DOCKET NUMBER 507-24-06906

IN THE MATTER OF PERMANENT CERTIFICATE NUMBER RN 1053355, ISSUED TO MARGARET WANJIKU KAHURA	**§**	**BEFORE THE STATE OFFICE**
	§	**OF**
	§	**ADMINISTRATIVE HEARINGS**

OPINION AND ORDER OF THE BOARD

TO: MARC MEYER
2300 WOODFOREST PKWY N, STE 600
MONTGOMERY, TEXAS 77316

KATERINA DEANGELO
ADMINISTRATIVE LAW JUDGE
PO BOX 13025
AUSTIN, TX 78711-3025

At the regularly scheduled public meeting on January 30, 2025, the Texas Board of Nursing (Board) considered the following items: the Proposal for Decision (PFD) regarding the above cited matter; Staff's recommendation to the Board regarding the PFD and order; 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 ALJ issued an Exception Letter indicating no exceptions were timely filed.

The Board, after review and due consideration of the PFD; Staff's recommendations; and the recommendations made by the Respondent, if any, adopts all of the findings of fact and conclusions of law of the ALJ contained in the PFD. All proposed findings of fact and conclusions of law filed by any party not specifically adopted herein are hereby denied.

Recommendation for Sanction

Pursuant to Tex. Occ. Code. §301.459 (a-1), an Administrative Law Judge may make a recommendation regarding an appropriate action or sanction. The Board, however, has the sole authority and discretion to determine the appropriate action or sanction.

The ALJ found that Siena unlawfully issued Respondent's diploma because it was approved to offer in-person practical nursing program in Florida and required at least 50 percent of the hours to be comprised of clinical instruction.[1] Respondent's program through Siena was not an approved Texas program and was not substantially equivalent to Texas standards for RN programs.[2] Specifically, Respondent's nursing program was deficient because there were no clinical rotations with live patients and faculty supervision.[3] A RN who was not properly trained poses a risk of harm to patients.[4]

The Board agrees with the ALJ's finding that practicing nursing under a diploma that was issued unlawfully.[5] Nursing practice under an unlawfully issued diploma is prohibited by the Nursing Practice Act.[6] If the Respondent continued to practice under her current credentials, she would continue to violate Tex. Occ. Code § 301.451(3)(B), and by extension, Tex. Occ. Code § 301.452(b)(1). For this reason, the Board disagrees with the ALJ's recommended sanction of enforced suspension and imposes revocation.

IT IS, THEREFORE, ORDERED THAT Registered Nurse License Number 1053355, previously issued to MARGARET WANJIKU KAHURA, to practice nursing in the State of Texas be, and the same are hereby, REVOKED.

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 30th day of January, 2025.

TEXAS BOARD OF NURSING

Kristin K. Benton, DNP, RN

Kristin K. Benton, DNP, RN
EXECUTIVE DIRECTOR FOR THE BOARD

Attachments: Proposal for Decision; Docket No. 507-24-06906 (September 27, 2024), Exceptions Letter issued October 15, 2024.

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[1] Finding of Fact 20, 22, 23, 26.
[2] Finding of Fact 23-25.
[3] Finding of Fact 9.
[4] Finding of Fact 27.
[5] Conclusion of Law 6.
[6] Tex. Occ. Code § 301.451(3)(B).

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

September 27, 2024

Tiffany Collins **VIA EFILE TEXAS**
Assistant Attorney General

Marc Meyer **VIA EFILE TEXAS**
Attorney for Respondent

RE: SOAH Docket No. 507-24-06906.TBN; *Texas Board of Nursing v. Margaret Wanjiku Kahura*

Dear Parties:

Please find attached a Proposal for Decision in this case.

Exceptions and replies may be filed by any party in accordance with 1 Texas Administrative Code section 155.507(b), a SOAH rule which may be found at www.soah.texas.gov.

CC: Service List

SOAH Docket No. 507-24-06906 Suffix: TBN

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS BOARD OF NURSING,
PETITIONER
v.
MARGARET WANJIKU KAHURA,
RESPONDENT

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BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS BOARD OF NURSING,
PETITIONER
v.
MARGARET WANJIKU KAHURA,
RESPONDENT

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Board of Nursing (Board) seeks to revoke held Margaret Wanjiku Kahura's (Respondent) Registered Nurse (RN) license on the basis that she used a fraudulent or unlawful license or diploma and lacks the requisite education or degree. The Administrative Law Judge (ALJ) finds Staff failed to demonstrate fraud on Respondent's part but recommends the Board suspend or revoke the license because Respondent received an unlawful diploma and does not meet the requirements to practice nursing.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

Matters of notice and jurisdiction were undisputed and are set out in the Findings of Fact and Conclusions of Law. State Office of Administrative Hearings (SOAH) ALJ Katerina DeAngelo convened a videoconference hearing on June 27, 2024. Assistant Attorney General Tiffany Collins represented Staff, and attorney Marc Meyer represented Respondent. The record closed on August 19, 2024, upon the filing of closing briefs.

II. STAFF'S ALLEGATIONS AND APPLICABLE LAW

This case is the result of a law enforcement action against a fraudulent nursing diploma scheme, called "Operation Nightingale" by the Federal Bureau of Investigation and federal Health and Human Services Commission-Office of Inspector General. Siena Education Center, LLC (Siena) was identified as a school potentially involved in issuing fraudulent diplomas.

The Board is authorized to regulate nurses pursuant to the Texas Nursing Practice Act (Act).[1] A person may not practice nursing in Texas without a Board-issued license.[2] Respondent was identified as a nurse who received a degree from Siena and subsequently secured a license to practice nursing. As a result, Staff brought formal charges against Respondent and seeks to revoke her RN license.[3]

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[1] Tex. Occ. Code ch. 301.

[2] Tex. Occ. Code § 301.251(a).

[3] In the alternative to revocation, the Board seeks to deny the renewal of Respondent's RN license. *See* Staff's First Amended Formal Charge, filed Jun. 11, 2024.

