

Agenda Item #7.4.8
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July 19 & 20, 2007

**Proposed Amendment to 22 Tex. Admin. Code § 213.20 (Informal Proceedings)
pertaining to an Alternative Dispute Resolution (ADR) Policy by Rule**

House Bill 2426 amended the Nursing Practice Act to include section 301.167 related to Negotiated Rulemaking: Alternative Dispute Resolution. Section 301.167 requires the Board to “develop and implement a policy to encourage the use of...appropriate alternative dispute resolution procedures under Chapter 2009, Government Code, to assist in the resolution of internal and external disputes under the board’s jurisdiction.” The statute continues as follows:

“The board’s procedures relating to alternative dispute resolution must conform, to the extent possible, to any model guidelines issued by the State Office of Administrative Hearings for the use of alternative dispute resolution by state agencies.” The amendment proposed in Rule 213.20 implements this requirement.

Staff requests that the Board move to propose amendments to section 213.20 and publish them in the *Texas Register* for a 30-day comment period, and if negative comments are not received in the 30 day comment period, adopt and publish the amendments in the *Texas Register*.

§ 213.20 Informal Proceedings and Alternate Dispute Resolution.

(a) The Board's policy is to encourage the resolution and early settlement of internal and external disputes, including contested cases, through voluntary settlement processes such as informal proceedings or alternative dispute resolution. Any matter within the Board's jurisdiction may be resolved informally by stipulation, agreed settlement, agreed order, dismissal, or default. These matters may also be resolved using any ADR procedure or combination of procedures described by Chapter 154, Civil Practice and Remedies Code.

(b) In disciplinary matters, the Board shall offer the complainant and the licensee the opportunity to be heard. The offer may be made at any time prior to disposition and may be included on the Board's complaint form, on any notice required by statute or these rules, or otherwise.

(c) Informal proceedings may be conducted in person, by attorney, or by electronic, telephonic, or written communication.

(d) Informal proceedings shall be conducted pursuant to the following procedural standards:

(1) Respondent shall have a right to be represented by an attorney of record. At any time, should respondent choose to obtain representation by an attorney and advises staff of such choice, the conference will be discontinued;

(2) Respondent will be expected to answer questions concerning the allegations contained in notice of complaint or formal charges, but may decline to answer any questions posed during the conference;

(3) Respondent and staff participation in the conference is voluntary and may be terminated by either party without prejudicing the right to proceed with a contested case. Respondent will be expected to cooperate fully with the Enforcement Staff to ensure that it has all pertinent information relating to the complaint or formal charges against respondent; and

(4) Although, a verbatim transcript is not being kept of the informal conference, party admissions and outline notes may be used at a formal hearing if this matter is docketed as a formal complaint at the State Office of Administrative Hearings.

(e) Informal conferences may be conducted at any time by the executive director or designee.

(f) The Board's counsel or assistant attorney general shall participate in informal proceedings.

(g) Disposition of matters considered informally may be made at any time in an agreed order containing such terms as the executive director may deem reasonable and necessary. Except as to matters delegated to the executive director for ratification, said agreed order shall not be final and effective until the Board, or an eligibility and disciplinary committee, votes to accept the proposed disposition.

(h) Referral to peer assistance after report to the Board.

(1) A nurse required to be reported under Texas Occupations Code Annotated §§ 301.401 - 301.409, may obtain informal disposition through referral to a peer assistance program as specified in Texas Occupations Code Annotated §301.410, as amended, if the nurse:

(A) makes a written stipulation of the nurse's impairment by dependency on chemicals or by mental illness;

(B) makes a written waiver of the nurse's right to administrative hearing and judicial review of:

(i) all matters contained in the stipulation of impairment;

(ii) any future modification or extension of the peer assistance contract;

(iii) the future imposition of sanctions under Texas Occupations Code Annotated § 301.453 in the event the executive director should determine the nurse has failed to comply with the requirements of the peer assistance program; and

(C) makes a written contract with the Board of Nurse Examiners through its executive director promising to:

(i) undergo and pay for such physical and mental evaluations as the executive director or the peer

assistance program determine to be reasonable and necessary to evaluate the nurse's impairment; to plan, implement and monitor the nurse's rehabilitation; and, to determine if, when and under what conditions the nurse can safely return to practice;

(ii) sign a participation agreement with the peer assistance program;

(iii) comply with each and every requirement of the peer assistance program in full and timely fashion for the duration of the contract and any extension(s) thereof; and

(iv) waive confidentiality and privilege and authorize release of information about the nurse's impairment and rehabilitation to the peer assistance program and the executive director of the Board of Nurse Examiners.

