

DOCKET NUMBER 507-06-2819

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 200464
ISSUED TO
AMY MICHELLE SMITH

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BEFORE THE BOARD OF
NURSE EXAMINERS FOR
THE STATE OF TEXAS



Patricia P. Roman
Executive Director of the Board

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.

OPINION AND ORDER OF THE BOARD

TO: Amy Michelle Smith
c/o Louis Leichter, Attorney
1602 E. 7th Street
Austin, Texas 78702

At the regularly scheduled public meeting on April 19 - 20, 2007, AMY MICHELLE SMITH, through counsel, came before the Board and requested this cause be tabled and rescheduled. The Board tabled this cause and directed Staff to reschedule it. At the regularly scheduled public meeting on July 19-20, 2007, the Board considered the following items: (1) the Proposal for Decision regarding the above cited matter; and (2) Staff's recommendation that the Board accept an Order modifying the Proposal for Decision and imposing a WARNING on the license of AMY MICHELLE SMITH, hereinafter "RESPONDENT."

The Board of Nurse Examiners finds that after proper and timely notice was given, the above-styled case was heard by an Administrative Law Judge who made and filed a Proposal for Decision containing the Administrative Law Judge's Findings of Fact and Conclusions of Law. The Proposal for Decision was properly served on all parties and all parties were given an opportunity to file exceptions and replies as part of the record herein. No exceptions were filed by either party within the specified time period.

The Board of Nurse Examiners, after review and due consideration of the Proposal for Decision, adopts the findings of fact and conclusions of law of the Administrative Law Judge as though fully set out and separately stated herein with the exception of Finding of Fact Number 2 which contains a technical error.

Pursuant to TEX. GOV'T CODE ANN. § 2001.058(e)(3), the Board hereby changes Finding of Fact Number 2 because it contains a technical error. The proposed and modified Findings of Fact are as follows:

PROPOSED Finding of Fact Number 2: On September 26, 2006, Respondent tested positive for cannabinoids and amphetamines in a pre-employment drug screen urine test.

MODIFIED Finding of Fact Number 2: On September 26, 2005, Respondent tested positive for cannabinoids and amphetamines in a pre-employment drug screen urine test.

The body of the Proposal For Decision contains the correct date of September 26, 2005. PFD p.1 The date contained in the Proposed Finding of Fact Number 2 is inconsistent with the dates in Findings of Fact Numbers 3 and 4 and is inconsistent with the evidence in the record. Correcting the error does not affect the substantive rights of the parties. Finding of Fact Number 2 is ADOPTED AS MODIFIED.

IT IS ORDERED that Respondent SHALL receive the sanction of a WARNING WITH STIPULATIONS, and RESPONDENT SHALL comply in all respects with the Nursing Practice Act, Revised Civil Statutes of Texas as amended, Texas Occupations Code, §§301.001 *et seq.*, the Rules and Regulations Relating to Vocational Nurse Education, Licensure and Practice, 22 TEX. ADMIN. CODE §211.01 *et seq.* and this Order.

IT IS FURTHER ORDERED that this Order SHALL be applicable to Respondent's multistate licensure privilege, if any, to practice vocational nursing in compact states.

IT IS FURTHER ORDERED that while Respondent's license is encumbered by this Order, Respondent may not work outside the State of Texas pursuant to a multistate licensure privilege without the written permission of the State of Texas and the Board of Nursing in the party state where Respondent wishes to work.

IT IS FURTHER ORDERED that:

(1) RESPONDENT SHALL deliver the wallet-sized license issued to AMY MICHELLE SMITH, to the office of the Board of Nurse Examiners within ten (10) days from the date of ratification of this Order for appropriate notation.

(2) RESPONDENT SHALL, within one (1) year of entry of this Order, successfully complete a course in Texas nursing ethics and jurisprudence. RESPONDENT SHALL obtain Board approval of the course prior to enrollment only if the course is not being offered by a pre-approved provider. Home study courses and video programs will not be approved. In order for the course to be approved, the target audience shall include nurses. It shall be a minimum of six (6) contact hours in length. The course's content shall include the Nursing Practice Act, standards of practice, and documentation of care. Courses focusing on malpractice issues will not be accepted. RESPONDENT SHALL CAUSE the sponsoring institution to submit a Verification of Course Completion form, provided by the Board, to the Office of the Board to verify RESPONDENT's successful completion of the course. This course shall be taken in addition to any other courses stipulated in this Order, if any, and in addition to any continuing education requirements the Board has for relicensure. *Board-approved courses may be found at the following Board website address: <http://www.bne.state.tx.us/about/stipscourses.html>.*

