

**PROPOSED ADOPTION OF AMENDMENTS TO SECTION 213.30,
DECLARATORY ORDER OF ELIGIBILITY FOR LICENSURE, AND CONSIDERATION OF COMMENTS AND BOARD
RESPONSES TO COMMENTS**

Summary of Request: Consider final adoption of proposed amendments to Rule 213.30(h), relating to the Declaratory Order of Eligibility for License process. The Rule amendment clarifies the current practice wherein an applicant denied licensure by final order of the Board is not eligible to file another petition or application for licensure until after the expiration of three years from the date of the Board's order denying the preceding petition for licensure.

Background: At the October 20-21, 2005 Board Meeting, the Board proposed amendment to 22 Texas Administrative Code, Section 213.30 regarding the Declaratory Order for Eligibility for Licensure (published in the November 11, 2005 issue of the *Texas Register*.) The amendment specifically adds the new subsection 213.30(h) and relates to decisions that are made to DENY eligibility for licensure in Texas.

(h) The Board's order must set out each basis for potential ineligibility and the Board's determination as to eligibility. In the absence of new evidence known to but not disclosed by the petitioner or not reasonably available to the Board at the time the order is issued, the Board's ruling on the petition determines the person's eligibility with respect to the grounds for potential ineligibility set out in the written notice or order. An individual whose petition is denied by final order after an appeal and formal hearing at SOAH may not file another petition or application for licensure until after the expiration of three years from the date of the Board's order denying the petition or application for licensure. If the applicant or petitioner does not request a formal hearing at SOAH regarding the determination to deny licensure eligibility made by the E & D Committee or the executive director, the applicant or petitioner may re-petition in accordance with this rule and Section 301.257, Texas Occupations Code, after the expiration of one year following the date of the notification of the Committee or executive directors of the proposal to deny eligibility.

Staff recommended proposal of the rule based on confusion of candidates who were proposed to be denied by the Executive Director or the E & D Committee. A previously denied candidate for licensure may re-petition after one year from the date of the Executive Director's denial of eligibility if the person has not requested a hearing at SOAH. Many applicants who the executive director or the E & D Committee have proposed to be denied have believed they should appeal to SOAH or otherwise wait 3 years before seeking to re-petition. These petitioners are wanting to address or correct the underlying basis for the denial and do not want to wait three years to prove their character. The proposed rule clarifies the meaning of 213.27(f).

Negative Comment Received: There was one letter comment received in response to the proposed rule and was submitted by the Texas Nurses Association. (See attachment A.) The letter comment expressed concern that individuals who are proposed to be denied by the Executive Director or the Eligibility Committee and request a hearing at SOAH will be penalized with a waiting period of three years, while those individuals who withdraw their appeal will be allowed to repetition in one year. TNA stated that 213.30(h) is inconsistent with the Legislative intent of Texas Occupation Code, Section 301.257(e) which states that "[i]f the board proposes to find that the petitioner is ineligible for a license, the petitioner is entitled to a hearing before the State Office of Administrative Hearings."

Staff disagrees with state that the proposed amendment is inconsistent with Section 301.257. Section 301.257(e) only speaks to an applicant's rights when there is a *proposed* denial of licensure. The applicant is clearly allowed to a hearing as required by Section 301.257(e). However, Section 301.257(e) does not

address an applicant's rights to repetition after a formal hearing before SOAH that results in a Final Board Order. In fact, Section 301.257(f) provides that "in the absence of new evidence known but not disclosed by the petitioner or not reasonably available to the Board at the time the order is issued, the Board's ruling on the petition determines the person's eligibility with respect to the grounds for potential ineligibility set out in the written notice and order." Proposed rule 213.30(h) would allow the petitioner to repetition with the concomitant due process rights after three years and is a reasonable policy in light of the Board's express and implied authority. Proposed rule 213.30(h) is consistent with the Board's current rule 213.27(f) which expresses the exact policy and has never been challenged.

TNA further states that the proposed rule serves no public purpose other than to discourage individuals from exercising their due process right. TNA states that exercising a right to SOAH review is not inconsistent with wanting to correct the underlying basis for the proposed denial. Staff disagrees with TNA's comments. An individual is still entitled to a hearing if he disagrees on the proposed denial of eligibility and believes that he does not have a ground for ineligibility. SOAH review is statutorily authorized and not prevented by the proposed rule. The rule would require a waiting period only after a final order confirming on what ground of ineligibility exists. The petitioner is never prevented from seeking a hearing as authorized by 301.257(e). In fact, the proposed rule actually permits re-petitioning after three years of an adjudication of ineligibility.

Lastly, TNA states that the BNE cannot justify imposing a different requirement based on whether an individual elected to exercise a right to a hearing. Staff disagrees with this comment because the Board's enabling legislation expressly differentiates between a proposal to find an applicant ineligible (301.257(e)) and an adjudication that an applicant is ineligible (301.257(f)). The proposed rule is a reasonable policy based on the Board's statute.

Pros and Cons:

Pros: The rule amendment may clarify the Board's current policy and reduce unnecessary requests for hearings at SOAH

Cons: Petitioners may gain a false impression that their eligibility issues improve after a one year waiting period.

Staff's Recommendation:

Move to adopt Rule 213.30(h) as published in the *Texas Register*. Staff is authorized to publish the summary and response to comments as indicated in Attachment B.



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DELIVERED VIA:EMAIL TO kathy.thomas@bne.state.tx.us
AND COURIER AS ADDRESSED.