A nurse is subject to disciplinary action for a violation of the Act, a Board rule or regulation, or a Board order.[4] The bases for disciplinary action include: (1) fraud or deceit in procuring or attempting to procure a license to practice professional nursing; (2) use of a nursing license, diploma, or permit, or the transcript of such a document, that has been fraudulently purchased, issued, counterfeited, or materially altered; and (3) unprofessional conduct in the practice of nursing that is likely to deceive, defraud, or injure a patient or the public.[5] It is also prohibited for a person to: (1) fraudulently obtain a nursing license or (2) practice nursing under a diploma, license, or record that was obtained unlawfully or fraudulently; or signed or issued unlawfully or under false representation.[6]

When a nurse violates the Act or Board rules, the Board is required to impose a disciplinary sanction, which can range from remedial education to license revocation.[7] If the facts establish a basis for sanction, the Board's disciplinary matrix (Matrix) and aggravating and mitigating factors must be analyzed.[8] The Matrix categorizes violations into tiers and sanction levels based on the seriousness of the offense and risk of harm to patients or the public.[9]

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[4] Tex. Occ. Code § 301.452(b)(1).

[5] Tex. Occ. Code § 301.452(b)(2), (5), (10).

[6] Tex. Occ. Code § 301.451(1), (3).

[7] Tex. Occ. Code § 301.453; 22 Tex. Admin. Code § 213.33(e).

[8] 22 Tex. Admin. Code § 213.33.

[9] 22 Tex. Admin. Code § 213.33(b).

A person licensed in another state may obtain a license by endorsement in Texas by submitting proof of initial licensing by examination and evidence the person "possessed, at the time of initial licensing as a nurse, the other qualifications necessary at that time to have been eligible for licensing in this state."[10] The Board has specified that licensure by endorsement requires a nurse to have graduated from "an approved nursing education program."[11] An approved nursing education program includes a program approved by the state board of nursing of another state and the Board.[12] The Board may recognize and accept as approved a school of nursing or educational program operated in another state and approved by a state board of nursing or other regulatory body of that state.[13]

An RN program in another state may be deemed to have "substantially equivalent education standards" to a Texas program if:

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[10] Tex. Occ. Code § 301.260(a).

[11] 22 Tex. Admin. Code § 217.5(a)(1). For purposes of this PFD, citations to licensing requirements are to the rules in effect at the time Respondent was initially licensed in September 2021. *See* Tex. Occ. Code § 301.260(a). In October 2022, 22 Texas Administrative Code section 217.5(a)(1) was amended to include either "an approved Texas nursing education program" or a "program with substantially equivalent education standards[.]" *See* 47 Tex. Reg. 6581 (Oct. 7, 2022) (adopting the rule as proposed in 47 Tex. Reg. 4933, 4935 (Aug. 19, 2022)). Additional changes to 22 Texas Administrative Code section 217.5, effective March 21, 2024, do not affect the subsections cited in this PFD. *See* 49 Tex. Reg. 1715 (Mar. 15, 2024).

[12] Tex. Occ. Code § 301.157(d)(3). To be approved by the Board to operate in Texas, a professional RN nursing education program must be licensed by the Texas Workforce Commission or the Texas Higher Education Coordinating Board, as applicable, and the program's proposal must be approved by the Board. If the governing entity of a program has a nursing education program in other jurisdictions (for example, a Florida-approved school seeks to operate an extension site in Texas), the program proposal must still be approved by the Board. *See* 22 Tex. Admin. Code § 215.3(a)(1), (2)(B) (requiring entities with programs in other jurisdictions to include additional information with their program proposals).

[13] Tex. Occ. Code § 301.157(d-4). The Board is required to adopt rules to ensure that the other state's standards are substantially equivalent to the Board's standards.

i. the program is approved by a state board of nursing or other governmental entity to offer a pre-licensure professional nursing program of study that awards a nursing diploma or degree upon completion;

ii. the program includes general education courses providing a sound foundation for nursing education for the level of preparation; [and]

iii. the program's nursing courses include didactic content and supervised clinical learning experiences in medical-surgical, maternal/child health, pediatrics, geriatrics, and mental health nursing that teach students to use a systematic approach to clinical decision-making and safe patient care across the life span[.][14]

Each applicant for an RN license must submit to the Board a sworn application that demonstrates the applicant's qualifications, accompanied by evidence that the applicant, among other things, has successfully completed an approved program of professional nursing education.[15] The Board's rules prohibit providing false, deceptive, or misleading information in connection with the practice of nursing.[16]

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[14] 22 Tex. Admin. Code § 217.2(a)(4)(A)(i)-(iii). An additional requirement found in 22 Texas Administrative Code section 217.2(a)(4)(A)(iv) applied to baccalaureate nursing programs, but it is not pertinent here because Respondent obtained an associate's degree (not a bachelor's) from Siena. As of 2022, the requirements for substantially equivalent RN education standards were added to 22 Texas Administrative Code section 217.5(a)(1)(A). *See* 47 Tex. Reg. 6581 (Oct. 7, 2022) (adopting the rule as proposed in 47 Tex. Reg. 4933, 4935 (Aug. 19, 2022)).

[15] Tex. Occ. Code § 301.252(a)(2).

[16] 22 Tex. Admin. Code § 217.12(6)(H).

The standard of proof is a preponderance of the evidence.[17] Staff has the burden of proof, and Respondent has the burden of proving mitigating factors, if any.[18]

III. EVIDENCE

Staff offered 13 exhibits that were admitted,[19] called Respondent as a witness, and presented testimony of Jason Bowman, Anthony Diggs, and its expert Dr. Virginia Ayars. Respondent did not offer documentary evidence but testified on her own behalf and presented testimony of Sunday Osoro and Betty Kariuki.

A. BACKGROUND

Respondent attended a Texas-approved program and became a licensed vocational nurse (LVN) in 2014.[20] On August 29, 2021, Respondent submitted an application for an RN licensure by endorsement to the Board, attesting that she attended and completed an Associate Degree of Nursing (ADN) program at Siena.[21] Respondent's transcripts from Siena reflects her attendance dates as

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[17] *Granek v. Tex. St. Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.); *Sw. Pub. Serv. Co. v. Pub. Util. Comm'n of Tex.*, 962 S.W.2d 207, 213-14 (Tex. App.—Austin 1998, pet. denied).

