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

In the Matter of the Accusation Against: CHELYNN CASSALE SEMILLA P.O. Box 2333 Aptos, CA 95001 Vocational Nurse License No. VN 282251, Respondent.	Case No. 4302019000328 OAH No.: 2020040801 Precedential Decision No.: 2022-01

DECISION UPON RECONSIDERATION

This case comes before the Board of Vocational Nursing and Psychiatric Technicians (Board) on reconsideration of its Decision dated October 30, 2020, adopting the Proposed Decision of the Administrative Law Judge. By order dated December 6, 2020, the Board granted respondent's petition for reconsideration, stayed the effective date of the Decision and fixed the dates for submission of written argument. The Board ordered and received the transcript of the hearing and the parties were notified of the availability of the transcript. The Board has received written arguments from the parties. Now, having reviewed the administrative record, including the hearing transcript, and having read and considered the written arguments of the parties, the Board renders its Decision Upon Reconsideration as follows:

PROCEDURAL HISTORY

1. Complainant Elaine Yamaguchi, in her official capacity as the Executive Officer of the Board, commenced this case by filing an Accusation on January 27, 2020. The Accusation alleged two causes for discipline: (1) unprofessional conduct under Business and Professions Code section 2878, subdivision (a); and dishonesty under Code section 2878, subdivision (j). Respondent Chelynn Cassale Semilla was served with the Accusation and returned a timely Notice of Defense. The case was referred to the Office of Administrative Hearings for hearing before an Administrative Law Judge.

2. On September 15, 2020, the case was heard by Administrative Law Judge Ruth Astle as a virtual hearing in California. Complainant was represented by Deputy Attorney General Christopher Young. Respondent appeared at hearing and was represented by Kathleen McCormac, Attorney at Law. Oral and documentary evidence was received at the hearing, the record was closed and the case was submitted for proposed decision on September 15, 2020.

3. On October 7, 2020, the Administrative Law Judge issued a Proposed Decision sustaining both causes for discipline, finding insufficient evidence of mitigation or rehabilitation to warrant a probationary license and ordering that respondent's license be revoked and that she be required to pay investigation and enforcement in the amount of $3,336.25, if reinstated. The Office of Administrative Hearings served a copy of the Proposed Decision on the parties when it was issued. On October 30, 2020, the Board issued a Decision adopting the Proposed Decision as its final decision in the case, effective December 3, 2020. (Copy attached.)

4. On November 22, 2020, the Board received a timely petition for reconsideration from respondent. The Board extended the effective date of the Decision to December 13, 2020, to allow the Board sufficient time to consider the petition. After due consideration, the Board granted the petition and stayed the effective date of the Decision, to reconsider the Decision upon the record, including hearing transcript, and upon the written argument of the parties. The Board received the hearing transcript and the parties were notified of its availability. The Board has reviewed the administrative record, including the hearing transcript, and has read and considered the written argument of the parties.

5. On reconsideration, complainant was represented by Deputy Attorney General Christopher Young and respondent was represented by Attorney Kathleen McCormac. The Board received legal guidance and assistance drafting this Decision Upon Reconsideration from its General Counsel Kenneth Swenson. Appropriate separation of functions was maintained on reconsideration. While the matter was on reconsideration, the Board issued a notice and order to show cause relating to reconsideration on its own motion of the issue of the cost award being made due only upon reinstatement. The Board received and considered the returns to the order to show cause from the parties in rendering this Decision Upon Reconsideration.

FACTUAL FINDINGS UPON RECONSIDERATION

The Board accepts and adopts Factual Findings 1-11 of the Proposed Decision, and makes additional findings upon reconsideration. To avoid duplication of numbers and the possible confusion which may result, the Board numbers these additional factual findings starting with number 12.

12. Respondent received due and legal notice of the Accusation and filed a timely Notice of Defense in response. The Accusation provided adequate notice of the factual and legal basis for discipline and of revocation being a possible consequence of the disciplinary proceeding. She appeared at the hearing with counsel and was given a full, fair and adequate opportunity to confront the witnesses against her and to present her defense to the

Accusation. During the hearing, respondent failed to offer any evidence of good character, professional competence, or trustworthiness or any evidence of her rehabilitation or of why she should be granted a probationary license. Respondent made no request to continue the hearing to permit unavailable witnesses to attend or to keep the record open for additional documentary evidence to be offered prior to closure of the record and submission of the matter for proposed decision. After the hearing, she made no request to have the case reheard or to have the record reopened to permit the submission of additional evidence before the Proposed Decision was issued.

