

Agenda Item: 7.7
Prepared by: Jena Abel
July 23-24, 2009

**Consideration of Proposed Amendments to 22 Tex. Admin. Code §213.32,
Concerning *Schedule of Administrative Fine(s)* and §211.7, Concerning *Executive
Director*;**

and

**Consideration For Authorizing Emergency Adoption of Amendments to 22 Tex.
Admin. Code §213.32, Concerning *Schedule of Administrative Fine(s)* and §211.7,
Concerning *Executive Director* If Proposed Amendments Cannot Be Adopted by
September 1, 2009**

Summary of Request: Consider proposal of amendments to 22 TAC §213.32, Concerning *Schedule of Administrative Fine(s)* and §211.7, Concerning *Executive Director* as part of the implementation of Senate Bill (SB) 1415, which was passed during the 81st Regular Legislative Session. Alternatively, consider emergency adoption of amendments to 22 TAC §213.32, Concerning *Schedule of Administrative Fine(s)* and §211.7, Concerning *Executive Director* if proposed amendments cannot be adopted to be effective on September 1, 2009 through normal proposal and adoption process.

Background: SB 1415 amends the Nursing Practice Act by adding §301.651 - §301.657 (Subchapter N) to Chapter 301 of the Occupations Code. New Subchapter N authorizes the Board to offer a corrective action as a resolution to certain violations of the Nursing Practice Act and Board rules and/or policies. A corrective action may consist of a fine, remedial education, or a combination of a fine and remedial education and is not a disciplinary action under Subchapter J of the Occupations Code. If a person accepts the Board's offer of a corrective action and satisfies the conditions associated with the corrective action, the case is closed. If a person does not accept the Board's offer of a corrective action or fails to respond in a timely manner to the offer, the Board is required to dispose of the matter as a disciplinary matter. SB 1415 takes effect September 1, 2009, and affects actions for violations that are pending on September 1, 2009, or that are commenced after September 1, 2009. A copy of SB 1415 is attached hereto as "Exhibit A".

SB 1415 requires the Board to adopt rules that prescribe the types of violations that are appropriate for disposition through a corrective action. The proposed amendments to §213.32 implement this requirement by listing six types of violations for which a corrective action may be offered. Further, the proposed amendments describe circumstances under which a person would not be eligible for a corrective action and state the amount of the fines that may be imposed by the Board as part of a corrective action. The proposed amendments also revise and clarify the amount of fines applicable to disciplinary actions in general, including remedial education stipulations and other penalties/sanctions

described under other Board rules. The proposed amendments to §211.7 are necessary for consistency with the amendments to §213.32, regarding the types of orders that the Executive Director may approve and accept without Board ratification.

Traditional Proposal and Adoption

If the proposed amendments to §213.32 and §211.7 are published in the *Texas Register* for the 30-day comment period and the Board does not receive any negative comments or a request for a public rule hearing during that period of time, the proposed amendments could be adopted to be effective on September 1, 2009, the date on which SB 1415 becomes effective.

Emergency Adoption

If negative comments or a request for a public rule hearing are received during the 30-day comment period, the proposed amendments to §213.32 and §211.7 could not be adopted before the October, 2009, Board meeting, because the comments and proposed responses would need to be deliberated on by the Board prior to adoption. In that scenario, the proposed rules could not be adopted to be effective on September 1, 2009, unless the Board published an emergency rule adoption in the *Texas Register*, which would be effective from September 1, 2009, until the time the Board could deliberate and adopt permanent amendments to §213.32 and §211.7.

The proposed amended text for §213.32 and §211.7 is attached as “Exhibit B”.

Staff Recommendations:

Board Action: Move to approve the proposed amendments to 22 Tex. Admin. Code §213.32, Concerning *Schedule of Administrative Fine(s)* and §211.7, Concerning *Executive Director* and authorize staff to publish the proposals in the *Texas Register* for a 30-day comment period, 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*. If no negative comments and no request for a public hearing are received, move to adopt the proposed amendments to 22 Tex. Admin. Code §213.32, Concerning *Schedule of Administrative Fine(s)* and §211.7, Concerning *Executive Director* as proposed.

Further, in the event that negative comments are received or a request for a rule hearing is received within the 30-day comment period, authorize staff to publish an emergency rule adoption in the *Texas Register*, to be effective from September 1, 2009, until such a time as the Board has the opportunity to deliberate and adopt permanent amendments to 22 Tex. Admin. Code §213.32, Concerning *Schedule of Administrative Fine(s)* and §211.7, Concerning *Executive Director*.

AN ACT

relating to certain corrective actions by the Texas Board of Nursing, including a pilot program on deferred disciplinary action; providing corrective actions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter D, Chapter 301, Occupations Code, is amended by adding Section 301.1607 to read as follows:

Sec. 301.1607. PILOT PROGRAM ON DEFERRAL OF FINAL DISCIPLINARY ACTION. (a) In this section, "deferred disciplinary action" means a final disciplinary action against a person licensed or regulated under this chapter that is deferred by the board as provided by this section.

