DOCKET NUMBER 507-24-01665

IN THE MATTER OF PERMANENT CERTIFICATE NUMBER RN 1018931, ISSUED TO LYDIA MWIHAKI KARIUKI	**§**	**BEFORE THE STATE OFFICE**
	§	
	§	**OF**
	§	
	§	**ADMINISTRATIVE HEARINGS**

OPINION AND ORDER OF THE BOARD

TO: ADIAH OREYOMI
1400 BROADFIELD BLVD, STE 200
HOUSTON, TEXAS 77084

ROSS HENDERSON
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 changing his sanction recommendation to suspension if there is a path for filling in education gaps other than completing an ADN at a Board-approved program.

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 Palm Beach unlawfully issued Respondent's diploma because it was approved to offer in-person practical nursing program in Florida.[1] Respondent's program through Palm Beach 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 her 84 hours of clinicals is well below the approximately 400 average hours of clinical instruction at Texas-approved ADN programs.[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 agrees with the ALJ's recommended sanction of revocation.

IT IS, THEREFORE, ORDERED THAT Registered Nurse License Number 1018931, previously issued to LYDIA MWUIHAKI KARIUKI, 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. 507-24-01665 (October 17, 2024), Exceptions Letter issued November 19, 2024.

[1] Finding of Fact 27.
[2] Finding of Fact 20-22.
[3] Finding of Fact 28.
[4] Finding of Fact 29.
[5] Conclusion of Law 7.
[6] Tex. Occ. Code § 301.451(3)(B).

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

October 17, 2024

VIA EFILE TEXAS

Kathy Johnson
Jerry Bergman
Office of the Attorney General

VIA EFILE TEXAS

Adiah Oreyomi
Nurse Defense Firm, PLLC

RE: Docket Number 507-24-01665.TBN; *Texas Board of Nursing v. Lydia Mwihaki Kariuki*

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. 507-24-01665 Suffix: TBN

BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS BOARD OF NURSING,
PETITIONER
V.
LYDIA MWIHAKI KARIUKI,
RESPONDENT

PROPOSAL FOR DECISION

The staff (Staff) of the Texas Board of Nursing (Board) seeks to revoke Lydia Mwihake Kariuki's (Respondent) registered nurse (RN) license (No. 1018931) or to deny renewal on the bases that Respondent was issued an unlawful license or diploma, that she lacks the requisite education or degree, and that she engaged in unprofessional conduct and fraud. The Administrative Law Judge (ALJ) recommends the Board revoke her license because Respondent practiced nursing under an unlawful diploma and does not meet the requirements to practice nursing.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

State Office of Administrative Hearings (SOAH) ALJ Ross Henderson convened a hearing on the merits on April 16, 2024. Kathy Johnson and Jerry Bergman represented Staff, and attorney Adiah Oreyomi represented Respondent. The record closed on August 20, 2024, with the filing of last written closing argument.

There are no contested issues of jurisdiction in this proceeding; therefore, that matter is addressed solely in the Findings of Fact and Conclusions of Law.

II. BACKGROUND

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—O ffice of Inspector General.[1]

Respondent was identified as a nurse who received a degree from Palm Beach School of Nursing (Palm Beach)—one of the schools implicated in the investigation. As a result, Staff brought formal charges against Respondent and seeks the revocation of her RN license.

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[1] Proposal for Decision, *Tex. Bd. of Nursing v. Omietimi*, SOAH Dkt. No. 507-23-18180 (St. Off. Of Admin. Hrgs., Nov. 20, 2023) (Shenoy, J.). That Proposal for Decision (PFD) offers a full discussion on "Operation Nightingale" and its scope, which is not reproduced here.

III. APPLICABLE LAW

The Board is responsible for the regulation of nurses pursuant to the Texas Nursing Practice Act (Act).[2] A nurse may not practice nursing without a Board-issued license.[3] A person may not sell, fraudulently obtain, or fraudulently furnish a nursing diploma, license, renewal license, or record.[4] A person may not practice under a diploma, license, or record that was (a) obtained unlawfully or fraudulently or (b) signed or issued unlawfully or under false representation.[5]

A. LICENSING REQUIREMENTS

A person licensed in another state may qualify for a license by endorsement in Texas by submitting proof of initial licensing by examination and evidence that 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."[6] By rule, the Board has specified that licensure by endorsement requires a nurse to have graduated from "an approved nursing education program."[7]

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

[3] Tex. Occ. Code § 301.251(a).

[4] Tex. Occ. Code § 301.451(1).

[5] Tex. Occ. Code § 301.451(3).

[6] Tex. Occ. Code § 301.260(a)(2). For purposes of this PFD, citations to licensing requirements will be to the rules in effect at the time of Respondent's applications and licensing (October and November 2020), unless otherwise specified. *See* Tex. Occ. Code § 301.260(a)(2).

[7] 22 Tex. Admin. Code § 217.5(a)(1).