13. Respondent received a copy the Proposed Decision when it was issued by the Administrative Law Judge on October 7, 2020. In the Proposed Decision, the Administrative Law Judge found that respondent did not present any testimony or letters from colleagues or supervisors regarding her abilities as a vocational nurse, and that respondent did not present any testimony or letters from anyone attesting to her good character. (Factual Finding 9.) The Administrative Law Judge also found that respondent admitted what she did was wrong, and that respondent has not had any prior criminal involvement or past disciplinary action. (Factual Finding 10.) In weighing the evidence, the Administrative Law Judge concluded that, while the respondent did cooperate with the Board, she had failed to make restitution and had failed to establish that she is respected in her profession or a trustworthy person. (Legal Conclusion 4.) The Administrative Law Judge gave little or no weight to the fact that the respondent did not have any prior criminal involvement or disciplinary action against her. After receiving the Proposed Decision, respondent made no effort to reopen the record despite having been notified of the shortcomings of her defense. Instead, she waited until the Board adopted the Proposed Decision and then petitioned for reconsideration.

14. Through the petition for reconsideration, respondent offered new evidence consisting of documents created after the Decision was entered. These documents did not exist prior to the Decision and, therefore, would literally have been impossible for respondent to have presented before the Decision was made. Specifically, these documents consist of a minute order and payment receipts offered for the purpose of showing respondent had paid restitution to her victim in the criminal case and, as a result, had the criminal charges against her reduced from a felony to a misdemeanor, a performance evaluation from one of respondent's employers offered for the purpose of showing respondent's abilities as a vocational nurse, and a letter from a friend offered for the purpose of showing respondent's good character.[1] With respect to the minute order and payment receipts, respondent testified at the hearing before the Administrative Law Judge that she had not paid any of the restitution because she was only allowed to pay the entire amount at once and that she had saved about $1,700 toward repaying the amount she stole. With respect to the other two new exhibits, she

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[1] With her opening written argument, respondent submitted two additional reference letters. The Board declines to consider these letters because they were not offered as additional evidence in the petition for reconsideration. Moreover, even if these two letters had been included in the petition for reconsideration, they did not exist when the Decision was issued and, as explained *infra*, should not be made part of the administrative record and considered upon reconsideration.

offered no evidence to show why it was impossible to have an employer representative appear at hearing and testify regarding her abilities as a vocational nurse or to have her friend or some other witness appear at hearing and testify regarding her good character.

LEGAL CONCLUSIONS UPON RECONSIDERATION

Except as provided herein, the Board accepts and adopts Legal Conclusions 1-5 of the Proposed Decision, and makes additional conclusions upon reconsideration. To avoid the duplication of numbers and the possible confusion which may result, the Board numbers these additional conclusions starting with number 6.

6. In discipline cases, the jurisdiction of the Board persists until it issues a decision and the decision becomes effective. (*Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407; *Kirk v. County of San Luis Obispo* (1984) 156 Cal.App.3d 453, 460.) The Board lacks jurisdiction to review its own decisions, except as expressly provided by statute. (*Olive Proration Program Committee for Olive Proration Zone* (1941) 17 Cal.2d 204, 208-209; *Chas. L. Harney, Inc. v. State of California* (1963) 217 Cal.App.2d 77, 97.) The power to review the decisions of the Board rests with the courts and, then, only by filing a petition for a writ of administrative mandate under Code of Civil Procedure section 1094.5.[2] (Gov. Code § 11523.) As applicable to this case, Government Code section 11521 provides the Board with the limited authority to reconsider its own decisions before they become effective.[3] The Board has retained jurisdiction in this case by granting respondent's petition for reconsideration before the Decision became effective. The Board, having retained jurisdiction by granting the petition for reconsideration, preserved its power to reconsider any part of the Decision in this case. (Gov. Code § 11521, subdiv. (a).)

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[2] Prior to seeking relief from the court, a party must exhaust available administrative remedies. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1080; *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) Compliance with this requirement constitutes "a jurisdictional prerequisite to resort to the courts." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321.) To satisfy the exhaustion requirement, a party must present the entire controversy to the administrative agency. (*Jonathan Neil Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 933 ("in the case of exhaustion, the administrative agency must initially decide the 'entire controversy'"); *Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432 (exhaustion requires "a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings").) The requirement "is founded on the theory that the administrative tribunal is created by law to adjudicate the issue sought to be presented to the court, and the issue is within its special jurisdiction." (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137.) The doctrine also advances the prudential interests of avoiding litigation, lightening the burden on overworked courts, and facilitating development of a complete record that draws on administrative expertise and promotes judicial efficiency. (*Ibid.*)

[3] A petition for reconsideration is not a prerequisite to seeking relief from the court. (Gov. Code § 11523 ("The right to petition [for writ of administrative mandate] shall not be affected by the failure to seek reconsideration before the agency."); *Anderson v. Department of Alcoholic Beverage Control* (1958) 159 Cal.App.2d 413, 415 ("A licensee need not petition for reconsideration under the administrative procedure act in order to exhaust his administrative remedies.").)

In exercising its jurisdiction to reconsider this case, Business and Professions Code section 2841.1 requires the Board to make public protection its highest priority and, whenever the protection of the public is inconsistent with other interests sought to be promoted, to treat the protection of the public as the paramount interest.

