

CHAPTER 213. PRACTICE AND PROCEDURE
22 TAC §213.32

1. INTRODUCTION. The Texas Board of Nursing (Board) adopts, on an emergency basis, amendments and new paragraphs to §213.32, concerning *Schedule of Administrative Fine(s)*, to take effect on September 1, 2009. The Board is authorized by the Government Code §2001.034(a) to adopt an emergency rule without prior notice or hearing if a requirement of state or federal law requires the adoption of a rule on fewer than 30 days' notice. An emergency rule adopted under the Government Code §2001.034 may be effective for not longer than 120 days and may be renewed once for not longer than 60 days.

The 81st Texas Legislature, Regular Session, enacted Senate Bill (SB) 1415, which adds new Subchapter N to the Occupations Code Chapter 301. SB 1415 authorizes the Board to impose a corrective action, which is a non-disciplinary action consisting of a fine, remedial education, or any combination of a fine or remedial education, on an individual who violates a provision of Chapter 301 or a rule or order adopted under Chapter 301. SB 1415 requires the Board to adopt, by rule, guidelines for the types of violations for which a corrective action may be imposed under new Subchapter N. SB 1415 becomes effective on September 1, 2009. SB 1415 does not identify the specific types of violations for which a corrective action may be imposed by the Board or the specific procedures and/or requirements that must be met by an individual in order to be eligible to receive a corrective action. As a result, the provisions of SB 1415 cannot be fully implemented by the Board without the adoption of such guidelines. The adoption of the emergency rules permits the Board to comply with the effective date of SB 1415 so that the requirements of SB 1415

may be fully implemented on September 1, 2009.

The adopted amendments and new paragraphs identify the six specific violations for which a corrective action may be imposed by the Board. Further, the adopted amendments and new paragraphs prohibit an individual from being eligible to receive a corrective action (i) if the individual has committed one of the specified violations more than one time or (ii) if the individual has committed more than one of the specified violations. The adopted amendments and new paragraphs establish a \$500 fine that may be imposed as part of a corrective action. The adopted amendments and new paragraphs also clarify that (i) the Executive Director of the Board has the sole discretion to offer an individual a corrective action and (ii) an individual may not receive a corrective action as the result of a contested case proceeding conducted under the Government Code Chapter 2001. Further, the adopted amendments and new paragraphs distinguish a corrective action, which is a non-disciplinary action comprised of a fine, remedial education, or a combination of a fine and remedial education, from a disciplinary action under the Occupations Code Chapter 301 Subchapter J, which may also be comprised of a fine and/or remedial education. The adopted amendments and new paragraphs also authorize the Executive Director to offer and accept a corrective action without ratification by the Board and require the Executive Director to report such cases to the Board at its regular meetings. Finally, the adopted amendments appropriately re-designate the remaining paragraphs of §213.32.

2. STATUTORY AUTHORITY.

The amendments and new paragraphs are adopted under the Occupations Code §301.453(a), §301.4531, §301.466(a) and (b), §301.501, §301.502, §301.651 - §301.657,

and §301.151. The Occupations Code §301.453(a) provides that, if the Board determines that a person has committed an act listed in §301.452(b), the Board shall enter an order imposing one or more of the following: (1) denial of the person's application for a license, license renewal, or temporary permit; (2) issuance of a written warning; (3) administration of a public reprimand; (4) limitation or restriction of the person's license, including limiting to or excluding from the person's practice one or more specified activities of nursing or stipulating periodic board review; (5) suspension of the person's license for a period not to exceed five years; (6) revocation of the person's license; or (7) assessment of a fine. The Occupations Code §301.4531(a) states that the Board by rule shall adopt a schedule of the disciplinary sanctions that the Board may impose under Chapter 301. In adopting the schedule of sanctions, the Board shall ensure that the severity of the sanction imposed is appropriate to the type of violation or conduct that is the basis for disciplinary action. The Occupations Code §301.4531(b) states, in determining the appropriate disciplinary action, including the amount of any administrative penalty to assess, the Board shall consider: (i) whether the person is being disciplined for multiple violations of either Chapter 301 or a rule or order adopted under Chapter 301 or has previously been the subject of disciplinary action by the Board and has previously complied with Board rules and Chapter 301; (ii) the seriousness of the violation; (iii) the threat to public safety; and (iv) any mitigating factors. The Occupations Code §301.4531(c) provides that, in the case of a person described by §301.4531(b)(1)(A), the Board shall consider taking a more severe disciplinary action, including revocation of the person's license, than the disciplinary action that would be taken for a single violation; and in the case of a person described by §301.4531(b)(1)(B), the Board shall consider taking a more severe disciplinary action,

