

IN THE MATTER OF
PERMANENT CERTIFICATE
NUMBER 127652 & 567862
ISSUED TO MAVIS N. HENDERSON

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BEFORE THE TEXAS
BOARD OF NURSING

NUNC PRO TUNC ORDER OF THE BOARD

TO: Mavis N. Henderson
c/o Connie Williams, Attorney
1314 Texas, Suite 1710
Houston, TX 77002

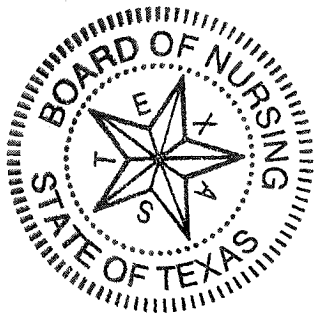
During open meeting held in Austin, Texas, the Texas Board of Nursing finds that an Order of the Board was mistakenly entered for Mavis N. Henderson. Formal Charges, as well as Notice of Hearing, referenced both Permanent Certificate Numbers 127652 and 567862. However, the Proposal for Decision referenced only Permanent Certificate Number 567862, which was incomplete, and therefore, in error. Upon notice and hearing, administrative agencies, like the Courts, have the power to enter nunc pro tunc orders where it can be seen by reference to a record that what was intended to be entered, but was omitted by inadvertence or mistake, can be corrected upon satisfactory proof of its rendition provided that no intervening rights will be prejudiced. *Railroad Comm'n v. McClain*, 356 S.W.2d 330, 334 (Tex. App.--Austin 1962, no writ) (citing *Frankfort Ky. Nat. Gas Co. v. City of Frankfort*, 276 Ky. 199, 123 S.W.2d 270, 272).

The Executive Director, as agent of the Texas Board of Nursing, after review and due consideration of the record and the facts therein invalidates the Order of the Board mistakenly signed and entered on December 11, 2007 and submits and enters the corrected Order of the Board which references Permanent Certificate Numbers 127652 and 567862. Respondent received due process regarding both licenses; therefore, her rights have not been prejudiced by the inclusion of Permanent Certificate Number 127652.

NOW, THEREFORE, IT IS ORDERED that the corrected Order of the Board is hereby approved and entered on the dates set forth below.

Order effective December 11, 2007.

Entered this 4th day of January, 2008.



TEXAS BOARD OF NURSING

BY:

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

DOCKET NUMBER 507-07-2967

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
PERMANENT CERTIFICATE	§	
NUMBER 127652 & 567862	§	OF
ISSUED TO	§	
MAVIS N. HENDERSON	§	ADMINISTRATIVE HEARINGS

ORDER OF THE BOARD

TO: Mavis N. Henderson
c/o Connie Williams, Attorney
1314 Texas, Suite 1710
Houston, TX 77002

During open meeting held in Austin, Texas, the Texas Board of Nursing 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.

The Texas Board of Nursing, after review and due consideration of the proposal for decision, and exceptions and replies filed, if any, adopts the findings of fact and conclusions of law of the Administrative Law Judge as if fully set out and separately stated herein. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

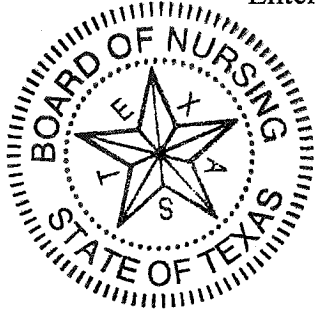
NOW, THEREFORE, IT IS ORDERED that Permanent Certificate Numbers 127652 & 567862, previously issued to MAVIS N. HENDERSON, to practice nursing in the State of Texas be, and the same are hereby, REVOKED.

IT IS FURTHER ORDERED that Permanent Certificate Numbers 127652 & 567862, previously issued to MAVIS N. HENDERSON, 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 privilege, if any, to practice professional nursing in the State of Texas.

Order effective December 11, 2007.

Entered this 4th day of January, 2008.



TEXAS BOARD OF NURSING

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

SOAH DOCKET NO. 507-07-2965

TEXAS STATE BOARD OF NURSE
EXAMINERS,
Petitioner

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BEFORE THE STATE OFFICE

v.