7. The Board, as the "agency" deciding the case under Government Code section 11405.30, maintains the statutory authority to reconsider the case before the decision becomes effective. "The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party." (Gov. Code § 11521, subdiv. (a).) If reconsideration is ordered, "the case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted." (*Id.*, at subdiv. (b).) This provision leaves it within the sound discretion of the agency what additional evidence and argument may be permitted when reconsidering the case. Therefore, the Board maintains the discretion to determine what, if any, additional evidence will be permitted when reconsidering this case. Where, as here, the record was closed and the matter was submitted for proposed decision by the Administrative Law Judge and the Administrative Law Judge has issued a proposed decision, the Board may, in its sole discretion, reopen the administrative record to permit additional evidence to be admitted upon the reconsideration of a decision of the Board adopting the proposed decision of the Administrative Law Judge.

8. Among many other functions, the Board decides numerous contested discipline cases each year.[4] The Board refers these contested cases to the Office of Administrative Hearings to be heard by an Administrative Law Judge. After the case is heard and the record is closed and matter is submitted, the Administrative Law Judge prepares a proposed decision based on the evidence from the hearing. The Board deliberates on the proposed decision and either accepts and adopts the proposed decision as its decision or rejects the proposed decision and decides the case based the record from the hearing, including the transcript of hearing, and the written arguments of the parties. The Board expects the parties to offer all relevant evidence and argument during the hearing before the Administrative Law Judge, because the record from that hearing forms the basis for the recommended decision of the Administrative Law Judge and final decision of the Board and constitutes an integral part of the administrative record if the final decision of the Board is reviewed by the Superior Court through a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5.

9. In an administrative mandate proceeding involving discipline of a professional license, the Superior Court will review the administrative record to determine whether, in its independent judgment, the weight of the evidence supports the final decision. (Code Civ. Proc. § 1094.5; *Fukada v. City of Angels* (1999) 20 Cal.4th 805, 817.) The Superior Court generally confines its review to those issues which appear in the administrative record, although additional evidence may, in proper cases, be received by the Superior Court. (*Bohn v. Watson* (1954) 130 Cal.App.2d 24, 37.) This limitation protects the integrity of the administrative

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[4] The Board decided 68 cases in 2016, 66 cases in 2017, 84 cases in 2018, 83 cases in 2019, and 65 cases in 2020, for an average of 73 cases per year over those five calendar years.

process by requiring the parties to present all legitimate issues to the administrative tribunal. (*Ibid.*) Thus, a respondent should not withhold any defense available to them or make a perfunctory or skeleton showing during the administrative hearing and, thereafter, attempt to obtain unlimited review on expended issues in the Superior Court. (*Ibid.*) As explained in *Bohn v. Watson, supra*, "[t]he rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play." (*Ibid.*) In other words, the parties are required to exhaust administrative remedies by making "a full presentation to the administrative agency upon all issues of the case" before resorting to the courts. (*Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432.) "This rule affords the public agency an opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review." (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1137.)

10. The Superior Court may, in reviewing an administrative decision, augment the administrative record to admit additional evidence but only within the strict limits of Code of Civil Procedure section 1094.5, subdivision (e) which "opens a narrow, discretionary window for additional evidence." (*Fort Mohave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1595.) Specifically, subdivision (e) provides that, "[w]here the court finds there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before [the agency] it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case." (Code Civ. Proc. § 1094.5, subdiv. (e).) Accordingly, the Superior Court requires the proponent of the new evidence to show "that the evidence existed before the agency made its decision, but that it was impossible in the exercise of reasonable diligence to present it to the agency before the decision was made." (*Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917, 930 (not an abuse of discretion for court to preclude deposition transcripts which did not exist before the administrative hearing.).) "In the absence of a proper preliminary foundation showing that one of the exceptions noted in subdivision (e) applies, it is error for the court to permit the record to be augmented" with the new evidence. (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.)

11. Likewise, in civil actions or proceedings before the Superior Court, a motion for reconsideration may only be made based upon "new or different facts, circumstances, or law." (Code Civ. Proc. § 1008, subdiv. (a).) This code section applies to administrative mandate cases. (Code Civ. Proc. § 1107.) A party seeking reconsideration under this code section must identify the new or different facts, circumstances or law warranting the reconsideration. (*Id.*, at subdiv. (b).) Moreover, "[a] party seeking reconsideration also must provide [the court] a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) "Section 1008 is designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over." (*Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156–1157.)