An approved nursing education program means a program (i) approved by the Board; (ii) accredited by a national nursing accreditation agency the Board has determined has acceptable standards; or (iii) approved by the state board of nursing of another state and the Board.[8] To be approved by the Board to operate a Texas-based program, a professional 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.[9] If the governing entity of a program has professional nursing programs in other jurisdictions (for example, a Florida-approved school seeks to operate a nursing program in Texas), the Texas-based program must still be approved by the Board.[10]

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

(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 and supervised clinical learning experiences in medical-surgical, maternal/child health, pediatrics, geriatrics, and mental health nursing that teach students to

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[8] Tex. Occ. Code § 301.157(d).

[9] 22 Tex. Admin. Code § 215.3(a)(1), (a)(2)(B).

[10] *See* 22 Tex. Admin. Code § 215.3(a)(1), (a)(2)(B) (requiring governing entities with programs in other jurisdiction to include additional information with their program proposal).

use a systematic approach to clinical decision-making and safe patient care across the life span.[11]

B. DISCIPLINE

Pursuant to the Act, a nurse is subject to disciplinary action for:

- A violation of the Act, a Board rule or regulation, or a Board order; or
- Using a nursing license, diploma, or permit, or the transcript of such a document that has been fraudulently purchased, issued, counterfeited, or materially altered.[12]

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.[13] When determining the proper sanction, the Board shall consider: (1) whether the person is being disciplined for multiple violations or has previously been the subject of disciplinary action by the Board and has previously complied with applicable law; (2) the seriousness of the violation; (3) the threat to public safety; and (4) any mitigating factors.[14] The Board's schedule of disciplinary sanctions is a disciplinary matrix.[15] 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.[16]

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[11] 22 Tex. Admin. Code § 217.2(a)(4)(A) (including an additional requirement for baccalaureate degree nursing programs). As of 2022, these requirements were added to 22 Texas Administrative Code section 217.5(a)(1)(A). *See* 47 Tex. Reg. 6581 (Oct. 7, 2022).

[12] Tex. Occ. Code § 301.452(b)(1), (5).

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

[14] Tex. Occ. Code § 301.4531(b).

[15] 22 Tex. Admin. Code § 213.33.

[16] 22 Tex. Admin. Code § 213.33(b).

Staff has the burden of proving its allegations by a preponderance of the evidence, and Respondent has the burden of proving mitigating factors, if any.[17]

IV. EVIDENCE

Staff offered 18 exhibits, which were admitted.[18] Respondent offered 10 exhibits which were admitted.[19] The following witnesses provided testimony:

Lydia Kariuki	Respondent
Virginia Ayars	Nursing education expert with the Board. Dr. Ayars testified about nursing program qualifications in Texas and opinions on Respondent's education.
Anthony Diggs	Director of enforcement at the Board. Mr. Diggs testified as to the Board's response to the Nightingale investigation.
Sherri Sutton-Johnson	Education Unit Director at the Florida Board of Nursing. She testified about Florida's relevant rules and the accreditation of Palm Beach.

A. SUMMARY AND DOCUMENTARY EVIDENCE

On October 19, 2020, Respondent, while residing in Houston, Texas, became a licensed RN in the State of Florida through the Florida Department of

[17] 1 Tex. Admin. Code § 155.427; *Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.).

[18] Pet. Exs. 1, 3-12, 14, 17-20, 22, 27. Exhibits 8-9, 11-12, 14, 17-19 were admitted over objection.

[19] Resp. Exs. 1-10. Exhibits 1-4, and 10 were admitted over objection.

Health/Florida Board of Nursing (Florida Board) and was issued license number RN9548808.[20] On November 5, 2020, Respondent submitted her RN application, application number 161251, to the Board to become a licensed RN by endorsement.[21] Respondent certified to the Board that she met the qualifications and regulations under Texas law to receive a license, attesting that she had completed an Associate's Degree of Nursing (ADN) program from Palm Beach in Florida on December 6, 2019.[22] Respondent took the Florida NCLEX-RN test in Houston, Texas in October 2020 and passed.[23] She was licensed by the Board as an RN on November 5, 2020.[24] Respondent is also a Licensed Vocational Nurse (LVN) by the Board (No. 331727), but Staff is not seeking discipline against her LVN.[25] Respondent has never had any disciplinary issues at work or with either the Florida Board or the Texas Board.

B. RESPONDENT'S TESTIMONY

Respondent testified about her nursing education and career. She explained how her salary progressed as she obtained each license—starting as a certified nurse aid (CNA), moving to LVN, and then finally becoming an RN. Her salary increased from $8 per hour as a CNA to $25 per hour as an LVN and now she is paid around

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[20] Pet. Ex. 7 at 51, 65, 78; Tr. at 93.

[21] Pet. Ex. 7 at 70-85.

[22] Pet. Ex. 7 at 79, 83.

[23] Tr. at 118.

[24] Pet. Ex. 7 at 64.

[25] Pet. Ex. 7 at 43, 66.

$35 per hour as an RN. She also testified that she could possibly make $35 per hour as an LVN, but it really varies by the employer and years of experience.

