

Consideration of Adoption of Proposed Amendments to 22 Tex. Admin. Code §213.20, Pertaining to *Informal Proceedings and Alternate Dispute Resolution (ADR)*; §213.29, Pertaining to *Criteria and Procedure Regarding Intemperate Use and Lack of Fitness in Eligibility and Disciplinary Matters*; §213.30, Pertaining to *Declaratory Order of Eligibility for Licensure*; and §213.33, Pertaining to *Factors Considered for Imposition of Penalties/Sanctions and/or Fines, Written Comments Received, and Board Responses to Comments*

Summary of Request: Consider final adoption of proposed amendments to 22 Tex. Admin. Code §213.20, Pertaining to *Informal Proceedings and Alternate Dispute Resolution (ADR)*; §213.29, Pertaining to *Criteria and Procedure Regarding Intemperate Use and Lack of Fitness in Eligibility and Disciplinary Matters*; §213.30, Pertaining to *Declaratory Order of Eligibility for Licensure*; and §213.33, Pertaining to *Factors Considered for Imposition of Penalties/Sanctions and/or Fines*. Proposed amendments to §213.20, §213.29, §213.30, and §213.33 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 11, 2009, and the comment period ended on October 12, 2009. The Board received several public comments. A copy of the written comments received are attached as Attachment "A".

The proposed amendments to §213.20, §213.29, §213.30, and §213.33 implement HB 3961, which was enacted by the 81st Legislature, effective June 19, 2009, and requires the Board to adopt guidelines for requiring or requesting an individual to submit to an evaluation under new Occupations Code §301.4521 and rules regarding the qualifications for a licensed practitioner to conduct an evaluation under new §301.4521. The proposed amendments to §213.33 implement these requirements by prescribing the circumstances under which an evaluation will be requested by the Board, the requirements that the evaluation must meet, and the credentials that an evaluator must possess in order to conduct the evaluation. The proposed amendments also clarify existing Board policy regarding random drug testing through urinalysis.

Comments Received: A summary of the written comments received are attached as Attachment "B", along with Staff's responses to the comments. A summary of the Eligibility and Disciplinary Advisory Committee's discussions are also contained in Attachment "B".

Staff's Recommendation: Move to adopt the proposed amendments to 22 Tex. Admin. Code §213.20, Pertaining to *Informal Proceedings and Alternate Dispute Resolution (ADR)*; §213.29, Pertaining to *Criteria and Procedure Regarding Intemperate Use and Lack of Fitness in Eligibility and Disciplinary Matters*; §213.30, Pertaining to *Declaratory Order of Eligibility for Licensure*; as proposed and published in the *Texas Register* on September 11, 2009, 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*. Move to adopt proposed amendments to 22 Tex. Admin. Code §213.33, Pertaining to *Factors Considered for Imposition of Penalties/Sanctions and/or Fines*, with changes. Further, move to adopt the summary of the written comments and Staff's responses 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 "Exhibit C" and authorize Staff to publish the revised rule text attached hereto as "Exhibit 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 §213.20 as published at 34 Tex Reg 6255, (9/11/2009)

Dear Mr. Johnston:

The Texas Nurses Association (TNA) submits the following comments on proposed Rule §213.20 as published at 34 Tex Reg 6255, (9/11/2009).

1. Relationship Between §301.4521 and Rule §213.20

The proposed changes to Rule §213.20 are based on H.B. 3961's adding §301.4521 to the Nursing Practice Act. Section 301.4521 authorizes the BON to: 1) require a physical and psychological evaluation if it has probable cause to believe a nurse cannot practice safely due to physical impairment, mental impairment, chemical dependency or abuse of drugs or alcohol and 2) request a physical and psychological evaluation if Board believes a nurse cannot practice safely for a reason other than physical impairment, mental impairment, chemical dependency or abuse of drugs or alcohol.

Subsections (b)-(e) of §301.4521 specifically apply to evaluations the BON is authorized to require and Subsections (f)-(g) to evaluations the BON is authorized to request. Correspondingly, Subsection (e) of Rule §213.20 governs evaluations the BON is authorized to require and Subsection (f) evaluations the BON is authorized to request. However, Rule §213.20(f)(4) states:

(4) The provisions of the Occupations Code §301.4521 apply to an evaluation requested under this subsection.

There is no corresponding provision in Rule §213.20(e).