12. While, strictly speaking, Government Code section 11521 does not contain the same sort of express limitations as Code of Civil Procedure sections 1094.5 or 1008, these code sections and the cases interpreting them provide a reasonable starting place to consider how the Board should exercise its power to augment the administrative record with new evidence or to reconsider a decision based on new or different facts. The reason for the restrictions in proceedings before the Superior Court to review the decisions of the Board, that is preserving the integrity of the proceedings before the tribunal so as to endow them with a dignity beyond that of a mere shadow-play, apply with equal weight to proceedings before the Board to review the proposed decisions of Administrative Law Judges and, as a maxim of jurisprudence puts it, "[w]here the reason is the same, the rule should be the same." (Civ. Code § 3511.) To this end, restrictions on augmenting the administrative record, grounded as they are on the jurisdictional doctrine of exhaustion of administrative remedies, should apply to all the levels of review in an administrative adjudication process. (See *International Association of Firefighters, Local 230 v. City of San Jose* (2011) 195 Cal.App.4th 1179, 1213 (doctrine applies to "all prescribed stages of the administrative proceedings").)

13. In light of these legal authorities, and for the reasons expressed in them, the Board will ordinarily limit reconsideration of a decision based on new or different facts to those instances where the evidence offered to support those facts existed at the time of the decision but was, in the exercise of reasonable diligence, impossible to present before the decision was rendered. This approach to reconsideration based on new or different facts strikes the proper balance between administrative efficiency, prompt disposition of cases, and public protection. It promotes administrative efficiency by allowing the Board, in appropriate cases, to augment the record at the administrative level in the same way the Superior Court might on writ review. It promotes the prompt disposition of contested cases[5] by preventing unnecessary litigation of matters which could have and should have been presented during the administrative hearing. And, it promotes public protection by bringing the contested cases to finality so, in those cases where the grounds for discipline are sustained, appropriate disciplinary action may promptly be taken against licensees to avoid the potential risk of harm to the public and to patients resulting from unsafe or unethical practitioners remaining licensed.

14. Applying the limitation to reconsideration in this case, the Board concludes that the proffered evidence did not exist at the time the Decision was issued and, therefore, should not be made part of the administrative record and considered upon reconsideration. The three proffered exhibits were all created after the Decision was issued as was found in Factual Finding number 14. Moreover, even if the additional documents were considered, they would not have changed the outcome of the case because they do not establish that the respondent has been sufficiently rehabilitated to warrant granting her a probationary license.

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[5] As a healing arts board within the Department of Consumer Affairs, the Board is required to comply with certain guidelines for the timely disposition of discipline cases referred to as the Consumer Protection Enforcement Initiative (CPEI). The CPEI established a goal for discipline cases for healing arts boards to be completed within 12 to 18 months of intake.

15. The proffered minute order and payment receipts, if considered, would establish that respondent paid full restitution to her victim in the criminal case and, as a result, had the criminal charges against her reduced from a felony to a misdemeanor as part of the plea deal in the case. While the Board condones respondent for paying full restitution to her victim and for resolving the criminal action, the Board notes that respondent paid restitution under the threat of being sentenced to a felony instead of a misdemeanor. The Board ordinarily considers the payment of restitution as a factor in mitigation. However, restitution paid under the force of criminal proceedings is not properly considered to have any mitigating effect. (*Hitchcock v. State Bar of California* (1989) 48 Cal.3d 690, 709.) Moreover, payment of "[r]estitution *after* disciplinary proceedings have been initiated is entitled to little weight in selecting the appropriate discipline for professional misconduct." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310 (italics in original).) The Board, therefore, would give little or no weight to the fact that respondent paid restitution even if the additional evidence was considered and what weight the fact would be given would not warrant issuing respondent a probationary license upon reconsideration.

16. The proffered evaluation, if considered, would establish that respondent had a favorable performance review from one of her employers during the year preceding the date of the evaluation. The evaluation rates respondent as "very good" in all responsibilities assessed and contains narrative comments that respondent is a great addition to the nursing pool at the facility, that she is always willing to help others at her work, and that she always has a positive attitude. The evaluation would tend to show that, at least for the year preceding the review, respondent performed her nursing responsibilities well and demonstrated positive traits of being helpful and having a positive attitude at work. However, the evaluation offers nothing about her honesty or trustworthiness other than what can be inferred from the lack of negative comments about these character traits or from favorable ratings on nursing responsibilities that reflect on these character traits. The grounds for discipline in this case do not involve how well respondent performed her nursing responsibilities so much as they involve her dishonest and fraudulent conduct in connection with her employment as a vocational nurse. The fact that respondent may have performed her nursing responsibilities well for this particular employer sheds no light on the fact she committed theft from a prior employer by repeatedly submitting false and fraudulent timesheets. Unlike work performance, dishonesty is not considered an isolated or transient behavioral act but is considered more of a continuing trait of character of an employee. (*Gee v. State Personnel Board* (1970) 5 Cal.App.3d. 713, 719.) A healing arts licensee such as a vocational nurse may be subject to disciplinary action notwithstanding their technical competence or skill where, as here, their conduct calls their moral character for honesty into question. (*Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 305.) The Board would, therefore, give little or no weight to the performance evaluation even if it were considered, and what weight it would give would not warrant issuing a respondent a probationary license.