OF

MAVIS N. HENDERSON,
Respondent

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas State Board of Nurse Examiners¹ (Staff/Board) brought this action seeking to revoke the nursing license of Mavis N. Henderson (Respondent) for engaging in the intemperate use of cocaine and for failing to comply with the terms of an agreed Board order. This proposal finds that Staff met its burden to prove the alleged violations and that revocation of Respondent's license is warranted.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

On October 17, 2007, the hearing in this matter convened before Administrative Law Judge (ALJ) Ami L. Larson at the State Office of Administrative Hearings (SOAH), 300 W. 15th Street, Austin, Texas. Assistant General Counsel Victoria Cox represented Staff. Respondent appeared with her attorney, Connie Williams. Because there are no contested issues of notice or jurisdiction, those matters will be set forth in the Findings of Fact and Conclusions of Law without further discussion.

At the conclusion of the hearing, the parties agreed to allow the record to remain open for Respondent to submit additional evidence. On October 24, 2007, the ALJ received Respondent's Exhibit B,² which was admitted as evidence. The record closed on that date.

¹ The agency is now called the Texas Board of Nursing.

² Exhibit B is the report with results from a hair follicle test submitted by Respondent on October 16, 2007.

II. SUMMARY OF EVIDENCE PRESENTED

A. Evidence Presented

Staff submitted ten documentary exhibits and presented the testimony of one witness. Respondent submitted two exhibits and testified on her own behalf.

B. Summary of Undisputed Facts

Most of the facts were not disputed. Respondent has been licensed as a Registered Nurse in Texas since 1991.³ Since obtaining her license, she has been employed off and on as a nurse. In February 2003, Respondent submitted to a drug screen as part of the application process for a position at Christus St. Joseph Hospital in Houston, Texas. That drug screen indicated the presence of cocaine in her system. Because of the positive drug screen, Respondent was referred to the Texas Peer Assistance Program for Nurses (TPAPN). She was noncompliant with and ultimately suspended from that program, however, without completing it.

Respondent then agreed to be bound by the terms of a three-year Board order (Order), which became effective on April 22, 2004. The Order included provisions requiring Respondent to abstain from using any alcohol, synthetic opiates, or controlled substances not validly prescribed to her; undergo random drug screens; successfully complete designated approved professional educational courses; supply proof of regular attendance at group recovery meetings; and submit regular job performance evaluations. Additionally, Respondent's nursing license was suspended for the initial

³ Respondent testified that she has been licensed as a nurse in Texas since 1988. The Board's records show that she was initially licensed in 1990 as a Vocational Nurse and then in 1991 she received her Registered Nurse's license. BNE Exhibit 1. This discrepancy is not relevant to the ALJ's findings or recommendation, however.

12 months of the Order,⁴ after which the suspension was stayed for the duration of the three-year term, provided Respondent was in compliance with all requirements of the Order.

Respondent complied with all terms of the Order until May 22, 2006, when she submitted a drug screen that tested positive for the presence of cocaine. The Board notified Respondent of the violation on July 7, 2006.⁵ Following the positive test, Respondent submitted several additional drug screens, including a hair follicle test, all of which were negative.⁶

Respondent is currently unemployed. Her most recent job was as a nurse for Ashford Gardens Nursing Home in Houston, Texas, where she worked from 2004 until April 2007. She was terminated from that position for allegedly failing to follow hospital policy regarding pharmacy protocol.⁷

III. SUMMARY OF ARGUMENTS PRESENTED

A. Staff's Position

Staff argued that it is imperative for nurses to be clean and sober to safely practice nursing. Staff further contended that nurses who are chemically dependent or who abuse drugs or alcohol may have impaired judgment and, therefore, risk harming patients.

⁴ The period of suspension under the Agreed order was for 12 months or until Respondent demonstrated sobriety for a period of 12 consecutive months. It appears from the evidence in the record that, Respondent's license suspension was stayed after the initial 12 months of the Agreed Order.

⁵ Board's Exhibit 2.

⁶ According to the evidence in the record, the hair follicle test reveals that Respondent had not used any of the screened drugs for a period of approximately ninety days prior to October 16, 2007.