[18] 1 Tex. Admin. Code § 155.427.

[19] Staff Exs. 1, 2, 3, 4, 5 (p. 17, lines 20-25; p. 18, line 2; p. 38, lines 7-9; and p. 42, lines 21-25), 6, 7, 8, 9, 11, 12, 14, and 15.

[20] *See* Staff Ex. 2. Respondent stated that she worked as an LVN for seven years. She received clinical experiences when getting her LVN education. Respondent stated that RNs and LVNs "do the same thing" in terms of patient care with the exception that an LVN cannot pronounce death. Dr. Ayars testified that Respondent's LVN experience does not excuse Respondent's lack of supervised clinical hours with live patients in her ADN program. Dr. Ayars stated that the RN scope of practice is much broader than LVN.

[21] Staff Ex. 3 at BON0064-79.

March 2019-June 2020; and her diploma has the issuance date of June 30, 2020;[22] however, at the deposition and the hearing, Respondent testified that she attended Siena in July 2020-February 2021.[23] Respondent represented to the Board that she passed the National Council Licensing Examination (NCLEX) in August 2021, and then became duly licensed by the state of Florida as an RN.[24] The Board issued Respondent an RN license.[25]

Respondent testified that she never lived in Florida and never planned on living or working in Florida. She found out about Siena from a nurse in Texas. Respondent did not contact the Board to check if Siena was approved for an RN program. She did not believe that was required of her. She contacted the Florida Board of Nursing to confirm that Siena was certified for the ADN program. Respondent attended all her classes exclusively online except for three days of simulated in-person clinical courses in Florida. Respondent completed zero hours of in-person hands-on clinicals with live patients during her RN program.

Respondent testified that she paid for her education directly to the owner of the school. She stated that, since it was during the COVID-19 pandemic, she did not question that she paid directly to the owner.

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[22] Staff Exs. 6, 7.

[23] Staff Ex. 5 at BON0093-94, 96.

[24] Staff Ex. 3 at BON0073-74.

[25] Staff. Ex. 2. Respondent submitted her RN renewal application on December 18, 2023, where she attested again that she had graduated from Siena on June 30, 2020. Staff Ex. 4 at BON0081-90. In her renewal application Respondent identified that she was under the Operation Nightingale investigation. Staff Ex. 4 at BON0085-86.

Siena was approved as an exclusively in-person nursing program to be administered and taught on a Florida campus. Siena was approved to provide in-person clinicals. Siena was not approved by the Board to provide a nursing program in Texas. The program was terminated by the Florida Board of Nursing on or about August 11, 2020.[26]

B. TESTIMONY OF MR. BOWMAN

Mr. Bowman is an educational policy analyst at the Florida Commission for Independent Education (FCIE). He explained that the FCIE is responsible for the licensure of most non-public post-secondary institutions in Florida, including private nursing schools. He testified that Siena was licensed and approved by the FCIE to offer ADN programs. Specifically, Siena was approved to operate an ADN program composed of 74 semester hours, with 50 percent of those hours required to be clinicals.[27]

Mr. Bowman testified that the type of nursing education program Respondent received did not comport to the program for which Siena was licensed because Siena was not approved to offer courses exclusively online,[28] was not approved to offer courses to students not residing in Florida during the time frames at issue, did not instruct from a single textbook listed in the course outline but only from an NCLEX study guide, and did not offer live clinicals with actual patients.

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[26] Staff Ex. 1 at BON0002.

[27] Staff Exs. 1 at BON0002, 29-35; 14 at BON0133.

[28] According to Mr. Bowman, the FCIE's executive director granted temporary online approval in March 2020 requiring institutions to reply to the FCIE staff with their plan for delivering programs online. To Mr. Bowman's knowledge, Siena never indicated to the Commission that they were "offering anything online."

Mr. Bowman was not aware of any licensure requirements for students to seek out information about the institutions before or while attending the school. However, he stated that the institutions must disclose information about licensure to their students, including their license status and previous year's passage rates.

C. TESTIMONY OF RESPONDENT

Respondent testified she attended classes exclusively online twice a week for two-three hours, while residing in Texas. She stated that the courses were presented via PowerPoints, but she did not recall whether the courses were structured by semester or quarter. She stated it took her about one to three months to complete a course. Respondent further testified the program was instructed from one book, titled Comprehensive Review for NCLEX-RN Exam 8th edition, which she used for homework.[29]

Respondent attended a three-day clinical course in Florida in January 2021, in a simulation lab, which was in the school's building and had mannequins and other equipment such as IV's, supplies, and beds. She stated she was in the simulation lab, along with ten other students, for approximately one and a half hours a day. She could not recall how many total hours she spent in the lab, but said it was more than three hours.[30] When she was not in the lab, she was in class studying, going over questions, and waiting for the next clinical session. She could not describe in detail

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[29] That book was not amongst the 24 books listed in the FCIE approved course outline for Siena. Staff Ex. 1 at Bates BON0035. Dr. Ayars testified that it was "unthinkable" that one prep book would be the basis for the entire curriculum. She said it was not an acceptable method to teach ADN students.

[30] During her deposition, Respondent stated that she spent "roughly about three hours performing simulation in the lab." Staff Ex. 5 at BON0095.

the tasks she performed in the simulation lab but stated that they "did a lot." Respondent testified that she did catheter insertion and removal, IV therapy, and blood transfusions, all using mannequins.

Respondent testified that she had no explanation for the discrepancy in the dates she said that she attended Siena and the dates reflected in her diploma and transcript.[31] She confirmed that she used the diploma and transcript as the basis for her education when applying for her Texas RN license. Respondent testified that she knowingly listed an incorrect date as her graduation date on her applications; but she could not explain why she did that.

