

### **Consideration of Proposed Repeal of the Board's Minor Criminal History Policy**

**Background:** The Board originally adopted its Minor Criminal History Policy (Policy) in 2008 and has amended it several times in the intervening years. The Policy was originally intended to allow Staff to conduct an initial review of minor single incidents or minor criminal misdemeanor offenses. Further, the Policy allowed Staff to close (without prejudice) matters where an individual had a history of minor criminal behavior that met the Policy's criteria. Historically, the Policy was used in conjunction with the Board's Guidelines for Criminal Conduct (Guidelines) and its criminal history rule (Rule 213.28).

During the 85<sup>th</sup> Legislative Session, the Board underwent review by the Texas Sunset Advisory Commission (Commission). As part of that review, the Commission directed the Board to review its Guidelines to limit disciplinary actions to crimes directly related to the practice of nursing and to ensure that the Guidelines did not expand beyond crimes that affect actual nursing practice. Pursuant to the Commission's directive, the Board proposed significant changes to Board Rule 213.28, including changes to its Guidelines, in December 2017. Those proposed amendments will become effective in February 2018.

The Board's Policy is now moot due to new Board Rule 213.28 and the Board's Guidelines. New Board Rule 213.28 (including the Board's Guidelines) sets forth the crimes that will be considered by the Board for investigation and potential action. In general, if a criminal offense is not listed in the Guidelines, is not classified as a felony, and does not contain substantially similar elements to an offense listed in the Guidelines, it will not be considered by the Board. Offenses that are not listed in the Guidelines either fall outside the Board's jurisdiction or are too minor in nature to warrant Board review. Common examples of these types of offenses include: Assault (misdemeanor), Driving While Intoxicated (misdemeanor), Criminal Mischief (misdemeanor), Possession of Controlled Substances (misdemeanor), and Class C misdemeanors. The offenses listed in the Board's Policy have been reviewed and addressed as part of the Board's comprehensive proposal of new Board Rule 213.28 and the new Guidelines. As the Board's new rule and Guidelines will become effective in February 2018, Staff is therefore recommending the Board repeal the Policy. A copy of the Policy is attached as Attachment "A" for reference.

**Board Action:** Move to repeal the Board's Minor Criminal History Policy.



## Policy on Minor Criminal History Review and Staff Approval of Applicants and Petitioners with Minor Criminal History

**Purpose:** To fulfill its mission of public protection, the Board believes that a single minor criminal incident, or minor criminal behavior, (including by applicants and petitioners for orders of eligibility), should be investigated when relevant, but should ordinarily not result in disciplinary action.

This policy allows Staff to conduct an initial graduated review process for a minor single incident or minor criminal misdemeanor offenses. This policy allows Staff to close without prejudice matters wherein an individual has a history of minor criminal behavior that meets the below criteria for no action. If the minor criminal history does not meet the initial review criteria for no action, then Staff may also evaluate the minor criminal history based on the age of the misconduct.

### A. Initial Minor Criminal History Review

Single incident or minor criminal behavior resulting in conviction or deferred adjudication that may be closed without prejudice includes, but is not limited to:

1. One misdemeanor DWI/DUI (not on probation)
2. One misdemeanor offense of Possession of Marijuana
3. Up to two misdemeanor Theft by Check less than \$750
4. One misdemeanor Domestic/Family Violence
5. One misdemeanor Theft less than \$750
6. One misdemeanor Criminal Mischief less than \$750
7. Misdemeanor Graffiti
8. One misdemeanor Criminal Trespass
9. One misdemeanor Disorderly Conduct
10. Up to two misdemeanor Public Intoxication
11. Up to two misdemeanor Pan Handling
12. Misdemeanor "loud noise" violations
13. One misdemeanor Reckless Driving
14. Misdemeanor Minor in Possession of Tobacco
15. One misdemeanor Selling Alcohol to a Minor
16. Failure to Appear
17. Vehicular Molestation (slashing tires)
18. An arrest for a misdemeanor (must be a misdemeanor included in this list) that has been dismissed completely or where prosecution has been denied

19. Up to three (3) prior misdemeanors (each misdemeanor must be a misdemeanor included in this list) and the most recent misdemeanor is at least ten (10) years old

Each discovered incident of criminal behavior will not be closed until the individual has provided a copy of the underlying court documents, or a reasonable explanation as to why the documents are not available. The individual must also provide a written explanation regarding each criminal charge, along with any other material to verify the minor nature of the conduct or the lack of nexus to the nursing practice.