December 8, 2005

Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
333 Guadalupe 3-460
Austin, Texas 78701

Re: Proposed Amendment to Rule 213.30 as published at 30 Texas Register 7349 (11/11/05)

Dear Ms. Thomas:

TNA opposes proposed Subsection (h) of Rule 213.30 as published at 30 TexReg 7349 (11/11/05) because TNA believes it imposes an unjustified burden on individuals' exercising their right to a hearing granted by Sec. 301.257(e) of the Nursing Practice Act.

Proposed Subsec. (h) requires individuals whose petitions for declaratory order for licensure eligibility are denied and who elect to request a hearing before the State Office of Administrative Hearings ("SOAH") to wait three years before re-petitioning but requires individuals not requesting a SOAH hearing to wait only one year. Section 301.257 of the Nursing Practice Act governs declaratory orders for licensure eligibility and Subsec. (e) explicitly grants individuals a right to a SOAH hearing.

(e) . . . If the board proposes to find the petitioner is ineligible for a license, the petitioner is entitled to a hearing before the State Office of Administrative Hearings

To the extent proposed Subsec. (h) penalizes individuals who exercise the right to a hearing granted by Subsec. 301.257(e), it would appear inconsistent with the Legislature's intent in enacting 301.257(e).

In its preamble to the proposed rule, the BNE states:

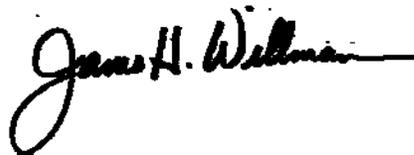
These petitioners are wanting to address or correct the underlying basis for the denial and do not want to wait three years to prove their character.

But addressing or correcting the underlying basis for the denial is as applicable to individuals who request a SOAH hearing as those who don't. An individual's exercising his or her right to a hearing is not inconsistent with wanting to correct the underlying basis for the denial. If an individual that requests a hearing corrects the underlying basis for denial, she or he should be as much entitled to re-petition as an individual that elects not to exercise that right. What is the public purpose served by requiring individuals that request a hearing to wait three years but others only one? How is the public better protected?¹ It appears the only purpose is to discourage individuals from exercising a right granted by the Legislature.

TNA believes the critical question is whether there has been a change in circumstances relevant to issues raised by the individual's petition. If so, the individual's ability to re-petition should not be delayed solely because he or she requested a SOAH hearing. TNA assumes individuals would not re-petition unless there is (or at least the individual perceives) some change in their circumstances that would justify a different result. To expect a different result with no change in circumstances is foolhardy at best.

TNA is not suggesting the BNE cannot justify requiring individuals a) wait a reasonable period of time before being able to re-petition or b) meet some condition precedent such as showing a change in circumstances. What TNA is suggesting is that the BNE cannot justify imposing different requirements based on whether an individual elected to exercise the right to a hearing explicitly granted by the Legislature in Subsec. 301.257(e).

Respectfully submitted,

A handwritten signature in black ink that reads "James H. Willmann". The signature is written in a cursive style with a long horizontal line extending to the right.

James H. Willmann, JD
General Counsel and Director Governmental Affairs

¹ TNA would suggest that the public includes not only patients and clients but also nurses and that protecting due process rights of nurses is part of the BNE's responsibility of protecting the public.

Attachment B

Proposed Summary of Comments and Responses to Comments on Proposed Rule 213.30(h)

Summary and Responses:

One letter comment was received in response to the proposed rule and was submitted by the Texas Nurses Association. See attachment A. The letter comment expressed concern that individuals who are proposed to be denied by the Executive Director or the Eligibility Committee and request a hearing at SOAH will be penalized with a waiting period of three years, while those individuals who withdraw their appeal will be allowed to re-petition in one year. TNA stated that 213.30(h) is inconsistent with the Legislative intent of Texas Occupation Code, Section 301.257(e) which states that “[i]f the board proposes to find the petitioner is ineligible for license, the petitioner is entitled to a hearing before the State Office of Administrative Hearings.”

The Board disagrees that the proposed rule is inconsistent with Section 301.257. Section 301.257(e) only speaks to an applicant’s rights when there is a *proposed* denial of licensure. The applicant is clearly allowed to a hearing as required by Section 301.257(e). However, Section 301.257(e) does not address an applicant’s rights to re-petition after a formal hearing before SOAH that results in a Final Board Order of denial. In fact, Section 301.257(f) provides that “in the absence of new evidence known but not disclosed by the petitioner or not reasonably available to the Board at the time the order is issued, the Board’s ruling on the petition determines the person’s eligibility with respect to the grounds for potential ineligibility set out in the written notice and order.” Proposed rule 213.30(h) would allow an individual to re-petition with the concomitant due process rights after three years. Proposed rule 213.30(h) is consistent with the Board’s current rule 213.27(f) which expresses the exact policy and has never been challenged. These rules establish a reasonable policy in light of the Board’s express and implied authority.

TNA further states that the proposed rule serves no public purpose other than to discourage individuals from exercising their due process right. TNA states that exercising a right to SOAH review is not inconsistent with wanting to correct the underlying basis for the proposed denial. The Board disagrees with TNA’s comments. An individual remains entitled to a hearing if he disagrees with the proposed denial of eligibility and believe that he does not have a ground for ineligibility. The rule would require a waiting period only after a final order confirming the ground ineligibility is made. The petitioner is never prevented from seeking a hearing as authorized by Section 301.257(e). In fact, the proposed rule permits re-petitioning after three years of an adjudication of ineligibility.

Lastly, TNA states that the BNE cannot justify imposing a different requirement based on whether an individual elected to exercise a right to a hearing. The Board disagrees with this comment because the Board’s enabling legislation expressly differentiates between a proposal to find an applicant ineligible (301.257(e)) and an adjudication that an applicant is ineligible (301.257(f)). The proposed rule is a reasonable policy based on the Board’s enabling legislation.