Regarding her schooling, in 2011, she attended an in-person, 7-week program in Houston to obtain her CNA. In 2016, she graduated from a 14-month in-person program at Bell Tech Career Institute in Houston. In 2018, she completed the necessary prerequisites at Houston Community College (HCC) to be able to enter an RN program. Although she could have obtained her ADN at HCC or one of many schools located in Houston, she decided to attend another school she found online, Jay College of Health Science (Jay College), and was registered there on October 24, 2018. She did not ask whether Jay College was authorized to provide online instruction in Florida or whether it was authorized to have a campus in Texas. Respondent said she chose Jay College because, as a single mother, it offered her the option of attending in-person at a campus location in Houston or the ability to receive online instruction. In fact, she started with Jay College at their Houston campus but eventually found that attending online was better for her family.

At some point, she was told that Jay College was changing names to become Palm Beach, but her class schedule and teachers remained the same. She did not request the transfer from Jay College to Palm School and she was not told anything more about the change.

For her clinical hours, Respondent had to travel to Florida twice. She did a total of 84 clinical hours in September and December 2019. She said the clinicals

covered the areas of maternity and newborn, geriatric, adults, adult health, mental health and pediatric.

C. DR. AYARS'S TESTIMONY

Dr. Ayars is a nursing consultant at the Board, with focus and expertise in nurse education and teaching.[26] She testified that each nursing program requires approval by the Board before it can be licensed to provide instruction. She described this approval process as thorough, typically requiring eight to 12 months from proposal to approval. The Board never approved Palm Beach or Jay College to operate an ADN program in Texas.

As for an ADN program's educational requirements, Dr. Ayars testified that the Board requires 60 credit hours—30 hours of general education courses and 30 hours of nursing courses. She described in detail what an ADN program would provide its students in terms of education and training. According to Board rules, there are five content areas, and all the associate degree and baccalaureate diploma programs must provide didactic and clinical learning experiences in these five content areas: pediatric nursing, mother/baby, adult, geriatric nursing, and psych or mental health nursing. Based on the documentation she had reviewed, she could not tell if Respondent had been provided clinical experiences in all of the content areas, but agreed the didactic instruction covered them. She said the ADN program Respondent completed at Palm Beach is an LVN to RN program, of which there are 11 such programs in Texas. While the Board's rules do not specify a minimum

[26] Dr. Ayars has a doctorate in education, has been licensed as registered nurse for over 50 years, and is a certified nurse educator.

number of clinical hours, there have to be enough hours to meet the learning objectives. For the 11 Texas LVN to RN programs, the average number of clinical hours required is 400 hours. For 2019, the lowest was 250 and the highest was 560. In 2014, the lowest was 176 hours. She said that the clinical experiences are crucial for patient safety, and later work as an RN could not substitute for the needed training and experience gained during those clinical hours.

Dr. Ayars explained that Respondent applied to the Board through an endorsement application, which allows individuals licensed in other states to endorse into Texas if they meet the Board's Rules and become licensed in Texas. The endorsement application requires an attestation statement where the applicant confirms that they have met the Board's Rules and that they have completed didactic and clinical learning experiences in the five content areas. Dr. Ayars opined that neither the number of hours nor the format of the clinical sites and instructions would meet the Board's standards—or in other words, Palm Beach was not substantially equivalent to Texas standards. Dr. Ayars believes without a substantially equivalent education, Respondent's continues to pose a risk to the public in her practice.

D. MR. DIGGS'S TESTIMONY

Mr. Diggs is the Board's director of enforcement. His testimony largely reflected the documentary evidence of Board's knowledge of Operation Nightingale and the investigations it undertook after being made aware of the federal investigation in 2022. He testified that the Board's mission is to protect the public health by regulating educational requirements. He believed that Respondent

obtained her ADN falsely or fraudulently by purchasing a false transcript based on the federal investigation and his review of documents provided. He stated Palm Beach was approved in Florida, but the approval was revoked by Florida's Board in 2017. Per Florida, Palm Beach's existing students could graduate in a phase-out program, but new students were prohibited from obtaining an ADN. Therefore, he opined, Respondent falsely submitted her application for a Texas license when she attested that she completed an ADN at Palm Beach.

E. MS. SUTTON-JOHNSON'S TESTIMONY

Ms. Sutton-Johnson is the Education Unit Director at the Florida Board. She supervises a small unit of nurse consultants and a research assistant that regulates the pre-licensure process for nursing education programs throughout Florida.