Respondent testified that she alone completed her endorsement and renewal applications and certified that the information in her application was truthful, accurate, and complete. She stated that, to the best of her knowledge, she represented that she satisfactorily completed a curriculum with didactic and clinical components comparable to the Board's requirements. Respondent believed she met all the requirements, and she did not question whether the Texas endorsement under an exclusively online program was allowed.[32] She believed that she met the Board's requirement for clinical hours, even though she had zero live patient experience, because she was told that, due to the COVID-19 pandemic, no facility was accepting any students, and she did not question it further. Respondent testified that at the time she submitted both applications she was familiar with some of the Board's rules,

[31] Respondent testified that she called Siena to discuss the discrepancy and asked to change the dates but was told that her diploma was already submitted to the Florida Board of Nursing.

[32] Respondent stated that she did not inquire about the Board's rules for licensure before applying for an RN license.

but she was not familiar with the substantially equivalent education standards for endorsement licensure in Texas.

Respondent has been practicing as an RN full-time since receiving her license. Currently, Respondent is employed as a case manager in a hospice facility where she works with patients independently. She has never received any disciplinary action from the Board. She believes that if a nurse does not have proper education and training, she/he should not be practicing nursing because they pose a risk of harm to patients.

D. TESTIMONY OF MR. DIGGS

Mr. Diggs is the Director of Enforcement for the Board and has worked for the Board for over 30 years. He is responsible for overseeing the enforcement division, and that includes eligibility, investigations, and compliance of licensees. He stated that the Board's mission is to protect the people from unsafe nursing practice, which is done through the regulation of nursing practice and education. Mr. Diggs testified that, in January 2023, the Board was notified of the Operation Nightingale scheme. Siena was one of the schools investigated under Operation Nightingale, and Respondent was specifically listed as a participant in the scheme.[33]

Mr. Diggs explained that the licensure by endorsement means that a person can endorse a license in Texas based on a license obtained in another jurisdiction. For endorsement applications, the Board relies on the state where the person was

[33] Staff Ex. 14 at Bates BON0157.

initially licensed, which is supposed to check the educational program. The Board only verifies that the person's criminal background is clear and that the license in that state is in good standing. According to Mr. Diggs, in her application, Respondent certified that she understood the requirements for RN licensure and met them.[34] He said that the Board relied upon Respondent's certification in issuing her license.[35] Mr. Diggs testified that Respondent never contacted the Board to make corrections to her applications. Mr. Diggs stated that, if a person does not have the minimum qualifications to practice nursing, they are putting vulnerable public in jeopardy. Mr. Diggs was not aware of any complaints or other allegations of improper nursing practice by Respondent.

E. TESTIMONY OF DR. AYARS

Dr. Ayars is a nursing consultant for education. She has been employed with the Board for 22 years. Her job responsibilities include ensuring that the Board's RN program operates in alignment with the Board's rules. Dr. Ayars testified that for a graduate of a nursing education program to be deemed eligible to take an NCLEX, the individual must have graduated from a board-approved program. The Board requires an out-of-state applicant who seeks licensure in Texas to have graduated from an approved school. If a school is approved by another state board of nursing, then the Board may consider the candidate for eligibility if they meet the requirements.

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[34] Respondent certified the same in her renewal application. Staff Ex. 4.

[35] Staff Ex. 3.

Dr. Ayars testified that Respondent was eligible to receive the Texas RN license because Siena was approved by the Florida Board of Nursing and the FCIE. She explained that if an individual is deemed appropriate to take an NCLEX by another state board of nursing, the Board will "take the word of another state board of nursing and not give that applicant a heightened level of scrutiny." At the time of Respondent's initial application, the Board was not aware of any problems with Siena. Dr. Ayars testified that, prior to January 2023, the Board had no reason to believe that Respondent did not receive a proper education.

According to Dr. Ayars, the Board would "absolutely" not approve Siena's ADN program because its didactic content is insufficient, and the clinical content is "totally lacking."[36] Dr. Ayars testified that the Board requires RNs to receive didactic and clinicals in five content areas: medical-surgical, maternal/child health, pediatrics, geriatrics, and mental health. Dr. Ayars opined that Respondent did not attend a program that was substantially similar to a Texas-approved education—she lacks substantially equivalent education to a Texas-approved ADN program from Siena in those five areas, including substantially equivalent clinical experience. Dr. Ayars opined that the three days of clinical lab experience that Respondent testified she received was in fact skills training and not a hands-on live patient clinical experience. She stated that clinicals in a lab are not comparable to clinical learning experiences with actual live human beings. Dr. Ayars testified that in 2020, Texas ADN students averaged around 398 clinical hours.

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[36] Dr. Ayars testified that clinical learning experiences allow students to learn how to deal with live patients and to apply the knowledge they have learned in the classroom. She stated that usually live hands-on clinical experience with actual patients takes place in hospitals, rehabilitation facilities, long-term care settings, clinics, physician offices, and adult daycares.

Additionally, Dr. Ayars testified that Respondent's didactic hours fell below the minimum acceptable hours to receive a substantially equivalent education to a Texas approved ADN program and that the program she attended appeared to be a NCLEX review course rather than a legitimate professional nursing program.[37] Dr. Ayars testified that Respondent poses a risk of harm to the public practicing as an RN without proper education.

F. TESTIMONY OF MS. OSORO AND MS. KARIUKI

Ms. Osoro has been an RN in Texas for five years. She has been working with Respondent since fall of 2023. She stated that she never discussed Respondent's educational background, but she trained Respondent. Ms. Osoro testified that she did not have any reason to think that Respondent was not qualified to be an RN, and she was not aware of any issues with Respondent's nursing practice.

Ms. Kariuki has been an RN in Texas for nine years. She used to work with Respondent for two years at a rehab and then in "home health." She was not aware of any issues with Respondent's RN nursing practice.

IV. ANALYSIS

The Board seeks to revoke Respondent's RN license alleging that: (1) Respondent obtained the license through fraud by purchasing a fraudulent diploma/transcript; (2) Respondent's diploma was issued unlawfully;

[37] Moreover, Dr. Ayars testified that the Board requires a minimum of a faculty member in addition to the program director. Typically, there is an instructor teaching the specific nursing course that have professional experiences in that subject. She believes that one individual cannot have sufficient professional experiences to be an expert in all five content areas.