⁷ Respondent denied any wrongdoing and stated that she was unjustly terminated from employment.

Under the Board's policy regarding disciplinary sanctions for nurses with chemical dependency,⁸ all nurses with substance abuse problems are given an opportunity to seek approved treatment and are eligible to resume caring for patients once they are able to provide verifiable, documented proof of at least one year of sobriety and ongoing stable recovery.

Where, as in this case, a nurse is disciplined by the Board, the nurse is subject to probationary monitoring by the Board for a minimum of three years in addition to being required to demonstrate sobriety and ongoing stable recovery. The Board's policy dictates that license revocation will be sought in cases where a nurse fails to maintain compliance with a Board order. Accordingly, Staff contends that, since Respondent violated both the law and the terms of a Board order, her license should be revoked pursuant to the Board's policy.

B. Respondent's Position

Respondent argued that her license should not be revoked because she did not violate the terms of the Order, the Nursing Practice Act, or the Board's rules. She stated that she was shocked when the May 22, 2006, drug screen was returned with positive results for cocaine. She denied that she had either used cocaine herself or been around others who had. She stated that she had complied with all terms of the Order, which included being supervised and evaluated at work, and that all evaluations of her job performance were positive.

Additionally, she noted that she had already successfully completed more than two years of the three-year Order. Respondent argued that she simply would not jeopardize her career or sabotage her successful completion of the Order by using drugs.

Respondent further pointed out that she had submitted more than twenty other drug screens, all of which were negative. Additionally, following the positive screen and even after she stopped

⁸ Original policy adopted July 26, 2002, amended on April 25, 2003, and revised on April 23, 2004.

working, she submitted several drug screens which came back negative. Respondent argued that the large number of negative drug screens, taken both before and after May 22, 2006, including a negative hair follicle test taken the week of the hearing,⁹ demonstrates that she is clean and fit to retain her license and continue to practice nursing.

IV. APPLICABLE LAW

In its notice of hearing and formal charges, Staff alleged that Respondent is subject to disciplinary action under the Texas Occupations Code for intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient¹⁰ and 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.¹¹

Intemperate use includes practicing nursing or being on duty or on call while under the influence of alcohol or drugs.¹² Unprofessional conduct, pursuant to the Board's rules, includes the following:

- Engaging in unsafe practice by accepting the assignment of nursing functions or a prescribed health function when the acceptance of the assignment could be reasonably expected to result in unsafe or ineffective client care;¹³

⁹ Those results, which test for drugs taken up to 90 days before the sample was taken, were admitted as Respondent's Exhibit B.

¹⁰ TEX. OCC. CODE ANN. § 301.452(b)(9).

¹¹ TEX. OCC. CODE ANN. § 301.452(b)(10).

¹² TEX. OCC. CODE ANN. § 301.452(a).

¹³ 22 TAC § 217.12(1)(E).

- Being potentially unable to practice nursing with reasonable skill and safety to clients by reason or illness, use of alcohol or drugs, chemicals, or any other mood-altering substances, or as a result of any mental or physical condition;¹⁴
- Using any controlled substance or any drug, prescribed or unprescribed, or device or alcoholic beverages while on duty or on call and to the extent that such use may impair the nurse's ability to safely conduct to the public the practice authorized by the nurse's license;¹⁵
- Having positive drug screen results for which there is no lawful prescription.¹⁶

Those desiring to obtain or retain a license to practice professional nursing are required to provide evidence of current sobriety and fitness consistent with the Board's rules.¹⁷

V. ANALYSIS AND RECOMMENDATION

The ALJ finds that Staff met its burden to establish that Respondent engaged in unprofessional conduct and failed to comply with the terms of an agreed Board order. Therefore, the ALJ recommends that Respondent's nursing license be revoked subject to her right to petition for its reinstatement after one year from the date of the revocation pursuant to Board policy.

Although Respondent denied using cocaine, she did not present any evidence to show that the test results indicating its presence in the sample she submitted on May 22, 2006, were invalid. Absent any credible alternative explanation as to why or how those results could reflect a false positive, the ALJ finds those lab results to be persuasive evidence of Respondent's use of cocaine. Additionally, cocaine appears to be Respondent's drug of choice, as evidenced by the fact that she

¹⁴ 22 TAC § 217.12(5).