17. The proffered letter of reference, if considered, would establish that a friend of respondent for some 13 years knows respondent to be dedicated, hardworking and passionate

about nursing and a person who continually works to improve her skills and hone her craft and who enjoys helping others and experiencing new challenges. The letter also mentions that the illness and death of respondent's husband was, understandably, a very difficult experience for respondent, that it took a heavy emotional toll on respondent, that respondent has turned her life around and is taking appropriate steps to help her overcome her grief, and that respondent is remorseful for what she has done and would like a fresh start. The letter of reference offers no explanation why someone with the fine personal characteristics attributed to respondent would steal $4,367.39 from her employer by repeatedly submitting fraudulent time sheets, other than perhaps an oblique reference to respondent being in a state of grief. Assuming the author of the letter attributes the aberrant conduct to respondent's grief, the letter provides no explanation why being in a state of grief would cause respondent to steal from her employer by repeated acts of dishonesty or how it could possibly justify or excuse such serious misconduct, or how the steps respondent has taken to overcome her grief would prevent future dishonest or fraudulent conduct. The Board would, therefore, would give little or no weight to the letter even if it were considered and what weight the letter would be given would not warrant issuing respondent a probationary license.

18. The Board hereby takes official notice of the facts that, on November 18, 2020, respondent was convicted of one count of misdemeanor theft as part of a plea deal and was sentenced to pay fines and to wear an ankle monitor for 30 days to be followed by two years of court probation, that the theft occurred in connection with her delivery of a health care service and that she remains on court probation in the criminal case until sometime in December 2022. (Gov. Code § 11515; Evid. Code § 452, subdiv. (d)(1).)

19. On reconsideration, respondent argues for the first time that her license should not be revoked because of the collateral effect of her being excluded from working in a facility receiving federal funds pursuant to section 1128 of the Social Security Act (42 U.S.C. 1320a–7). Respondent failed to raise this argument at the hearing before the Administrative Law Judge and offers no explanation why the argument was not previously raised. The law respondent cites to support of this argument is nothing new: the exclusion law was initially enacted by the Medicare-Medicaid Anti-Fraud and Abuse Amendments, Public Law 95-142 (now codified at section 1128 of the Act) in 1977, and was expanded with the enactment of the Civil Monetary Penalties Law, Public Law 97-35 in 1981, the Medicare and Medicaid Patient and Program Protection Act, Public Law 100-93, in 1987, the Health Insurance Portability and Accountability Act, Public Law 104-191, in 1996 and the Balanced Budget Act (BBA), Public Law 105-33, in 1997, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 and the Patient and the Protection and Affordable Care Act of 2010, as amended by the Health Care Education Reconciliation Act of 2010. Exclusion is and has been a well-known collateral effect of the revocation of a healthcare license. (See Rutter, California Practice Guide: Administrative Law ¶ 7:430 (admonishing counsel to advise their clients as soon as possible in the case about the collateral effects of license discipline including exclusion).) The Board ordinarily will not consider issues which could have been raised before the Administrative Law Judge but were not. (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143; *Lee v. Board of Registered Nursing* (2012) 209 Cal.App.4th 793, 798.) Respondent could have and should have

presented this argument to the Administrative Law Judge and, upon reconsideration, failed to offer the Board any explanation why she did not. The Board, therefore, declines to consider the argument because it was not presented at the administrative hearing and is not based on any new or different law.

20. Even if this belated argument were considered, the Board would reject it for two reasons. First, the argument confuses cause and effect by seeking reconsideration of a decision revoking a license because the revocation would have the effect of excluding the person whose license has been revoked. The Board, in rendering its decision, weighed the serious misconduct of respondent and the lack of evidence of mitigation or rehabilitation and found that revocation of the license was the appropriate discipline in this case. The collateral effect of the revocation does not represent a legitimate reason for the Board to reconsider the finding that revocation was the appropriate discipline. Second, the argument ignores the fact that respondent would still be subject to permissive exclusion as a result of her having been convicted of the crime of theft in connection with the delivery of a health care service. (42 U.S. Code § 1320a–7(b).) The argument seeks to have the revocation stayed or reduced to prevent respondent from being subject to exclusion when she would still be potentially subject to exclusion as a result of her conviction. In other words, the argument requests the Board perform an idle act. "The law neither does nor requires [such] idle acts." (Civ. Code § 3532.) Accordingly, even if the Board were to consider the argument concerning exclusion, the Board would reject the argument and deny the request for reconsideration of the level of discipline based on the argument.

