

## **BOARD OF REGISTERED NURSING INITIAL STATEMENT OF REASONS**

**Hearing Date:** September 9, 2013

**Subject Matter of Proposed Regulations:** Enforcement

**Sections Affected:** Amend Sections: 1403 and 1444.5  
Adopt Section: 1441

**Introduction:** The Board's highest priority is consumer protection. The primary methods by which the Board achieves this goal are: issuing registered nurse licenses to eligible applicants; investigating complaints against registered nurses and disciplining licensees for violation of the Nursing Practice Act (NPA); monitoring registered nurses whose licenses have been placed on probation; and managing a Diversion Program for registered nurses, whose practice may be impaired due to chemical dependency or mental illness. The Board is proposing the regulatory changes described below in order to enhance its disciplinary function and strengthen its Enforcement Program to better achieve its public protection mandate. The proposed changes are the result of extensive reviews of the Board's Enforcement Program, including services rendered by the Department of Consumer Affairs' (DCA) Division of Investigation (DOI) and the Attorney General's (AG) Office. The proposed regulatory action will facilitate achievement of the Board and DCA's goal to improve discipline case processing timeframes so that case resolution is completed on average in 12 to 18 months.

### **Specific Changes and Factual Basis/Rationale:**

#### ***Amend Section 1403-Delegation of Certain Functions***

The regulatory proposal would delegate to the Board's Executive Officer (EO) the authority to approve settlement agreements for revocation, surrender, or interim suspension of a registered nurse license. Such approval must be reported to the Board at regularly scheduled Board meetings.

Under existing law, the Board has delegated to the EO specific duties relative to disciplinary matters including receiving and filing accusations and notices of defense, and issuing subpoenas. The Board has retained for itself the authority to render decisions on proposed decisions prepared by administrative law judges (ALJ) and settlement agreements prepared by deputy attorney generals (DAG). The ALJ's proposed decision is issued after the registered nurse has had an opportunity to dispute the charges at an administrative hearing. The registered nurse and DAG may negotiate a settlement agreement to resolve the case prior to the hearing. In a settlement agreement, the registered nurse admits specific charges and agrees to the proposed disciplinary action. Board members must vote to approve proposed decisions and settlement agreements. The regulatory proposal would enable the Board's EO to approve settlement agreements for license revocation, interim suspension, or voluntary surrender of the registered nurse license. Because the registered nurse willingly and voluntarily admitted to the charges and agreed to a proposed disciplinary action that is among the severest the Board can impose, there is little discretion for the Board to exercise in these cases. Staff is unaware of any case in which the Board has not adopted such a proposed settlement agreement.

The proposed amendment also requires that settlement agreements approved by the EO be reported to the Board at regularly scheduled Board meeting, thus assuring that the Board is fully cognizant of all such settlements.

Benefit: Delegating to the Board's EO the authority to approve settlement agreements, if the agreed upon action is license revocation, surrender or interim suspension, will shorten the timeframe for these cases, thus adding to consumer protection by allowing orders to become effective in a more timely manner.

***Adopt Section 1441-Unprofessional Conduct***

B&P Code Sections 2761(a) and 2762 define acts that constitute unprofessional conduct. This regulatory change specifies in regulations additional acts that constitute unprofessional conduct. The specific acts and rationale for defining the act as unprofessional conduct are as follows:

1. Failure to provide to the Board lawfully requested documents under the registered nurse's control, within the specified timeframe.

Investigators from the DOI, Board investigators, and other Board staff frequently encounter difficulty in obtaining pertinent and legally requested documents and records. The Board recognizes that registered nurses may not be in possession of or have control over the requested items. However, when the registered nurse does, it is necessary and appropriate that the Board be provided the requested items so that the investigation can be conducted in a timely manner.

Benefit: Defining failure to provide the records as unprofessional conduct and grounds for Board disciplinary action will facilitate and expedite obtaining records, and will facilitate resolution of Board cases.

2. Failure to cooperate and participate in any Board investigation, as long as such action does not infringe upon the registered nurse's constitutional or statutory privileges.

As with failure to produce documents, the failure to participate or cooperate in the investigation impedes and delays the investigative process and erodes the Board's public protection mandate. The proposal would not deprive the registered nurse of any constitutionally or statutorily guaranteed privileges or rights.

Benefit: Mandating that the registered nurse cooperate and participate in any Board investigation will expedite the investigative process and shorten the complaint resolution timeframe.