TNA requests that Rule §213.20(e) be amended to more accurately reflect that §301.4521 addresses required and requested evaluations differently. More specifically, TNA requests that:

1) Rule §213.20(f)(4) be amended to read:

(4) The provisions of the Occupations Code §301.4521(f)-(g) apply to an evaluation requested under this subsection;

and

2) Rule §213.20(e) be amended by adding a sentence at the end that reads:

(4) The provisions of the Occupations Code §301.4521(b)-(e) apply to an evaluation requested under this subsection.

2. Content of Evaluations under Rule §213.20(e).

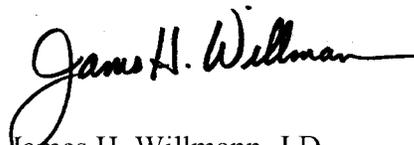
Rule §213.20(e) governs the BON requiring physical and psychological evaluations when it has probable cause to believe a nurse cannot practice safely due to physical impairment, mental impairment, chemical dependency or abuse of drugs or alcohol. Subsection (e) requires that:

The evaluation must include the utilization of objective tests and instruments which at a minimum are designed to test the psychological stability, fitness to practice, professional character, and veracity of the person subject to evaluation.

TNA believes that it is not appropriate to require testing of professional character and veracity as part of an evaluation required due to possible physical impairment, mental impairment or chemical dependency or abuse. Testing of these two items is more appropriate to evaluations the board is authorized to request under Subsection (f). For example, an evaluation of physical impairment would normally not be designed to test professional character or veracity. Even psychological stability may not be tested. TNA requests that this sentence in Subsection (f) be reworded to read:

The evaluation must include the utilization of objective tests and instruments which at a minimum are designed to test the fitness to practice and, when appropriate, the psychological stability of the person subject to evaluation.

Respectively submitted,



James H. Willmann, J.D.

General Counsel and Director Governmental Affairs

Abel, Jena

Subject: FW: Comment on Proposed Rule 213.33(e)

From: Lynda Woolbert [mailto:lynda.woolbert@gmail.com]
Sent: Sunday, October 11, 2009 6:13 PM
To: Johnston, Dusty
Cc: Hutto, Kathy; Joan Ross
Subject: Comment on Proposed Rule 213.33(e)

Dear Dusty:

The Coalition for Nurses in Advanced Practice (CNAP) recommends one addition to the amendments to 22 TAC §213.33(e) proposed on September 11, 2009. CNAP suggests adding advanced practice registered nurses to the types of health care providers that the Board of Nursing may approve to provide a physical or psychological evaluation of a nurse's competency to safely practice.

As the Board is aware, APRNs are practicing in various specialties that might qualify them to provide the type of evaluations required by the Board. APRNs are also more likely than any other type of health care providers to be aware of the physical and psychological demands on a nurse and, therefore, may be uniquely qualified to evaluate a nurse's fitness to practice.

Also in Subsection (e), there seems to be an error in the use of "osteopathic". It appears the Board may have intended to include "osteopathic physician" but it might be clearer to delete osteopathic and substitute "doctor of osteopathy".

Therefore, CNAP suggests the following language in Subsection (e). The recommended amendments are noted by highlighted text.

(e) If the Board has probable cause to believe that a person is unable to practice nursing with reasonable skill and safety because of physical impairment, mental impairment, chemical dependency, or abuse of drugs or alcohol [~~When determining evidence of present fitness to practice~~], the Board [~~or Executive Director~~] may require an evaluation by a Board-approved addictionologist, addictionist, advanced practice registered nurse, treatment evaluator, physician, medical doctor, doctor of osteopathy, neurologist, psychologist, forensic psychologist, forensic psychiatrist, or psychiatrist, with credentials appropriate for the specific evaluation requested [~~who is licensed by the Texas State Board of Examiners of Psychologists or the Texas Medical Board, respectively~~]. The evaluator must be familiar with the duties appropriate to the nursing profession. The evaluation must be conducted pursuant to professionally recognized standards and methods. The evaluation must include the utilization of objective tests and instruments which at a minimum are designed to test the psychological stability, fitness to practice, professional character, and veracity of the person subject to evaluation [~~applicant or licensee~~]. If applicable, the evaluation must include information regarding the person's prognosis and medication regime. The person[~~applicant or licensee~~] subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board. The person subject to evaluation [~~applicant or licensee~~] should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the person [~~individual~~] a copy.

10/12/2009

Thank you for considering these changes. If you have any questions, please contact by email at lynda@cnaptexas.org, or by phone at (979) 345-5974.

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Lynda Woolbert, MSN, RN, PNP
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For information about Advanced Practice Nurses (APNs) in Texas, go to www.cnaptexas.org.

