

Consideration of Adoption of Proposed Amendments to 22 Tex. Admin. Code §213.32, Pertaining to *Schedule of Administrative Fine(s)* and §211.7, Pertaining to *Executive Director*, Written Comments Received, and Board Responses to Comments

Summary of Request: Consider final adoption of proposed amendments to 22 Tex. Admin. Code §213.32, pertaining to *Schedule of Administrative Fine(s)* and §211.7, pertaining to *Executive Director*. Proposed amendments to §213.32 and §211.7 were approved by the Board at its July 23-24, 2009, meeting for submission to the *Texas Register* for public comment. The proposed amendments were published in the *Texas Register* on September 4, 2009, and the comment period ended on October 5, 2009. The Board received one written comment from the representative of an organization. A copy of the comment is attached as Attachment "A". The Eligibility and Disciplinary Advisory Committee also reviewed and considered the proposed amendments at its September 17, 2009, meeting.

The proposed amendments to §213.32 implement the requirements of SB 1415 by prescribing the types of violations that are eligible for resolution through a corrective action and the circumstances under which a corrective action may be offered. The proposed amendments also revise and clarify the amount of fines applicable to disciplinary actions. The proposed amendments to §211.7 clarify the types of orders that the Executive Director may approve and accept without Board ratification. If adopted, the amendments to §213.32 will permanently take the place of the amendments to §213.32 that were adopted on an emergency basis on September 1, 2009.

Comments Received: A summary of the written comment received and Staff's response to the comment are attached as Attachment "B". A summary of the Eligibility and Disciplinary Advisory Committee's discussions are also contained in Attachment "B". Staff's suggested changes to the rule text as adopted are attached hereto as Attachment "C".

Staff's Recommendation: Move to adopt the proposed amendments to 22 Tex. Admin. Code §213.32, pertaining to *Schedule of Administrative Fine(s)* and §211.7, pertaining to *Executive Director*, with changes. Further, move to adopt the summary of comments and Staff's response to the comments as attached hereto as Attachment "B" and authorize Staff to publish the summary of comments and response to comments with authority for General Counsel to make editorial changes as necessary to clarify rule and Board intent and to comply with the formatting requirements of the *Texas Register*. Further, move to adopt the revised rule text attached hereto as Attachment "C" and authorize Staff to publish the revised rule text attached hereto as Attachment "C" with authority for General Counsel to make editorial changes as necessary to clarify rule and Board intent and to comply with the formatting requirements of the *Texas Register*.



Sent via email to:
dusty.johnston@bon.state.tx.us

October 1, 2009

James W. Johnston
General Counsel
Texas Board of Nursing
333 Guadalupe, Ste 3-460
Austin, Texas 78701

Re: Comments on proposed Rule §213.32 as published at 34 Tex Reg 6084, (9/4/2009)

Dear Mr. Johnston:

The Texas Nurses Association (TNA) submits the following comments on proposed Rule §213.32 as published at 34 Tex Reg 6084, (9/4/2009).

1. Proposed Rule §213.32(3).

TNA requests Rule §213.32(3) be revised to give the BON's executive director the discretion to take corrective action if a nurse has committed more than one of the six violations listed. As proposed, §213.32(3) makes a nurse ineligible for corrective action if he or she has committed more than one of the six violations listed. The six violations listed are described in the preamble as "minor, administrative violations." While TNA does not disagree that, as stated in the preamble, "multiple violations may indicate a more serious disciplinary issue" which should be resolved through the disciplinary process, it does not believe that multiple violations necessarily do so.

For example, suppose a nurse experiences a dramatic event in her/his life that causes depression and the nurse actually takes time off from nursing for a period of time. Suppose further that the nurse's license is up for renewal and the nurse moves during this time and the nurse fails both to complete her/his continued competency requirements and to notify the BON of an address change. Another example would be the nurse who receives corrective action for failure to comply with continued competency requirement and two years later fails to notify BON of a change of address. In neither of these examples, would it appear the two violations "indicate a more serious disciplinary violation." However, under the proposed rule, in both examples the nurses would be ineligible for corrective action.