(b) Not later than February 1, 2010, the board shall determine the feasibility of conducting a pilot program designed to evaluate the efficacy and effect on the public's protection of board deferral of disciplinary action against a person licensed or regulated under this chapter in cases in which the board proposes to impose a sanction other than a reprimand or a denial, suspension, or revocation of a license. If the board determines the pilot program is feasible, the board shall develop and implement the pilot program not later than February 1, 2011. The pilot program must conclude not later than January 1, 2014.

(c) The pilot program may not include cases in which the board proposes to issue a reprimand or to deny, suspend, or revoke a

1 license.

2 (d) During the time the pilot program is implemented and for
3 any action or complaint for which the board proposes to impose a
4 sanction other than a reprimand or a denial, suspension, or
5 revocation of a license, the board may:

6 (1) defer final disciplinary action the board has
7 proposed against a person licensed or regulated under this chapter
8 if the person conforms to conditions imposed by the board,
9 including any condition the board could impose as a condition of
10 probation under Section 301.468; and

11 (2) if the person successfully meets the imposed
12 conditions, dismiss the complaint.

13 (e) Except as otherwise provided by this subsection, a
14 deferred disciplinary action by the board under the pilot program
15 is not confidential and is subject to disclosure in accordance with
16 Chapter 552, Government Code. If the person successfully meets the
17 conditions imposed by the board in deferring final disciplinary
18 action and the board dismisses the action or complaint, the
19 deferred disciplinary action of the board is confidential to the
20 same extent as a complaint filed under Section 301.466.

21 (f) The board may treat a deferred disciplinary action taken
22 against a nurse under this section as a prior disciplinary action
23 against the nurse when considering the imposition of a sanction for
24 a subsequent violation of this chapter or a rule or order adopted
25 under this chapter.

26 (g) The board may contract with a third party to evaluate
27 the pilot program established under this section.

1 (h) The board shall appoint an advisory committee to assist
2 the board in overseeing the pilot program and its evaluation. The
3 committee must include representatives of public advocacy
4 organizations.

5 (i) This section expires September 1, 2014.

6 SECTION 2. Chapter 301, Occupations Code, is amended by
7 adding Subchapter N to read as follows:

8 SUBCHAPTER N. CORRECTIVE ACTION PROCEEDING

9 Sec. 301.651. DEFINITION. In this subchapter, "corrective
10 action" means a fine or remedial education imposed under Section
11 301.652.

12 Sec. 301.652. IMPOSITION OF CORRECTIVE ACTION. (a) The
13 board may impose a corrective action on a person licensed or
14 regulated under this chapter who violates this chapter or a rule or
15 order adopted under this chapter. The corrective action:

16 (1) may be a fine, remedial education, or any
17 combination of a fine or remedial education;

18 (2) is not a disciplinary action under Subchapter J;
19 and

20 (3) is subject to disclosure only to the extent a
21 complaint is subject to disclosure under Section 301.466.

22 (b) The board by rule shall adopt guidelines for the types
23 of violations for which a corrective action may be imposed.

24 Sec. 301.653. REPORT AND NOTICE OF VIOLATION AND CORRECTIVE
25 ACTION. If the executive director determines that a person has
26 committed a violation for which a corrective action may be imposed
27 under the guidelines adopted under Section 301.652(b), the

1 executive director may give written notice of the determination and
2 recommendation for corrective action to the person subject to the
3 corrective action. The notice may be given by certified mail. The
4 notice must:

- 5 (1) include a brief summary of the alleged violation;
6 (2) state the recommended corrective action; and
7 (3) inform the person of the person's options in
8 responding to the notice.

9 Sec. 301.654. RESPONSE. Not later than the 20th day after
10 the date the person receives the notice under Section 301.653, the
11 person may:

- 12 (1) accept in writing the executive director's
13 determination and recommended corrective action; or
14 (2) reject the executive director's determination and
15 recommended corrective action.

16 Sec. 301.655. ACTION FOLLOWING RESPONSE. (a) If the
17 person accepts the executive director's determination and
18 satisfies the recommended corrective action, the case is closed.

19 (b) If the person does not accept the executive director's
20 determination and recommended corrective action as originally
21 proposed or as modified by the board or fails to respond in a timely
22 manner to the executive director's notice as provided by Section
23 301.654, the executive director shall:

- 24 (1) terminate proceedings under this subchapter; and
25 (2) dispose of the matter as a complaint under
26 Subchapter J.

27 Sec. 301.656. REPORT TO BOARD. The executive director

1 shall report periodically to the board on the corrective actions
2 imposed under this subchapter, including:

- 3 (1) the number of corrective actions imposed;
4 (2) the types of violations for which corrective
5 actions were imposed; and
6 (3) whether affected nurses accepted the corrective
7 actions.

8 Sec. 301.657. EFFECT ON ACCEPTANCE OF CORRECTIVE ACTION.

9 (a) Except to the extent provided by this section, a person's
10 acceptance of a corrective action under this subchapter does not
11 constitute an admission of a violation but does constitute a plea of
12 nolo contendere.

13 (b) The board may treat a person's acceptance of corrective
14 action as an admission of a violation if the board imposes a
15 sanction on the person for a subsequent violation of this chapter or
16 a rule or order adopted under this chapter.