According to Ms. Sutton-Johnson, Palm Beach was initially approved for an ADN program under the name of Med Life Institute, West Palm Beach, and it underwent an institutional name change to Palm Beach School of Nursing with an address in West Palm Beach, Florida. She explained that Palm Beach was not approved to provide online classes because the Florida Board does not regulate distance education programs. Further, she said the Florida Board does not have the legal authority to approve an ADN program to operate in the State of Texas. Palm Beach was terminated by the Florida Board on June 5, 2017—and was prohibited from admitting new students after that date. She explained that if a student was enrolled in this program after June 5, 2017, that person is not considered to have graduated from a Florida Board-approved program. She said that once Palm Beach was terminated, there was a three-year window in the Florida Board system to allow

the Palm Beach students to take the Florida NCLEX, and the Florida Board did not verify the student's date of enrollment when issuing licenses. It was only several years later when the Florida Board received notice of Operation Nightingale that it began to scrutinize the students identified as having fraudulent degrees by the defendants in those federal investigations. The Florida Board is considering the discipline of the nurses identified in Operation Nightingale on a case-by-case basis. She said some of these nurses believe that they completed a nursing program legitimately. But by Florida statute, if the student was not enrolled before termination, they are ineligible for licensure. Regarding the Florida requirement for clinicals in an ADN program, she said the Florida Nurse Practice Act requires that fifty percent of the instruction be clinical instruction. She also explained the licensure process for obtaining an RN in Florida.

V. ANALYSIS

A. PRACTICING NURSING UNDER AN UNLAWFULLY ISSUED DIPLOMA

Staff asserts that Respondent has practiced nursing under a diploma that was issued unlawfully, a violation of Act section 301.451(3)(B). Respondent disputes that her diploma was issued unlawfully. The ALJ finds Staff met its burden to show that Palm Beach unlawfully issued Respondent's diploma because: 1) Palm Beach was not authorized to accept Respondent after its approval in Florida was terminated, 2) Palm Beach was not authorized to provide out-of-state or online education by Florida Board, and 3) Palm Beach was not authorized to operate in Texas by the Board.

Palm Beach could not have lawfully issued a diploma to Respondent because Palm Beach was not approved to admit new students after June 5, 2017.[27] Respondent enrolled in Palm Beach on October 24, 2018 after Palm Beach's ADN program was terminated.[28] Dr. Sutton-Johnson testified that under section 464.0197 of the Florida Nurse Practice Act, terminated programs may continue to "teach out" current students, but may not enroll or admit new students.[29] Respondent does not argue that she was admitted to Palm Beach prior to its termination by the Florida Board. Instead, she argues that the Florida Board accepted her enrollment date at Palm Beach when it granted her a licence because the enrollment date is prominent on the transcript she submitted with her application. She argues that Dr. Sutton-Johnson must be incorrect because the Florida Board licensed her with knowledge of her enrollment date, and the Florida Board, to date, has taken no action to revoke or flag her Florida license.[30] The ALJ is not persuaded by Respondent's challenges to Dr. Sutton-Johnson's testimony in this case regarding Palm Beach's termination date and teach out period. Her testimony was both persuasive and unrebutted.

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[27] Tr. at 267.

[28] Pet. Ex. 7.

[29] Tr. at 267.

[30] Additionally, Respondent challenges Dr. Sutton-Johnson's credibility by arguing that statements in her affidavit (Staff Exhibit 10) are contradicted by testimony in another SOAH proceeding. Resp.'s Closing Br. at 3-5. This argument stems from an enrollment cut-off date for a school unrelated to this proceeding (Quisqueya). Respondent argues that the August 3, 2018 enrollment cut-off for Quisqueya was contradicted by the testimony of Jason Bowman, an Education Policy Analyst for Florida Department of Education Commission for Independent Education in the contested case hearing in SOAH Docket No. 507-24-01762, where he purportedly provided an enrollment cut-off of December 2018 or January 2019. This challenge is unavailing: (1) Mr. Bowman's testimony was not made part of the record in this case, (2) it relates to a different school that may have different circumstances than Palm Beach, and (3) even if true, a discrepancy of five months (between Dr. Sutton-Johnson's August 2018 and Mr. Bowman's December 2018 or January 2019) would not address the 16-month difference between the cut-off date and Respondent's enrollment date in this case.

Palm Beach also could not have lawfully issued a diploma to Respondent because it was not approved by the Florida Board to offer classes online. Dr. Sutton-Johnson's testimony was unrebutted that Palm Beach was not approved by the Florida Board to offer classes online.[31] Respondent argues that Dr. Sutton-Johnson's testimony is contradicted by Florida Nurse Practice Act section 464.019(b)(1), regarding approval of nursing education programs. Section 464.019(b)(1) states that such an application must document that the applying program's nursing major curriculum consists of at least fifty percent clinical training in the United States, the District of Columbia, or a possession or territory of the United States for a practical nursing education program, an associate degree professional nursing education program, or a professional diploma nursing education program. Respondent says this provision authorizes the Florida Board approve a program that has its clinicals based outside of Florida; therefore, Dr. Sutton-Johnson's testimony that the Florida Board does not approve programs operating outside of Florida is wrong. Again, the ALJ finds Dr. Sutton-Johnson's testimony persuasive. There was no evidence or testimony sought or offered about a program's approval in light of section 464.019(b)(1) or if programs operating clinicals outside of Florida have been approved, but Dr. Sutton-Johnson was unequivocal that the Florida Board does not regulate schools operating outside of Florida or online. Even if the ALJ found this provision authorized the Florida Board to approve a school operating outside of Florida, which the ALJ declines to find, the

