

**BEFORE THE  
BOARD OF VOCATIONAL NURSING AND  
PSYCHIATRIC TECHNICIANS  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

**In the Matter of the Accusation Against:**

**MYRALDA FIDELINA HULSIZER, Respondent.**

**Agency Case No. 430-2021-000853**

**OAH No. 2021120724**

**PROPOSED DECISION**

Eileen Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on March 8, 2022, in Los Angeles, California.

Jane Kaufman, Certified Law Student, accompanied and supervised by Elaine Yan, Deputy Attorney General, represented Elaine Yamaguchi (complainant), Executive Officer of the Board of Vocational Nursing and Psychiatric Technicians (Board).

Respondent Myralda Fidelina Hulsizer (respondent) was present and was self-represented.

Oral and documentary evidence was received. The record was left open by stipulation to allow respondent an opportunity to submit additional rehabilitation evidence and for complainant to object. Respondent failed to submit any additional

evidence. The record was closed, and the matter was submitted for decision on April 15, 2022.

## **SUMMARY**

Complainant seeks to discipline and revoke respondent's vocational nurse license (LVN) based on her convictions for driving under the influence (DUI) which are substantially related to her profession. Respondent offered evidence of her rehabilitation and challenging life circumstances, and overall commendable record as an LVN. There is no evidence respondent has been inebriated during her work hours, and respondent is making good progress toward full rehabilitation. Nevertheless, respondent did not heed the warning of the Board after her first DUI another violation may result in disciplinary action, her second conviction was very recent and probation will not expire until 2024, and respondent failed to provide character references, testimony or written support from a current and future employer she would be properly supervised under a probationary license to assure public portion. As such, respondent needs more time to demonstrate rehabilitation to protect the public, and her license is revoked.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. On October 17, 2001, the Board issued vocational nurse license number VN 197095 (license) to respondent. The license is scheduled to expire on April 30, 2023, unless renewed. (Ex. 2.)

2. On September 9, 2021, in her official capacity, complainant filed an Accusation which seeks to discipline respondent's license based on her convictions for driving under the influence. (Ex. 1.)

3. Respondent filed a timely Notice of Defense. (Ex. 1.) All jurisdictional requirements were met for this hearing to proceed.

### **Respondent's Convictions and Additional Conduct**

4. On September 14, 2020 (2020 Conviction), respondent was convicted and found guilty, on a plea of no contest, for violating Vehicle Code section 23152, subdivision (a), (DUI of alcohol), a misdemeanor. (Super. Ct., San Luis Obispo County, 2019, Case No. 19M-09212.) The court suspended respondent's sentence and imposed three years of probation, ending September 14, 2023, with terms and conditions, including service of 10 days in County Jail with credit for one day, actual service and balance at a credit rate of one-half time, participation in a Driving Under the Influence 3-month Program, and required her to pay fines and fees, or community work service in lieu of payment, in the total amount of \$2,415. As of March 5, 2022, there remained a balance due of \$2,715. (Ex. 3.)

5. The circumstances of the conviction are as follows: On October 16, 2019 respondent was parked at a gas station and after police officers approached in their vehicle, she backed up her car and almost collided with their vehicle. When police officers stopped respondent, they observed signs she was inebriated. Respondent submitted to a breath sample which revealed her blood alcohol content (BAC) to be .168 and .175 percent. Respondent admitted to drinking only one glass of wine. (Ex. 4.)

6. On October 28, 2020, the Board notified respondent it completed its review of her 2019 arrest and reminded her of the Board's authorization pursuant to

Business and Professions Code (Code) section 4521, subdivision (a) to suspend or revoke a license based on unprofessional conduct. The Board advised respondent it would not “pursue disciplinary action at this time, based on the fact you have gone through court proceedings and are in compliance with court orders.” The Board warned her about possible negative consequences to her license for future similar conduct:

However, be advised that as a licensed vocational nurse, you are responsible for behaving professionally, honestly and ethically. Future substantiated reports that you have engaged in similar behavior or otherwise violated the law or regulations governing your practice ... **may** result in formal disciplinary action against your license. (Emphasis in the original.)

(Ex. 5.)

7. On June 16, 2021 (2021 Conviction), respondent was convicted and found guilty, on a plea of nolo contendere of violating Vehicle Code section 23152, subdivision (b) (driving with a BAC of .08% or higher), a misdemeanor. (Super. Ct., Santa Barbara County, 2020, Case No. 20CR08189.) The court suspended respondent’s sentence and imposed three years of probation, with terms and conditions, including service of 60 days in County Jail, with credit for time served/good work time of four days, enrollment in and completion of 18-month DUI Program through Central Coast Highway Alcohol Program (for multiple offenses), no drinking for three years, stay away from bars and liquor stores, use of an ignition interlock device, payment of fines and fees of approximately \$2,070. The balance due as of January 12, 2022 was \$2,370.

(Ex. 6.)

