed.[19] She noted that she has no prior criminal history or

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[12] *Nwosuocha v. Texas*, 325 S.W.3d 816, 2010 Tex. App. LEXIS 8831 (Tex. App.—Houston [14th Dist.] Nov. 4, 2010) ("Appellate Opinion"). The ALJ notes that in the caption of the appellate opinion, Ms. Nwosuocha's name appears to be misspelled as "Nwosoucha." The Appellate Opinion was admitted as Resp. Ex. A.

[13] Appellate Opinion, 2010 Tex. App. LEXIS 8831 at *69.

[14] Appellate Opinion, 2010 Tex. App. LEXIS 8831 at *72-76 (Mirabal, S.J., dissenting).

[15] Appellate Opinion, 2010 Tex. App. LEXIS 8831 at *57-62.

[16] Appellate Opinion, 2010 Tex. App. LEXIS 8831 at *31-34, 38.

[17] Appellate Opinion, 2010 Tex. App. LEXIS 8831 at *36-37, n. 24.

[18] Appellate Opinion, 2010 Tex. App. LEXIS 8831 at *38-39.

[19] As discussed in the Analysis section, below, the administrative hearing cannot be a forum to relitigate a valid conviction. Ms. Nwosuocha was advised of this point at hearing, but the ALJ permitted testimony to the

disciplinary history with the Board. In her practice, she had access to the files of over 200 patients, Ms. Nwosuocha said. If she were unethical, Ms. Nwosuocha posited, she could have defrauded the Medicare and Medicaid programs of far more money for many more patients.

Ms. Nwosuocha testified that she is an advanced practice nurse with decades of experience in multiple health care settings.[20] The Board issued RN license no. 526357 to her on August 28, 1985.[21] Ms. Nwosuocha holds a masters degree in nursing and has served as an assistant professor at a school of nursing. Although she believes she ultimately will be cleared, Ms. Nwosuocha testified that in the interim, she has complied with all of the terms of her community supervision order. Specifically, she said that she practices under monitoring by a supervising physician, has not billed Medicare or Medicaid for any services, and has reported to her probation officer as required. Ms. Nwosuocha said that in April 2010, her probation officer told her she no longer needed to come to monthly appointments. However, she did not submit written evidence of a release from any of the terms of her probation.

Ms. Nwosuocha said she is well known in her community, where she is active in charitable and public health programs, including speaking engagements. As the mother of five children who needs to work to support her family, Ms. Nwosuocha asked that she be allowed to retain her license as an act of mercy. She submitted four letters from patients and colleagues attesting to her excellent work ethic and genuine concern for her patients.[22] In addition, Ms. Nwosuocha submitted a letter from her supervising physician, Dr. Janice Powells of The Children's Doctors of Texas in Houston, Texas. Dr. Powells stated in her letter that she has known Ms. Nwosuocha since 1996, and has been a mentor, preceptor, and medical director for Ms. Nwosuocha since 2001. Dr. Powells praised Ms. Nwosuocha's professionalism, dedication, integrity, sound judgment, and excellent rapport with peers and patients.

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extent it concerned aggravating or mitigating factors that would be relevant to the ALJ's and the Board's evaluation of the appropriate sanction in this matter.

[20] Ms. Nwosuocha submitted documentation indicating that she has completed programs in ambulatory care and prevention, as well as continuing education classes offered by the Board. Resp. Ex. B at 1-2.

[21] Staff Ex. 1 at 2.

[22] Resp. Ex. B at 2-4, 6.

As witnesses, Ms. Nwosuocha called Argie Jimenez, RN, and medical assistant Cecilia Dimas. Ms. Jimenez testified that although she also is a nurse, she met Ms. Nwosuocha through church and does not have any knowledge of Ms. Nwosuocha in a professional setting. Ms. Jimenez has worshipped with Ms. Nwosuocha and has come to know her as a "good and spiritual" person. Ms. Jimenez averred that she does not know the details of Ms. Nwosuocha's conviction, but she believes Ms. Nwosuocha is an honorable person and is telling the truth.

Ms. Dimas said that she began working for Ms. Nwosuocha in September 2003. In the seven years that they have worked together, Ms. Dimas said she has seen Ms. Nwosuocha "go the extra mile" for patients on numerous occasions, even making home visits after hours. Currently, Ms. Nwosuocha sees only "cash patients" who pay for her services out-of-pocket, Ms. Dimas said. Even though most of these patients could go to another provider and have their care reimbursed by Medicare or Medicaid, they come back to Ms. Nwosuocha because they highly value her dedication and personal attention, Ms. Dimas averred. In Ms. Dimas' opinion, Ms. Nwosuocha is "humble, loves her patients, and works very hard." Ms. Dimas began working for Ms. Nwosuocha after the events at issue in Ms. Nwosuocha's conviction, and said that she is unaware of any wrongdoing by Ms. Nwosuocha at any time.