[31] Tr. at 267, 295-297; Pet. Ex. 10 at 274 (Program Outline, part of application of Palm Beach to the Florida Commission for Independent Education for approval of its program) (this document notes approval for campus instruction while an online option on the document is not selected).

evidence establishes that Palm Beach was only approved for in-person instruction.[32] Section 464.019(b)(1) does not reference online education—which is how Respondent predominantly attended Palm Beach. The only document in the record that pertains to Palm Beach's approval to provide instruction specifically indicates instruction will be provided on a campus.[33]

Staff also argues that Palm Beach could not lawfully confer a diploma on Respondent because it did not meet the Florida Board's requirement that fifty percent of its instruction be clinical instruction.[34] The ALJ finds that Staff did not meet its burden to prove this. Staff contends that, with 72 semester hours indicated on the Program Outline for Palm Beach's ADN program, Respondent's 84 hours of clinical instruction are not enough to meet this requirement. However, Staff's argument relies on a fact not in evidence. Specifically, Staff asserts, without citation or reference, that "a program's clock hours are generally at least three times as many hours as the number of semester hours."[35]

The ALJ also finds Palm Beach was never approved by the Board or any other Texas authority to offer an ADN program in Texas. Palm Beach acted outside of its authority when it established a nursing program in Texas without being approved by the Board, and any diplomas issued from that program were unauthorized and

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[32] Pet. Ex. 10 at 274.

[33] Pet. Ex. 10 at 274.

[34] Pet. Closing Arg. at 17.

[35] Pet. Closing Arg. at 17.

unlawful. Therefore, for all these reasons, Staff has met its burden of proving that Respondent has been practicing nursing under a diploma that was issued unlawfully, in violation of Act section 301.451(3)(B). For this violation, Respondent may be subject to discipline pursuant to Act section 301.452(b)(1).

B. OBTAINING AN ENDORSEMENT LICENSE WITHOUT HAVING RECEIVED SUBSTANTIALLY EQUIVALENT EDUCATION

As an alternative basis for discipline, Staff argues that Respondent's Texas license was issued unlawfully or under false pretenses because the education she received from Palm Beach was not substantially equivalent to a Texas-approved program.[36] Nursing students in an ADN program must complete didactical and clinical learning experiences in five content areas: 1) medical/surgical; 2) maternal/child nursing; 3) pediatrics; 4) geriatrics, and 5) mental health.[37] Dr. Ayars explained that on average, ADN programs in Texas contain at least 400 hours of faculty-supervised clinical learning experiences.[38] Respondent disputes this, arguing that her nursing education included 84 hours of clinical instruction in all of these content areas. Therefore, she argues that she meets the criteria for a substantially equivalent program set out in Board Rule 217.5(1)(B). The ALJ need not decide this because that standard would not apply to Respondent.

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[36] 22 Tex. Admin. Code § 217.2(a); Tr. at 155.

[37] Tr. at 150.

[38] Tr. at 153.

First, the argument incorrectly relies on Board rules as amended after Respondent applied for and received her license. In 2020, the plain language of the Board's rules required applicants for licensure by endorsement to have graduated from an approved program; they did not contain any language about a substantially equivalent education.

Second, the program Respondent attended was operated in Texas, not another state, so provisions regarding a substantially equivalent education would not apply. To obtain a Texas license by endorsement, Respondent was required to show the Board that when she received her Florida license, she also possessed "the other qualifications necessary at that time to have been eligible for licensing in this state."[39] Both the Act and the Board's rules address what those necessary qualifications are. Registered nurses must have successfully completed a program of professional nursing approved under Act section 301.157(d).[40] That statute, in turn, provides that a program can certify graduates only if the program has been approved by the Board; accredited by a national nursing accreditation agency determined by the Board to have acceptable standards; or approved by *both* a state board of nursing of another state and the Board.[41] Respondent's online education and in-person clinical education at Palm Beach meet none of these criteria. No party contends that Palm Beach was accredited by any national agency. And, as discussed above, the Board has never approved the Palm Beach program in Texas, and the Florida Board never

[39] Tex. Occ. Code § 301.260(a)(2).

[40] Tex. Occ. Code § 301.252(a)(2).

[41] Tex. Occ. Code § 301.157(d).

approved the online program that Respondent attended. Further, because Respondent began after Palm Beach's license to teach was terminated, she was ineligible to receive any type of education from Palm Beach that was approved by the Florida Board.

Lastly, the Board's rules echo these statutory requirements and impose additional ones. 22 Texas Administrative Code section 217.5(a)(1) provides that licensure by endorsement is available only to "[a] nurse who has practiced nursing in another state within the four years immediately preceding," who has "graduat[ed] from an approved nursing education program," among other requirements.[42] Thus, Respondent was not eligible for licensure by endorsement, regardless of whether her nursing program could have been approved under the substantially-equivalent standard.