Before a matter is closed without further investigation or action, Staff will review the documents, information and individual's written explanation. After a cumulative review, the matter will not be closed unless it is established that:

1. There appears to be no material omissions or misrepresentations;
2. The incident is isolated or minor;
3. There is no recency of conduct or other evidence of a failure to rehabilitate; and
4. There is no reasonable basis to conclude the behavior will affect the individual's ability to safely practice nursing.

#### B. Age Based Minor Criminal History Review

The Board has determined that certain misdemeanor offenses have little impact on the ability of an individual to safely practice nursing and pose little risk of harm to the public. In such cases, the Board believes it is generally appropriate to close the matter without action against the individual.

#### Policy Regarding Misdemeanor Offenses:

##### **The following applies to Class B and C Misdemeanor Offenses:**

1. The Board will not take disciplinary action against an applicant or petitioner for a Class B or C misdemeanor offense when a judicial order of conviction, or deferred adjudication, was entered more than five (5) years before the individual applies for initial licensure.
2. The Board will not take disciplinary action against a licensee for a Class B or C misdemeanor offense when a judicial order of conviction, or deferred adjudication, was entered more than five (5) years before the Board learns of the conviction or deferred adjudication.

##### **The following applies to Class A Misdemeanor Offenses:**

1. The Board will not take disciplinary action against an applicant or petitioner for a Class A misdemeanor offense when a judicial order of conviction, or deferred adjudication, was entered more than ten (10) years before the individual applies for initial licensure.
2. The Board will not take disciplinary action against a licensee for a Class A misdemeanor offense when a judicial order of conviction, or deferred adjudication, was entered more than ten (10) years before the Board learns of the conviction or deferred adjudication.

### C. Exceptions

The following EXCEPTIONS apply to the above provisions regarding Class A, B, or C Misdemeanor Offenses:

1. The Board may take disciplinary action against an applicant, petitioner or licensee for a Class A, B, or C misdemeanor offense, regardless of when the judicial order of conviction, or deferred adjudication, of the misdemeanor was entered, if the misdemeanor is part of a pattern of conduct.
2. The Board may take disciplinary action against an applicant, petitioner or licensee for a Class A misdemeanor offense identified in the Board's rules, regardless of when the conviction or deferred adjudication for the misdemeanor offense occurred.

### D. Non-disclosure Policy

The Board has the authority to take action against an individual for the non-disclosure of any criminal offense in violation of the Occupations Code §301.452(b)(2), regardless of when the offense occurred. The Board has determined, however, that it will not take action against an individual for non-disclosure of a criminal offense if the non-disclosure occurred more than five years ago and the individual would not be subject to discipline for the criminal offense itself under this policy. This policy, however, does not prevent the Board from taking disciplinary action against an applicant, petitioner, or licensee for the non-disclosure of a criminal offense in violation of the Occupations Code §301.452(b)(2), regardless of when the offense occurred, if the non-disclosure is associated with other violations or evidences a pattern of conduct or repetitive, fraudulent, or intentional behavior.

### E. Providing Documentation

An individual will not be required to provide documentation relating to a misdemeanor offense unless the Board requests such documentation for good cause.

### **\*\*Note:**

#### **House Bill (HB) 798**

Pursuant to HB 798 (effective 9/1/13), a licensing authority may not suspend, revoke, or deny licensure to an individual who has been convicted only of an offense punishable as a Class C misdemeanor.

The provisions of this policy shall be applied consistently with this statutory requirement.

#### **HB 1659**

Pursuant to HB 1659 (effective 9/1/13), a licensing authority may not suspend, revoke, or deny licensure to an individual who has received a deferred adjudication unless the individual is charged with:

- (1) an offense under Article 62.001(5) of the Code of Criminal Procedure (requiring registration as a sex offender); or
- (2) another offense for which the individual has not completed the period of supervision or the individual completed the period of supervision less than five years before the date the individual applied for licensure;  
or

- (3) another offense for which conviction of the offense would make the person ineligible for licensure by operation of law; and
- (4) the agency determines that the individual may pose a continued threat to public safety or the employment of the individual in the licensed occupation would create a situation in which the individual would have an opportunity to repeat the prohibited conduct.

The provisions of this policy shall be applied consistently with these statutory requirements.