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

HAVE ELAPSED. PERIODS OF UNEMPLOYMENT OR OF EMPLOYMENT THAT DO NOT REQUIRE THE USE OF A VOCATIONAL NURSE (LVN) LICENSE WILL NOT APPLY TO THIS STIPULATION PERIOD:

(4) RESPONDENT SHALL notify each present employer in vocational nursing of this Order of the Board and the stipulations on RESPONDENT's license. RESPONDENT SHALL present a complete copy of this Order and all Proposals for Decision issued by the Administrative Law Judge, if any, to each present employer within five (5) days of receipt of this Order. RESPONDENT SHALL notify all future employers in vocational nursing of this Order of the Board and the stipulations on RESPONDENT's license. RESPONDENT SHALL present a complete copy of this Order and all Proposals for Decision issued by the Administrative Law Judge, if any, to each future employer prior to accepting an offer of employment.

(5) RESPONDENT SHALL CAUSE each present employer in vocational nursing to submit the Notification of Employment form, which is provided to the Respondent by the Board, to the Board's office within ten (10) days of receipt of this Order. RESPONDENT SHALL CAUSE each future employer to submit the Notification of Employment form, which is provided to the Respondent by the Board, to the Board's office within five (5) days of employment as a vocational nurse.

(6) For the duration of the stipulation period, RESPONDENT SHALL be supervised by a Registered Nurse or a Licensed Vocational Nurse who is on the premises. The supervising nurse is not required to be on the same unit or ward as RESPONDENT, but should be on the facility grounds and readily available to provide assistance and intervention if necessary. The supervising nurse shall have a minimum of two (2) years experience in the same or similar practice setting to which the Respondent is currently working. RESPONDENT SHALL work only regularly assigned, identified and predetermined unit(s). RESPONDENT SHALL NOT be employed by a nurse

registry, temporary nurse employment agency, hospice, or home health agency. RESPONDENT SHALL NOT be self-employed or contract for services. Multiple employers are prohibited.

(7) RESPONDENT SHALL CAUSE each employer to submit, on forms provided to the Respondent by the Board, periodic reports as to RESPONDENT's capability to practice vocational nursing. These reports shall be completed by the Registered Nurse or Licensed Vocational Nurse who supervises the RESPONDENT. These reports shall be submitted by the supervising nurse to the office of the Board at the end of each three (3) months for one (1) year of employment as a vocational nurse.

(8) RESPONDENT SHALL abstain from the consumption of alcohol, Nubain, Stadol, Dalgan, Ultram, or other synthetic opiates, and/or the use of controlled substances, except as prescribed by a licensed practitioner for a legitimate purpose. If prescribed, RESPONDENT SHALL CAUSE the licensed practitioner to submit a written report identifying the medication, dosage and the date the medication was prescribed. The report shall be submitted directly to the office of the Board by the prescribing practitioner, within ten (10) days of the date of the prescription. **In the event that prescriptions for controlled substances are required for periods of two (2) weeks or longer, the Board may require and RESPONDENT SHALL submit to an evaluation by a Board approved physician specializing in Pain Management or Psychiatry. The performing evaluator will submit a written report to the Board's office, including results of the evaluation, clinical indications for the prescriptions, and recommendations for on-going treatment within thirty (30) days from the Board's request.**

(9) RESPONDENT SHALL submit to random periodic screens for controlled substances, tramadol hydrochloride (Ultram), and alcohol. For the first three (3) month period, random screens shall be performed at least once per week. For the second three (3) month period, random screens shall be performed at least once per month. For the remainder of the stipulation

period, random screens shall be performed at least once every three (3) months.

Specimens shall be screened for at least the following substances:

Amphetamines	Meperidine
Barbiturates	Methadone
Benzodiazepines	Methaqualone
Cannabinoids	Opiates
Cocaine	Phencyclidine
Ethanol	Propoxyphene
tramadol hydrochloride (Ultram)	

A Board representative may appear at the RESPONDENT's place of employment at any time during the stipulation period and require RESPONDENT to produce a specimen for screening.

All screens shall be properly monitored and produced in accordance with the Board's policy on Random Drug Testing. A complete chain of custody shall be maintained for each specimen obtained and analyzed. RESPONDENT SHALL be responsible for the costs of all random drug screening during the stipulation period.

Any positive result for which the nurse does not have a valid prescription will be regarded as non-compliance with the terms of this Order and may subject the nurse to further disciplinary action by this Board. Failure to report for a drug screen may be considered the same as a positive result and may result in further disciplinary action by this Board.

IT IS FURTHER ORDERED, that upon full compliance with the terms of this Order, RESPONDENT SHALL be issued an unencumbered license and multistate licensure privileges, if any, to practice vocational nursing in the State of Texas.

