

BEFORE THE BOARD OF NURSING  
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2015-NUR-LIC-610 REGARDING:

THE PROPOSED DISCIPLINARY	)	Case No. 182-2016
TREATMENT OF THE LICENSE OF	)	
LARISSA STEINMETZ,	)	
Registered Nurse, License No. 39057.	)	

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**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED ORDER**

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**I. INTRODUCTION**

At its meeting on Tuesday, July 21, 2015 the Screening Panel (Panel) of the Montana Board of Nursing (Board) decided to issue a “Notice of Proposed Board Action, Summary Suspension, and Opportunity for Hearing” regarding the license of Larissa Steinmetz, R.N. The “Summary Suspension Order” portion of the document was signed on Wednesday, July 22, 2015. The notices were signed and the entire document was issued on Thursday, July 23, 2015. That same day, the department’s Business Standards Division (“BSD”), responsible for carrying out the directions and decisions of the Panel and the Board, through the Division’s personnel in the Office of Legal Services, emailed a copy of the order, among other documents, to counsel for licensee. On Monday, July 27, 2015 licensee’s counsel emailed back a response demanding proceedings promptly instituted and determined regarding licensee’s summary suspension. Mont. Code Ann. § 2-4-631.

On July 28, 2015 BSD forwarded the documents and a cover letter requesting the Office of Administrative Hearings (OAH) to appoint a hearing examiner for the proceedings licensee requested. On Thursday, July 30, 2015 Sandy Duncan, Legal Secretary, OAH, sent an email to counsel for licensee and counsel for BSD with possible times and dates during the week of August 3-7, 2015 for a telephonic scheduling conference.

On Tuesday, August 4, 2015 at the agreed time, Hearing Examiner Terry Spear convened that telephonic scheduling conference. At the scheduling conference, the Hearing Examiner and the attorneys for BSD and the licensee established a prehearing schedule and trial date, which was memorialized in the Hearing Examiner’s Scheduling Order of August 4, 2015, which was designed to provide a proposed final decision for the Board’s consideration at its October 2015 meeting in

order to comply with the requirements of Mont. Code Ann. § 2-4-631. That same day OAH issued a scheduling order for a contested case hearing reflecting the parties' agreements. The scheduling order made it clear that the hearing would address both the propriety of the summary suspension and any proposed additional action regarding Steinmetz' license, as the parties had agreed.

Due to a family commitment, counsel for BSD was forced to withdraw, requiring substitute counsel to step in. That change in counsel was formalized by a Notice of Appearance and Uncontested Motion to Amend Discovery Exchange dated August 18, 2015. Through that motion, the parties agreed to a slight modification of the discovery deadline, which left the original hearing setting in place.

At the final pretrial conference, held September 1, 2015, the parties offered their positions regarding post-trial submissions of proposed findings of fact and briefs as well as an acceptable date for the anticipated final adjudication of this matter by the Board. With no objection by either party, the Hearing Examiner entered a post-trial schedule designed to produce a timely proposed order for presentation to the Board at its October 21, 2015, Adjudication Panel meeting.

Steinmetz offered no objection to the post-trial schedule during the final pretrial conference. Her counsel reserved objections to scheduling in the matter, which he had raised in his filings and then again at the beginning of the hearing, that his client was denied due process when her license was suspended by the Panel, that her waiver of privacy rights regarding test results, etc., had been forced by the summary suspension of her license, and that a contested case hearing with a proposed decision subject to later review and final determination by the Board did not constitute proceedings promptly instituted and determined regarding licensee's summary suspension. The Hearing Examiner, tasked with holding a hearing on behalf of the Board, took no action on those objections beyond confirming that Steinmetz's counsel was satisfied he had made his record.

On September 2-3, 2015, as the scheduling order required, Hearing Examiner Spear held a hearing in this matter. Michael L. Fanning and Tyler G. Moss, Special Assistant Attorneys General and Agency Legal Counsel, represented BSD. Mark D. Parker, Parker, Heitz & Cosgrove, represented the licensee. Larissa Steinmetz, Registered Nurse, License No. 39057 (suspended), was present and testified.

Exhibits 1-25 (including all subparts of Exhibits 10, 15, 16 and 17) were admitted into evidence by stipulation. Exhibit 26's first five pages only were admitted only for the specific purposes of proving that licensee received it from her case manager and knew of its contents with regard to her conduct on the dates indicated in that document and at the time of her reported positive breath and urine tests in April, May and June 2015, and proving its contents in the context of

proposed additional action regarding Steinmetz's license, but not with regard to the propriety of the summary suspension. Steinmetz's counsel was given a continuing objection and time within which to file a motion to strike after hearing and before decision. Before the deadline for such filing the objection was withdrawn. Exhibit A was admitted into evidence over foundation and relevance objections by BSD, for use only in the context of determining (if additional action regarding Steinmetz' license is recommended) the kind of treatment she might need and what additional limitations, if any, should be placed upon her license. Hereafter, specific exhibits will be referenced as "Ex." with the number or numbers.

Heidi Kaufman (Compliance Specialist, BSD), Michelle Skorupa (Business Office Manager, Parkview Healthcare Community), Peggy Bourassa (R.N., Owner and licensed Administrator, Bear Lodge Assisted Living, former Director of Nursing, Parkview Healthcare Community), Charles Cedric (Fred) Cobb (Alcohol Monitoring Systems) and Christy Eckley (R.N., employee of Valley Health Care Center) testified by telephone, by agreement of the parties. Jodine Tarbert (Compliance Monitoring Systems, LLC), Emery Jones (L.C.P.C., L.A.C., Director of Montana Nursing Assistance Program), Marsha Straus and Larissa Steinmetz (R.N., Licensee) testified in person.