For all of these reasons, the "substantially equivalent education" criteria are inapplicable in this case, and the ALJ need not reach whether the education Respondent received was, in fact, substantially equivalent. When she applied, Respondent did not qualify for licensure by endorsement in Texas, and none of her arguments regarding her specific courses, studies, or clinicals would make her eligible under the applicable rules. She has been practicing under an endorsement license that she is not qualified to hold, which is a violation for which she may face disciplinary action.[43]

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[42] 22 Tex. Admin. Code § 217.5(a)(1).

[43] Tex. Occ. Code §§ 301.260(a)(2), .452(b)(1).

C. FRAUD[44]

Staff alleges that Respondent is subject to discipline because she fraudulently obtained her diploma in violation of Act section 301.451(1), and practiced under a license issued under false representations in violation of Act section 301.451(3)(B). In Staff's view, Respondent purchased her diploma in an attempt to skirt Texas' more rigorous licensure requirements and knew she had not received a substantially equivalent education; knew she had not attended school in Florida, as she put on her endorsement application; and knew her diploma had been issued unlawfully. And then, knowing this, she made misrepresentations to the Board regarding her qualifications that allowed her to obtain a Texas endorsement. Respondent counters that she believed she obtained her diploma legitimately and the representations in her application were all truthful.

Centered in many of these allegations is the issue fraud or fraudulent acts. Neither the Act nor Board rules appear to provide a definition for fraud. Therefore, turning to the common law is appropriate.[45] In this case, the dispositive element is

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[44] Staff raises unprofessional conduct in its brief; however, Staff provided no citations to the law or rules pertaining to unprofessional conduct and provided no conclusions of law pertaining to unprofessional conduct, and the First Amended Formal Charge does not cite unprofessional conduct. Therefore, the ALJ will not consider unprofessional conduct.

[45] *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) (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).

that the speaker knew the representation was false or recklessly made the representation without knowledge of its truth.[46]

Staff attempts to impute the conduct of bad actors who were swept up in Operation Nightingale for fraudulently issuing diplomas to nursing students, including Respondent. However, the weight of the evidence shows that Respondent was herself a victim of fraud, and she diligently attended her classes, took notes, communicated with her teachers, and travelled to Florida to complete 84 hours of clinical studies. She learned enough to pass the Florida NCLEX exam on the first try. Respondent believed that the diploma she received was legitimate, and she graduated from Palm Beach—she felt prepared to enter the nursing practice as an RN.

Her beliefs are supported by the circumstantial evidence. Respondent received a diploma and a transcript from Palm Beach. In choosing the school, Respondent testified that she found Jay College online and chose it for the flexibility it afforded her to attend online or in-person in Houston. She started in-person but moved to online coursework because her children needed more of her time. While she testified that the name change from Jay School to Palm Beach caused some concern, she was assured that everything was fine. The school had a physical location in Houston. While Dr. Ayars takes issue with the quality of Palm Beach's education, it is not established that a reasonable person would question that this licensed

[46] Fraud requires "a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which caused injury." *Formosa Plastics*, 960 S.W.2d at 47-48.

program was not providing the education that it was approved for and advertising. The fact that Respondent did not question the school or was unaware about certain requirements the Board places on nursing programs does not rise to the level of fraud. Therefore, the evidence fails to establish that Respondent acted fraudulently in obtaining her license or diploma, so she did not violate Act section 301.451(1) or .451(3)(A).

Additionally, the evidence does not establish that Respondent knew that the representations were false or made recklessly when she told the Board she was a graduate of Palm Beach, and her diploma was lawfully issued by Florida. Act section 301.451(3)(B), states that a person "may not practice nursing under a diploma, license, or record that was: signed or issued unlawfully or under false representation." Although the ALJ found above that she committed sanctionable conduct under Act section 301.451(b) when she practiced nursing under a license that was issued unlawfully, she did not additionally violate the provision by making false representations to the Board. In sum, Staff failed to prove either fraud or misconduct on the part of Respondent. Staff did not meet its burden on these grounds.

D. RECOMMENDATION

Because Respondent has been practicing nursing under a diploma that was issued unlawfully, in violation of Act section 301.451(3)(B); and has been practicing under an endorsement license that she is not qualified to hold, in violation of Act section 301.260(a)(2), the Board is authorized to impose disciplinary action under Act section 301.452(b)(1). These are the only grounds for discipline asserted in the

Formal Charges and supported by the evidence. For these violations, Staff seeks revocation of Respondent's license, which is authorized under Act section 301.453(a)(6). Neither party has addressed the other methods of discipline available under Act section 301.453; any of the factors the Board must consider in determining an appropriate sanction; or the recommended sanctions, aggravating factors, or mitigating factors in the Board's disciplinary Matrix.[47]

For discipline pursuant to Act section 301.452(b)(1), the Matrix generally contemplates that the nurse is being disciplined for failing to comply with a prior Board Order, stipulation, or probationary restriction. An isolated failure to comply with a procedural rule or non-substantive requirement is classified as a first-tier offense; a failure to comply with a substantive requirement, or a violation that poses risk of harm to patients is a second-tier offense; and a failure to comply with substantive probationary restrictions is a third-tier offense. Though none squarely fits here, Respondent's circumstances most closely match the second tier, which applies to violations that raise a competency issue, including practicing on a delinquent license. Under the second tier, Sanction Level I would require the nurse to "complete conditions of original Board order and a fine of $500.00 or more," and may subject the nurse to the "next higher sanction and an extension of the stipulations."[48] Sanction Level II would impose denial, suspension, or revocation of the nurse's license. None of the aggravating or mitigating factors listed in the Disciplinary Matrix for this violation squarely applies to the facts of this case.