B. Evidence Related to Appropriate Sanction

Staff called Melinda Hester, MS, RN, and established Ms. Hester's qualifications as an expert on the Act, Board rules and the Disciplinary Matrix.[23] Ms. Hester has 31 years of experience as a nurse. She has been a Practice Consultant to the Board since 2005, and became the Lead Practice Consultant in 2009. In her time with the Board, Ms. Hester testified that she has answered thousands of questions from the public and from nurses on matters concerning nursing practice and disciplinary actions.

Ms. Hester testified that based on her review of the facts, the Act, Board rules, the Disciplinary Matrix, and Disciplinary Sanctions for Fraud, Theft, and Deception, she believes that revocation of Ms. Nwosuocha's RN license is the appropriate sanction. After considering

[23] Ms. Hester's *curriculum vitae* is contained in Staff's Ex. 7.

the testimony and evidence presented at hearing, Ms. Hester said that her opinion and recommendation had not changed.

With respect to the alleged violations of Act § 301.452(b)(3) and Board Rule 217.12(13), relating to criminal conduct, Ms. Hester noted that Ms. Nwosuocha's conviction is for a crime that resulted in a significant loss – between $100,000 and $200,000 – to government programs that are designed to aid vulnerable segments of society. Ms. Nwosuocha also had personal financial gain from her crime. By participating in a scheme to obtain wheelchairs for persons who did not need them, Ms. Hester said Ms. Nwosuocha caused harm to both the taxpayers who fund Medicare and Medicaid, and to the patients who might not obtain the services or equipment they require if these federal programs are defrauded.

The specific crime of theft by a government contractor is not listed in Board Rule 213.28 (addressing the fitness to practice nursing of persons with criminal conduct), but the rule is not meant to be exhaustive, Ms. Hester said. She said that Ms. Nwosuocha's crime is encompassed by Board Rule 213.28(b)(2)(A)(viii), which states that theft in an amount greater than $1,500 is a crime indicating that a person may be unfit to practice nursing. Such crimes are related to the practice of nursing, the rule states, because nurses often operate autonomously and without direct supervision and they have access to persons who are vulnerable to exploitation.[24]

Ms. Hester reviewed the factors set forth in Board Rules 213.33(c) and 213.28(c)-(e) as well as the Disciplinary Sanctions for Fraud, Theft, and Deception, and the factors set forth in Tex. Occ. Code § 53.023(a). She found the following to be of particular relevance to her recommendation: evidence of significant economic harm to the public and financial gain to Ms. Nwosuocha; the existence of opportunity for future misconduct if Ms. Nwosuocha is permitted to continue practicing nursing, because she will have access to personal information of patients and may work without constant supervision; and the lack of evidence that Ms. Nwosuocha has made restitution. Ms. Hester said that this is the first time Ms. Nwosuocha's involvement in criminal behavior has been established, as well as the first time the Board has sought disciplinary action against her. Ms. Hester commended Ms. Nwosuocha's extensive

[24] Board Rule 213.28(b)(2)(B).

education, but asserted that, as a result, Ms. Nwosuocha should be all the more familiar with the ethical and disciplinary rules governing the nursing profession. Based on her analysis, Ms. Hester recommended that Ms. Nwosuocha's alleged violations of Act § 301.452(b)(3) and Board Rule 217.12(13) result in revocation.

Ms. Hester noted that Ms. Nwosuocha's conduct also constituted unprofessional or dishonorable conduct likely to deceive, defraud, or injure a patient or the public under Act § 301.452(b)(10). Taxpayers pay into Medicare and Medicaid as well as obtain benefits from those programs. Ms. Hester said that nurses hold a special position of public trust and Ms. Nwosuocha violated that trust by using her license – and her access to patient medical information – to steal from federal funds. Under the Disciplinary Matrix, Ms. Hester averred that the violation of Act § 301.452(b)(10) would be a third tier offense because it involved repeated acts of unethical behavior and financial loss to a patient or the public in excess of $4,999.99. After considering the applicable aggravating and mitigating factors, Ms. Hester said she recommends revocation on the basis of Ms. Nwosuocha's violation of Act § 301.452(b)(10) as well. Since Ms. Nwosuocha is required to make a "large restitution," Ms. Hester said that she is not recommending that the Board seek an administrative penalty against Ms. Nwosuocha.

