

**Consideration of Proposed Amendments to Section 213.33,  
Factors considered for Imposition of Penalties/Sanctions and/or Fines**

House Bill 2426 amended the Nursing Practice Act to include section 301.4531 related to Licensing and Regulatory Functions. Section 301.4531 requires the board to “adopt a schedule of the disciplinary sanctions that the board may impose under this chapter.... The board shall ensure that the severity of the sanction is appropriate to the type of violation or conduct that is the basis for disciplinary action.” The statute continues as follows:

“(b)...the board shall consider: (1) whether the person: (A) is being disciplined for multiple violations...(B) has previously been the subject of disciplinary action...; (2) the seriousness of the violation; (3) the threat to public safety; and (4) any mitigating factors.” When persons are described by subsections (b)(1)(A) and (B) “the board shall consider taking a more severe disciplinary action....”

The amendments proposed in Rule 213.33 implement these requirements. They were presented to the Enforcement and Discipline Task Force on July 13, 2007, which recommended their approval by the Board.

Staff requests that the Board move to propose amendments to section 213.33 and publish them in the *Texas Register* for a 30-day comment period, and if negative comments are not received in the 30 day comment period, adopt and publish the amendments in the *Texas Register*.

**RULE §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 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;384;384 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), 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), 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) & (b), NPA:

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

2) 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, 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 213.33(e);
  - (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;
- 3) 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;
- 4) 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
- 5) Limitation or restriction of the person's license, including limits on specific nursing activities or periodic board review:
- 6) 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 213.33(e);
  - (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

7) Acceptance of a Voluntary Surrender of a nurse license;

8) Revocation of the person's license;

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

10) Assessment of a fine;

11) Assessment of costs as authorized by section 301.461, Texas Occupation Code and section 2001.177, Texas Government Code; or

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

(C) 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.