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[47] Tex. Occ. Code § 301.4531(b); 22 Tex. Admin. Code § 213.33.

[48] 22 Tex. Admin. Code § 213.33.

Turning to the general sanctions factors in the Board's rules, 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. Respondent has worked in the nursing field for almost five years without issue and has no prior discipline from the Board or any other regulatory body.

Respondent's conduct has been consistent with a sincere belief that she was obtaining a legitimate degree from Palm Beach. She completed her courses, passed her exit exam, and demonstrated a dedication to her studies that indicates truthfulness and trustworthiness. Although Palm Beach unlawfully issued her diploma, Respondent passed the NCLEX-RN on her first attempt and the record does not show she purposely misrepresented her credentials to the Board, the Florida Board, or any employers. The persons allegedly involved in Operation Nightingale exploited gaps in state regulatory schemes, indicating that system dynamics were a factor.

Despite these points in Respondent's favor, the Board alleged her nursing program was deficient because she had fewer than average in-person clinicals with live patients while attending Palm Beach. As noted above, the ALJ did not find one way or the other on this allegation. Ultimately, although Respondent appears to have been an unwitting victim of an unlawful diploma scheme perpetrated by others, the Board's duty is to the public. And without resolving this question, allowing

Respondent to continue practicing as an RN has the potential for public harm that the Board's sanction must address.

Unfortunately for Respondent, even weighing all the factors in her favor, there does not appear to be any viable alternative other than revocation. There was no evidence offered that Respondent has any path of filling in education gaps other than completing an ADN at a Board-approved program.

VI. FINDINGS OF FACT

1. On October 19, 2020, Lydia Kariuki (Respondent), while residing in Houston, Texas, became a licensed Registered Nurse (RN) in the State of Florida through the Florida Department of Health/Florida Board of Nursing (Florida Board) and was issued license number RN9548808.

2. On November 5, 2020, Respondent submitted her RN application, application number 161251, to the Texas Board of Nursing (Board) to become a licensed RN in Texas by endorsement, under 22 Texas Administrative Code section 217.5.

3. Respondent certified to the Board that she met the qualifications and regulations under Texas law to receive a license, which included attesting that she had completed an Associate's Degree of Nursing (ADN) program from Palm Beach School of Nursing (Palm Beach) in West Palm Beach, Florida on December 6, 2019.

4. Although Respondent finished her diploma at Palm Beach, she initially started at another Florida school she found online, Jay College of Health Science (Jay College). She went to Jay College in Florida to apply and was registered there on October 24, 2018.

5. Respondent said she chose Jay College because, as a single mother, it offered her the option of attending in-person at a campus location in Houston, Texas or the ability to receive online instruction.

6. Respondent did not inquire whether Jay College was authorized to provide online instruction in Florida or whether it was authorized to have a campus in Texas.

7. Respondent began taking her instruction at Jay College at its Houston campus but eventually found that attending online was better for her family. Her online instruction covered the content areas of maternity and newborn, geriatric, adults, adult health, mental health and pediatric.

8. At some point, Respondent was told that Jay College was changing names to become Palm Beach, but her class schedule and teachers remained the same. She did not request the transfer from Jay College to Palm School and she was not told anything more about the change.

9. For her clinical hours, Respondent had to travel to Florida twice. She did a total of 84 on-site clinical hours in September and December 2019. The clinicals covered the content areas of maternity and newborn, geriatric, adults, adult health, mental health and pediatric.

10. Respondent took notes, purchased books, communicated with professors and other students, went to Florida to receive clinical training, and attended a graduation ceremony in Florida with her classmates.

11. Respondent finished at Palm Beach on December 6, 2019, and received a diploma.

12. It was not unreasonable for Respondent to assume Palm Beach was authorized to provide her an ADN instruction either online or in-person in Houston.

13. Respondent took the Florida National Council Licensing Examination (NCLEX) RN test in Houston, Texas in October 2020 and passed on the first attempt.

14. Respondent was licensed by the Board as an RN on November 5, 2020.

15. Respondent is also a Licensed Vocational Nurse (LVN) by the Board (No. 331727).

16. Respondent has worked in Texas as an RN since November 5, 2020, and prior to that as an LVN, and has never had any disciplinary issues at work or with either the Florida Board or the Board.

17. In January 2023, the Federal Bureau of Investigation (FBI) and the federal Health and Human Services Commission-Office of Inspector General (HHSC-OIG) announced "Operation Nightingale," a law enforcement action against participants in an alleged fraudulent nursing diploma scheme. Around 7,600 individuals nationwide were allegedly identified as participants in an alleged scheme to obtain fraudulent nursing degrees and transcripts that allowed them to sit for the NCLEX and, if they passed the NCLEX, to obtain licenses to practice nursing.