(3) Respondent did not receive a substantially equivalent education; (4) Respondent fraudulently obtained her Texas RN license; and (5) Respondent engaged in unprofessional conduct. In the alternative to revocation, the Board seeks to deny the renewal of Respondent's RN license. According to Staff, allowing Respondent to continue practicing as an RN is a risk to public safety.[38]

Respondent argues that there are no bases for disciplinary action against her. Specifically, Respondent asserts, among other things discussed more in detail below, that she was "truly the victim here"—she relied on the material representations of others, including Siena's leaders and the approval of the program by the FCIE. Further, Respondent argues that by accepting the Respondent's education as noted on her endorsement application, the Board has taken discretionary action and waived further complaints regarding her education.[39]

Staff responds that the granting of Respondent's RN license does not constitute a waiver and does not prevent the Board from subsequently taking action against Respondent's license.[40] The ALJ agrees with Staff—the Board has not waived its claims for disciplinary action because the Board did not intentionally waive any known claims, and the Board is authorized to regulate the practice of nursing and enforce the Act.[41]

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[38] Staff's First Amended Formal Charge, filed Jun. 11, 2024; Staff Closing Brief (Br). at 7-10.

[39] Resp. Closing Br. at 3-5.

[40] Staff Reply Br. at 5.

[41] *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003) (quoting *Sun Expl. & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987)) (defining waiver as an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right); Tex. Occ. Code §§ 301.151, .452, .453.

A. RESPONDENT DID NOT OBTAIN HER DIPLOMA OR LICENSE FRAUDULENTLY BUT HER DIPLOMA WAS ISSUED UNLAWFULLY

The Act prohibits the practice of nursing under a diploma, license, or record that was obtained unlawfully or fraudulently or signed or issued unlawfully or under false representation and fraudulently obtaining a nursing license.[42] The Act also prohibits fraudulently obtaining a nursing license; fraud or deceit in procuring or attempting to procure a license to practice professional nursing; and use of a nursing license, diploma, or permit, or the transcript of such a document, that has been fraudulently purchased, issued, counterfeited, or materially altered.[43]

Neither the Act nor the Board's rules appear to provide a definition for fraud. Accordingly, it is appropriate to apply the common law definition. At common law, fraud requires the following elements: (1) the speaker made a representation; (2) the representation was material; (3) the representation was false; (4) when the representation was made, the speaker knew the representation was false or made the representation recklessly, as a positive assertion, and without knowledge of its truth; (5) the speaker made the representation intending that another act on it; (6) the other person relied on the representation; and (7) the representation caused the other

[42] Tex. Occ. Code § 301.451(3).

[43] Tex. Occ. Code §§ 301.451(1), .452(b)(2), (5).

person injury.[44] "A representation is recklessly made if the speaker knows that he does not have sufficient information or basis to support it."[45]

First, Staff argues that Siena unlawfully issued a diploma to Respondent because she did not receive the education that Siena was approved to provide.[46] Respondent argues that her diploma was issued lawfully. Because the Act does not define "issued unlawfully," Respondent argues that it means that the diploma was issued by an entity that was not authorized by the relevant agency to issue that diploma and, here, Siena had legal authority to issue the diploma.[47] Staff responds that an entity authorized to issue a diploma may still act unlawfully if it acts beyond the scope of its authority, and Siena issued the diploma unlawfully under circumstances not approved by the FCIE.[48]

The ALJ finds that Staff met its burden to show that Siena unlawfully issued Respondent's diploma. It is not disputed that Siena was approved to operate an exclusively in-person program to be administered and taught on the Florida campus. Siena's ADN program was approved to offer 74 semester hours, with 50% of those

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[44] *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 47-48 (Tex. 1998); *see also Fraud,* O'Connor's Texas Causes of Action Ch. 12-A § 1 (2023 ed.) (collecting cases); *Fraud*, Black's Law Dictionary (11th ed. 2019) (providing two definitions with one requiring a knowing misrepresentation and the other requiring a reckless misrepresentation).

[45] *Am. Dream Team, Inc. v. Citizens State Bank*, 481 S.W.3d 725, 739 (Tex. App.—Tyler 2015, pet. denied) (citing *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507 (Tex. 1998).

[46] Staff Closing Br. at 7.

[47] Resp. Closing Br. at 2.

[48] Staff Reply Br. at 1-3.

hours required to be clinicals. Siena's program outline, including the course textbooks, was also approved by the FCIE.

It is undisputed that Respondent attended Siena's ADN program online with exception to the three-day simulated in-person "clinical course" in Florida. Although Respondent's diploma shows that she earned 74 credits, she received zero hours of in-person clinicals. Respondent also was instructed from PowerPoints and a single NCLEX study guide, which was not on the list of textbooks approved for Siena's course outline. Because Respondent did not meet the approved program components, Siena could not lawfully issue her an ADN degree. The degree that Siena awarded to Respondent was issued under the false representation that Respondent had completed all required elements of the FCIE-authorized program. Moreover, Siena's ADN program was terminated by the Florida Board of Nursing in August 2020. Therefore, Respondent has subsequently practiced under this unlawfully issued diploma in violation of the Act section 301.451(3)(B), and she may be subject to sanction for that conduct.

Second, Staff argues that Respondent fraudulently obtained her ADN diploma and transcript. Staff asserts that, because Respondent has prior LVN education, which required extensive clinicals, and she worked as an LVN for seven years, she should have known that her RN education should require clinicals. Staff notes Respondent never lived in Florida nor planned on living or working in Florida after graduation from her ADN program. The only reason, Staff claims, for Respondent to obtain a license in Florida would be "to fly under the radar and avoid [the Board's]

vigorous vetting of first-time RN applicants."[49] While Staff's argument regarding Respondent's LVN education has some merit, the rest of allegations are speculative. The evidence does not support knowing complicity in fraud by Respondent.