This matter is before the Hearing Examiner to determine: (1) the propriety of the Panel's action taken July 21, 2015, and effective July 23, 2015, summarily suspending Larissa Steinmetz, R.N.'s (Steinmetz) nursing license; (2) whether Steinmetz committed unprofessional conduct; and (3) if Steinmetz committed unprofessional conduct, to recommend an appropriate disciplinary sanction. Based on the evidence at hearing and the post hearing submissions of the parties, the following findings of fact, conclusions of law, and recommended decision now issue, for the Board's consideration.<sup>1</sup>

## II. FINDINGS OF FACT

1. On July 21, 2015, the Panel considered a complaint against Steinmetz filed by Emery Jones, the administrator of the Nurses Assistance Program (NAP), informing the Panel that Steinmetz had been "unsuccessfully discharged" from the NAP because she had violated her contract. "Notice of Proposed Board Action,

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<sup>1</sup> The court reporter was kind enough to provide a rough transcript to the Hearing Officer for his use in this case, with the consent of both counsel. Because the rough transcript page and line citations do not precisely match the page and line citations the parties provided in briefing (presumably from the final transcript) for particular testimony, the Hearing Officer has not included any citations to the transcript, since he has not had time to verify the correct page and line citations. Quotations in this decision that are not cited to the exhibits are from the rough transcript.

Summary Suspension, and Opportunity for Hearing” (“Notice”), pp. 2-3 ¶ 1-3 (July 23, 2015). The “contract” involved was Steinmetz’s Montana Assistance Program Contract, signed on April 5, 2014 (also called a “MAP Contract” for short), Ex. 4.

2. NAP also provided documentation of a number of positive breathalyzer and urine test results indicating that Steinmetz had violated her contract on numerous instances by using alcohol. Ex. 15 and 20.

3. The Panel summarily suspended Steinmetz’s Montana registered nurse license because the Panel found that the public health, welfare, or safety imperatively required emergency action. Notice, p. 4, ¶8.

4. Steinmetz is an alcoholic, as she admitted during her testimony at hearing, and had admitted at other points in her life when her excessive alcohol use created life problems that she could no longer ignore. Steinmetz has a long history of excessive alcohol use and dependence, which has caused her legal problems, family issues and employment problems.<sup>2</sup> That history begins in her teenage years and continues to the present.

5. Steinmetz has had some stretches of her life during which she either did not drink or did not drink so much so often as to create problems in her life. But after each such stretch, her alcohol use again increased until it did create problems in her life. When legal, medical, family or employment problems, or some combination of them, led others to confront Steinmetz about her excessive alcohol use, she typically initially denied it, but eventually had to admit it. Her eventual admissions that she was using alcohol excessively, even though her use was creating life problems, led to increased scrutiny of her alcohol use and other behaviors, with counseling and/or medicinal assistance with her depression and other developing long term health problems as well as with her drinking, and increased participation (with monitoring) in AA,<sup>3</sup> followed by her return to abstinence, to a successful work performance and to reliable, responsible behavior in her life.<sup>4</sup>

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<sup>2</sup> Steinmetz disclosed her background and history of excessive alcohol use in a number of documents she completed during either her application to and admission into NAP or her participation in NAP. She had previously disclosed that same background and history, as it then existed, when she initially applied for a Registered Nurse’s license in Montana, reporting to the Board that she was “sober” (i.e., entirely abstinent and committed to remaining entirely abstinent).

<sup>3</sup> The Hearing Examiner is not suggesting that AA is the only community-based peer support recovery group that can be a component of recovering from excessive alcohol use, it simply happens to be the one that worked in the past for Steinmetz, in conjunction with other components of recovery, and the one with which she seems most comfortable.

<sup>4</sup> Steinmetz’s history suggests that complete abstinence is her best chance of avoiding further relapses and is also the approach to recovery in which she has professed some faith.

6. Steinmetz has never received in-patient care to address her longstanding alcohol problem, and her co-occurring depression, away from family, relationship and employment stressors.

7. On February 27, 2014, Steinmetz reported to work at Parkview Healthcare Community for her scheduled shift. Peggy Bourassa was, at that time, the Director of Nursing for Parkview. Bourassa received a phone call from the Administrator of the facility, Laurie Kimball, that there was an issue with Steinmetz that Bourassa needed to address. When Bourassa arrived at the facility to check on Steinmetz, two nurses on duty at the time approached Bourassa and reported that Steinmetz smelled of alcohol. Bourassa eventually located Steinmetz, in the vicinity of Steinmetz' medication cart. Bourassa observed that Steinmetz smelled of alcohol, had bloodshot eyes and was nervous. Bourassa believed, based upon her observations, that Steinmetz was under the influence of alcohol.

8. Bourassa told Steinmetz that she (Bourassa) had reasonable cause to believe that Steinmetz was under the influence, and that a drug and alcohol test was necessary. Steinmetz underwent the test. It was positive for alcohol and marijuana. Ex. 25, pp. 26-27. Consistent with the policies of Parkview, Steinmetz was discharged. Ex. 25, pp. 28-29.

9. Bourassa gave Steinmetz a choice – she could “self-report” what had led to her discharge, including the positive tests for alcohol and marijuana, or Bourassa would report it to the Board. If Steinmetz self-reported, she would be enrolled in NAP's alternative to discipline track (voluntary enrollment as opposed to mandatory participation in the process). Steinmetz did self-report.

10. NAP is a monitoring program for nurses impaired by alcohol, drugs, mental illness or chronic physical illness. Mont. Code Ann. § 37-8-202(1)(j). NAP is administered on behalf of the Board by an entity called the Montana Assistance Program (MAP), which also provides the same services for the Board of Pharmacy, administering its assistance program, the Montana Impaired Pharmacists Program (MIPP).

11. The relationship between NAP and its staff and the enrollees in the program is defined by the terms of the Montana Assistance Program Contract and related documents such as the MAP Participant Handbook, rather than by the traditional standards of care in a provider/patient role. NAP enrollees are licensed nurses. These licensees receive behavioral health and chemical dependency evaluations and care from outside professionals. NAP case managers are assigned to communicate with employers, healthcare providers (such as treating counselors) and the licensees, to verify and to ensure compliance with drug and alcohol testing

requirements for each licensee and to monitor each licensee's progression under her or his MAP contract. Ex. 4, p. 1, ¶2 and p. 2, ¶¶3-7.