18. Upon receiving notice that some Texas nurses may be implicated in an investigation involving illegitimate or fraudulent diplomas from Palm Beach as part of Operation Nightingale, the Staff of the Board initiated a disciplinary action against Respondent and sought to revoke her license.

19. Respondent did not fraudulently obtain or commit fraud in the representations she made to the Board for her RN license application.

20. Palm Beach was not approved by the Board to offer RN instruction as a Texas-based program.

21. Palm Beach was not approved by the Florida Board to offer RN instruction remotely or to students in Texas.

22. Other than her clinicals, Respondent only attended Jay School and Palm Beach in Texas or online.

23. Palm Beach was terminated by the Florida Board on June 5th, 2017—and was prohibited from admitting new students after that date. However, Palm Beach could "teach out" its existing students.

24. A student enrolled in the Palm Beach ADN program after June 5th, 2017, is not considered to have graduated from a Florida Board approved program.

25. Once Palm Beach was terminated, there was a three-year window in the Florida Board system to allow the Palm Beach students to take the NCLEX.

26. The Florida Board did not verify the student's date of enrollment when issuing licenses.

27. Respondent has been practicing nursing under a diploma that was issued unlawfully.

28. Respondent's 84 hours of clinicals is well below the approximately 400 average hours of clinical instruction at Texas-approved ADN programs.

29. An RN who is not properly trained can harm a patient.

30. On March 9, 2023, and March 20, 2023, the Board sent Respondent its Formal Charges.

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

32. On December 19, 2023, and April 11, 2024, respectively, Staff sent Respondent its First Amended Notice of Hearing and First Amended Formal Charges. Together, the Notice of Hearing and Formal Charges 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.

33. SOAH Administrative Law Judge Ross Henderson convened a hearing on the merits on April 16, 2024. Kathy Johnson and Jerry Bergman represented Staff, and attorney Adiah Oreyomi represented Respondent. The record closed on August 20, 2024, with the filing of the last written closing argument.

VII. CONCLUSIONS OF LAW

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

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

4. 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.

5. The standard of proof is by 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.).

6. Staff did not meet its burden of proof to show that Respondent fraudulently sold, obtained, purchased, issued, counterfeited, or materially altered her diploma or license or that she practiced under a diploma or license that was obtained fraudulently. Tex. Occ. Code §§ 301.451(1), (3)(A), .452(b)(5).

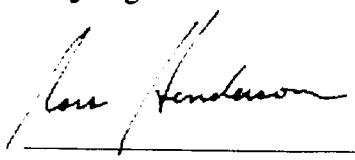
7. Respondent violated the Nursing Practice Act by practicing nursing under a diploma that was unlawfully issued. Tex. Occ. Code § 301.451(3)(B).

8. The Palm Beach program in Texas was not approved by the Board, accredited by a national nursing accreditation agency the Board determined to have acceptable standards, and was not lawfully issued by the Florida Board. Tex. Occ. Code § 301.157(d).

9. The Board may take disciplinary action against Respondent. Tex. Occ. Code §§ 301.451(3)(b), .452(b)(1), .453, .4531(b); 22 Tex. Admin. Code § 213.33.

Signed October 17, 2024.

ALJ Signature:



Ross Henderson

Presiding Administrative Law Judge

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

November 19, 2024

To the Parties **VIA EFILE TEXAS**

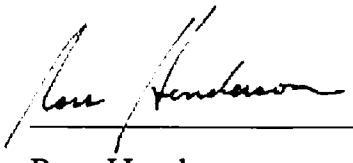
RE: Docket Number 507-24-01665.TBN; *Texas Board of Nursing* v. *Lydia Mwihaki Kariuki*

Dear Parties:

Ms. Kariuki (Respondent) filed exceptions to the Proposal for Decision (PFD) issued on October 17, 2024. Specifically, she excepts to the recommended sanction of revocation. She notes that suspension is also an authorized sanction under the Board's matrix for a Sanction Level II, Second-Tier offense. She argues that because Respondent did not obtain her diploma fraudulently, and she was an unwitting victim of fraud herself, her license should be suspended rather than revoked. Staff of the Board responded that revocation is an appropriate sanction because Respondent has been practicing under an unlawfully issued diploma.

The ALJ is sympathetic to Ms. Kariuki. She worked diligently to obtain a diploma, paid a substantial amount for the education, passed the NCLEX on the first attempt, and has been practicing without incident for over 5 years. Although the sanction is at the discretion of the Board, as the PFD notes, there was no evidence offered that Respondent has any path of filling in education gaps other than completing an ADN at a Board-approved program. If there is such a path, or suspension while Respondent completes an ADN at a Board-approved program is more beneficial to Respondent than revocation, then the ALJ would recommend the Board consider suspension in lieu of revocation.

ALJ Signature(s):



Ross Henderson,

Presiding Administrative Law Judge

CC: Service List