Prior to attending Siena, Respondent contacted the Florida Board of Nursing to confirm that Siena was certified for the ADN program. She also selected Siena based on another Texas nurse's recommendation. The ALJ finds her credible when she stated that she reasonably believed she was not required to investigate Siena's legitimacy with the Board. As Mr. Bowman testified, he was not aware of any licensure requirements for students to seek out information about the institutions before or while attending the school.

Although Respondent's diploma and transcript reflect incorrect graduation and attendance dates, they both reflect that Respondent attended, earned credits, and graduated from Siena. Respondent credibly testified that she paid for her education; attended the school for eight months twice a week for two to three hours; and traveled to Florida for three days to attend simulation lab clinicals, which were held in the school's building. She also did not question the facts that she was required to pay directly to the school's owner and that in-person clinicals were not available at the time because she was told it was due to the COVID-19 pandemic.

Respondent never contested that her ADN education included zero clinical hours. It is reasonable to assume that if she wanted to obtain a diploma through fraud, she would have not spent time, money, and resources for attending Siena for eight

[49] Staff Closing Br. at 9.

months and travelling to another state. She could also have maintained that her education covered all elements the FCIE and the Board required.

Without sufficient evidence that Respondent was knowing as to the legitimacy of her diploma, even though it reflects a wrong date, the ALJ does not find that Respondent committed fraud within the meaning of sections 301.451(3)(A), .452(b)(2) and (b)(5), so she is not subject to sanction for these alleged violations.

Third, Staff argues that Respondent fraudulently obtained her Texas RN license by certifying in her endorsement application that she met the requirements for licensure and by providing an erroneous graduation date. Staff asserts that Respondent knowingly made a material misrepresentation, which the Board relied on in issuing her license and caused harm to the Board by creating a risk to public safety.[50]

Respondent argues that she did not intentionally misinterpret her nursing education in her application. She relied on the accredited ADN program providing her education that would allow her to become an RN. Respondent asserts that she had a good faith belief, until 2023, that her education was adequate to meet the requirements to obtain a nursing license.[51]

The evidence does not establish that, when Respondent made the representation that she was a graduate of Siena to obtain her license that she knew

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[50] Staff Closing Br. at 9, Staff Reply Br. at 7-8.

[51] Resp. Closing Br. at 4-6.

that the representations were false or made recklessly, even if she knowingly included an erroneous graduation date, which the ALJ finds to be immaterial. The ALJ does not find that if Respondent included the correct date, there would be a different outcome to her application as the Board was not aware of any problems with Siena prior to January 2023.

Moreover, the endorsement application asked Respondent to certify that she has met "the qualification required by Texas law and regulations"[52] and she did that. However, Respondent credibly testified that she did not intentionally misrepresent her educational credentials in her license applications and that she had a good faith belief that her education from Siena's accredited nursing program was adequate to meet the requirements to obtain an RN license. The fact that Respondent was ignorant about certain requirements the Board places on nursing programs does not rise to the level of fraud. The ALJ finds that Staff did not prove that Respondent committed fraud in obtaining her license, so she is not subject to sanction for this alleged violation.

Finally, Staff alleges that Respondent is subject to disciplinary action because she engaged in unprofessional conduct in the practice of nursing that was likely to deceive, defraud, or injure a patient or the public.[53] The Board has defined unprofessional conduct to include providing false, deceptive, or misleading

[52] Staff Ex. 3 at BON0077.

[53] Tex. Occ. Code § 301.452(b)(10).

information in connection with the practice of nursing.[54] Here, Respondent's conduct did not fall within the definition of unprofessional conduct—the rule requires providing false information in connection with the practice of nursing, not with connection to receiving a nursing license. Staff did not prove that Respondent violated the Act section 301.452(b)(10) or 22 Texas Administrative Code section 217.12(6)(H), so she is not subject to sanction for this alleged violation.

B. RESPONDENT'S EDUCATION IS NOT SUBSTANTIALLY EQUIVALENT TO TEXAS STANDARDS

Licensure by endorsement requires that a nurse show she graduated from an approved nursing education program.[55] Siena was not a Board-approved program.[56] As an out-of-state program, Siena was required to provide an education substantially equivalent to a Texas-approved program for Respondent's degree to qualify her for Texas licensure.[57] Texas standards require that RN programs include both didactic and clinical instruction in five subject areas and that some portion of clinical hours be conducted in-person with live patients. Dr. Ayars testified that in 2020, Texas ADN students averaged around 398 clinical hours. It is undisputed that Respondent did not receive any in-person hands-on clinical instruction during her ADN education at Siena. Dr. Ayars testified that Respondent's didactic education was also

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[54] 22 Tex. Admin. Code § 217.12(6)(H). In their closing briefs, Respondent and Staff also argue whether Respondent violated 22 Texas Administrative Code section 217.12(6)(I) (providing false or misleading answers in a licensing or employment matter that could reasonably affect the decision to license, employ, certify, or otherwise utilize a nurse). Because there is no alleged violation of that rule in the Notice of Hearing and Formal Charge, it is not an appropriate base for discipline and is not considered by the ALJ.

[55] Tex. Occ. Code § 301.260; 22 Tex. Admin. Code 217.5(a)(1).

[56] Tex. Occ. Code § 301.157(d).

[57] 22 Tex. Admin. Code § 217.2(a)(4).

insufficient. Respondent did not provide any argument or evidence disputing this allegation, except for making a waiver argument, which was discussed above. The ALJ finds that Respondent did not receive a substantially equivalent education to a Texas program that would qualify her for an RN license.[58]

C. SANCTION

The Board may discipline Respondent under Act section 301.452(b)(1) for practicing under a diploma that was issued unlawfully in violation of the prohibition in Act section 301.451(3)(B).

Respondent's misconduct falls within the Second Tier in the Matrix, even though the Matrix for section 301.452(b)(1) focuses primarily on violations of a Board order and does not align precisely with this case.[59] The First Tier is not suitable because lacking a lawfully issued diploma is a substantive issue, not a procedural or technical matter. The Third Tier is not appropriate because Respondent did not violate a substantive probationary restriction or stipulation in a prior Board order. Within the Second Tier, Sanction Level II appears to fit better, because there is no prior Board order here, which is a requirement under Sanction Level I. Sanction Level II calls for license suspension or revocation.

