

Consideration of Adoption of Proposed Amendments to 22 Tex. Admin. Code §213.23, Related to *Decision of the Board*, Written Comments Received, and Board Responses to Comments

Summary of Request: Consider final adoption of proposed amendments to 22 Tex. Admin. Code §213.23, related to *Decision of the Board*. Proposed amendments to §213.23 were approved by the Board at its July 23-24, 2009, meeting for submission to the *Texas Register* for public comment. The proposed amendments were published in the *Texas Register* on August 28, 2009, and the comment period ended on September 28, 2009. The Board received three written comments. A copy of the written comments received are attached as Attachment "A". The proposed amendments to §213.23 implement the Board's policy that a Respondent be required to submit written exceptions and briefs to the Board before being permitted to make an oral presentation to the Board regarding a proposal for decision.

Comments Received: A summary of the written comments received is attached as Attachment "B", along with Staff's response to those comments.

Staff's Recommendation: Move to adopt the amendments to §213.23, related to *Decision of the Board*, as proposed and published in the *Texas Register* on August 28, 2009. Authorize Staff to publish the summary of comments and response to comments as attached hereto as Attachment "B".

McDonald, Mackay, & Weitz, L.L.P.

Attorneys At Law

Jeff B. McDonald, J.D.† Taralynn R. Mackay, R.N., J.D.† Timothy E. Weitz, J.D.† Jon E. Porter, J.D.

September 1, 2009

James W. Johnston, General Counsel
Texas Board of Nursing
333 Guadalupe, Tower III, Suite 3-460
Austin, Texas 78701

RE: Proposed Rule Changes 22 TAC §213.23(d),

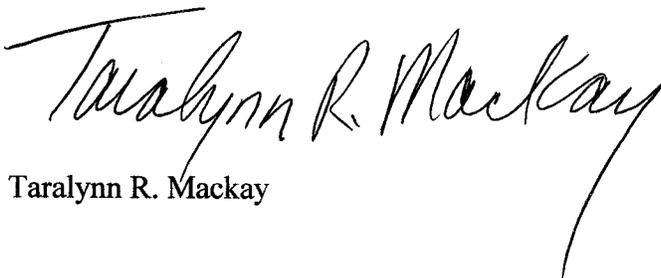
Dear Mr. Johnston:

The following are offered as comments on the proposed rule change published in the August 28, 2009 Texas Register:

The concern that evidence and testimony that was not considered by the ALJ issuing the PFD may be presented to the Board can also apply to the Board Staff involved in the case and thus, the rule should apply to all parties, not just the Respondent. In order to promote the fairness as expressed in the proposed rule's preamble, the rule should apply equally to all parties. Therefore, any references to "Respondent" in 22 TAC §213.23(d) should be changed to "Party" in order to apply to both the Respondent and the Board Staff.

Please contact me if you have any questions. Thank you.

Sincerely,



Taralynn R. Mackay

†Board Certified, Administrative Law – Texas Board of Legal Specialization

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September 1, 2009

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Texas Board of Nursing
333 Guadalupe, Tower III, Suite 3-460
Austin, Texas 78701

Hand Delivery

Re: Proposed Rule Changes 22 TAC §213.23(d)

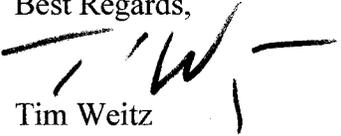
Dear Mr. Johnston:

I am a local Austin attorney who from time-to-time represents nurses before your agency. As a former state agency general counsel and as a practicing licensure defense attorney, I have some concerns about the draft rule change referenced above. I am in opposition to the rule change as currently drafted, but would be in support if a modification is made to the proposal. Please accept this correspondence as my public comment on the proposed rule change published in the August 28, 2009 Texas Register in regard to 22 TAC §213.23(d).

In order to ensure a fair and balanced process, the rule should apply equally to all parties. The possibility currently exists that evidence and testimony, which was not considered by the ALJ issuing the PFD, might be presented to the Board not just by the Respondent, but also by the Board Staff handling the case. Consequently, the rule should be modified to apply to all parties, and not just be limited to the Respondent. Perhaps the simplest way to address this concern is to change references to "Respondent" in 22 TAC §213.23(d) to "Party." Such a modification would bring the proposed change in line with longstanding principles of balanced due process, and I would be in support of the rule change with this modification.

If you have any questions or concerns, do not hesitate to contact me. I can best be reached by cell phone at 512.797.1322.

Best Regards,


Tim Weitz

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September 1, 2009

VIA FACSIMILE

James W. Johnston
General Counsel
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333 Guadalupe, Tower III, Suite 3-460
Austin, Texas 78701

RE: Comment on Proposed Rule Changes 22 TAC §213.23(d)

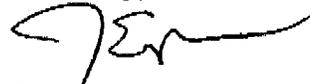
Dear Mr. Johnston:

Please accept this correspondence as my public comment on the proposed rule change published in the August 28, 2009 *Texas Register* in regard to 22 TAC §213.23(d). In order to ensure a fair and balanced process, as well as to avoid the perception that the process is not fair, the proposed rule must apply equally to all parties.

As currently drafted, it may be that evidence and testimony not considered by the ALJ issuing the PFD, might be presented to the Board. Consequently, the rule should be modified to apply to all parties, and not just be limited to the Respondent. Perhaps the simplest way to address this concern is to change references to "Respondent" in 22 TAC §213.23(d) to "Party." Such a modification would bring the proposed change in line with principles of balanced due process and fairness to all. This simple change lends itself to process that all can be satisfied with.

If you have any questions or concerns, do not hesitate to contact me.

Sincerely,



Jon E. Porter

Attachment “B”

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

§213.23(d)

Comment: Three individual commenters expressed concern that the proposed rules do not apply equally to all parties. The commenters state that there is a possibility that evidence and testimony, which was not considered by the Administrative Law Judge (ALJ) issuing the Proposal for Decision (PFD), might be presented to the Board, not just by the Respondent, but by Board Staff. The commenters state that, in order to ensure a fair and balanced process, the proposed rules should not be limited to the Respondent, but should apply equally to all parties. The commenters further suggest changing all references in §213.23(d) from “Respondent” to “Party” so that the proposed requirements apply to both the Respondent and Board Staff.

Agency Response: The Board declines to make the suggested change. The Board is not required by the Government Code Chapter 2001 (Administrative Procedure Act) or the Occupations Code Chapter 301 to provide a Respondent with an opportunity to appear before it to make an oral presentation regarding a PFD once the individual has been afforded a hearing at the State Office of Administrative Hearings. Nevertheless, out of a sense of fairness, the Board has determined that it is important to offer Respondents this additional opportunity to be heard, provided they present written material for Board consideration prior to the presentation.

While the Board believes that this opportunity should be preserved, the Board also recognizes the need to adopt requirements and procedures that will help maintain the integrity of its decisions. The adopted requirements are intended to minimize and reduce

the risk of the introduction of new information and evidence not properly vetted during the evidentiary hearing before the ALJ.

The Board has determined that there is no need to impose the identical criteria of the adopted rule towards Board Staff at this time. The adopted amendments are intended to address the problematic issues the Board has experienced with Respondents when the Board has permitted an oral audience before it not otherwise permitted by the Administrative Procedure Act. The adopted amendments do not impose unfair, unreasonable, or overly burdensome requirements on Respondents seeking to appear before the Board. Rather, the adopted amendments provide Respondents with an additional opportunity to be heard, which is not required by law. Further, the Government Code Chapter 2001 currently provides adequate remedy for any error or abuse committed by Board Staff, which can be cured on appeal.