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WHEREFORE, PREMISES CONSIDERED, the Board of Nurse Examiners for the State of Texas does hereby ratify and adopt this Order and said Order is final.

Entered this 20th day of July, 2007.

BOARD OF NURSE EXAMINERS
FOR THE STATE OF TEXAS

BY: *Katherine A. Thomas*
KATHERINE A. THOMAS, MN, RN
EXECUTIVE DIRECTOR ON BEHALF OF SAID BOARD

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

January 11, 2007

Katherine A. Thomas, M.N., R.N.
Executive Director
Board of Nurse Examiners for the State of Texas
333 Guadalupe, Tower III, Suite 460
Austin, Texas 78701

HAND DELIVERY

**RE: Docket No. 507-06-02819; In the Matter of Permanent Certificate
Number 200464 Issued to Amy Michelle Smith**

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 § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink that reads "Paul D. Keeper".

Paul D. Keeper
Administrative Law Judge

PDK/rm
Enclosures

XC: Docket Clerk, State Office of Administrative Hearings - **VIA HAND DELIVERY**
Victoria Cox, Assistant General Counsel, BNE, 333 Guadalupe, Tower III, Ste. 460, Austin, TX 78701 - **VIA HAND DELIVERY**
Louis Leichter, Attorney at Law, Law Office of Louis Leichter, 1602 East 7th Street, Austin, TX 78702-**VIA REGULAR MAIL**

SOAH DOCKET NO. 507-06-2819

**IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 200464
ISSUED TO
AMY MICHELLE SMITH**

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**BEFORE THE STATE OFFICE

OF
ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The staff of the Texas State Board of Nurse Examiners (Staff/Board) seeks to impose disciplinary action against Amy Michelle Smith, Respondent, a licensed vocational nurse, for violating the Nursing Practice Act (Act), TEX. OCC. CODE ANN. ch. 301, and the Board's rules. In two pre-employment drug screen tests, Respondent tested positive for drugs for which she did not have prescriptions or that were illegal to possess. The Administrative Law Judge (ALJ) finds that Staff met its burden with respect to finding a violation. The recommended discipline is a written warning under the provisions of TEX. OCC. CODE ANN. § 301.453(a).

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

On October 10, 2006, the ALJ convened a hearing on the merits in the William P. Clements Building, 300 West 15th Street, Austin, Texas. Counsel for Staff of the Board was Victoria Cox, and counsel for Respondent were Louis Leichter and Gary Reibschlager. Neither party challenged notice or jurisdiction, matters that are addressed in the findings of fact and conclusions of law. The hearing concluded on October 10, 2006, and the record initially closed on October 20, 2006, following submission of written closing arguments. On November 3, 2006, the ALJ reopened the record for additional information. The additional information was submitted on November 13, 2006, on which date the record closed.

II. BACKGROUND AND EVIDENCE

The facts in this case were not in dispute. On September 21, 2005, Respondent took the examination for licensing as a vocational nurse. On September 26, 2005, before her license was issued, Respondent applied for a job at Covenant Health Systems in Lubbock, Texas, conditioned

on her becoming licensed and passing a pre-employment drug screening test. On September 27, 2005, Respondent was licensed to practice as a vocational nurse in Texas. On September 29, 2005, the testing laboratory reported that Respondent's results were positive for amphetamines and cannabinoids. On November 3, 2005, Respondent applied for a job with Highland Medical Center in Lubbock, Texas. The job interview included a drug screening test, and Respondent tested positive for benzodiazepines (found in Valium) and cannabinoids.

At the hearing, Respondent testified that a psychiatrist had given her a prescription for Adderal, an amphetamine, to treat her adult attention deficit disorder and that she had taken the drug to help her study for her examinations. However, with respect to the benzodiazepines and cannabinoids, Respondent admitted that she had taken Valium while at a party when she was in school. She also admitted that she had smoked marijuana occasionally. However, she also explained that she no longer engaged in the recreational use of any drugs and that she did not rely on unprescribed drugs or illegal substances for any purpose. Respondent expressed remorse for her previous behavior and eagerness to move forward with her new professional career.¹

A. Respondent's evidence.

In addition to her own testimony, Respondent presented the testimony of Robert Cantu, M.D., a board-certified psychiatrist. Dr. Cantu testified that: (1) Respondent did not have a DSM-IV diagnosis of either substance abuse or chemical dependency, and (2) Respondent's sporadic and episodic use of these drugs amounted to poor judgment or misuse rather than abuse. Dr. Cantu testified that a continued program of drug screening was unnecessary to address Respondent's needs.