The Board and SOAH are required to consider certain factors in conjunction with the Matrix when determining the appropriate penalty/sanction in disciplinary

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[58] Tex. Occ. Code § 301.157(d).

[59] 22 Tex. Admin. Code § 213.33(b).

and eligibility matters.[60] Relevant here, the Board should consider that there is no evidence of actual harm to patients, clients, or the public from Respondent's practice, and no actual damages were shown, whether physical, economic, or otherwise.[61] There is no evidence that Respondent had any prior disciplinary action in her approximately ten years of nursing practice (seven as an LVN and RN since 2021) from the Board or any other regulatory body.[62]

Respondent's conduct is consistent with a sincere belief that she was obtaining a legitimate degree from Siena. She waited until she completed all the courses and receive her diploma before applying to take the NCLEX for an RN license. Her dedication to her studies appears genuine. To the extent employers and other relied on those credentials, there is no evidence the reliance was unsafe given Respondent's clean employment record.[63] The persons allegedly involved in Operation Nightingale exploited gaps in state regulatory schemes, indicating that system dynamics were a factor.[64]

Although the record does not show she purposely misrepresented her credentials on the application, Respondent did provide an incorrect graduation date, which brings her trustworthiness into question.[65] However, the incorrect date was

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[60] 22 Tex. Admin. Code § 213.33(c).

[61] 22 Tex. Admin. Code § 213.33(c)(1), (8).

[62] 22 Tex. Admin. Code § 213.33(c)(4), (6), (7).

[63] 22 Tex. Admin. Code § 213.33(c)(3).

[64] 22 Tex. Admin. Code § 213.33(c)(12).

[65] 22 Tex. Admin. Code § 213.33(c)(2).

not a material misrepresentation, and Respondent truthfully answered that she was subject to the Operation Nightingale investigation in her renewal application.

Respondent's violation is serious—she had no clinical rotations with live patients and insufficient didactic education, which makes her RN education inadequate and thus, the potential for harm and threat to patients remains.[66] Although Respondent appears to have been a victim or, at worst, an unwitting participant in an unlawful diploma scheme, the Board's duty is to protect the public from unsafe nursing practice. Allowing Respondent to continue practicing as an RN has the potential for public harm, and the Board should address that risk through license suspension or revocation.

Accordingly, the ALJ recommends the Board find Respondent's misconduct to be a Second Tier, Sanction Level II offense under Act section 301.452(b)(1). After reviewing the guidelines set out in the Matrix and the evidence pertinent to the relevant penalty factors, the ALJ recommends suspension of Respondent's RN license. The suspension should be for a period adequate to allow Respondent to complete a remedial clinical practice program or other requirements imposed by the Board and could trigger revocation of her RN license if she fails to timely satisfy those requirements.

As for the alternative request to deny Respondent's renewal application, the record did not indicate the renewal application is pending. If the Board suspends or revokes Respondent's RN license, she will have to prove her fitness before her

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[66] 22 Tex. Admin. Code § 213.33(c)(1), (14), (15).

license may be reinstated.[67] Accordingly, the ALJ does not recommend denial of license renewal on the facts as presented. In support of the recommended sanction, the ALJ makes the following findings of fact and conclusions of law.

V. FINDINGS OF FACT

1. On May 27, 2014, the Texas Board of Nursing (Board) issued a Vocational Nurse License No. 320114 to Margaret Wanjiku Kahura (Respondent).

2. Respondent practiced as a Licensed Vocational Nurse for seven years.

3. In July 2020, Respondent began studying for an associate's degree in nursing (ADN) at Siena Education Center, LLC (Siena), based in Florida.

4. Respondent never lived in Florida and never planned on living or working in Florida.

5. Between July 2020-February of 2021, Respondent attended classes at Siena exclusively online twice a week for two to three hours, while residing in Texas.

6. Respondent contacted the Florida Board of Nursing to confirm that Siena was certified for the ADN program.

7. Respondent did not contact the Board to check if Siena was approved for an RN education.

8. Respondent attended a three-day clinical course in Florida in January 2021, in a simulation lab, which was in the school's building and had mannequins and other equipment.

9. Respondent did not have clinical rotations with live patients as part of her education through Siena.

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[67] *See* 22 Tex. Admin. Code § 213.26.

10. Respondent received an ADN diploma from Siena that reflected the issuance date of June 30, 2020.

11. Respondent received a transcript from Siena that reflected attendance dates of March 2019-June 2020.

12. Respondent attempted to get Siena to change the date to reflect the correct graduation date, but Siena refused stating that the graduation date had already been sent to the Florida Board of Nursing.

13. On August 25, 2021, Respondent took and passed the National Council Licensing Examination (NCLEX) for registered nurses (RN). She then obtained an RN license in Florida.

14. Respondent applied to the Board for a Texas RN license by endorsement. On September 1, 2021, the Board issued RN License No. 1053355 to Respondent.

15. Respondent included an incorrect graduation date in her endorsement application.

16. Respondent sincerely believed her program at Siena was a legitimate course of study for ADN.

17. Respondent sincerely believed she had met the qualification required by Texas law and regulations for an RN licensure.

18. Respondent she paid Siena's owner directly for her ADN education.

19. Respondent did not commit fraud in the representations she made to the Board on her RN license application.

20. The Florida Commission for Independent Education (FCIE) authorized Siena to operate an ADN program only via in-person education in Florida and required at least 50 percent of the hours to be comprised of clinical instruction.

21. Siena's ADN program was terminated by the Florida Board of Nursing in August 2020.

22. Respondent did not complete the program that the FCIE authorized Siena to provide.

23. Siena was not authorized by the Board to operate a program in Texas.

24. Texas requires RN programs to include didactic and clinical instruction in five subject areas and some portion of clinical hours must be conducted in-person with live patients.