(2) Disposition of a complaint by referral to a peer assistance program is not a finding which requires imposition of a sanction under Texas Occupations Code Annotated § 301.453.

(3) In the event the nurse fails to comply with the nurse's contract with the Board of Nurse Examiners or the nurse's participation agreement with the peer assistance program, such non-compliance will be considered by the executive director at an informal proceeding after notice to the nurse of the non-compliance and opportunity to respond. At the informal proceeding, the executive director may consider facts relevant to the alleged non-compliance, modify or extend the contract or participation agreement, declare the contract satisfied or impose § 301.453 sanctions on the nurse which will result in public discipline and reporting to the National Council of State Boards of Nursing's Disciplinary Data Bank.

(i) ADR shall be conducted pursuant to the following procedural standards:

(1) Any ADR procedure used to resolve disputes before the Board shall comply with the requirements of the NPA, Chapter 2009 of the Government Code, and any model guidelines for the use of ADR issued by the State Office of Administrative Hearings, which may be found at: <http://www.soah.state.tx.us>.

(2) The Board's general counsel or his designee shall be the Board's dispute resolution coordinator (DRC). The DRC shall perform the following functions, as required:

(A) coordinate the implementation of the Board's ADR policy;

(B) serve as a resource for any staff training or education needed to implement the ADR procedures; and

(C) collect data to evaluate the effectiveness of ADR procedures implemented by the Board.

(3) The Board, a committee of the Board, a respondent in a disciplinary matter pending before the Board, the executive director, or a Board employee engaged in a dispute with the executive director or another employee, may request that the contested matter be submitted to ADR. The request must be in writing, be addressed to the DRC, and state the issues to be determined. The person requesting ADR and the DRC will determine which method of ADR is most appropriate. If the person requesting ADR is the respondent in a disciplinary proceeding, the executive director shall determine if the Board will participate in ADR or proceed with the Board's normal disciplinary processes. The matter may be submitted to ADR only upon approval by all concerned parties.

(4) Any costs associated with retaining an impartial third party mediator, moderator, facilitator, or arbitrator, shall be borne by the party requesting ADR.

(5) Agreements of the parties to ADR must be in writing and are enforceable in the same manner as any other written contract. Confidentiality of records and communications related to the subject matter of an ADR proceeding shall be governed by §154.073 of the Civil Practice and Remedies Code.

(6) If the ADR process does not result in an agreement, the matter shall be referred to the Board for other appropriate disposition.

(j)(†) If eligibility matters are not resolved informally, the petitioner may obtain a hearing before SOAH by submitting a written request to the staff.

~~(k)~~(j) If disciplinary matters are not resolved informally, formal charges may be filed in accordance with § 213.15 of this title (relating to Commencement of Disciplinary Proceedings) and the case may be set for a hearing before SOAH in accordance with § 213.22 of this title (relating to Formal Proceedings).

~~(l)~~(k) Pre-docketing conferences may be conducted by the executive director prior to SOAH acquiring jurisdiction over the contested case. The executive director, unilaterally or at the request of any party, may direct the parties, their attorneys or representatives to appear before the executive director at a specified time and place for a conference prior to the hearing for the purpose of:

- (1) simplifying the issues;
- (2) considering the making of admissions or stipulations of fact or law;
- (3) reviewing the procedure governing the hearing;
- (4) limiting the number of witnesses whose testimony will be repetitious; and
- (5) doing any act that may simplify the proceedings, and disposing of the matters in controversy, including settling all or part of the issues in dispute pursuant to § 213.20 and § 213.21 of this title (Informal Proceedings and Agreed Disposition).