Respondent presented the testimony of Jeffrey Lee Butts, D.O., a board-certified physician in family practice. Dr. Butts testified that he had interviewed Respondent, reviewed Respondent's

¹ No citations to a transcript are made in this Proposal for Decision (PFD). Although a court reporter was present, Staff did not order or provide a transcript. The official record of the proceedings is comprised of the exhibits and about three hours of tape recordings of oral testimony.

file, and administered a surprise urine drug screen for which Respondent tested negative for all substances. As with Dr. Cantu's opinion, Dr. Butts' testimony was that Respondent's positive drug screens reflected Respondent's naive actions but did not demonstrate that Respondent had any classic symptoms of chemical abuse or dependency.

Respondent also called Cynthia McKee, her present supervisor at the home health agency at which she is employed as a vocational nurse. Ms. McKee testified that Respondent has consistently provided negative drug screens throughout her tenure and that Respondent has demonstrated superlative job skills while working with patients and staff.

Respondent called her mother, Pamela Smith, as a witness. Ms. Smith reiterated her daughter's expressions of remorse, her interest in moving on with her life and her profession, and the absence of any indication of Respondent's chemical abuse or dependency.

Although Respondent did not call Robert L. Howell as a witness, Mr. Howell's expert report was admitted in evidence.² Mr. Howell is a licensed chemical dependency counselor. His report of April 20, 2006, summarized his interview with Respondent in which he found that she demonstrated "no significant patterns of abuse and no evidence of chemical dependency."³

B. Staff's evidence.

Donna Pearson and Pat Perryman of Highland Medical Center testified about the administration of the drug screening test and Respondent's pre-employment interview. Ms. Perryman testified about the hospital's policy of not hiring nurses with a positive drug screen.

² Respondent's Ex. 2.

³ *Id.* at 2.

Staff called Aftab Ahmed, the director of nurses for Covenant Health Systems. Mr. Ahmed testified that the hospital's policy was then and continues to be not to hire nurses with positive drug screens. However, Mr. Ahmed testified that Respondent would be eligible for hiring if she had a negative drug screen.

Staff called Earl Stearns, the investigator for the Board, who reviewed the Board's allegations against Respondent based on the Board's receipt of the two positive drug screening results from Respondent's potential employers. Mr. Stearns confirmed that the screening results were part of the Board's records and that such reports were commonly relied upon by the Board in taking disciplinary action against nurses.

Staff called Carol Marshall, a Board employee, to discuss the elements of the Nurse Practice Act and the Board's policies and procedures with regard to positive drug tests. Ms. Marshall explained that the Board typically seeks a period of monitoring as a sanction following a positive drug test.

III. DISCUSSION

Staff's pleadings frame the primary issue: is Respondent subject to disciplinary action for unprofessional or dishonorable conduct that, in the Board's opinion, is likely to injure a patient or the public?⁴

The legislature has delegated to the Board the general authority to adopt and enforce rules to regulate the practice of vocational nursing. Based on that same authority, the Board establishes standards of professional conduct.⁵ The Board has adopted a rule that defines "unprofessional

⁴ TEX. OCC. CODE ANN. § 301.452(b)(10). Also prohibited in the law is conduct that is likely to deceive or defraud a patient or the public. The issues of deception or fraud were not raised in these proceedings and are not addressed further in this PFD.

⁵ TEX. OCC. CODE ANN. § 301.151.

conduct” to include a positive drug screen for which there is no lawful prescription.⁶ Thus, within the analysis established by the Board’s rule, Respondent had been engaged in unprofessional conduct at the time her positive drug tests were reported to the Board. As a matter of law, Respondent’s conduct had the potential to injure a patient or the public.

The question then becomes: (1) under what circumstances does the Board consider Respondent’s violations to become likely to injure a patient or the public, and (2) if disciplinary action is to be taken against Respondent, what are the Board’s policies in determining that discipline?

A. Under What Circumstances Does the Board Consider Respondent’s Violations to Be Likely to Injure a Patient or the Public?

The Board’s rules require that every person who desires to “obtain or retain a license to practice vocational nursing shall provide evidence of current sobriety and fitness consistent with [Board rules].⁷ However, if an allegation of “misuse or abuse of drugs or alcohol” is made against a vocational nurse then “at a minimum” she must obtain at her expense a chemical dependency evaluation performed by “a licensed chemical dependency evaluator or other professional approved by the executive director.”⁸ Respondent did not satisfy this requirement.

The term “licensed chemical dependency evaluator” is not defined in the rule or in the Board’s enabling legislation. To clarify a number of questions related to Respondent’s compliance with this Board requirement, the ALJ reopened the record on November 3, 2006, and sought the parties’ written responses to four questions:

⁶ 22 TEX. ADMIN. CODE (TAC) § 217.12(10)(D). The related term, “dishonorable conduct,” is not defined by the Nursing Practice Act or by the Board’s rules; the definition, if one exists, was not part of the notice of hearing.