12. NAP is administered through the collective effort of four case managers and Emery Jones, the NAP administrator as well as the MAP Director (Ex. 4, p. 7, below Jones' signature). The administrator and the case managers discuss and debate the appropriate action to be taken in each case. Normally, decisions are made by consensus. Jones conveys the decisions of the NAP to the Board. Case managers may differ in opinions, but all are expected to work as a team to support and implement decisions made.

13. Steinmetz entered the program voluntarily and not as a result of a Board disciplinary order. Nevertheless, the MAP contract she signed cautioned that the Board considered breach any breach of that contract by a licensed nurse to be unprofessional conduct "as stipulated in Montana State Administrative Rule" (Ex. 4, p. 7, ¶¶ 38-39).

14. NAP accepted Steinmetz into the "alternative to discipline track" and she signed a Montana Assistance Program Contract on April 5, 2014. By signing it, Steinmetz specifically agreed to meet certain conditions. Chief among those duties was her agreement to abstain from the use of alcohol and of all products containing alcohol.

**Regarding Abstinence from Mood Altering Chemicals, I agree:**

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2. To completely abstain from the use of alcohol (regardless of diagnosis) and all products containing alcohol.

Ex. 4 at p. 1, ¶2. (Emphasis in original).

15. In her contract, Steinmetz also agreed to self-report any relapse (Ex. 4, p. 2, ¶4) and to admit to any return to use (Ex. 4, p. 3, ¶13).

16. In her contract, Steinmetz agreed that she understood that any positive test result or noncompliance with drug screens would be reported by NAP to the Board. The consequences of violating the contract were summarized in the final four paragraphs of the contract, above Steinmetz's signature. Upon any violation:

- a. NAP could notify her employer and could modify the length and terms of the contract;
- b. NAP could discharge her from the program;
- c. Noncompliance with the contract would be a violation of Montana law; and

- d. The Board may use any misconduct by Steinmetz while enrolled in the NAP program in disciplinary proceedings and may obtain her complete records of participation in NAP.

Ex. 4, p. 7, ¶¶36-39.

17. Steinmetz had told Emery Jones, the NAP administrator, during her “enrollment” process, that she had lost her job at Parkview because she had come to work smelling of alcohol, after drinking with friends the day before, which had been a day off for her. Jones testified that Steinmetz felt in some ways that she really had not come to work impaired, because she did not work that day. Jones challenged her about this, pointing out that the only reason she had not worked while impaired was that she was prevented from working because she was so obviously impaired. Jones doubted that Steinmetz believed that she was impaired when she went to work on February 27, 2014. NAP’s admission report on Steinmetz indicates that she entered the NAP program on April 5, 2014. Ex. 9, caption (on all pages of Ex. 9) and pp. 1-3, first 4/5/14 entry.

18. Steinmetz enrolled in an alcohol monitoring program operated by Compliance Monitoring Systems (CMS). CMS is headquartered in Missoula, Montana, and offers monitoring services in 17 Montana communities and serves courts and agencies in all but two of Montana’s counties. Between monitoring individuals in the criminal justice system, the Montana 24/7 DUI monitoring program, commercial truck drivers, and various licensees, CMS has between 600 – 700 clients. Of those clients, five to six are nurses enrolled in NAP.

19. CMS contracts its alcohol breath testing services to NAP as an alternative for urinalysis testing. CMS provides a SCRAM Remote Breath Test device manufactured by Compliance Monitoring System, LLC. The device offers several advantages to both the Board and NAP as well as to the users. It is affordable and can be set up to test multiple times per day without additional cost. The device can be used anywhere so users in rural settings have equal access to NAP. Since the device can be used at any time of the day in any location, users are not required to interrupt their work or private lives to travel to a collection site to offer a urine sample to a monitoring official. With the SCRAM Remote Breath Test device, results are available immediately assuring the public safety.

20. The device assigned to Steinmetz was serial number RB101CV. The device was calibrated on November 10, 2014, and was current for one year following that calibration. The calibration confirmed that the device was accurately detecting alcohol within tolerances.

21. Random urine tests, the reliability of which is not in question in this case, cost around \$35.00 to \$40.00 per test, and require the user to go to a location where the urine specimen can be collected under conditions that verify the identity of user and that the user indeed has provided the sample. Breath tests, using a SCRAM Remote Breath Test device (the reliability of which Steinmetz vehemently challenged) cost around \$7.00. The device can be operated by the user, at any location.

22. Based upon the testimony of Charles Cedric (Fred) Cobb (Alcohol Monitoring Systems) and Jodine Tarbert (Compliance Monitoring Systems, LLC), the Hearing Examiner finds that the SCRAM Remote Breath Test device functions as a screening device, using fuel cell technology, to detect the presence of ethyl alcohol, or ethanol (C<sub>2</sub>H<sub>5</sub>OH), in a volume of air blown into the chamber of the device by a person exhaling air from his or her lungs into a tube connected to the device. The device specifically detects so called “drinking” alcohol (ethanol), since the other varieties of alcohol are poisonous. The SCRAM Remote Breath Test device also measures the amount of ethyl alcohol in the volume of air blown into the device’s chamber and expresses that measurement in numbers that are intended to reflect the blood alcohol level in the body of the person blowing into the collection tube. The SCRAM Remote Breath Test device employed in this case was an accurate and reliable screening device for the detection of the presence of alcohol in Steinmetz’s body. However, the SCRAM Remote Breath Test device had not yet been tested and certified to meet the standards established for so-called “evidentiary” breathalyzer alcohol detection devices, meaning, for simplicity’s sake, devices certified as capable of accurately measuring the amount of ethyl alcohol in the volume of air blown into the device’s chamber, and expressing that measurement in numbers that reflect the actual blood alcohol level in the body of the person blowing into the collection tube.

23. When correctly calibrated and operating properly, the SCRAM Remote Breath Test device does not register any other chemical compound in the air in the chamber, only giving a positive result when detecting the presence of ethyl alcohol in the air in the chamber. The device applies a system known as a fuel cell which has been understood by scientists for decades.<sup>5</sup> It is reliable in reporting the presence or lack of presence of alcohol in a user’s body.