IV. ANALYSIS AND RECOMMENDATION

Ms. Nwosuocha emphatically maintained that she is innocent of any theft or fraud and was wrongly convicted. She stated that she would continue to pursue legal remedies to clear her name, and asked that she be allowed to keep her RN license in the meantime. At hearing, Ms. Nwosuocha attempted to introduce testimony and evidence contradicting her conviction. The ALJ advised Ms. Nwosuocha that the administrative hearing could not serve as a forum to re-litigate her conviction. Board Rule 213.27(c)(1) directs that, when determining if a person with criminal conduct has good professional character and fitness to practice nursing, the "record of conviction or order of deferred adjudication is *conclusive evidence* of guilt."[25] Ms. Nwosuocha's evidence was permitted to the extent it concerned mitigating factors and other considerations pertaining to the correct administrative sanction.

[25] Board Rule 217.27(c)(1) (emphasis added).

Clearly, there is evidence that Ms. Nwosuocha has a high degree of education and has worked as a nurse for decades with no evidence of criminal behavior and no prior disciplinary action by the Board. Ms. Jimenez attested to Ms. Nwosuocha's spiritual character, and Ms. Dimas testified that Ms. Nwosuocha is an excellent nurse and good employer. The letters from Ms. Nwosuocha's patients and colleagues are entitled to some weight, particularly the letter from Dr. Powells, who serves as Ms. Nwosuocha's supervising physician and has known her for nearly 15 years.[26] Dr. Powells praised Ms. Nwosuocha's professionalism, dedication, integrity, sound judgment, and excellent rapport with colleagues and patients.

On the other hand, Ms. Nwosuocha was convicted of a crime that caused significant loss to federal programs that serve vulnerable populations. By recommending wheelchairs for persons who did not require them, Ms. Nwosuocha failed to serve her patients with the required professionalism and trustworthiness. She also caused harm to Medicare and Medicaid patients who might not receive necessary services because federal funds were defrauded, and the taxpayers who support the federal programs.

Two courts with jurisdiction have reviewed the evidence of Ms. Nwosuocha's crime. The Fourteenth Court of Appeals affirmed the conviction after an extensive examination of the evidentiary record and procedural history. The dissenting appellate opinion focused on whether Ms. Nwosuocha's last motion for continuance should have been granted, and made no evaluation of the underlying evidence.

The theft resulted in personal financial benefit to Ms. Nwosuocha. Although she is currently practicing under supervision, Ms. Nwosuocha cannot be supervised every minute, and she has access to the sensitive personal and financial information of patients. This gives her opportunities to repeat her misconduct. Barely two years of her 10-year community supervision period have elapsed, and Ms. Nwosuocha still has a large restitution payment to make. Based on the facts and applicable law, the ALJ finds that Staff has met its burden to prove, by a

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[26] Staff objected to the letters on hearsay grounds. However, the ALJ notes that Board Rule 213.28(e)(6) permits the consideration of "other evidence of the person's present fitness, including letters of recommendation from . . . persons in contact with the convicted person." Chapter 53 contains substantially similar language. TEX. OCC. CODE § 53.23(6)(C).

preponderance of the evidence, that Ms. Nwosuocha committed behavior subject to sanction by the Board. Staff also presented persuasive evidence that the correct sanction should be revocation of Ms. Nwosuocha's RN license.

V. FINDINGS OF FACT

1. Frances Unoka Nwosuocha holds registered nurse (RN) permanent certificate no. 526357 issued by the Texas Board of Nursing (Board) on August 28, 1985.

2. On May 11, 2010, Board staff (Staff) sent its Notice of Hearing to Ms. Nwosuocha by certified mail. The notice was received on May 13, 2010.

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. Administrative Law Judge (ALJ) Pratibha J. Shenoy convened the hearing on the merits on December 1, 2010, at the State Office of Administrative Hearings (SOAH), William P. Clements Building, 300 West 15th Street, Austin, Texas. Assistant General Counsel Lance R. Brenton represented Staff. Ms. Nwosuocha represented herself. The hearing concluded and the record closed the same day.

5. On November 5, 2008, in Case No. 1157990, in the 185th District Court of Harris County, Texas, Ms. Nwosuocha was convicted of the first-degree felony offense of theft by a government contractor in an amount greater than $100,000 but less than $200,000.