⁷ 22 TAC § 213.29(a).

⁸ 22 TAC § 213.29(c)(1).

1. What is the relation, if any, between a “licensed chemical dependency *counselor*” in TEX. OCC. CODE ANN. § 504.001(2) and a “licensed chemical dependency *evaluator*” in 22 TAC § 213.29(c)(1)?
2. Of the mental health professionals who evaluated Amy Michelle Smith, Respondent, were any a “licensed chemical dependency evaluator or other professional approved by the executive director,” in accordance with 22 TAC § 213.29(c)(1)?
3. Which governmental entity, if any, licenses “chemical dependency evaluators” in Texas?
4. Under the provisions of 22 TAC § 213.29(c)(1), must a “licensed chemical dependency evaluator” be approved by the executive director of the Board of Nurse Examiners (Board), or does the requirement for approval apply only to “other professionals”?

Based on the parties’ responses and a review of the laws governing the construction of statutes and rules, the ALJ concludes that a “chemical dependency *counselor*” is a professional licensed by another state agency, the Texas Department of Health Services, pursuant to its enabling legislation.⁹ However, no governmental entity licenses “chemical dependency *evaluators*.” Instead, this is a term created by the Board to describe one or more types of professionals upon whom the Board may rely to determine a license holder’s fitness to serve as a nurse. Although the Board has the authority to recognize the role of “chemical dependency evaluator,” the Board’s rules do not specify the requirements for recognition.

In addition, the rule includes a parallel reference to “chemical dependency counselor *or other professional approved by the executive director*.” This portion of the term is similarly without definition. Respondent asserts that the language reveals the Board’s intent to create two separate categories of persons authorized to conduct evaluations for chemical dependency: “licensed chemical dependency evaluators” and “other professionals approved by the executive director.”

⁹ TEX. OCC. CODE ANN. §§ 504.001 *et seq.*

Although the ALJ the rule is ambiguous, the ALJ does not adopt Respondent's interpretation. The Board did not recognize two separate types of evaluators. Instead, the Board recognized a single group: counselors or other professionals who possess Board-approved credentials and who are certified to diagnose and evaluate chemical dependency. To reach this conclusion, the ALJ notes that administrative rules are construed in the same manner as statutes.¹⁰ The objective in legislative construction is to determine and give effect to the legislature's intent,¹¹ and the objective in administrative construction is to give similar effect to the agency's intent. An agency's interpretation of its own rules is entitled to deference unless it is plainly erroneous.¹² Among the tools of construction available in the interpretation of a statute is a review of the statute's legislative history.¹³ Similarly, a court may rely upon an administrative history in the interpretation of an agency's rule.

The administrative history of this rule reveals that the language was adopted by the Board in 2002 as part of a general rule revision program. After the initial draft of the rule was published, the Texas Nursing Association raised questions about the meaning of 22 TAC § 213.29(c)(1). In response, Staff explained that the term "licensed chemical dependency evaluator or other professional approved by the executive director" refers to "an individual who possesses Board approved credentials and is certified to diagnose and evaluate chemical dependency."¹⁴ The rule became effective on November 14, 2002.

The Staff's assertion of the meaning of the rule is consistent with the rule's administrative history: to be a chemical dependency evaluator, a health care professional – of whatever background

¹⁰ *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976).

¹¹ *City of San Antonio v. City of Boerne*, 11 S.W. 3d 22, 25 (Tex. 2003).

¹² *Public Utility Comm'n v. Gulf States Utility Co.*, 809 S.W. 2d 201, 207 (Tex. 1991).

¹³ TEX. GOV'T CODE ANN. § 311.023(3).

¹⁴ 27 TEX. REG. 10596 (Nov. 8, 2002).

– must have approval of the Board or Executive Director to render an opinion about a nurse’s current sobriety and fitness as required under 22 TAC § 213.29(a).¹⁵

Based on these conclusions, the remaining question is whether any of the many professionals who evaluated Respondent held the approved status in accordance with 22 TAC § 213.29(c)(1). The answer is no. As noted by Respondent in her November 13, 2006, response to the ALJ’s four questions, only Dr. Cantu “had been previously approved by the [Board’s] Executive Director as a chemical dependency . . . evaluator in other cases similar to this before the [Board].” During his testimony, Dr. Cantu admitted that he had been approved by an evaluator for the Board but that he no longer held that status at the time that he performed his evaluations of Respondent.