24. The device used here has a number of security features to assure the accuracy of the test. In addition to a quality camera, the device applies sophisticated facial recognition software to confirm the identity of the user. The device has a built-in housing breach alert that detects when someone tries to open the device.

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<sup>5</sup> On the present record, the Hearing Examiner declines to hold that the device reliably establishes the actual blood alcohol level in the user’s blood.

Additionally, the device automatically initiates a self-diagnostic process to test for a malfunction. The device used in this case was operating properly and produced reliable results.

25. Standard procedure in using the SCRAM Remote Breath Test device conforms to a recommended industry standard to repeat the breath test with a second test 20 minutes later. The system is designed to require the user to deliver 1.5 liters of breath, testing the deep lung breath expelled at the end of the sample. However it is possible for the user to contact products that contain alcohol that could interfere with test results. Consequently, if the device detects alcohol in the first test it notifies the user that she must retest in 20 minutes. It is recognized that “mouth alcohol,” from a product such as mouth wash, will dissipate in about 10 minutes, and the second test will produce a reliable value uncontaminated by transient alcohol.

26. The SCRAM Remote Breath Test device is designed and programmed to transmit error messages (as well as results of measurements) to the remote receiver when it is malfunctioning. The only malfunctions that actually occurred with the device Steinmetz was provided and which she used did not involve the measuring components of the device, but its communication with the remote receiver, resulting in the device “freezing up” (like a cell phone) and not completing the measurement. The technician at the remote receiver site would send a signal to reset the computer board (SIM card), similar to turning a cell phone off and then back on. If that had failed to “unfreeze” the device, a replacement SIM card would be installed.

27. The SCRAM Remote Breath Test device is programmed (instructed) to turn on (come out of “sleep” mode) and tell the user to perform a breath test (within a certain amount of time). It can be programmed for a regular testing schedule, or it can be activated from the remote receiver when an on-demand breath test is required. When it is time for a breath test, the device beeps, alerting the user that a test is required. The device signals the user to blow, compares the image of the user in the iPhone5 camera to the identification picture of the person being tested (in this case, Steinmetz) and verifies the identify of the user while she or he is blowing into the tube. When the correct amount of air has been blown into the chamber the device will click and say “Stop,” and the test is over. If the device detects alcohol (a “positive” test result), it tells the user to wait and retest. It gives the time until the retest, a countdown is displayed, and when it is ready to retest, it again instructs the user to blow into the tube, and then the retest is performed. After the retest or after the test, if the device does not detect alcohol (a “negative” test), it will say that it is shutting down and turn off.

28. If NAP were to abandon the remote breath tests it would have to return to exclusive urinalysis tests, losing the advantages of the device to both the Board and to the users.

29. Steinmetz started to work with the outside providers on her recovery, under her contract. NAP referred her to “Journey Recovery” and required her to complete an intensive outpatient program and do well in it before she could return to work in nursing. Steinmetz was subject to random urine sample collections around four times a month. Typically, as a cost saving measure, two days’ samples were discarded and two days’ samples were tested. Steinmetz completed the intensive outpatient program successfully, and with her continuing “clean” samples, NAP allowed her to move into an aftercare group and begin looking for a nursing job.

30. Effective June 23, 2014, with NAP’s permission, Steinmetz started a nursing job with the Billings Clinic. Ex. 9, p. 4, 6/17, 6/23, 6/24 entries. Steinmetz continued to have “clean” urine samples upon testing through June and July.

31. On Tuesday, August 5, 2014, Marsha Straus made her second entry in Steinmetz’s progress notes, and the first entry documenting Straus’s direct communication, as a case manager, with Steinmetz. Ex. 9, p. 5, 8/5. On that date, Steinmetz had returned an earlier call from Straus and they had visited about her job and how she was doing. Steinmetz agreed to call Straus back the following Tuesday (August 12). The only date before August 5, 2014, that Straus’s initials had appeared in Steinmetz’ progress notes, was on Steinmetz’s very first contact note during intake. (Ex. 9, p. 1, 3/24). Steinmetz did not say anything to Straus on August 5, 2014, about drinking that day or the day before.

32. On Monday, August 11, 2014, NAP received notification that alcohol had been detected in Steinmetz’s urine sample from August 5, 2014. Ex. 9, p. 5, first note for 8/11. Steinmetz had not self-reported her drinking to NAP before that notification. It was possible that Steinmetz, after giving a sample on August 4, 2014, could have believed that she would not be tested again that week, and had used alcohol thereafter. Id. For this reason, NAP requested further testing of Steinmetz’s August 4 sample. Id.

33. Straus called Steinmetz and left a voice mail message for her to call Straus back. Ex. 9, p. 5, second note for 8/11. When Steinmetz called back “almost immediately,” Straus asked her if she “forgot to tell me something” (presumably during their August 5, 2014 telephone conversation). Ex. 9, p. 5, third note for 8/11. Steinmetz responded that “yes, she relapsed.” Id. Steinmetz told Straus she had been “depressed” and “drinking Hutterite wine with her neighbor on Monday and Tuesday” (August 4 and 5). Id. Steinmetz also said that she had told her doctor and her A.A. sponsor about her drinking, but not her counselor. Id. Straus instructed Steinmetz to notify her supervisor at the Billings Clinic about her drinking. Id.

34. The next day, Tuesday, August 12, 2014, Straus got a call-back from Steinmetz’s supervisor at Billings Clinic, Sunday Crawford. Ex. 9, p. 5, first note for Tuesday, 8/12. Crawford confirmed that Steinmetz had left her a voice mail message

but that Crawford had not had time to listen to it. Straus told Crawford that Steinmetz had tested positive for alcohol and had admitted to “relapse drinking with a neighbor for a couple of days.” *Id.* This was Crawford’s first notice of Steinmetz’s drinking. Crawford told Straus that “so far” Steinmetz “had been ‘awesome’ no issues with performance or attendance.” *Id.* Crawford also told Straus that she would have to report the drinking to the “HR department.” *Id.*

35. On Monday, August 18, 2014, Crawford asked for a letter confirming in writing that alcohol had been detected in Steinmetz’ urine sample and that she had admitted drinking on her days off. Crawford also told Straus that Billings Clinic had made the decision to terminate Steinmetz’s employment during the probationary period. Crawford again complimented Steinmetz’s job performance and expressed personal disappointment that Steinmetz had lost her job. Ex. 9, p. 6, 8/19.

36. NAP would have supported Steinmetz staying in employment and working with the relapses, which seemed to be an isolated event or events,<sup>6</sup> but Billings Clinic was the employer, and chose to terminate Steinmetz, who was still a probationary employee.

37. On Wednesday, August 27, 2014, NAP case manager Fred Eigenmann logged a call from the night before – Steinmetz called and reported she had missed her Tuesday, August 26, 2014, urine collection, saying that she thought there would not be any more that month since she already had four. Ex. 9, p. 6, first entry for 8/27. Eigenmann told her to provide a sample on Wednesday, August 27, 2014. *Id.* Steinmetz did so.

38. On Monday, September 1, 2014, Straus received notification that Steinmetz’s sample tested positive for alcohol. Ex. 9, p. 7, first entry for 9/1. Straus called Steinmetz and asked if “she had something to tell me and she was clueless.” Ex. 9, p. 7, second entry for 9/1. Straus’ note also reports that Steinmetz was “speechless when I said her 8/27/14 drug screen was positive for alcohol and very high, even higher than the last screen.” *Id.* Steinmetz asked Straus, “[H]ow could this happen?” *Id.* Straus told her to write down everything she did, ate and was in contact with last week, and call Straus back. *Id.*

39. Steinmetz called Straus back and reported that she had been with her mother much of the previous week because she was sick, with vomiting, diarrhea and stomach cramps. Ex. 9, p. 7, third entry for 9/1. She told Straus that she “took Imodium and some cellulose stuff which she is going to text me the name.” *Id.*

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<sup>6</sup> For some reason (perhaps because the alcohol was detected in her urine on two consecutive days) these two incidents of drinking were sometimes referenced as one relapse instead of two. This difference in language does not describe a substantive difference of any significance to this decision.

Straus wrote also that Steinmetz made a point of telling her that Steinmetz's mother "does not know" (original emphases) about Steinmetz's first relapse. *Id.* The purpose of this statement may have been Steinmetz's hope to keep her mother from finding out about that first relapse, but it is not helpful with regard to the question of another relapse on or just before August 27, 2014.

40. On the other hand, Emery Jones, after reading the first two progress notes for September 1, 2014, wrote a progress note on September 2, 2014, stating:

I left a message for Larissa, my strong belief is this is again a relapse situation, I indicated that she could either be forthcoming or we would DC [discharge] her as we can not [sic] assess her risk appropriately. I also directed her not to work in nursing until the BoN [Board of Nursing] has reviewed her case.

Ex. 9, p. 7, 9/2.

41. Jones testified at hearing that Steinmetz always denied having relapsed before the August 27, 2014, urine collection, and that Straus had never reported that Steinmetz changed her story and admitted that relapse. However, Jones also testified that he has recently noticed that in one progress note Straus appeared to state that Steinmetz had changed her story at some point and how admitted that relapse.<sup>7</sup> He went on to testify that if Steinmetz ever had admitted to Straus that a relapse that caused the positive test results on the August 27, 2014 urine test, Straus had a responsibility to share that information with the NAP team, which she had never done.

42. Before April 1, 2015, the next positive breath test and retest by Steinmetz, Straus' progress notes on Steinmetz in Ex. 9 had never specifically reported that Steinmetz confessed that she had been drinking before her 8/27/14 test. There was one rather ambiguous progress report. "Larissa talked with Pam and told her about the relapse and she has to write a relapse prevention plan for her and will meet 1 on 1 with her weekly." Ex. 9, p. 8, 9/8. "Pam" is Pam Breck, Steinmetz's aftercare counselor, cf., *id.*, p. 5, 8/5. As already noted, Steinmetz stated to Straus on August 11, 2011, that she had told her doctor and her sponsor about her August 4-5, 2014 relapse, but not her counselor. *Id.*, third entry for 8/11. It is therefore possible that September 8, 2014 was when Steinmetz told Straus that she had now told her counselor that she had relapsed over a month before, although it strains credulity that NAP would leave Steinmetz's aftercare counselor in the dark about

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<sup>7</sup> The note at issue is in Ex. 9, p. 14, (a continuation of a long note started on p. 13, dated April 1, 2015. In her "discussion" note Straus wrote, "Since her last relapse 8/27 when she lost the second job and was evaluated to not need inpatient treatment . . ." Further in the same section she wrote, "As Larissa's case worker I have followed her closely since her 8/27 relapse . . ."

something so critical for that long. Even if the reference was instead to the August 27, 2014, relapse, Steinmetz could have told Breck that she was accused of relapse based upon that urinalysis, but that the test result was an error of some kind and she had not been drinking.

43. The April 1, 2015, note is a relatively clear statement that by that date Straus was satisfied that Steinmetz had relapsed shortly before the August 27, 2014, positive urinalysis test (see, footnote 6, p. 12, above). Given Straus's testimony, this could only mean that Steinmetz had at some point conceded that point to Straus. However, Straus specifically testified that Steinmetz's admission to a relapse on August 27, 2014, was made on August 27, 2014, and identified the circumstances under which Steinmetz did that as being when Steinmetz was talking to Jones. There is no credible evidence that Steinmetz ever admitted to Jones that she had a relapse that resulted in the August 27, 2014 positive test for alcohol. There is no credible evidence that Straus was present during a conversation between Jones and Steinmetz, at any time, in which Steinmetz admitted the late August relapse. There is no clear indication until Straus' progress note on April 1, 2015 that Steinmetz had let Straus know that she had relapsed on or shortly before August 27, 2014. Steinmetz had somehow let go of her insistence that she had not relapsed, without ever making an open confession that the positive alcohol test on her urine sample given August 27, 2014 resulted from her drinking. It is more likely than not that she simply quit denying this fact, while never really admitting it out loud. Jones, while probably unhappy that Steinmetz had not made a full and open admission of her drinking, must have been ready to let the point pass and focus on what to do next. Straus was still ready to assist in any way possible to get Steinmetz back to work in her employment and on her recovery.