8. The circumstances of the 2021 Conviction are as follows: On November 5, 2020 respondent was driving with her high beams illuminated when passing police officers ran a background check of her registration found her license was suspended. When officers stopped respondent, they observed her with symptoms of alcohol intoxication, including slurred speech and red and watery eyes. Respondent had difficulty balancing while performing a field sobriety test and submitted to a breath sample, which measured her BAC at .23 percent. Respondent admitted to driving with a suspended license and consuming two shots of a "melatonin gummy". (Ex. 7.)

9. As a matter in aggravation, complainant notes the following circumstance. On January 15, 2020, officers were called to a bar to conduct a welfare check of two females, one of whom was respondent, who were laying on the ground in the rear parking lot. Respondent was observed stumbling beside the front door of a vehicle and displaying objectives symptoms of severe level of alcoholic intoxication, including an extremely unsteady gate, slurred speech and being covered in vomit. It was apparent respondent was unable to care for herself and could not get home by herself safely. The police officers took her into custody and put her in a holding cell for Public Intoxication. During the investigation, officers discovered respondent had an outstanding bench warrant for driving with aa suspended license from a prior conviction. The matter was referred to the District Attorney's office. (Ex. 8.) No evidence was presented of the matter proceeding to a criminal charge.

## **Respondent's Evidence**

10. Respondent expressed remorse for her convictions and related conduct. She understands the risk her behavior imposed on the public, in particular, the potential for harming someone while driving under the influence. She insisted however she kept her private challenges separate from work and never went to work inebriated.

She admitted her convictions demonstrated poor judgement. At the time of the convictions, respondent was going through a divorce while raising three children.

11. Respondent maintained she has made progress with her rehabilitation and is not a risk to the public. She has been sober since August 31, 2021, the date she entered a sober living home to begin her sobriety. She has been attending Alcoholic Anonymous (AA) meetings, two days a week, mostly on-line, attends church, almost daily and participates in bible study. She currently does not drive and uses Uber. Respondent also pays for a mental health counselor.

12. Respondent maintained she has been compliant with the terms of probation. She has not gone to any bars as mandated and performed community service in lieu of payment of fees. She stated she paid "what she needed to pay" at this time for her fees and costs of probation, but her testimony was not supported by the recent court dockets which still showed outstanding fees. Although the Pandemic has interfered with in-person meetings, respondent has not provided any proof of attendance or continuation for the DUI programs mandated by the court.

13. Respondent was sincere in her apology. From her testimony, it was clear she was a dedicated nurse having worked consistently for 17 years at Lompoc Hospital where she has focused on elder care until she left work last year and recently reactivated her disability leave. Respondent represented she was acknowledged for her work but had not told her employers about her convictions. Respondent provided assurances her employers would report she is an "amazing worker." However, respondent did not provide testimony or any written character references from past or current employers who could support her testimony, assure the Board she was safe to practice and would be monitored if she were to practice under a probationary license.

## **Costs**

14. The Board incurred enforcement costs, through March 2, 2022, in the form of Attorney General fees, in the amount of \$5,491.25. These prosecution costs are exclusive of costs incurred after that date, including the hearing. The total costs of prosecution, in the amount of \$5,491.25 are reasonable. (Ex. 10.) Respondent participated in the hearing process in good faith and provided evidence of her inability to pay costs due to a break in her long-standing employment with Lompoc Hospital for disability leave unrelated to her sobriety. Her rent was paid for three months by someone else. Due to the discipline imposed, respondent will not have a source of income from her profession until such time as her license is reinstated. As such, to require respondent to pay any amount would be punitive and have a negative effect on her ability to progress with her rehabilitation.

## **LEGAL CONCLUSIONS**

### **Burden and Standard of Proof**

1. Since complainant seeks to discipline a professional license, complainant has the burden of establishing cause for discipline by clear and convincing proof to a reasonable certainty. (See *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

2. Clear and convincing evidence requires a finding of high probability; the evidence must be so clear as to leave no substantial doubt and must be sufficiently strong to command the unhesitating assent of every reasonable mind. This requirement presents a heavy burden, far in excess of the preponderance of evidence

standard that is sufficient for most civil litigation. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 84.) Complainant met her burden of proof.

## **Bases for Discipline**

3. First Cause for Discipline (Convictions of Substantially Related Crimes): Cause exists to discipline respondent's license pursuant to Code sections 490 and 2878, subdivision (f) on the ground respondent was convicted of crimes substantially related to the qualifications, functions, or duties of an LVN which to a substantial degree evidenced her present or potential unfitness to perform the functions authorized by her license in a manner consistent with the public, health, safety, or welfare, by reason of factual findings 4-9. Respondent insists her inebriation never occurred during her work hours and no evidence was presented she was inebriated on the job. Nevertheless, her decision to drink while driving, drive without a valid license and continue drinking to extreme even after being warned by the Board, establishes the potential for public harm.

4. Second Cause for Discipline (Convictions of Alcohol Related Crimes): Cause exists to discipline respondent's license pursuant to Code sections 2878, subdivision (a), as defined in section 2878.5, subdivision (c) on the ground of unprofessional conduct for two convictions of crimes involving the consumption of alcohol, by reason of factual findings 4-9 and legal conclusion 3.