Although neither Dr. Cantu, Mr. Howell, nor Dr. Butts held the necessary status to satisfy the requirements of the rule, their testimony and reports otherwise constituted some evidence of Respondent’s current sobriety and fitness to hold a license as an vocational nurse. Specifically, the witnesses’ evidence reflected that in the past five years Respondent: (1) had not become addicted to or treated for the use of alcohol or any other drug, and (2) had not been diagnosed with, or treated or hospitalized for schizophrenia and/or other psychotic disorders, bi-polar disorder, paranoid personality disorder, antisocial personality disorder, or borderline personality disorder.¹⁶ No contravening evidence was presented by Staff on this subject.

In addition, the rule requires that applicants with histories of chemical dependency or mental illness comply with other specific requirements.¹⁷ However, in the facts in this case, there was no

¹⁵ To be recognized as a chemical dependency evaluator, the licensed professional must use the Substance Abuse Subtle Screening Inventory (SASSI), a psychological diagnostic test designed to identify persons who engage in substance abuse. The test was described briefly in the hearing. It apparently involves a series of written questions. Neither Dr. Butts, Dr. Cantu, nor Mr. Howell relied upon this screening technique, choosing instead to rely on blood tests, psychiatric interviews, and more detailed physical and psychological examinations of Respondent to determine the presence or absence of chemical dependency or drug abuse. This PFD does not make a determination as to whether the SASSI is a more or less accurate predictor of a patient’s condition than these other techniques.

¹⁶ 22 TAC § 213.29(b).

¹⁷ 22 TAC § 213.29(f), (g), and (h).

evidence presented that Respondent ever had a history of chemical dependency or mental illness.¹⁸ Thus, the requirements relating to chemical dependency or mental illness do not apply to the obligations of Respondent in this case.

In summary, this case turns less on the actions or health status of Respondent and even less on her current potential threat to the public. Instead, this case turns on the absence of the proper credentials of Respondent's expert witnesses in rebutting the *a priori* evidence of Staff. Although Respondent failed to obtain a chemical dependency evaluation performed by professional approved by the executive director, she did present other evidence from other mental health professionals. The Board has the discretion to rely on other relevant facts about Respondent's current sobriety and fitness. Those facts may include the need for concern expressed by Staff's witnesses, as well as the lack of need for concern expressed by Respondent's non-approved chemical dependency evaluator witnesses.

Taken in total, Staff presented a reasonable case for a heightened level of concern about Respondent's professional conduct.

B. If Disciplinary Action Is to Be Taken Against Respondent, What Are the Board's Policies in Determining That Discipline?

The Board's disciplinary authority is found in TEX. OCC. CODE ANN. § 301.453 and specifically applies to violations of TEX. OCC. CODE ANN. § 301.452(b). The relevant portions of the Section 301.453 of the statute authorize the Board to take the following action in disciplinary matters:

¹⁸ In addition, the rule provides that a licensed or vocational nurse who is reported to the Board for intemperate use must comply with a series of other requirements. 22 TAC § 213.29(c). Staff's witness Mr. Stearns testified that Staff was not alleging intemperate use against Respondent.

Part (a)	Issue a written warning or a public reprimand; restrict, suspend, or revoke a person's license; or assess a fine.
Part (b)	Require a nurse to participate in a program of education or counseling prescribed by the board; practice for a specified period under the direction of a registered nurse or vocational nurse designated by the board; or perform public service the board considers appropriate.
Part (c)	Probate any penalty imposed.
Part (d)	Impose conditions for reinstatement following a suspension, revocation, or voluntary surrender of a license.

In addition, the Board has adopted a set of disciplinary sanctions for nurses who have a diagnosis of chemical dependency or who “demonstrate a pattern of use of addictive substances.”¹⁹

The policy states:

If the person does not receive a diagnosis of chemical dependence, the Board will take any recommendations of the evaluator into account, i.e. pain or disease management, and/or mental health issues, and determine whether or not a period of monitoring by the Board is in the best interest of public health and safety. . . . If the evaluator determines that the individual has a low probability for substance abuse, but the evidence supports identical drug discrepancies,²⁰ the Board will determine whether or not a period of monitoring is necessary to ensure public safety and welfare.²¹

¹⁹ It should be noted that the policy document refers to “use” and not “abuse,” a distinction made by the expert witnesses for Respondent. The title of the policy document is “Disciplinary Sanctions for Nurses with Chemical Dependency.” No citation was given during the hearing or in the briefs.

²⁰ This language apparently refers to the previous paragraph’s reference to instances in which nurses steal drugs from hospital facilities or patients’ residences.

²¹ Respondent argued in written closing argument that the Board’s chemical dependency policies are not rules and are not statutorily authorized. These arguments are rejected. An agency has a variety of ways in which to establish its policies and guidelines; an agency need not adopt its policies solely by rule. Second, although an agency may exercise only the authority delegated to it by statute, an agency’s adoption of a policy or a guideline does not require specific statutory authorization.