44. At this point, at the end of September 2014, the erstwhile combatants seemed to have let go of the controversies about how the alcohol got into the sample and turned instead towards fashioning a revised treatment plan for Steinmetz. The progress notes for September 29 and 30, 2014, Ex. 9, p. 9, mark the point at which it appeared that the controversy and conflict might be over, and the treatment work could move forward.

45. Straus wrote the September 29, 2014 note:

Staffed Larissa today: agreed could go to work [at the Valley Health Care job offered to her on September 25, 2014] on Oct. 8 if everything in place. We emailed Breathalyzer paper and she will email back: [email address] She will get a job description and supervisors contract signed by Bill [Valley H.C. supervisor] to us. I will let her know when she needs to pick up the portable

machine in Billings. She was elated: She chaired her first meeting last night and went to aa [sic] potluck. I congratulated her.

Ex. 9, p. 9.

46. The September 30, 2014, progress note is credited to "ALL":

Staffing: Larissa has had some difficulty with relapse issues (Read above) She will remain on her current level of testing. She will continue at her current level of testing. We will continue to monitor closely as MS has ongoing contact with her.

Ex. 9, p. 9.

47. From October 2014 through March 2015, things seemed to progress. But it fell apart with a vengeance beginning in April 2015. Steinmetz blew two positive breath tests on Saturday morning, April 4, two positive breath tests on Tuesday evening, May 12, two positive breath tests on Wednesday morning, May 13, and two positive breath tests on Tuesday morning, June 23. Her follow up urine collections tested positive on Saturday April 4, Wednesday May 13 and Tuesday June 23.

48. During the time Steinmetz was enrolled in the NAP program, she tested positive for alcohol as follows:

- a. random urine sample<sup>8</sup> taken August 4, 2014, Ex. 9, p. 6, (8/18/14);
- b. random urine sample taken August 5, 2014, Ex. 9, p. 5 (8/11/14);
- c. random urine sample taken August 27, 2014, Ex. 9, p. 7 (9/1/14);
- d. breathalyzer test self-administered at 5:20 a.m. on April 1, 2015, Ex. 9, p. 13 (4/1/15 notes starting on p. 12);
- e. breathalyzer test self-administered at 5:40 a.m. on April 1, 2015 Ex. 9, p. 13 (4/1/15 notes starting on p. 12);
- f. urine sample taken April 1, 2015, Ex. 9, p. 16 (4/8/15);
- g. breathalyzer test self-administered at 6:57 p.m. on May 12, 2015, Ex. 9, pp. 25-26 (5/12/15);
- h. breathalyzer test self-administered at 7:18 p.m. on May 12, 2015, Ex. 9, pp. 25-26 (5/12/15);
- i. breathalyzer test self-administered at 5:09 a.m. on May 13, 2015, Ex. 9, pp. 29-30 (5/13/15);
- j. breathalyzer test self-administered at 5:29 a.m. on May 13, 2015, Ex. 9, pp. 29-30 (5/12/15);

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<sup>8</sup> The evidence indicates that a urine collection provides a urine sample which is usually sufficient so that it can be divided into two samples, so a follow up test may be done after an initial positive test result.

- k. urine sample taken May 13, 2015, Ex. 9, pp. 32 (5/13/15) and 35 (5/20/15);
- l. breathalyzer test self-administered at 7:23 a.m. on June 23, 2015, Ex. 9, p. 39 (6/23/15);
- m. breathalyzer test self-administered at 7:43 a.m. on June 23, 2015, Ex. 9, p. 39 (6/23/15); and
- n. urine sample taken June 23, 2015, Ex. 9. p. 47 (6/24/15).

The urine sample collected on June 23, 2015 was a small amount, and the initial positive test result could not be confirmed with another test because the remainder of the sample leaked in transit. Ex. 9. pp. 47-48 (6/24 and 6/25/15).

49. Following each of these four positive breath tests and retests were followed with testing of a urine sample collected from her as soon as practicable after each positive breath test. In 2015, Steinmetz's breath tests and retests on the SCRAM Remote Breath Test device were positive on the morning of April 1, the evening of May 12, the morning of May 13, and the morning of June 23. Follow up urine tests were run on samples collected from her on April 1 after that morning's positive test and retest, on May 13 after the positive tests and retests on the evening of May 12 and on the morning of May 13, and on June 23 after that morning's positive test and retest. The urine test on June 23, 2015 could not be confirmed with a second test, as noted in Finding 17. All urine tests performed – on April 1, on May 13, and on June 23 – were positive.

50. There is an irreconcilable conflict between the documented detection, on multiple dates, of alcohol in Steinmetz' breath and urine and her denial of drinking. Steinmetz is an excellent witness. She is a believable and likeable person. Even in the midst of this turmoil and trouble, her employers gave her excellent evaluations and kudos for her performance. It is understandable that an experienced and savvy nurse like Straus, with 45 years of nursing, with an advanced certification as a clinical nurse specialist, and with credentials as a certified addiction registered nurse would come to support Steinmetz. But there are so many positive tests and retests as to make her denials of four relapses in 2015 not credible in the face of multiple positive tests on each of the relapse days, especially coming after her equally adamant initial denial of relapse on August 27, 2014, only to admit it later

51. Also, there is questionable value to Steinmetz's suggestion, championed by Straus, that Nyquil she drank the night before her April 1, 2015 test and retest caused the detection of alcohol levels of .052 and .076. Cobb testified that consumption of a 10-ounce bottle of Nyquil would at least be required to reach those levels. Steinmetz testified she "swigged" a bit. Steinmetz told Straus she drank less than one-half of the bottle, about 3-4 doses in one evening.