5. Third Cause for Discipline (Dangerous Use of Alcohol): Cause exists to discipline respondent's license pursuant to Code section 2878, subdivision (a), as defined in section 2878.5, subdivision (b) on the ground of unprofessional conduct for consuming alcohol, to an extent or in a manner dangerous or injurious to herself, or



any other person or the public, by reason of factual findings 4-9 and legal conclusion 3.

## **Disposition**

6. Rehabilitation "is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved 'reformation and regeneration.'" (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058, citations omitted.) Thus, a determination that legal cause exists to discipline respondent's license does not end the inquiry. Respondent must prove she has sufficiently rehabilitated herself from her misconduct and that she is worthy of the license she holds.

7. The Board has established certain criteria to determine a licensee's rehabilitation, including: the nature and severity of the act(s), offense(s), or crime(s) under consideration; the actual or potential harm to the public; the actual or potential harm to any patient; the overall disciplinary record; the overall criminal actions taken by any federal, state or local agency or court; the prior warnings on record or prior remediation; the number and/or variety of current violations; the mitigation evidence; in case of a criminal conviction, compliance with terms of sentence and/or court-ordered probation; the time passed since the act(s) or offense(s) occurred; if applicable, evidence of proceedings to dismiss a conviction pursuant to Penal Code section 1203.4; the licensee's cooperation with the Board and other law enforcement or regulatory agencies; and other rehabilitation evidence. (Cal. Code Regs., tit. 16, § 2522.)

8. Respondent provided convincing testimony she is a capable LVN, and her 17-year employment history supports her statement. Respondent's own representation of her competence, conscientiousness, and compassion as an LVN were not supported

and explained by character references. (See *Werner v. State Bar* (1954) 42 Cal.2d 187, 196-197; *Preston v. State Bar* (1946) 28 Cal. 2d 643, 650-651 [character references of friends and associates are entitled to careful consideration and should weigh heavily in the scales of justice].)

9. The purpose of a licensing proceeding is to protect the public. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 785-786.) In reaching a decision on the appropriate level of discipline, the Board must consider the guidelines entitled Disciplinary Guidelines and Uniform Standards Related to Substance Abuse, revised June 20, 2011, and incorporated by reference at California Code of Regulations, title 16, section 2524 (Guidelines). The Guidelines apply to all disciplinary matters. (Cal. Code Regs., tit. 16, § 2524.) The Guidelines provide for a range of discipline for the various causes, but due to multiple convictions and an incident demonstrating the severity of respondent's inebriation, revocation or revocation stayed with a minimum of three years' probation with terms and conditions should only be considered.

10. The seriousness of respondent's conduct cannot be minimized even though it occurred outside of her employment as an LVN. Respondent presented as a sincere and capable LVN. However, her convictions and sobriety are recent, her probation is ongoing and will not terminate until June 2024, and she did not provide supporting evidence from a current or prospective employer with knowledge of her convictions, to provide sufficient assurance she will be properly supervised and safe to practice. Respondent also failed to provide a documentary record of her participation in AA or mental health counseling.

11. Respondent demonstrated at hearing that she has made progress toward full rehabilitation. Nevertheless, after careful consideration of the Guidelines, and the

goal of public protection, revocation of respondent's license is required at this time to adequately assure public safety, protection and welfare.

## **Costs**

12. Code section 125.3 provides, in pertinent part, that a licensee found to have committed a violation of the licensing law shall pay a sum not to exceed the reasonable costs of investigation and enforcement. In this case, respondent violated provisions of the Vocational Nursing Practice Act and the Board has incurred reasonable costs of prosecution in this matter of \$5,491.25, by reason of factual finding 14.

13. Under *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the Board must exercise its discretion to reduce or eliminate cost awards so as to prevent cost award statutes from deterring licensees with potentially meritorious claims or defenses from exercising their right to a hearing. "Thus, the Board must not assess the full costs of investigation and prosecution when to do so will unfairly penalize a [licensee] who has committed some misconduct, but who has used the hearing process to obtain dismissal of other charges or a reduction in the severity of the discipline imposed." (*Ibid.*) The Board, in imposing costs in such situations, must consider the licensee's subjective good faith belief in the merits of her position as well as whether the licensee has raised a colorable defense. The Board must also consider the licensee's ability to make payment.

14. The *Zuckerman* criteria were applied. Respondent exercised her right to use the hearing process to obtain a reduction in the severity of the discipline imposed and although she did not raise a colorable defense to the charges, participated in good faith to plea for her continued licensure. Respondent presented evidence she

was unable to pay the costs of prosecution and the imposition of costs would be unduly burdensome and impede her full rehabilitation. Accordingly, respondent shall not be required to pay costs

## **ORDER**

Vocational nurse license number VN 197095 issued to respondent Myralda Fidelina Hulsizer is revoked.

DATE:

EILEEN COHN

Administrative Law Judge

Office of Administrative Hearings