Because Respondent engaged in a pattern of use of addictive substances, the policy applies.²² However, upon applying the policy, it is clear that Respondent did not receive a diagnosis of chemical dependence, nor was she involved in “drug discrepancies.”

This analysis reflects the difficulty of an agency’s drafting rules that apply to all possible types of problems that may arise within the scope of the agency’s licensing authority. The problem in this case may best be resolved by reviewing the focus of the parties’ arguments:

Staff’s evidence focused on Respondent’s *past* behavior. Staff’s argument was that Respondent’s previous use of Valium and marijuana had the potential to adversely affect her future performance as a nurse in two ways. First, Staff argued that Respondent’s positive drug tests were a reasonable basis for Staff to be concerned about Respondent’s future inclination to engage in drug abuse. Second, Staff argued that Respondent’s positive drug tests called into question Respondent’s current ability “to recognize subtle signs, symptoms, or changes in a patient’s condition and could impair the nurse’s ability to make rational, accurate, and appropriate assessments, judgments, and decisions regarding health care, thereby placing the patient in potential danger.”²³

Respondent’s evidence focused on Respondent’s *current* behavior. Respondent argued that she is not chemically dependent, is not a substance abuser, is unlikely to engage in conduct that would injure a patient or the public, and has demonstrated that she has the ability to function as a vocational nurse within the limits of her professional obligations. Respondent argued that her current behavior (including her history of compliance with all drug laws) should control the Board’s decision about the lack of need to take any disciplinary action against her.

²² Dr. Butts testified that Respondent was not chemically dependent, was not involved in drug abuse, but had been an episodic user. Whether Respondent’s use of these drugs constituted a “pattern” is debatable. However, as described in the text that follows, her actions were not sufficient to require the application of the balance of the policy.

²³ TEX. OCC. CODE ANN. § 301.402(f).

In short, Staff argues that if Respondent's future is like her past, then Staff has reason to take stern disciplinary action. In contrast, Respondent argues that if Respondent's future is like her present, then Staff has no reason to take any disciplinary action.

The solution lies in a careful reading of the portion of the Board rule that defines good professional character.²⁴ The rule states that seven factors are to be considered in determining good professional character in evaluating disciplinary matters. These include a person's ability to:

- distinguish right from wrong;
- think and act rationally;
- keep promises and honor obligations;
- be accountable for his or her own behavior;
- practice nursing in an autonomous role with patients/clients, their families, significant others, and members of the public who are or who may become physically, emotionally, or financially vulnerable; and
- recognize and honor the interpersonal boundaries appropriate to any therapeutic relationship or health care setting; and promptly and fully self-disclose facts, circumstances, events, errors, and omissions when such disclosure could enhance the health status of patients/clients or the public or could protect patients/clients or the public from unnecessary risk of harm.

The evidence in the hearing reflects that Respondent has performed well in almost all of these areas since she became licensed and employed. The sole issue about which Staff has a legitimate concern is whether Respondent is able to satisfy the third criteria, to keep her promises and honor her obligations to her profession by remaining drug-free. Staff asserts that an appropriate administrative response to Respondent's prior actions should include a period of practice under the direction of a registered nurse or vocational nurse designated by the Board, as authorized in TEX. OCC. CODE ANN. § 301.453 (b).

²⁴ 22 TAC § 213.27(b).

However, Respondent has been a nurse for more than a year. Her current employer and supervisor had only praise for her professional abilities. Her first positive drug screen was the result of pre-licensing behavior. She has proved to a physician that she does not engage in recreational drug use on a post-licensing basis. At least two other addiction specialists have examined her and pronounced her unlikely to relapse. She has been diagnosed as not being chemically dependent or mentally ill. Under the circumstances, a written warning under the provisions of TEX. OCC. CODE ANN. § 301.453(a) would be the more appropriate response.

Finally, Staff's pleadings seek an order that Respondent be required to pay the administrative costs of the hearing, including the cost paid by the Board to SOAH and to Board counsel for legal and investigative services, the cost of a court reporter, witnesses, reproduction of records, Staff time, travel, and expenses.²⁵ These amounts were not proved, and Respondent is not required to pay the requested amount of \$1,200.00.

IV. FINDINGS OF FACT

1. Amy Michelle Smith, Respondent, a licensed vocational nurse, holds license number 200464.
2. On September 26, 2006, Respondent tested positive for cannabinoids and amphetamines in a pre-employment drug screen urine test.
3. On September 27, 2005, Respondent received her license as a vocational nurse from the Board of Nurse Examiners (Board), Petitioner.
4. On November 3, 2005, Respondent tested positive for cannabinoids and benzodiazapines in a pre-employment drug screen urine test.
5. On May 1, 2006, Staff of the Board filed a complaint against Respondent for her failure of the two drug screening tests violated TEX. OCC. CODE ANN. § 301.452(b)(10) and 22 TEX. ADMIN. CODE (TAC) § 217.12(10)(D).