52. Likewise, the novel suggestion at trial that daily exposure to alcohol products such as hand sanitizers regularly used while on duty as a nurse, could have caused the positive results of four tests and retests lacks merit. If hand sanitizers, used as directed, generated positive results on mouth alcohol tests, Steinmetz should have tested positive virtually every day, instead of only on four days.

53. Steinmetz's credibility is compromised. She denied (then later admitted) or did not report alcohol use until after it was revealed in testing (and then admitted it when confronted) in three specific instances in August 2014, when she was obligated in all three instances to tell the truth.

54. Straus's credibility is compromised. Her demeanor on the witness stand indicated hostility towards Emery Jones, director of NAP and her supervisor before Jones dismissed her from her position with NAP. Of greater weight was the evidence indicating that Straus' strong support of Steinmetz compromised her objectivity. When Steinmetz denied drinking, despite positive tests for alcohol, Straus suggested ways she might be able to explain the test results. In her testimony, as well as at the time, Straus also seemed to be trying to minimize Steinmetz's repeated positive tests for alcohol, in ways such as combining the two positive urine tests of August 4 and 5, 2014 as one relapse, and testifying that after two positive breath tests and one positive urine test on June 23, 2015, loss of the remaining urine sample without a second test of it entirely invalidated the previous test results of that day.

55. Steinmetz violated her NAP contract on each of the four occasions in 2015 when she used alcohol, did not report the use and subsequently denied the use.

56. Steinmetz must successfully complete a treatment program, with the assistance and guidance of NAP or such other entity, institution or person(s) that NAP may approve to so serve, that will arm her with the necessary changes in thought, feeling and behavior to remain abstinent so she can return to her practice nursing, a profession at which she is gifted. This requirement is fraught with difficulty, because of the mistrust and conflict. Realistically, Steinmetz and NAP must both be willing to set aside that mistrust and conflict. Unless (1) Steinmetz and the NAP team can agree unanimously to begin from the beginning and cooperate and work to trust one another; (2) Steinmetz can state unequivocally that she will be open and honest and cooperative with NAP; and (3) the NAP team can state unequivocally that they will assist Steinmetz in making a fresh start in a treatment plan that can meet her needs; for the Board to order her to commence and complete another treatment program with the assistance and guidance of NAP is a recipe for failure, if NAP would even accept such a task.

57. IF feasible with the resources available to the Board of Nursing and to the licensee, Steinmetz should be assisted in going forward with her treatment and recovery with NAP if the conditions in Finding 56 can be met, or under some

alternative method, which is unlikely to be available unless NAP and MAP are willing to craft such an alternative method.

58. IF feasible with the available resources of all involved, an evaluation of Steinmetz, including reevaluation of the benefits and drawbacks for her of inpatient treatment, should be undertaken by a third-party unconnected with NAP but acceptable to NAP. An in-state facility that can accept Steinmetz despite her limited resources would be ideal, for the evaluation and/or for in-patient treatment, should that appear to be the best course of treatment.

### III. CONCLUSIONS OF LAW<sup>9</sup>

1. The Board of Nursing has and exercises jurisdiction over this proceeding. Mont. Code Ann. §§ 37-1-131, 37-1-136, 37-1-307, 37-1-309, 37-8-202(1) (f), (g).

2. This matter was properly referred to the Office of Administrative Hearings for a contested case hearing. Mont. Code Ann. §§37-1-131(1) (b); 37-1-121(1), and is a licensing disciplinary case subject to the Montana Administrative Procedure Act, which has been properly and regularly employed. Mont. Code Ann. §§ 37-1-136(2), 37-1-310.

3. The Department, for the Board, bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. St. ex rel. Bd. of Funeral Serv.*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126. The Department must also show any sanction it seeks is appropriate under the circumstances of the case. The Department has sustained those burdens, with some limited exceptions.

4. The Board of Nursing is charged with the responsibility to “safeguard life and health” of Montanans by assuring that those practicing nursing are properly qualified. Mont. Code Ann. § 37-8-101.

5. The “practice of professional nursing” is a sophisticated profession that requires extensive training in physical sciences and social sciences and also requires the ability to undertake and engage in “assessment, nursing analysis, planning, nursing intervention, and evaluation in the promotion and maintenance of health, the prevention, case finding, and management of illness, injury, or infirmity, and the restoration of optimum function.” Mont. Code Ann. § 37-8-102(9).

6. A practitioner impaired by use of alcohol or of other substances cannot be allowed to practice professional nursing due to the unacceptable risk of harm to Montana patients.

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<sup>9</sup> Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

7. The Legislature authorized the Board of Nursing to “establish a medical assistance program to assist licensed nurses who are found to be physically or mentally impaired by habitual intemperance or the excessive use of addictive drugs, alcohol, or any other drug or substance or by mental illness or chronic physical illness.” That program assists licensees “in seeking treatment,” but does not directly offer treatment to enrollees. Mont. Code Ann. § 37-8-202(1)(j). NAP’s function is to protect the public through monitoring processes, but neither the Board nor NAP are responsible for participants’ treatment. Mont. Admin. R. § 24.159.2001(1). Administrative rules establish that under the Board’s medical assistance program, treatment and monitoring are separate functions. Mont. Admin. R. § 24.159.2012.

8. The following provision of the Montana Administrative Rules applies to this case:

24.159.2301 CONDUCT OF NURSES

. . . .

(2) Unprofessional conduct, for purposes of defining 37-1-307, MCA, in addition to unprofessional conduct listed at 37-1-316, MCA, the following being unique, is determined by the board to mean behavior (acts, omissions, knowledge, and practices) which fails to conform to the accepted standards of the nursing profession and which could jeopardize the health and welfare of the people and shall include, but not be limited to, the following:

. . . .

(r) failing to comply with the contract provisions of the nurses’ assistance program.