Attachment “B”

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

§213.33(e) and (f)

Comment: A commenter who represents an organization states that the Occupations Code §301.4521(b)-(e) specifically applies to evaluations the Board is authorized to require, and §301.4521(f)-(g) applies to evaluations the Board is authorized to request. The commenter further states that §213.33(e) governs evaluations the Board is authorized to require and §213.33(f) governs evaluations the Board is authorized to request. The commenter states that the proposed rules state in §213.33(f)(4): “The provisions of the Occupations Code §301.4521 apply to an evaluation requested under this subsection.” The commenter states that there is no corresponding provision in proposed rule §213.33(e). The commenter requests that the proposed sections be amended to reflect that §301.4521 addresses required and requested evaluations differently. The commenter requests that the proposed rules be amended to include specific reference to §301.4521(f)-(g) in proposed §213.33(f)(4) and §301.4521(b)-(e) in proposed §213.33(e).

The commenter also states that his organization does not believe that it is appropriate to require testing of professional character and veracity as part of an evaluation required due to possible physical impairment, mental impairment, or chemical dependency or abuse. The commenter states that the testing of these two items is more appropriate to evaluations the Board is authorized to request under §301.4521(f). The commenter states that an evaluation of physical impairment would normally not be designed to test professional character or veracity. The commenter further states that even psychological stability may not be tested. The commenter requests that the proposed rules be amended

to provide that an evaluation must include the utilization of objective tests and instruments which at a minimum are designed to test the fitness to practice and, when appropriate, the psychological stability of the person subject to evaluation.

Another commenter representing an organization recommends that the Board add advanced practice registered nurses to the types of health care providers that the Board may approve to provide a physical or psychological evaluation of a nurse's competency to safely practice. The commenter states that advanced practice registered nurses are practicing in various specialties that might qualify them to provide the type of evaluations required by the Board. Further, the commenter states that advanced practice registered nurses are more likely than any other type of health care providers to be aware of the physical and psychological demands on a nurse, and, therefore, may be uniquely qualified to evaluate a nurse's fitness to practice. Further, the commenter states that there seems to be an error in the use of the term "osteopathic" in the proposed rule and suggests that it might be clearer to substitute the term "doctor of osteopathy" in the rule text.

Agency Response: While the Board does not agree with all of the comments received, the Board has determined that it should further review and consider the comments before adopting the amendments to §213.33 as proposed. The Board has also determined that additional substantive amendments to §213.33, which were not proposed in this rule proposal, may now be necessary. As such, the Board has determined that it should address any new requirements regarding physical and psychological evaluations under the Occupations Code §301.4521 through a separate rulemaking process. Further, for purposes of clarity and consistency, the Board has determined that it should address all other proposed amendments to §213.33 in the same rule proposal. Thus, the Board will

publish a notice of proposal with a 30-day comment period before proceeding further with any proposed amendments to §213.33. Therefore, this adoption fully restores all of the provisions of §213.33 that were proposed for amendment in this rule proposal.

The Eligibility and Disciplinary Advisory Committee

The Eligibility and Disciplinary Advisory Committee (Committee) convened on September 17, 2009 and considered the proposed amendments to 22 Tex. Admin. Code §213.20, Pertaining to *Informal Proceedings and Alternate Dispute Resolution (ADR)*; §213.29, Pertaining to *Criteria and Procedure Regarding Intemperate Use and Lack of Fitness in Eligibility and Disciplinary Matters*; §213.30, Pertaining to *Declaratory Order of Eligibility for Licensure*; and §213.33, Pertaining to *Factors Considered for Imposition of Penalties/Sanctions and/or Fines*. Certain members of the Committee expressed concern that the proposed rules were too restrictive and suggested that additional health care providers be considered for performing physical and psychological evaluations. One member of the Committee requested that the Board consider whether nurse practitioners could provide evaluations in certain situations where the practitioner's speciality was appropriate and relevant. One member of the Committee also pointed out that the use of "osteopathic" was probably an incorrect usage of the term. Most of the members of the Committee agreed that it should be made clear that an evaluator must have the appropriate credentials, experience, and expertise to conduct an evaluation.

The Board declines to make any of the Committee's suggested modifications to the proposed rule at this time for the reasons set forth previously in this Rule Adoption.