²⁵ The Board's enabling legislation authorizes the Board to "assess a person who is found to have violated this chapter the administrative costs of conducting a hearing to determine the violation. TEX. OCC. CODE ANN. § 301.461.

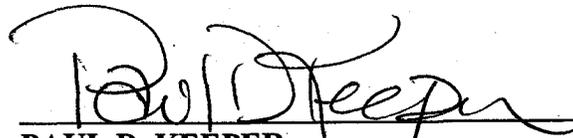
6. Staff sought to take disciplinary action against Respondent because Respondent's use of cannabinoids, benzodiazepam, or amphetamines could impair her ability to recognize subtle signs, symptoms, or changes in a patient's condition and could impair the nurse's ability to make rational, accurate, and appropriate assessments, judgments, and decisions regarding health care, thereby placing the patient in potential danger.
7. Respondent had a prescription for Adderal, an amphetamine prescribed for patients diagnosed with attention deficit hyperactivity disorder (ADHD).
8. Respondent used Adderal in studying for her nursing licensing examinations.
9. Respondent took a Valium at a party before graduating from nursing school.
10. Respondent had no prescription for Valium.
11. Respondent occasionally smoked marijuana on the weekends before graduating from nursing school.
12. Respondent stopped smoking marijuana weeks prior to taking the two pre-employment screening tests.
13. Robert Cantu, M.D., a board-certified psychiatrist, interviewed Respondent and reviewed her medical files.
14. Respondent exhibited to Dr. Cantu no evidence of drug abuse, drug dependency, mental instability, addictive personality, or risk to public health or safety.
15. Jeffrey Butts, D.O., a board-certified family practitioner, evaluates and treats drug and alcohol dependent patients.
16. Dr. Butts interviewed Respondent, reviewed Respondent's file, and administered a surprise urine drug screen for which Respondent tested negative for all substances.
17. Respondent exhibited to Dr. Butts none of the classic symptoms of chemical abuse or dependency.
18. Respondent is currently employed as a vocational nurse at a home health agency.
19. Respondent has consistently provided negative drug screens throughout her tenure and has demonstrated superlative job skills.

V. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to the Nursing Practice Act, TEX. OCC. CODE ANN. § 301.453.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with findings of fact and conclusions of law, pursuant to TEX GOV'T CODE ANN. ch. 2003 and TEX. OCC. CODE ANN. § 301.454.
3. Respondent received proper and timely notice pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 22 TEX. ADMIN. CODE (TAC) §§ 213.10 and 213.22.
4. A person licensed by the Board is subject to disciplinary action for unprofessional or dishonorable conduct that, in the Board's opinion, is likely to injure a patient or the public. TEX. OCC. CODE ANN. § 301.452(b)(10).
5. "Unprofessional conduct" by a licensed nurse includes a positive drug screen for which there is no lawful prescription. 22 TEX. ADMIN. CODE (TAC) § 217.12(10)(D).
6. Possession of Valium without a prescription and possession of marijuana is prohibited by the Controlled Substances Act, TEX. HEALTH & SAFETY CODE ANN. ch. 481.
7. Every person who desires to obtain or retain a license to practice vocational nursing is required to provide evidence of current sobriety and fitness consistent with Board rules. 22 TAC § 213.29(a).
8. If an allegation of "misuse or abuse of drugs or alcohol" is made against a vocational nurse then "at a minimum" she must obtain at her expense a chemical dependency evaluation performed by "a licensed chemical dependency evaluator or other professional approved by the executive director." 22 TAC § 213.29(c)(1).
9. The term "licensed chemical dependency evaluator or other professional approved by the executive director" refers to "an individual who possesses Board approved credentials and is certified to diagnose and evaluate chemical dependency." 27 TEX. REG. 10596 (Nov. 8, 2002).
10. Respondent did not satisfy the requirements of 22 TAC § 213.29(c)(1).
11. The Board's disciplinary authority specifically applies to violations of TEX. OCC. CODE ANN. § 301.452(b). TEX. OCC. CODE ANN. § 301.453.

12. The Board may require a vocational nurse to practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board . TEX. OCC. CODE ANN. § 301.453(b).
13. Based on the Findings of Fact and Conclusions of Law, Respondent should be issued a written warning under the provisions of TEX. OCC. CODE ANN. § 301.453(a).

SIGNED January 11, 2007.



**PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**