9. By use of alcohol, failure to self-report such use, and denial of said use, resulting in positive test results of such use on April 1, May 12, May 13, and June 23, 2015, Steinmetz breached her obligation to comply with her NAP contract which required her to “completely abstain” from the use of alcohol and all products containing alcohol; to self-report any relapse and to admit to any return to use. Admin. R. Mont. § 24.159.2012. Steinmetz’s breaches of her NAP contract are instances of unprofessional conduct in violation of Admin. R. Mont. 24.159.2301, which are subject to sanction.

10. The NAP director did his duty under Montana administrative regulations and his contract with the Board of Nursing by discharging Steinmetz from the program when she repeatedly tested positive for the use of alcohol when alcohol in

any quantity or form was expressly forbidden. Mont. Code Ann. § 37-1-131(1)(d); Admin. R. Mont. 24.159.2004, 24.159.2013.

11. Summary suspension of Steinmetz's license was appropriate to protect the public and should be continued through the final determination of this action. Mont. Code Ann. § 2-4-631(3). A licensee is subject to discipline for unprofessional conduct. Mont. Code. Ann. §§ 37-1-309, 312.

12. Steinmetz's license to practice as a registered nurse should be sanctioned under Mont. Code. Ann. § 37-1-312 because she has committed unprofessional conduct and her ability to practice with reasonable skill and safety cannot at this time be assured.

13. "To determine which sanctions are appropriate, the board shall first consider the sanctions that are necessary to protect or compensate the public. Only after the determination has been made may the board consider and include in the order any requirements designed to rehabilitate the licensee or license applicant." Mont. Code Ann. § 37-1-312(2).

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner recommends the following Order:

#### THE BOARD ENTERS THE FOLLOWING ORDER

1. Larissa Steinmetz's license to practice nursing in the State of Montana is suspended for one year. Mont. Code Ann. § 37-1-312(1)(b). This license must be surrendered to the Board within 24 hours after notice of entry of the Final Order in this case. Mont. Code Ann. § 37-1-312(4). Documents may be tendered to the Board at the following address:

Montana Department of Labor and Industry  
Board of Nursing  
301 South Park Avenue  
PO Box 200514  
Helena MT 59620-0514

2. At the end of the suspension, or sooner if the Board chooses to reconsider in light of new developments, Steinmetz will be eligible to petition for a probationary reinstatement of her nursing license under Mont. Code Ann. § 37-1-314. To be eligible to petition for said reinstatement she must first have the advocacy of the Nurses Assistance Program and be fully compliant with any recommended evaluation(s) and resultant aftercare contracts. Mont. Code Ann. §§ 37-1-312(1) (c), (d); 37-3-203(2). The Board of Nursing, in its discretion, may pass upon that petition and may impose such additional sanctions provided by Mont. Code Ann. §

37-1-312 as may be necessary for the protection of the public. Mont. Code Ann. §§ 37-1-312(1)(c)

3. Should Steinmetz resume the active practice of nursing in Montana, she will be under monitoring by the Nurses Assistance Program or its successor. Should that program cease, this matter shall be returned to the Board of Nursing Adjudication Panel for review and, in the Board's sole discretion, revision in any fashion deemed necessary to fulfill the Board's charge under Title 37, chapter 8 of the Montana Code Annotated and supporting regulations.

4. Steinmetz shall scrupulously adhere to the terms of her Nurses Assistance Program as it may be amended from time-to-time in the professional judgment of the program including terms requiring further evaluation or treatment.

5. Any violation of this term shall be deemed a material breach of this Final Order and grounds for a new unprofessional conduct complaint under Mont. Code Ann. § 37-1-316(8), as well as provisions regarding compliance with the monitoring program including Admin. R. Mont. 24.159.2301(1)(r).

6. Steinmetz is advised that any future material violation of her Nurses Assistance Program Contract or other unprofessional conduct may result in a complaint to the Board of Nursing with the Department of Labor moving for a summary suspension of her nursing license followed by an action to discipline or revoke that license.

NOTICE: Licensee is notified that she is not permitted to practice with a suspended license. However, Licensee is informed that in order to petition for reinstatement, she must, in the interim, regularly renew her suspended license and comply with all continuing education requirements (if any) else her suspended license may terminate and she would not then be eligible for reinstatement in any circumstance and would have to apply for licensure as a new applicant. Failure to receive a renewal form from the Board will not constitute an excuse for failure to renew the suspended license. It is Licensee's responsibility to insure that her suspended license is renewed in a timely fashion.

7. A regulatory board may impose any of the sanctions enumerated within Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Mont. Code Ann. § 37-1-312 provides that a regulatory board may suspend the license for an indefinite or fixed term.

8. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions that are necessary to protect the public. Only after making this determination can the board then consider and include in the order

requirements that are designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

9. Larissa Steinmetz at this time has demonstrated, while practicing as a nurse, that she has the requisite skills, talents and gifts to be an exemplary nurse. However, her alcohol use has rendered her unsafe to practice until she has completed a course of treatment that empowers her to maintain complete abstinence from alcohol. Over the course of her suspension, which the Board intends to last until she completes a course of treatment and recovery that convinces the Nurses Assistance Program that, with appropriate peer supervision and counseling, in whatever form deemed appropriate, she can return to the practice of nursing, whether it takes a year, or less time or more time, not only without jeopardizing the health and welfare of the people, but with the necessary means to practice nursing and enhance and contribute to the health and welfare of the people of Montana, to their mutual benefit and to hers.

#### **IV. RECOMMENDED ORDER**

Based on the foregoing, the Hearing Examiner recommends that the license of Larissa Steinmetz, Registered Nurse, License No. 39057, be suspended for a term of one year, subject to probationary reinstatement at that time, or before, upon a satisfactory petition for a probationary reinstatement of her nursing license under Mont. Code Ann. § 37-1-314, having first obtained the advocacy and approval of the Nurses Assistance Program and being fully compliant with any recommended evaluation(s) and resultant aftercare contracts.

DATED: October 5, 2015.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ TERRY SPEAR  
Terry Spear  
Hearing Examiner

#### **NOTICE**

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.