including revocation of the person's license, than the disciplinary action that would be taken for a person who has not previously been the subject of disciplinary action by the Board. The Occupations Code §301.466(a) provides that a complaint and investigation concerning a nurse under Subchapter J and all information and material compiled by the Board in connection with the complaint and investigation are confidential and not subject to disclosure under the Government Chapter 552 and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to anyone other than the Board or a Board employee or agent involved in license holder discipline. The Occupations Code §301.466(b) provides that, notwithstanding §301.466(a), information regarding a complaint and an investigation may be disclosed to: (i) a person involved with the Board in a disciplinary action against the nurse; (ii) a nursing licensing or disciplinary Board in another jurisdiction; (iii) a peer assistance program approved by the Board under the Health and Safety Code Chapter 467; (iv) a law enforcement agency; or (v) a person engaged in bona fide research, if all information identifying a specific individual has been deleted. The Occupations Code §301.501 provides that the Board may impose an administrative penalty on a person licensed or regulated under Chapter 301 who violates Chapter 301 or a rule or order adopted under Chapter 301. The Occupations Code §301.502(a) states that the amount of the administrative penalty may not exceed \$5,000 for each violation. Further, each day a violation continues or occurs is a separate violation for purposes of imposing a penalty. The Occupations Code §301.502(b) states that the amount of the penalty shall be based on: (i) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts and the hazard or potential hazard created to the health, safety, or economic welfare of the public; (ii) the economic harm to property or the

environment caused by the violation; (iii) the history of previous violations; (iv) the amount necessary to deter a future violation; (v) efforts made to correct the violation; and (vi) any other matter that justice may require. The Occupations Code §301.651 provides that "corrective action" means a fine or remedial education imposed under §301.652. The Occupations Code §301.652(a) states that the Board may impose a corrective action on a person licensed or regulated under Chapter 301 who violates Chapter 301 or a rule or order adopted under Chapter 301. The corrective action: (i) may be a fine, remedial education, or any combination of a fine or remedial education; (ii) is not a disciplinary action under Subchapter J; and (iii) is subject to disclosure only to the extent a complaint is subject to disclosure under §301.466. The Occupations Code §301.652(b) authorizes the Board to adopt guidelines for the types of violations for which a corrective action may be imposed. The Occupations Code §301.653 states that, if the Executive Director determines that a person has committed a violation for which a corrective action may be imposed under the guidelines adopted under §301.652(b), the Executive Director may give written notice of the determination and recommendation for corrective action to the person subject to the corrective action. The notice may be given by certified mail. The notice must: (i) include a brief summary of the alleged violation; (ii) state the recommended corrective action; and (iii) inform the person of the person's options in responding to the notice. The Occupations Code §301.654 states that, not later than the 20th day after the date the person receives the notice under § 301.653, the person may accept in writing the Executive Director's determination and recommended corrective action or reject the Executive Director's determination and recommended corrective action. The Occupations Code §301.655(a) states that, if the person accepts the Executive Director's determination

and satisfies the recommended corrective action, the case is closed. The Occupations Code §301.655(b) states that, if the person does not accept the Executive Director's determination and recommended corrective action as originally proposed or as modified by the Board or fails to respond in a timely manner to the Executive Director's notice as provided by §301.654, the Executive Director shall terminate proceedings under Subchapter N and dispose of the matter as a complaint under Subchapter J. The Occupations Code §301.656 states that the Executive Director shall report periodically to the Board on the corrective actions imposed under Subchapter N, including: (i) the number of corrective actions imposed; (ii) the types of violations for which corrective actions were imposed; and (iii) whether affected nurses accepted the corrective actions. The Occupations Code §301.657(a) states that, except to the extent provided by §301.657, a person's acceptance of a corrective action under Subchapter N does not constitute an admission of a violation but does constitute a plea of nolo contendere. The Occupations Code §301.657(b) provides that the Board may treat a person's acceptance of corrective action as an admission of a violation if the Board imposes a sanction on the person for a subsequent violation of Chapter 301 or a rule or order adopted under Chapter 301. The Occupations Code §301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (1) perform its duties and conduct proceedings before the Board; (2) regulate the practice of professional nursing and vocational nursing; (3) establish standards of professional conduct for license holders Chapter 301; and (4) determine whether an act constitutes the practice of professional nursing or vocational nursing.

3. TEXT.

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

A corrective action may be imposed by the Board as specified in the following circumstances.

(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.

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

(5)[(1)] 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) - (O) (No change).

(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) - (ii) (No change).

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

4. CERTIFICATION. This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's authority to adopt.