6. Ms. Nwosuocha engaged in organized criminal activity that unlawfully appropriated Medicare and Medicaid funds.

7. In late 2002 and early 2003, Ms. Nwosuocha signed at least 23 certificates of medical necessity (CMNs) in which she falsely stated that the Medicare or Medicaid participants at issue required motorized wheelchairs.

8. In exchange for signing the CMNs, Ms. Nwosuocha was paid amounts totaling at least $5,870 by the operators of a durable medical device (DME) company. The DME used the CMNs to obtain the wheelchairs and to receive reimbursement totaling over $100,000 from the Medicare and Medicaid programs.

9. Ms. Nwosuocha was sentenced to 10 years' confinement in the institutional division of the Texas Department of Criminal Justice. The sentence was suspended and she was placed on community supervision for 10 years.

10. The terms of her community supervision require Ms. Nwosuocha to pay a fine of $10,000, make restitution of $151,033.58 to the federal government, pay court costs of $520.00, and perform a total of 320 hours of community service. Ms. Nwosuocha also was ordered not to practice without supervision by a medical doctor licensed in Texas, and she is barred from billing the federal Medicare and Medicaid programs during her probation.

11. On November 4, 2010, the Fourteenth Court of Appeals affirmed Ms. Nwosuocha's conviction. *Nwosuocha v. Texas*, 325 S.W.3d 816, 2010 Tex. App. LEXIS 8831 (Tex. App.—Houston [14th Dist.] Nov. 4, 2010).

12. Ms. Nwosuocha has no prior criminal involvement, and no disciplinary history with the Board.

13. Ms. Nwosuocha has extensive education and experience in multiple health care settings.

14. The federal Medicare and Medicaid programs serve impoverished and vulnerable populations.

15. The Medicare and Medicaid programs suffered significant financial harm as a result of Ms. Nwosuocha's theft.

16. Ms. Nwosuocha obtained personal financial gain as a result of her crime.

17. Nurses occupy a position of public trust and have access to the sensitive personal and financial information, medical records, and belongings of patients.

18. If she is permitted to continue practicing as a nurse, Ms. Nwosuocha will have opportunities to repeat her misconduct.

19. Two years of Ms. Nwosuocha's 10-year community supervision period have elapsed.

20. There is no evidence of any restitution on Ms. Nwosuocha's part.

VI. CONCLUSIONS OF LAW

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

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

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

4. A nurse is subject to discipline for:
   a. conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude. TEX. OCC. CODE § 301.452(b)(3);

   b. unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public. TEX. OCC. CODE § 301.452(b)(10); and

   c. criminal conduct including but not limited to conviction or probation, with or without an adjudication of guilt. 22 TEX. ADMIN. CODE § 217.12(13).

5. A record of conviction or order of deferred adjudication is conclusive evidence of guilt. 22 TEX. ADMIN. CODE § 217.27(c)(1).

6. A licensing authority may deny, suspend or revoke a license on the basis that a person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed profession. TEX. OCC. CODE § 53.021.

7. Theft is a crime directly related to the practice of nursing. TEX. OCC. CODE § 53.022; 22 TEX. ADMIN. CODE § 213.33(g)(5).

8. Based on the foregoing Findings of Fact and Conclusions of Law, Ms. Nwosuocha violated TEX. OCC. CODE §§ 301.452(b)(3) and 301.452(b)(10), and 22 TEX. ADMIN. CODE §§ 217.12(13), and she also is subject to sanction under TEX. OCC. CODE § 53.021.

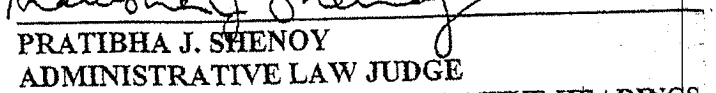
9. The foregoing Findings of Fact and Conclusions of Law indicate that the Board is authorized to sanction Ms. Nwosuocha.

10. Factors to be used by SOAH when recommending a sanction on the basis of criminal conduct are set forth at 22 TEX. ADMIN. CODE §213.33(c) and TEX. OCC. CODE § 53.023(a).

11. Under the Board's disciplinary matrix found at 22 TEX. ADMIN. CODE §213.33(b), the behavior exhibited by Ms. Nwosuocha warrants revocation of her nursing license.

12. Based on the Findings of Fact and Conclusions of Law set forth herein, the ALJ recommends that the Board revoke Ms. Nwosuocha's license.

SIGNED January 25, 2011.



PRATIBHA J. SHENOY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS