

Agenda Item # 6.3.1

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Meeting Date: January 17 & 18, 2008

REPLACEMENT REPORT

**Comments and Response to comments on Proposed new § 217.13,
Relating to Peer Assistance Program**

At the July 2007 Board meeting, the Board proposed amendments to section 217.13, Peer Assistance Programs, to include the requirement imposed by House Bill 2426 (Sunset Bill) that nurses who are impaired and commit a practice violation must be reported to the Board and not to a peer assistance program. This proposal was published in the August 3, 2007, edition of the *Texas Register*.

Subsequent to the Board meeting and publication in the *Register*, Staff reviewed other requirements imposed by the Sunset Bill on the Board regarding peer assistance programs, and found the proposed amendment inadequate. Since the *Texas Register* does not allow two (2) proposals at the same time on the same section, and due to the substantial changes necessary, the Board withdrew the proposed amendment, and proposed to repeal the rule and to adopt a new rule implementing all the requirements of the Sunset Bill.

The withdrawal of the proposed amendment, the proposed repeal of § 217.13, and the proposed new § 217.13 were published in the November 2, 2007, edition of the *Texas Register*. The comment period ended on December 3, 2007.

The Board received two comments on the proposed new rule, from an individual and the Texas Nurses Association (TNA), concerning proposed rule 217.13. No comments were received on the proposed repeal.

Comment:

The TNA requests an editorial change in Subsection (e)(2)(D) relating to minimum conditions associated with participation in the peer assistance contract and requests that it be amended to include the phrase “and for cause.” TNA states that the edit is non-substantive.

Response to Comment:

After review of TNA’s comment, the Board agrees that the phrase “and for cause” will clarify the meaning intended by the use of “random drug screens” during program monitoring and that it is a non substantive change.

Comment:

The individual commenter does not suggest a particular amendment or change in rule 217.13. Rather, the comments express concerns that rule 217.13 requires the disclosure of personal health information with regard to mental health diagnosis and addiction to employers when there are no practice violations. The commenter believes such disclosures are in violation of Title II of the

Americans with Disabilities Act and argues that persons with chemical dependency and mental illness are being singled out and treated differently because of their diagnosis. Additionally, the commenter states that a nurse's right to privacy over personal mental health information should not be compromised because of the disease of addiction or mental health diagnosis.

Response to Comment:

The Board believes that proposed rule 217.13 is a lawful rule consistent with the Board's statutory authority and mission to protect the public welfare by ensuring that each person holding a license as a nurse in Texas is competent to practice safely. A legitimate concern to public safety exists regarding nurses whose practice is impaired or suspected of being impaired by chemical dependency, mental illness, or diminished mental capacity. The peer assistance program for nurses approved by the Board under chapter 467, Health and Safety Code, will identify, monitor, and assist with locating appropriate treatment for those nurses whose practice is impaired or suspected of being impaired by chemical dependency, mental illness or diminished mental capacity so that they may return to practice safe nursing.

The proposed new rule is attached with the recommended change in bold and underlined.

Staff recommendation:

The Board moves to adopt the responses to comments as outlined herein and to adopt with changes new section 217.13, relating to Peer Assistance Program, in response to comments received to the proposal and to publish in the *Texas Register*.

§217.13. Peer Assistance Program.

(a) A peer assistance program for nurses approved by the Board under chapter 467, Health and Safety Code, will identify, monitor, and assist with locating appropriate treatment for those nurses whose practice is impaired or suspected of being impaired by chemical dependency, mental illness or diminished mental capacity so that they may return to practice safe nursing.

(b) Role of the Board of Nursing and Peer Assistance Program.

(1) The Board of Nursing will retain the sole and exclusive authority to discipline a nurse who has committed a practice violation under §301.452(b) of the Nursing Practice Act regardless of whether such violation was influenced by chemical dependency, mental illness, or diminished mental capacity. The Board will balance the need to protect the public and the need to ensure the nurse seeks treatment in determining whether the nurse is appropriate for participation in an approved peer assistance program.

(2) The program shall report to the board, in accordance with policies adopted by the board, a nurse reported to the program who is impaired or suspected of being impaired for chemical dependency, mental illness, or diminished mental capacity if the nurse was reported to the program by third party. A third party report is a report concerning a nurse suspected of chemical dependency, mental illness, or diminished mental capacity that comes to the attention of the program through any source other than a self report.

(c) General Criteria for Approved Peer Assistance Program.

(1) The program will provide statewide peer advocacy services to all nurses licensed to practice in Texas whose practice may be impaired by chemical dependency, certain mental illnesses, or diminished mental capacity.

(2) The program shall have a statewide monitoring system that will be able to track the nurse while preserving confidentiality.

(3) The program shall have a network of trained peer volunteer advocates located throughout the state.

(4) The program shall have a written plan for the education and training of volunteer advocates and other program personnel.

(5) The program shall have a written plan for the education of nurses, other practitioners, and employers.

(6) The program shall demonstrate financial stability and funding sufficient to operate the program.

(7) The program shall have a mechanism for documenting program compliance and for timely reporting of noncompliance to the board.

(8) The program shall be subject to periodic evaluation by the board or its designee in order for the board to evaluate the success of the program.

(d) Evaluation of Peer Assistance Program.

(1) The program shall collect and make available to the board and other appropriate persons data relating to program operations and participant outcomes.. At a minimum, the program shall submit the following statistical information quarterly to the Board for the purpose of evaluating the success of the program:

(A) Number and source of referral;

(B) Number of individuals who sign participation agreements;

- (C) Type of participation agreement signed, i.e., Extended Evaluation Program; substance abuse or dependency, dual diagnosis, mental illness;
 - (D) Number of cases referred to program by Board of Nursing (this number should include all third party referrals that are reported to the board, but remain in participation pending board review);
 - (E) Number of participants referred to program by Board order;
 - (F) Number of self referred cases closed and reason(s) for closure;
 - (G) Number of active cases;
 - (H) Number of participants employed in nursing;
 - (I) Number of participants completing program;
 - (J) Number of participants who are reported back for failing to comply with the participation agreement;
 - (K) Monitoring activities, including number of drug screens requested, conducted and results of these tests;
 - (L) All applicable performance measures required by the Legislative Budget Board.
- (2) The program shall have a written plan for a systematic total program evaluation. Such plan shall include at a minimum monthly reports of the programs activities showing compliance with this rule, quarterly reports of applicable LBB performance measure data and an annual report of program activities.
- (3) The program shall be subject to periodic evaluation by the board or its designee in order for the board to evaluate the success of the program.
- (e) Participants entering the approved peer assistance program for chemical dependency or chemical abuse must agree to the following minimum conditions:
- (1) The nurse shall undergo, as appropriate, a physical and/or psychosocial evaluation before entering the approved monitoring program. This evaluation will be performed by health care professional(s) with expertise in chemical dependency.
 - (2) The nurse shall enter into a contract with the approved peer assistance program to comply with the requirements of the program which shall include, but not be limited to:
 - (A) The nurse will undergo recommended substance abuse treatment by an appropriate treatment facility or provider.
 - (B) The nurse will agree to remain free of all mind-altering substances including alcohol except for medications prescribed by an authorized prescriber for legitimate medical purposes and approved by the program.
 - (C) The nurse must complete the prescribed aftercare, if any, which may include individual and/or group psychotherapy.
 - (D) The nurse will submit to random **and for cause** drug screening as specified by the approved monitoring program.
 - (E) The nurse will attend support groups as specified by the contract.
 - (F) The nurse will comply with specified employment conditions and restrictions as defined by the contract.
 - (G) The nurse shall sign a waiver allowing the approved peer assistance program to release, to the extent permitted by federal or state law, information to the Board if the nurse does not comply with

the requirements of this contract.

(3) The nurse may be subject to disciplinary action by the Board if the nurse does not participate in the approved peer assistance program, does not comply with specified employment restrictions, or does not successfully complete the program.

(f) Referral to Board of Non compliance with Peer Assistance Program.

(1) A participant may be terminated from the program for the following causes:

(A) Noncompliance with any aspect of the program agreement;

(B) Receipt of information by the board which, after investigation, results in disciplinary action by the board; or

(C) Being unable to practice according to acceptable and prevailing standards of safe nursing care.

(2) The program shall contact the board in accordance with board policies if a nurse under contract fails to comply with the terms of the program agreement or evidences conduct that indicates an inability or unwillingness to comply with the program.

(g) Eligibility for Program Participation.

(1) The program shall contact the board if it receives a third-party referral for a nurse who may have been impaired or suspected of being impaired and who may have failed to comply with the minimum standards of nursing (22 TAC §217.11) and/or committed an act constituting unprofessional conduct (22 TAC §217.12). The program shall send that report to the Board. The Board will balance the need to protect the public and the need to ensure the impaired nurse seeks treatment in determining the whether the nurse is appropriate for participation in an approved peer assistance program.

(2) An individual may not participate in the program if the information reviewed in conjunction with the report indicates to the board that the individual's compliance with the program may not be effectively monitored while participating in the program. This information includes, but is not limited to, the following:

(A) The individual is not currently licensed as a registered nurse or licensed vocational nurse;

(B) The individual is currently using or being prescribed a drug normally associated with chemical dependency or abuse;

(C) The individual has a medical and/or psychiatric condition, diagnosis, or disorder, other than chemical dependency, in which the manifest symptoms are not adequately controlled;

(D) The individual has attempted or completed two or more chemical dependency monitoring programs as of the date of the application, notwithstanding the individual's current chemical dependency treatment plan and related treatment currently submitted for purposes of program eligibility;

(E) The board has taken action against the individual's license to practice nursing as either a registered nurse or a licensed practical nurse in Texas within the last 5 years;

(F) The individual has been convicted of a felony, placed on probation or received deferred adjudication relating to a felony, or felony charges are currently pending, or is currently being investigated for a felony; or

(G) The individual has been convicted or registered as a sex offender.

(h) Successful Completion of the Program. A participant successfully completes the program when the participant fully complies with all of the terms of the program agreement for the period as specified in the agreement. When a participant successfully completes the program, the program

shall notify the participant of the successful completion in writing. Once the participant receives this written notification of successful completion of the program, the participant shall no longer be required to comply with the program agreement. The program shall notify the board when a nurse who the board has ordered to attend or referred to the program successfully completes the peer assistance contract.