21. The Board notes that, even if the proffered documents and belated argument were considered, they would not warrant imposing lesser discipline or granting respondent a probationary license. When determining the rehabilitation of an individual and her present eligibility for a license, the Board considers a number of factors clearly set-forth in regulation. (Calif. Code Reg. tit. 16, § 2522.) This regulation was identified and recited in its entirety in the Accusation, along with all other pertinent statutory and regulatory provisions. Weighing these factors in this case, even with the addition of the proffered documents and belated argument, the Board has no doubt that revocation of the vocational nurse license issued to respondent was just and proper and that respondent failed to present sufficient evidence of mitigation or rehabilitation to warrant granting her a probationary license.

22. The nature and severity of the misconduct giving rise to the discipline, and now the criminal conviction, were very serious and involved multiple acts of dishonesty over a six week period of time. The misconduct was not a single aberrant act of dishonesty but was part of a pattern evincing a propensity and willingness to engage in dishonest or fraudulent conduct which poses a serious and even grave risk of potential harm to the public and to patients.

23. The Board, like the Administrative Law Judge, gives little or no weight to the fact that respondent did not have any prior criminal convictions or any disciplinary actions after she received a license. Respondent had only been licensed for four years when she committed the acts of dishonesty for which she was convicted and disciplined. While lack of prior discipline may be significant mitigating factor where a licensee has practiced for a substantial period, this

mitigating factor carries little or no weight when a licensee has practiced for only a short time before engaging in misconduct giving rise to discipline. (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 658 (seven and one-half years without prior discipline insufficient to be considered a mitigating factor); *Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 708 (four years without prior discipline not a significant mitigating factor).)

24. Respondent was convicted in the criminal case on November 18, 2020, was placed on court probation for two years, and will presumably complete court probation in December 2022. The Board expected respondent to exhibit good behavior while on court-ordered probation in the criminal case. However, even rigorous compliance with the terms of her probation in the criminal case does not necessarily prove anything more than good sense on her part. (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473.) Sustained good conduct *after* completion of probation in a criminal case provides a far truer indication of rehabilitation than compliance with the terms and conditions of probation during the period of probation in a criminal case. Respondent remains on court ordered probation and, therefore, cannot demonstrate continuing good behavior *after* the completion of her court probation in the criminal case.

25. While respondent cooperated with the Board and admitted what she did was wrong, the admission of misconduct only represents the necessary, first step of beginning the rehabilitation process and does not, in itself, establish rehabilitation. "Fully acknowledging the wrongfulness of [ones] actions is an essential step towards rehabilitation." (*Seide v. Commission of Bar Examiners* (1989) 49 Cal.3d 933, 940.) However, mere "[r]emorse does not demonstrate rehabilitation. While a candid admission of misconduct and a full acknowledgment of wrongdoing may be a necessary step in the process, it is only a first step." (*In re Conflenti* (1981) 29 Cal.3d 120, 124-125.) Sustained conduct over an extended period of time demonstrating fitness to hold a professional license gives a truer indication of rehabilitation than mere remorse. (*Ibid.*)

26. The evidence in this case, even if the proffered documents were considered, does not establish any degree of rehabilitation let alone a degree of rehabilitation that would indicate respondent is not likely to reoffend and would not be a danger to the public or to patients if she were granted a probationary license. In the absence of such evidence, and in light of the Board's statutory mandate to make public protection its paramount concern, the Board concludes, upon reconsideration, that the public would not be adequately protected by anything other than the revocation of the vocational nurse license issued to respondent. The Board, therefore, affirms the revocation of the vocational nurse license issued to respondent.

27. Turning to payment of the cost award, the Board reconsiders the question on its own motion under Government Code section 11521, subdivision (a) permitting it to reconsider any part of the case on its own motion. The Administrative Law Judge reduced the cost award by half and made the award due upon reinstatement, in the Proposed Decision. The reduction of the cost award was made because of the financial hardship of respondent at the time of the

administrative hearing. While the Proposed Decision does not express exactly why payment of the cost award was made due on reinstatement, the Board presumes that it was to mitigate the potential effect of requiring respondent to immediately pay the reduced cost award given her current financial circumstances.

28. In contested discipline cases, the complainant may request the administrative law judge "direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case." (Bus. & Prof. Code § 125.3, subdiv. (a).) This cost reimbursement provision furthers the Board's paramount interest of public protection by requiring licensees who have violated the Board's practice acts to pay the reasonable costs of the investigation and enforcement of the case necessitated by their misconduct thereby freeing fiscal resources for other operational expenses. In addition to indemnifying the Board for its costs, this provision serves an important rehabilitative function by making licentiates who have been disciplined confront the impacts of their actions and deterring future misconduct thereby further promoting public protection.

29. As a special fund entity, the Board is financed by fees from license applications and renewals and from continuing education providers. The costs of the enforcement program make-up a significant and increasing part of the Board's budget.[6] Primarily due to the increased costs of the enforcement program, the Board was required to seek the statutory authorization to increase the fees it charges to applicants, licensees and continuing education providers in 2018, in order to avoid a budget shortfall. (Stats. 2018, Ch. 571, Sec. 16. (SB 1480) Effective January 1, 2019.) The Board implemented the statutory increases and promulgated emergency regulations to further increase fees to address the projected depletion of its reserves. In light of these fee increases, fairness dictates that those licentiates whose misconduct has resulted in discipline be required to pay cost reimbursement to the extent provided by law.