Under §217.32(4), it is within the BON executive director's sole discretion as to whether corrective action is available. TNA does not believe there is any reason to limit this discretion because of multiple violations. If the board believes that multiple violations should make a nurse

ineligible, then TNA would request that ineligibility be limited to multiple violations of the same type, e.g., twice failing to notify the BON of a change in address.

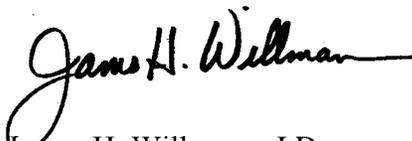
2. Violations Eligible for Corrective Action.

Proposed Rule 213.32(2) limits corrective action to six violations. While TNA does not disagree with initially limiting the violations eligible for corrective action to these six violations, TNA believes it is premature to state categorically, as the preamble does, that:

“it is not appropriate for corrective action to be offered in cases in where: (i) errors in practice or medication administration have occurred; (ii) an individual’s criminal conduct is at issue; (iii) an individual’s drug abuse is at issue; or (iv) an individual’s physical or mental state is at issue.”

Such a categorical statement would seem to preclude corrective action from ever being considered as potentially applicable to any of these situations. TNA does not believe such a categorical statement should be made without any experience with corrective action and how it may work. Also, such a categorical statement seems inconsistent with the BON’s Rule 217.16 (relating to minor incidents) which does not require every medication administration error to be reported to the board. TNA requests that the preamble to the rule as finally adopted not include such a broad, categorical statement of the types of violations to which corrective action may not be applicable.

Respectively submitted,



James H. Willmann, J.D.
General Counsel and Director Governmental Affairs

Attachment “B”

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

§213.32(2) and §213.32(3)

Comment: A commenter representing an organization states that proposed §213.32(2) limits corrective action to six violations. The commenter states that his organization does not disagree with initially limiting the violations eligible for corrective action to these six violations, but his organization believes it is premature to state categorically that it is not appropriate for corrective action to be offered in cases where: (i) errors in practice or medication administration have occurred; (ii) an individual’s criminal conduct is at issue; (iii) an individual’s drug abuse is at issue; or (iv) an individual’s physical or mental state is at issue. The commenter states that such a categorical statement would seem to preclude corrective action from ever being considered as potentially applicable to any of these situations. The commenter further states that his organization does not believe that such a categorical statement should be made without any experience with corrective action and how it may work. Further, the commenter states that such a categorical statement seems inconsistent with 22 Tex. Admin. Code §217.16 (relating to Reporting of Minor Incidents), which does not require every medication administration error to be reported to the Board. The commenter requests that the preamble to the adopted rule not include such a broad, categorical statement of the types of violations to which corrective action may not be applicable.

The commenter also requests that §213.32(3) be revised to give the Board’s Executive Director discretion to take corrective action if a nurse has committed more than one of the six violations listed. The commenter states that the proposed rule makes a

nurse ineligible for corrective action if he or she has committed more than one of the six violations listed. Further, while the commenter's organization does not disagree that multiple violations may indicate a more serious disciplinary issue which should be resolved through the disciplinary process, the commenter's organization does not believe that multiple violations necessarily do so. The commenter provides an example where a nurse experiences a dramatic event in her/his life that causes depression, and the nurse subsequently takes time off from nursing for a period of time. Then, the nurse's license comes up for renewal, and the nurse moves during this time and fails both to complete his/her continued competency requirements and to notify the Board of an address change. The commenter provides another example where a nurse receives corrective action for failure to comply with continued competency requirements and then, two years later, fails to notify the Board of a change of address. The commenter states that in neither of these two examples would it appear that the two violations indicate a more serious disciplinary violation. However, under the proposed rule, the commenter states, in both examples the nurses would be ineligible for corrective action. The commenter states that it is within the Board's Executive Director's sole discretion as to whether corrective action is available. The commenter states that his organization does not believe there is any reason to limit this discretion because of multiple violations. Further, the commenter states that if the Board believes that multiple violations should make a nurse ineligible, then the commenter's organization would request that ineligibility be limited to multiple violations of the same type, such as twice failing to notify the Board of a change in address.