17 SECTION 3. The changes in law made by this Act to Chapter
18 301, Occupations Code, apply to actions for violations under
19 Chapter 301 pending on the effective date of this Act or commenced
20 on or after the effective date of this Act.

21 SECTION 4. This Act takes effect September 1, 2009.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 1415 passed the Senate on April 30, 2009, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 1415 passed the House on May 14, 2009, by the following vote: Yeas 144, Nays 0, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor

Exhibit “B”

CHAPTER 213. PRACTICE AND PROCEDURE

§213.32. Corrective Action Proceedings and Schedule of Administrative Fines [Fine(s)].

(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; and

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

(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) [In disciplinary matters, the Board may assess a monetary penalty or fine in the circumstances and amounts as described.]

[(4)] A fine, [The following violations may be appropriate for disposition by fine,] with or without remedial education [educational] stipulations, may be imposed in a disciplinary matter for the following violations in the following amounts:

(A) - (C) (No change).

[(D) aiding, abetting or permitting a nurse to practice on a delinquent license:

(i) first occurrence: \$100 - \$500;

(ii) subsequent occurrence: \$200 - \$1,000;

(D)[(E)] failure to comply with continuing competency [CE] requirements:

(i) first occurrence: \$250 [\$100];

(ii) subsequent occurrence: \$500 [\$250];

(E)[(F)] failure to comply with mandatory reporting requirements:

(i) first occurrence: \$250 [\$100] - \$500;

(ii) subsequent occurrence: \$500 [\$200] - \$1,000;

(F)[(G)] failure to assure licensure/credentials of personnel for whom

the nurse is administratively responsible:

(i) first occurrence: \$250 [~~\$100~~] - \$500;

(ii) subsequent occurrence: \$500 [~~\$200~~] - \$1,000;

~~(G)~~~~(H)~~ 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 [~~\$200~~] - \$800;

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

~~(H)~~~~(I)~~ failure to report unauthorized practice:

(i) first occurrence: \$250 [~~\$100~~] - \$500;

(ii) subsequent occurrence: \$500 [~~\$200~~] - \$1,000;

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

(i) first occurrence: \$250 [~~\$100~~];

(ii) subsequent occurrence: \$300 [~~\$150~~];

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

(i) first occurrence: \$250 [~~\$100~~] - \$1,000;

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

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

~~(i) first occurrence: \$100;~~

~~(ii) subsequent occurrence: \$250;~~

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

~~(i) first occurrence: \$100;~~

~~(ii) subsequent occurrence: \$250];~~

(M)~~(N)~~ 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)~~(O)~~ 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 ~~[\$100]~~ - \$500;

(ii) subsequent occurrence: \$500 ~~[\$200]~~ - \$1,000.

(6)~~(2)~~ The following violations may be appropriate for disposition by fine in conjunction with one or more of the penalties/sanctions contained ~~[listed]~~ elsewhere ~~in the~~ Board's ~~[these]~~ rules:

(A) violations other than those listed in paragraphs (2) and (5) ~~[paragraph (1)(A) - (N)]~~ of this section:

(i) first occurrence: \$250 ~~[\$100]~~ - \$1,000;

(ii) subsequent occurrence: \$500~~[\$200]~~ - \$1,000; and

(B) a cluster of violations listed in paragraphs (2) and (5) ~~[(paragraph (1)(A) - (O)]~~ of this section: \$250 ~~[\$100]~~ - \$5,000.

~~[(3) Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty or fine.]~~

~~(7)[(4)]~~ The executive director is authorized to dispose of violations listed in paragraphs (2) and (5) ~~[paragraph (1)(A)-(O)]~~ of this section ~~[, by fine, or by a combination of fine and stipulations for education, which shall be effective]~~ without ratification by the Board. The executive director shall report such cases to the Board at its regular meetings.

CHAPTER 211. GENERAL PROVISIONS

§211.7. Executive Director.

(a) - (e) (No change).

(f) The Executive Director is authorized to accept the following orders on behalf of the Board and ratification by the Board is not necessary. The Executive Director will report summaries of dispositions to the Board at its regular meetings.

(1) Orders issued under §213.32(2) and (5) of this title (relating to Corrective Action Proceedings and Schedule of Administrative Fines) ~~[consisting of a fine and/or education. The following violations may be appropriate for disposition by fine with or without educational stipulations:~~

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

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

~~(C) practice on a delinquent license over four years;~~

~~(D) aiding, abetting or permitting a nurse to practice on a delinquent license;~~

~~(E) failure to comply with CE requirements;~~

~~(F) failure to comply with mandatory reporting requirements;~~

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

~~(H) failure to provide employers, potential employers or the Board with complete and accurate answers to specific questions regarding employment or background (e.g., presenting incomplete employment history);~~

~~(I) failure to report unauthorized practice;~~

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

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

~~(L) failure to file, or cause to be filed, complete, accurate and timely reports required by Board Order; and~~

~~(M) failure to make complete and timely compliance with the terms of any stipulation contained in a Board Order].~~

(2) (No change).

(g) (No change).