30. As indicated in the Proposed Decision, the law requires the Board to exercise its discretion to reduce or eliminate cost awards in a manner such that costs imposed do not deter respondents with potentially meritorious claims or defenses from exercising their right to an administrative hearing. (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45.) This exercise of discretion requires the Board to consider whether the respondent has been successful at hearing in getting the charges dismissed or reduced, her good faith belief in the merits of her position, whether she raised a colorable challenge to the proposed discipline, and her financial ability to pay the costs. (*Ibid.*) As it relates to the Board's own motion for reconsideration, the only relevant factor consists of respondent's financial ability to pay and, as to that factor, the only relevant question consists of whether the present inability to pay should require the cost reimbursement award, which has already been reduced by half, to be made due only upon reinstatement. The Board concludes that the present inability to pay does not require the cost reimbursement award to be made due only upon reinstatement, as the

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[6] Expressed as a percentage of total budget expenditures, enforcement costs represented 46 percent in 2015-16, 47 percent in 2016-17, 59 percent in 2018-19, and 59 percent in 2019-2020.

consideration of ability to pay and, where appropriate, the reduction of the cost award due to limited ability to pay fully satisfies the due process concern of not deterring the exercise of the right to an administrative hearing. The additional step of making the award due only upon the reinstatement of the license does nothing to prevent deterring the exercise of the right to an administrative hearing. Moreover, deferring when the award is due to an indefinite future time if and when respondent is reinstated undermines the reasons for the cost recovery provision – relieving the Board from the fiscal effect of the investigation and enforcement of respondent's misconduct and rehabilitating respondent by making her aware of the impact of her actions and deterring her future misconduct – and interferes with the Board's discretion to determine the terms of payment of the award; it also places a burden on all licensees in the form of increased fees to fully fund the enforcement program by making cost reimbursement awards effectively uncollectable until reinstatement of a license and then only after incurring the costs of handling a reinstatement petition.

31. For these reasons, the Board determines that a cost reimbursement award should not ordinarily be made payable only upon reinstatement particularly where, as here, the award has already been reduced due to the present inability to pay the full amount of the reasonable investigation and enforcement costs in the case. Accordingly, Legal Conclusion 5 is modified by striking the final sentence reading "Respondent is not required to pay the costs unless and until her license is reinstated" in its entirety and the cost reimbursement award is due and payable immediately.

ORDER UPON RECONSIDERATION

Upon reconsideration, the Board modifies the Order in the Proposed Decision of the Administrative Law Judge by striking the dependent clause "if respondent is reinstated" and the definite article preceding "investigation and enforcement" from the second sentence relating to payment of the cost reimbursement award.

The Order, as modified, will read: "Licensed Vocational Nurse Number VN 282251 issued to respondent Chelynn Cassale Semilla is revoked. Respondent shall pay the Board the costs associated with investigation and enforcement in the amount of $3,336.25." The cost award is due and payable immediately.

With these modifications, the Board's Decision dated October 30, 2020, adopting the Proposed Decision of the Administrative Law Judge is otherwise affirmed and incorporated into this Decision Upon Reconsideration by reference, and the stay of that Decision issued in connection with granting reconsideration, having served its purpose, is dissolved.

The Board hereby designates this Decision Upon Reconsideration, in its entirety, as precedential pursuant to Government Code section 11425.60, subdivision (b).

This Decision Upon Reconsideration is effective immediately.

IT IS SO ORDERED this 1st day of December 2022.

Carel Mountain

Dr. Carel Mountain
President

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

In the Matter of the Accusation against:

CHELYNN CASSALE SEMILLA, License Number VN 282251,

Respondent

Case No. 4302019000328

OAH No. 2020040801

PROPOSED DECISION

Administrative Law Judge Ruth S. Astle, State of California, Office of Administrative Hearings, heard this matter on September 15, 2020, as a virtual hearing in California.

Christopher Young, Deputy Attorney General, represented Complainant Elaine Yamaguchi, Executive Officer of the Board of Vocational Nursing and Psychiatric Technicians, Department of Consumer Affairs.

Respondent Chelynn Cassale Semilla was present and was represented by Kathleen McCormac, Attorney at Law.

The record closed on September 15, 2020, and the matter was submitted for decision on that date.

FACTUAL FINDINGS

Jurisdictional Matters

1. Elaine Yamaguchi made this accusation in her official capacity as the Executive Officer of the Board of Vocational Nursing and Psychiatric Technicians (Board), Department of Consumer Affairs.

2. On June 10, 2014, the Board issued Vocational Nurse License Number VN 282251 to Chelynn Cassale Semilla (respondent). The license will expire June 30, 2022, unless renewed.