3. Failure of a licensee to notify the Board within the specified timeframe of conviction of a felony or misdemeanor or disciplinary action by another licensing entity.

As part of the licensing process, all applicants for registered nurse licensure are fingerprinted for purposes of conducting criminal history background checks through the California Department of Justice (DOJ) and Federal Bureau of Investigation (FBI). In most cases, the Board receives subsequent arrest and conviction reports from DOJ; the Board does not receive these reports from the FBI, but proposes to in the future. The Board also requires that registered nurses report healthcare professional license discipline by any governmental agency and any convictions, with specified exceptions, at the time of biennial license renewal. Furthermore, the Board obtains information about disciplinary action taken against a licensee's registered nurse license in another state. Problems with the existing system include: (1) Board does not always receive

subsequent arrests and conviction records; (2) information from DOJ is not always accurate (a problem which the Board is working to resolve); and (3) the self-reporting requirement is every two years, resulting in a potential significant delay in Board awareness of the arrest, conviction, or license discipline.

Benefit: Requiring the registered nurse to report the required information will provide the Board with an additional and timelier source for information.

5. Failure to comply with a court ordered subpoena to release records.

Failure or refusal to comply with a court order mandating the release of records to the Board has an adverse impact upon the Board's ability to conduct investigations in a timely manner. Delays in the investigative process place consumers at risk.

Benefit: As with the other proposed changes, this change will enable the Board to reduce the delay in completion of the investigative process, and will result in better consumer protection.

#### ***Amend Section 1444.5-Disciplinary Guidelines***

This regulatory change would *require* an ALJ to issue a proposed decision revoking the registered nurse license, *without a stay order*, if the licensee is found to have engaged in any act of sexual contact, as defined in B&P Code Section 729(c), with a patient, or has committed an act or been convicted of a sex offense, as defined in Education Code Section 44010.

Existing law requires that an ALJ rendering a proposed decision on Board disciplinary matters take into consideration the Board's "Recommended Guidelines for Disciplinary Orders and Conditions of Probation" (Guidelines). The Guidelines specify revocation of license as the disciplinary action for convictions of rape or lewd conduct and for sexual abuse, misconduct, or relations with a patient; however, the ALJ, at his/her discretion, may recommend in the proposed decision that the revocation be stayed. The Board makes the final decision on the disciplinary action and may non-adopt a proposed decision and impose the discipline it determines is appropriate. The Board's non-adoption of a proposed decision lengthens the process, increases the cost, and potentially places consumers at risk, while the matter is being further adjudicated.

Because of the seriousness of sex offenses and sexual misconduct, and the potential threat to consumers that sex offenders pose, the Board has determined that revocation of the registered nurse license is the appropriate disciplinary action in any disciplinary matter where there is a finding that the licensee engaged in sexual misconduct with a patient or was convicted of a sex offense. The regulatory proposal ensures that ALJs render proposed decisions consistent with the Board's determination in these matters. The proposed regulation would utilize the same definition of sex offense that is used in the Education Code to apply to teachers.

Benefit: The proposed amendment will expedite disposition of cases where there is a finding of fact that the registered nurse has engaged in specified sexual misconduct.

#### **Underlying Data:**

Technical, theoretical or empirical studies or reports relied upon:

- Enforcement Process Report - August 12, 2009
- BRN Enforcement Improvement Proposal - September 2009
- Department of Consumer Affairs "Consumer Protection Initiative – January 21, 2010"

**Business Impact:**

This regulation will not have a significant adverse economic impact on businesses; it only impacts registered nurses.

**Economic Impact Assessment:**

This regulatory proposal affects individual registered nurses who may be or are the subject of a Board complaint. The proposed regulations will expedite the disciplinary process, thus enhancing consumer protection. The proposal will not create or eliminate jobs within the State of California; will not create or eliminate existing businesses within the state; will not affect worker safety; and does not affect the state's environment.

**Specific Technologies or Equipment:**

This regulation does not mandate the use of specific technologies or equipment.

**Consideration of Alternatives:**

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Not adopt the regulations. This alternative was rejected because the changes proposed by this regulatory action are based on months of internal and external review of the Board's enforcement processes and procedures and are necessary to improve the Board's enforcement operations. The regulatory proposal will assist in achieving the Board and Department goal of reducing the average enforcement completion timeline from the current 36 months to between 12 and 18 months.
2. Adopt the regulation. The Board determined that this alternative is the most feasible because the proposed regulatory changes would enhance the Board's ability to protect the public.