Attachment “C”

§213.33. Factors Considered for Imposition of Penalties/Sanctions and/or Fines

(a) The following factors shall be considered by the executive director when determining whether to dispose of a disciplinary case by fine or by fine and stipulation and the amount of such fine. These factors shall be used by the State Office of Administrative Hearings (SOAH) when recommending a sanction and the Board in determining the appropriate penalty/sanction in disciplinary cases:

(1) evidence of actual or potential harm to patients, clients, or the public;

(2) evidence of a lack of truthfulness or trustworthiness;

(3) evidence of misrepresentation(s) of knowledge, education, experience, credentials, or skills which would lead a member of the public, an employer, a member of the health-care team, or a patient to rely on the fact(s) misrepresented where such reliance could be unsafe;

(4) evidence of practice history;

(5) evidence of present fitness to practice;

(6) evidence of previous violations or prior disciplinary history by the Board or any other health care licensing agency in Texas or another jurisdiction;

(7) the length of time the licensee has practiced;

(8) the actual damages, physical, economic, or otherwise, resulting from the violation;

(9) the deterrent effect of the penalty imposed;

(10) attempts by the licensee to correct or stop the violation;

(11) any mitigating or aggravating circumstances;

(12) the extent to which system dynamics in the practice setting contributed to the problem; and

(13) any other matter that justice may require.

(b) Each specific act or instance of conduct may be treated as a separate violation.

(c) Unless otherwise specified, fines shall be payable in full by cashier's check or money order not later than the 45th day following the entry of an Order.

(d) The payment of a fine shall be in addition to the full payment of all applicable fees and satisfaction of all other applicable requirements of the NPA and the Board's rules.

(e) When determining evidence of present fitness to practice, the Board or Executive Director may request an evaluation by a psychologist or psychiatrist, who is licensed by the Texas State Board of Examiners of Psychologists or the Texas Medical Board, respectively. The evaluator must be familiar with the duties appropriate to the nursing profession. The evaluation must be conducted pursuant to professionally recognized standards and methods. The evaluation must include the utilization of objective tests and instruments which at a minimum are designed to test the psychological stability and veracity of the applicant or licensee. The applicant or licensee subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board. The applicant or licensee should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the individual a copy.

(f) When determining evidence of present fitness to practice by a licensee or applicant for licensure:

(1) the Board or Executive Director may request an individual risk assessment conducted by a Board-approved forensic psychologist or psychiatrist who:

(A) evaluates the criminal history of a person; and

(B) seeks to predict:

(i) the likelihood that the person will engage in criminal activity that may result in the person receiving a second or subsequent reportable adjudication or conviction; and

(ii) the continuing danger, if any, that the person poses to the community.

(C) is familiar with the duties appropriate to the nursing profession.

(D) conducts the evaluation pursuant to professionally recognized standards and methods; and

(E) utilizes objective tests and instruments that, at a minimum, are designed to test the psychological stability, fitness to practice, professional character, and/or veracity of the nurse applicant or licensee.

(2) The applicant or licensee subject to evaluation shall sign a release allowing the evaluator to review the file compiled by the Board staff and a release that permits the evaluator to release the evaluation to the Board.

(3) The applicant or licensee should be provided a copy of the evaluation upon completion by the evaluator; if not, the Board will provide the individual a copy.

(g) In accordance with the provisions of the Texas Occupations Code and the Nursing Practice Act (NPA), and in keeping with the obligation to protect the consumer of nursing services from the unsafe, incompetent or unprofessional nurse, the Board of Nursing has adopted the following recommended guidelines for disciplinary orders and conditions of probation for violations of the NPA. The purpose of these guidelines is to give notice to licensees of the range of penalties which will normally be imposed upon violations of the provisions in Chapter 301, Subchapter J. The disciplinary guidelines are based upon a single count violation of each provision listed. Multiple violations of the same provision or rule, or other unrelated violations included in the administrative complaint, will be grounds for an enhancement of penalties subject to §301.4531(c)(1) and (2), of the NPA. All penalties at the upper range of the sanctions set forth in the guidelines, such as suspension, revocation, or surrender, include lesser penalties, i.e., fine, remedial education, or probation, which may also be included in the final penalty at the Board's discretion.

(1) In addition to subsection (a) of this section, the Board shall consider the following factors, as set forth in §301.4531(b) of the NPA, when determining the appropriate disciplinary action:

(A) whether the person is being disciplined for multiple violations of the NPA, or its derivative rules and orders;

(B) whether the person has been subject to previous disciplinary action by the Board or any other health care licensing agency in Texas or another jurisdiction and, if so, the history of compliance with those actions;

(C) the seriousness of the violation;

(D) the threat to public safety; and

(E) any mitigating factors.