¹⁵ 22 TAC § 217.12(10)(A).

¹⁶ 22 TAC § 217.12(10)(D).

¹⁷ 22 TAC § 213.29(a).

testd positive for cocaine prior to enrolling in TPAPN. This adds further credibility to the
Ma 22, 2006, test results that indicated the presence of cocaine in her system.

In light of the positive drug screen, it is reasonable for the Board to be concerned about
Respondent's continued drug use and ability to safely practice nursing. And it is reasonable for the
Board to seek revocation of Respondent's license since she apparently relapsed after having already
had her license suspended and while under a Board order.

Finally, Staff's pleadings seek to require Respondent to pay the administrative costs of the
hearing in the amount of \$1,200.00. No evidence was presented, however, to support this request
and therefore Respondent should not be required to pay the hearing costs as requested.

For the reasons stated above, the ALJ finds that Respondent engaged in unprofessional
conduct and violated the terms of a Board order and that revocation of her license is, therefore,
waranted.

VI. FINDINGS OF FACT

1. Mavis N. Henderson (Respondent), holds registered nurse's license number 567862 issued by the Texas State Board of Nurse Examiners (Board).
2. On November 14, 2006, Board Staff (Staff) filed formal charges against Respondent, which she received on November 24, 2006.
3. On May 29, 2006, Respondent received Staff's Notice of Hearing, which was mailed by Staff on May 25, 2006.
4. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
5. A hearing on the merits was convened at the State Office of Administrative Hearings on October 17, 2007, before Administrative Law Judge Ami L. Larson (ALJ). Respondent

appeared and was represented by her attorney, Connie B. Williams. Staff was represented by Assistant General Counsel Victoria Cox. The record remained open until October 24, 2007.

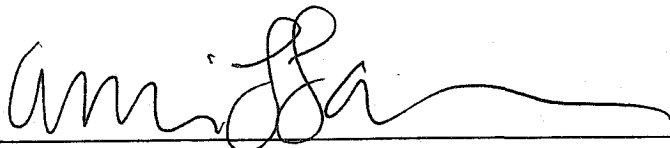
6. Respondent has worked on and off as a registered nurse since 1991, when she became licensed in Texas.
7. In February 2003, as part of the application process for a job at Christus St. Joseph Hospital in Houston, Texas, Respondent submitted to a drug screen that tested positive for the presence of cocaine.
8. Because of the positive drug screen, Respondent was referred to the Texas Peer Assistance Program for Nurses (TPAPN) but she was suspended due to noncompliance and did not complete the program.
9. Respondent agreed to be bound by the terms of a three-year Board order (Order), which became effective on April 22, 2004.
10. The Order included various provisions including a requirement that Respondent abstain from any use of alcohol, synthetic opiates, or controlled substances not validly prescribed to her.
11. The Order also required Respondent to submit to random drug screens.
12. Respondent's nursing license was suspended for the initial 12 months of the Order.
13. After the initial 12 months of the Order, the suspension of Respondent's license was stayed and she was allowed to continue to practice nursing under the terms of the Order.
14. On May 22, 2006, while the Order was still in effect, Respondent submitted a drug screen that tested positive for the presence of cocaine.
15. No evidence was presented to support Staff's request for an assessment of administrative hearing costs in the amount of \$1,200.00 against Respondent.

VII. CONCLUSIONS OF LAW

1. The Texas State Board of Nurse Examiners (Board) has jurisdiction over this matter pursuant to the Nursing Practice Act, TEX. OCC. CODE ANN. (Code) § 301.453.

2. The State Office of Administrative Hearings 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 Code § 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. By testing positive for cocaine without a valid prescription, Respondent engaged in unprofessional conduct as defined in Code § 301.452(b)(10) and 22 TAC §§ 217.12(10)(A) and (D).
5. Every person who desires to obtain or retain a license to practice professional nursing is required to provide evidence of current sobriety and fitness consistent with Board rules. 22 TAC § 213.29(a).
6. Because Respondent violated both the law and the terms of a Board order, revocation of her registered nurse's license is warranted.

SIGNED November 14, 2007.



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