Agency Response: The Board declines to make the suggested changes at this time. SB 1415 authorizes certain violations of the Occupations Code Chapter 301 to be resolved

through non-disciplinary, corrective actions. A corrective action is confidential and will not be reportable to the public or the Healthcare Integrity and Protection Data Bank (HIPDB). As a result, members of the public, such as an individual's employer or client, will not be made aware of conduct that results in a corrective action. The Board's mission is to ensure the protection of the public health, safety, and welfare. The Board may not be able to adequately fulfill this duty if violations of a serious nature or multiple, but less significant violations, are not reported to the public and monitored by the Board. As such, the Board has determined that it is necessary to limit the number and types of violations for which a corrective action may be imposed. This is especially true since the Board has not yet had enough time to evaluate the efficacy of issuing corrective actions. As such, the Board is reluctant to permit matters that may result in serious patient harm, such as errors in practice and medication administration; criminal conduct; drug abuse, chemical dependency, and substance abuse; and physical and mental impairment, to be resolved through non-reportable, non-public corrective actions at this time. The Executive Director does not have sole discretion to determine when a corrective action is appropriate. Rather, the Executive Director's discretion to offer a corrective action is regulated by the Board, who establishes the types of violations for which a corrective action may be offered. The Board is not convinced that it is appropriate to offer a corrective action to an individual who has committed more than one violation of Chapter 301 at this time. The Board is concerned that multiple or repetitive violations of Chapter 301 may be indicative of a more serious pattern of conduct that warrants a more severe sanction than a corrective action. As such, the Board has determined that corrective actions should be reserved for one-time, minor, administrative violations, at this time. The Board may be willing to consider

permitting additional types of violations to be resolved through corrective actions at some point in the future. However, the Board finds that it lacks the requisite information to consider such a change at this point in time.

The Eligibility and Disciplinary Advisory Committee

The Eligibility and Disciplinary Advisory Committee (Committee) convened on September 17, 2009 and considered the proposed amendments to §213.32, pertaining to *Schedule of Administrative Fine(s)* and §211.7, pertaining to *Executive Director*. Certain members of the Committee expressed concern that the proposed rules were too restrictive and suggested that the Executive Director be given more flexibility in determining which violations could be resolved through a corrective action. Other members of the Committee felt that the requirements were appropriate as proposed and suggested that the Board re-evaluate the requirements after more time had passed. One member of the Committee requested that the Board consider including an advanced practice registered nurse's failure to apply for prescriptive authority in a new role and failure to maintain national certification as violations for which a corrective action could be imposed. Several members of the Committee agreed that there should be a limit as to the violations that would be eligible for a corrective action, but they were unsure of how to determine what that limit should be. Most of the members of the Committee, however, generally expressed confidence in the Board's existing processes for the review and resolution of complaints.

The Board declines to make many of the Committee's suggested modifications to the proposed rule for the reasons set forth previously in this Rule Adoption. However, the Board has determined that an advanced practice registered nurse's failure to apply for

prescriptive authority in a new role is appropriate for resolution through a corrective action. This type of violation is administrative in nature and its associated threat of public harm is low. As such, the Board has modified §213.32(2) as proposed to include the failure of an advanced practice registered nurse to register for prescriptive authority in an additional role and population focus area as an additional violation that may be resolved through a corrective action.

Attachment “C”

§213.32. Corrective Action Proceedings and Schedule of Administrative Fines.

A corrective action may be imposed by the Board as specified in the following circumstances.

(1) For purposes of this section only, corrective action has the meaning assigned by the Occupations Code §301.651. A corrective action imposed under this section is not a disciplinary action under the Occupations Code Chapter 301, Subchapter J.