(2) The Board may, upon the finding of a violation, enter an order imposing one or more of the following disciplinary actions under the authority of §301.453 (a) and (b), of the NPA:

(A) Denial of the person's application for a license, license renewal, or temporary permit;

(B) Approval of the person's application for a license, license renewal, reinstatement of a revoked, suspended or surrendered license, or temporary permit; and set reasonable probationary stipulations as a condition of issuance, reinstatement or renewal of the license or temporary permit. Additionally, the Board may determine in accordance with §301.468, of the NPA, that an order denying a license application, license renewal or temporary permit be probated. Reasonable probationary stipulations may include, but are not limited to:

(i) submit to care, counseling, or treatment by a health provider designated by the Board as a condition for the issuance or renewal of a license;

(ii) submit to an evaluation as outlined in subsection (e) of this section;

(iii) participate in a program of education or counseling prescribed by the Board;

(iv) limit specific nursing activities and/or periodic board review;

(v) practice for a specified period under the direction of a

registered nurse or vocational nurse designated by the Board;

(vi) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing; or

(vii) perform public service which the Board considers appropriate;

(C) Issuance of a Warning. The issuance of a Warning shall include reasonable probationary stipulations which may include, but are not limited to, one or more of the following:

(i) participate in a program of education or counseling prescribed by the Board;

(ii) practice for a specified period of at least one year under the direction of a registered nurse or vocational nurse designated by the Board;

(iii) perform public service which the Board considers appropriate;

(iv) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing; or

(v) limit specific nursing activities and/or periodic board review;

(D) Issuance of a Reprimand. The issuance of a Reprimand shall include reasonable probationary stipulations which may include, but are not limited to, one or more of the following:

(i) participate in a program of education or counseling prescribed by the Board;

(ii) practice for a specified period of at least two years under the direction of a registered nurse or vocational nurse designated by the Board;

(iii) perform public service which the Board considers appropriate;

(iv) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing; or

(v) limit specific nursing activities and/or periodic board review.

(E) Limitation or restriction of the person's license, including limits on specific nursing activities or periodic board review:

(F) Suspension of the person's license. The Board may determine that the order of suspension be enforced and active for a specific period or probated with reasonable probationary stipulations as a condition for lifting or staying the order of suspension. Reasonable probationary stipulations may include, but are not limited to, one or more of the following:

(i) Limit the practice of the person to, or excluding, one or more specified activities of professional or vocational nursing;

(ii) submit to an evaluation as outlined in subsection (e) of this section;

(iii) submit to care, supervision, counseling, or treatment by a health provider designated by the Board as a condition for the issuance or renewal of a license;

(iv) participate in a program of education or counseling

prescribed by the Board;

(v) practice for a specified period of not less than two years under the direction of a registered nurse or vocational nurse designated by the Board;

(vi) abstain from unauthorized use of drugs and alcohol to be verified by random drug testing; or

(vii) remit payment of the administrative penalty, fine, or assessment of hearing costs.

(G) Acceptance of a Voluntary Surrender of a nurse's license(s);

(H) Revocation of the person's license;

(I) Require participation in remedial education course or courses prescribed by the Board which are designed to address those competency deficiencies identified by the Board;

(J) Assessment of a fine;

(K) Assessment of costs as authorized by §301.461, Texas Occupation Code, and §2001.177, Texas Government Code; or June 12, 2008

(L) Require successful completion of a Board approved peer assistance program.

(M) Every disciplinary order issued by the Board will require that the person subject to the order will participate in a program of education or counseling prescribed by the Board which at a minimum will include a review course in nursing jurisprudence and ethics.

(h) The following disciplinary and eligibility sanction policies and guidelines shall be used by the Executive Director, the State Office of Administrative Hearings (SOAH), when recommending a sanction; and the Board in determining the appropriate penalty/sanction in disciplinary and eligibility matters:

(1) Disciplinary Sanctions for Fraud, Theft and Deception approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1646) and available on the Board's website at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>.

(2) Disciplinary Sanctions for Lying and Falsification approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1647) and available on the Board's website at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>.

(3) Disciplinary Sanctions for Sexual Misconduct approved by the Board and published on February 22, 2008 in the *Texas Register* (33 TexReg 1649) and available on the Board's website at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>.

(4) Eligibility and Disciplinary Sanctions for Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder and published on February 22, 2008 in the *Texas Register* (33 TexReg 1651) and available on the Board's website at <http://www.bon.state.tx.us/disciplinaryaction/dsp.html>.

(5) Disciplinary Guidelines for Criminal Conduct approved by the Board and published on March 9, 2007 in the *Texas Register* (32 TexReg 1409) and available on the Board's website at <http://www.bon.state.tx.us/disciplinaryaction/discp-guide.html>.