Cause for Discipline

3. It was stipulated by the parties that: on January 22, 2019, in the Superior Court of California for the County of Santa Clara, respondent was charged with one felony count of violating Penal Code section 487, subdivision (b)(3) (Grand Theft by Employee). The felony charges are still pending. If respondent pays restitution in the amount of $4,300, the charges may be reduced to a misdemeanor. No other documentation of respondent's criminal charges was presented. The circumstances of the crime were that between June 11, 2018, and August 3, 3018, respondent falsely reported to United Health Care staffing that she worked 192 regular hours and 6.5 hours of overtime at Skyline Health Care in San Jose, earning a total of $4,367.39 in wages. Wages were issued via direct deposit to respondent's checking account. Respondent only worked one shift at Skyline Health Care. She falsified timecard

records for 4-5 weeks and submitted the timecard records to United Health Care staffing on a weekly basis.

4. Respondent has not made any restitution to date. She is only allowed to pay the entire amount at once. She has saved about $1,700 toward repaying the amount she stole.

Dishonesty

5. Respondent committed acts of dishonesty in her capacity as a vocational nurse. Her submission of fraudulent timecards involved dishonest in relation to her employment as a vocation nurse. Grand theft charges are pending.

Unprofessional Conduct

6. Respondent engaged in unprofessional conduct while employed as a vocational nurse through United Health Care staffing.

Respondent's Evidence

7. Respondent has been continuously employed. Her most recent employment is with Brookdale Senior Living in Scotts Valley, California since October 2019. She has also recently been employed by Valley House Rehabilitation Center in Santa Clara. Her employers do not know about her pending criminal charges. She did not present any letters from her present or past employers.

8. Respondent testified that she suffered the death of her spouse. She was stressed at the time she committed the offense.

9. Respondent presented numerous continuing education certificates. However, she did not present any testimony or letters from colleagues, or supervisors

regarding her abilities as a vocational nurse. She did not present any testimony or letters from anyone attesting to her good character.

10. Respondent admitted that what she did was wrong. She has not had any prior criminal involvement or past disciplinary action.

Enforcement Costs

11. In connection with the prosecution of this accusation, the Department of Justice has billed the Board $6,672.50 for legal services performed. These charges are supported by certifications that comply with the requirements of California Code of Regulations, title 1, section 1042, and are deemed to be reasonable.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In an action seeking to impose discipline against the holder of a professional license, the burden of proof is on complainant to establish the charging allegations by clear and convincing evidence. (*Ettinger* v. *Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 957.)

Cause for Discipline

2. Business and Professions Code section 2878, subdivision (a) provides that the Board may suspend or revoke the license of a vocational nurse who has engaged in unprofessional conduct. Cause for discipline was established by the matters set forth in Findings 3 and 6.

3. Business and Professions Code section 2878, subdivision (j), authorizes the Board to suspend or revoke the license of a vocational nurse on the ground that respondent committed an act of dishonesty. The matters set forth in Factual Findings 3 and 5 involve dishonesty. Cause for discipline was established by the matters set forth in Factual Findings 3 and 5.

Disciplinary Considerations

4. In its Disciplinary Guidelines, the Board sets forth factors to be considered when determining the appropriate discipline to impose. These factors include the nature and severity of the offense, actual or potential harm to the public, overall disciplinary record, actual or potential harm to any patient, compliance with probation, the time that has passed since the offenses, cooperation with the Board, mitigating and aggravating evidence, and evidence of rehabilitation. Protection of the public is the Board's highest priority. (Bus. & Prof. Code, § 2841.1.) This offense involved theft from respondent's employer through her professional employment. The criminal matter is still pending. Respondent did cooperate with the Board but has failed to make restitution and has failed to establish that she is respected in her profession or a trustworthy person. (See Factual Findings 4 and 7 to 10.)

Costs

5. Business and Professions Code section 125.3 authorizes the Board to recover its reasonable costs of investigation and enforcement. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court sets forth standards by which a licensing board must exercise its discretion to reduce or eliminate costs awards to ensure that licensees with potentially meritorious claims are not deterred from exercising their right to an administrative hearing. Those standards

include whether the licensee has been successful at hearing in getting the charges dismissed or reduced, the licensee's good faith belief in the merits of her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate to the alleged misconduct. Respondent is struggling financially, and payment of the full costs sought would cause further financial hardship. The costs will be reduced by one half, to $3336.25. Respondent is not required to pay the costs unless and until her license is reinstated.

ORDER

Licensed Vocational Nurse Number VN 282251 issued to respondent Chelynn Cassale Semilla is revoked. Respondent shall pay the Board the costs associated with the investigation and enforcement in the amount of $3,336.25 if respondent is reinstated.

DATE: October 7, 2020

DocuSigned by:
Ruth S. Astle
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RUTH S. ASTLE
Administrative Law Judge
Office of Administrative Hearings