(2) Pursuant to the Occupations Code §301.652, the Board may impose a corrective action for the first occurrence of each of the following violations:

(A) practice on a delinquent license for more than six months but less than one year;

(B) failure to comply with continuing competency requirements;

(C) failure to assure licensure/credentials of personnel for whom the nurse is administratively responsible;

(D) failure to provide employers, potential employers, or the Board with complete and accurate answers to either oral or written questions on subject matters including, but not limited to: employment history, licensure history, and criminal history;

(E) failure to comply with Board requirements for change of name/address;

(F) failure to develop, maintain, and implement a peer review plan according to statutory peer review requirements; and

(G) failure of an advanced practice registered nurse to register for prescriptive authority in an additional role and population focus area, where the advanced

practice registered nurse otherwise meets all requirements for prescriptive authority as specified in Chapter 222 of this title (relating to Advanced Practice Registered Nurses).

(3) An individual will not be eligible for a corrective action if the individual has committed more than one of the violations listed in paragraph (2) of this section. If a fine is imposed by the Board as part of a corrective action under paragraph (2) of this section, the amount of the fine shall be \$500.

(4) The opportunity to enter into an agreed corrective action order is at the sole discretion of the Executive Director and is not available as a result of a contested case proceeding conducted pursuant to the Government Code Chapter 2001.

(5) A fine, with or without remedial education stipulations, may be imposed in a disciplinary matter for the following violations in the following amounts:

(A) practice on a delinquent license for more than six months but less than two years:

(i) first occurrence: \$250;

(ii) subsequent occurrence: \$500;

(B) practice on a delinquent license for two to four years:

(i) first occurrence: \$500;

(ii) subsequent occurrence: \$1,000;

(C) practice on a delinquent license more than four years: \$1,000 plus \$250 for each year over four years;

(D) failure to comply with continuing competency requirements:

(i) first occurrence: \$250;

(ii) subsequent occurrence: \$500;

(E) failure to comply with mandatory reporting requirements:

(i) first occurrence: \$250 - \$500;

(ii) subsequent occurrence: \$500 - \$1,000;

(F) failure to assure licensure/credentials of personnel for whom the nurse is administratively responsible:

(i) first occurrence: \$250 - \$500;

(ii) subsequent occurrence: \$500 - \$1,000;

(G) failure to provide employers, potential employers, or the Board with complete and accurate answers to either oral or written questions on subject matters including but not limited to: employment history, licensure history, criminal history:

(i) first occurrence: \$250 - \$800;

(ii) second occurrence: \$500 - \$1000;

(H) failure to report unauthorized practice:

(i) first occurrence: \$250 - \$500;

(ii) subsequent occurrence: \$500 - \$1,000;

(I) failure to comply with Board requirements for change of name/address:

(i) first occurrence: \$250;

(ii) subsequent occurrence: \$300;

(J) failure to develop, maintain and implement a peer review plan according to statutory peer review requirements:

(i) first occurrence: \$250 - \$1,000;

(ii) subsequent occurrence: \$500 - \$1,000;

(K) failure to file, or cause to be filed, complete, accurate and timely reports required by Board order: \$250 for first occurrence;

(L) failure to make complete and timely compliance with the terms of any stipulation contained in a Board order: \$250 for first occurrence;

(M) failure to report patient abuse to the appropriate authority of the State of Texas, including but not limited to, providing inaccurate or incomplete information when requested from said authorities:

(i) first occurrence: \$500;

(ii) second occurrence: \$1000 - \$5000; and

(N) other non-compliance with the NPA, Board rules or orders which does not involve fraud, deceit, dishonesty, intentional disregard of the NPA, Board rules, Board orders, harm or substantial risk of harm to patients, clients or the public:

(i) first occurrence: \$250 - \$500;

(ii) subsequent occurrence: \$500 - \$1,000.

(6) The following violations may be appropriate for disposition by fine in conjunction with one or more of the penalties/sanctions contained elsewhere in the Board's

rules:

(A) violations other than those listed in paragraphs (2) and (5) of this

section:

(i) first occurrence: \$250 - \$1,000;

(ii) subsequent occurrence: \$500 - \$1,000; and

(B) a cluster of violations listed in paragraphs (2) and (5) of this

section: \$250 - \$5,000.

(7) The executive director is authorized to dispose of violations listed in paragraphs (2) and (5) of this section without ratification by the Board. The executive director shall report such cases to the Board at its regular meetings.