25. In 2020, Texas ADN program students averaged around 398 clinical hours.

26. Siena's issuance of an ADN diploma to Respondent was not authorized by either the FCIE or the Board.

27. An RN who is not properly trained poses a risk of harm to patients.

28. Respondent has been practicing as an RN full-time since receiving her license in 2021.

29. Currently, Respondent is employed as a case manager in a hospice in Texas where she works with patients independently.

30. Respondent submitted her RN renewal application on December 18, 2023.

31. Respondent has had no complaints or disciplinary action against her as a nurse, either as an LVN or an RN.

32. There is no evidence of actual harm to patients, clients, or the public from Respondent's practice, and no actual damages were shown, whether physical, economic, or otherwise.

33. In January 2023, the Federal Bureau of Investigation and the federal Health and Human Services Commission-Office of Inspector General announced Operation Nightingale, a law enforcement action against a fraudulent nursing diploma scheme. Siena was identified as a school potentially involved in issuing fraudulent diplomas. Respondent's name appeared on a list of individuals who may have—through the alleged scheme—obtained nursing diplomas and subsequently secured licenses to practice nursing.

34. The persons allegedly involved in Operation Nightingale exploited gaps in state regulatory schemes.

35. Upon learning of Operation Nightingale, the staff (Staff) of the Board, opened an investigation, and proposed to revoke Respondent's RN license.

36. Respondent timely requested a contested-case hearing through the State Office of Administrative Hearings (SOAH).

37. On June 11, 2024, Staff sent Respondent its Third Amended Notice of Hearing and First Amended Formal Charge. Together, the Notice of Hearing and Formal Charge 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 either a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.

38. SOAH Administrative Law Judge Katerina DeAngelo convened the hearing on the merits via Zoom videoconference on June 27, 2024. Assistant Attorney General Tiffany Collins represented Staff, and attorney Marc Meyer represented Respondent. The record closed on August 19, 2024, upon the filing of closing briefs.

VI. CONCLUSIONS OF LAW

1. The Board has jurisdiction over the licensing and discipline of nurses. Tex. Occ. Code chs. 301, 304.

2. SOAH has jurisdiction over contested cases referred by the Board, including the authority to issue a proposal for decision with findings of fact and conclusions of law. Tex. Occ. Code § 301.459; Tex. Gov't Code ch. 2003.

3. Staff had the burden of proving that disciplinary action against Respondent's license was warranted, and Respondent had the burden of establishing any mitigating evidence. 1 Tex. Admin. Code § 155.427.

4. Respondent received adequate and proper notice of the hearing on the merits. Tex. Occ. Code § 301.454; Tex. Gov't Code §§ 2001.051-.052.

5. The standard of proof in this case is a preponderance of the evidence. *Granek v. Tex. St. Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005,

no pet.); *Sw. Pub. Serv. Co. v. Pub. Util. Comm'n of Tex.*, 962 S.W.2d 207, 213-14 (Tex. App.—Austin 1998, pet. denied).

6. Staff met its burden of proof to show that Respondent practiced nursing under a diploma that was unlawfully issued, and she is subject to discipline for that conduct. Tex. Occ. Code §§ 301.451(3)(B), .452(b)(1).

7. Staff did not meet its burden of proof to show that Respondent committed fraud or deceit in procuring or attempting to procure a license; used a diploma that was fraudulently obtained, purchased, issued, counterfeited, or materially altered; or practiced under a diploma, license or record that was obtained unlawfully. Tex. Occ. Code §§ 301.451(1), (3)(A), .452(b)(2), (5).

8. Staff did not meet its burden of proof to show that Respondent engaged in unprofessional conduct. Tex. Occ. Code § 301.452(b)(10); 22 Tex. Admin. Code § 217.12(6)(H).

9. Respondent's program through Siena was not an approved Texas program, and it was not substantially equivalent to Texas standards for RN programs. Tex. Occ. Code §§ 301.157(d), (d-4), .260; 22 Tex. Admin. Code §§ 217.2(a)(4)(A), .5(a)(1).

10. The Board may impose a disciplinary sanction, which can range from remedial education to revocation of a nurse's license, and which may include assessment of a fine. Tex. Occ. Code 301.453; 22 Tex. Admin. Code § 213.33(e).

11. Respondent's misconduct is a Second Tier, Sanction Level II offense under Texas Occupations Code section 301.452(b)(1).

12. To determine the appropriate disciplinary sanction to be imposed in this case, the Board must consider the factors set forth in 22 Texas Administrative Code section 213.33(c) and the Board's Disciplinary Matrix, 22 Texas Administrative Code section 213.33(b).

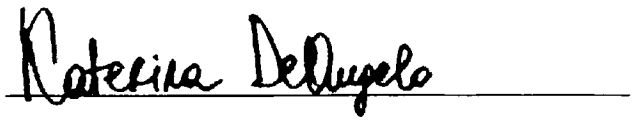
13. The Board may also consider any aggravating and mitigating circumstances set forth in the findings of fact above. 22 Tex. Admin. Code § 213.33.

VII. RECOMMENDATION

The Board should either suspend or revoke Respondent's RN license. The ALJ recommends the Board consider a suspension of the RN license for a period adequate to allow Respondent to complete a remedial clinical practice program or other requirements imposed by the Board, with automatic revocation of her RN license if she fails to timely satisfy those requirements. The ALJ further recommends that the Board specify in its order that there is no impact to Respondent's LVN license.

Signed September 27, 2024.

ALJ Signature:



Katerina DeAngelo

Presiding Administrative Law Judge

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

October 15, 2024

Marc Meyer & Sandra Thornton **VIA EFILE TEXAS**

Maya Bailey, Tiffani Collins, & Jeff Lutz **VIA EFILE TEXAS**

RE: Docket Number 507-24-06906.TBN; *Texas Board of Nursing v. Margaret Wanjiku Kahura*

Dear Parties:

Please be advised that the time period to file exceptions to the Proposal for Decision (PFD) issued in the above-referenced hearing has expired and neither party filed exceptions. Therefore, the Administrative Law Judge recommends that the PFD be adopted as written. Because SOAH has concluded its involvement in the matter, the case is being returned to the Texas Board of Nursing.

CC: Service List