

Discussion of Staff's Review Process for Minor Criminal History and Consideration of Incorporating Additional Criminal Behavior Into Current Policy

Summary of Request: Consider incorporating two additional categories of criminal history into Staff's current process for reviewing minor criminal history.

Background: At the January and July 2008, Board meetings, the Board considered and approved a review process for minor criminal history. The Board determined that certain misdemeanor offenses, which historically had little impact on the ability of an individual to practice nursing safely and that rarely led to a Board investigation or probationary order, could be reviewed by Staff and, if certain conditions were met, could be closed without further investigation or Board action. Copies of the January and July 2008, Board reports are attached hereto as Attachment "A" for reference.

Staff has identified the following additional categories of criminal behavior that Staff believes should be incorporated into the review process for minor criminal history:

- An arrest for a misdemeanor (must be a misdemeanor included in the Board-approved list) that has been dismissed outright or where prosecution has been denied;
- Up to three prior misdemeanors (must be misdemeanors included in the Board-approved list), where the most recent misdemeanor is at least 10 years old.

The Board has previously approved a list of minor misdemeanor offenses that rarely result in further investigation or Board action. The additional categories of criminal conduct that are being proposed for inclusion in the minor criminal history review process are limited to the same minor misdemeanor offenses that have already been approved by the Board. Further, the proposed additional categories of criminal conduct are unlikely to have an impact on the ability of an individual to safely practice nursing.

Arrests

The Occupations Code §301.452(d) requires the Board to use arrest information consistently, fairly, and only to the extent that the underlying conduct for the arrest relates to the practice of nursing, especially in situations where a criminal action is not proven or where charges are not filed or adjudicated. Board Rule 213.28(h) further specifies that the mere fact that a person has been arrested will not be used as grounds for disciplinary action. While the Board may conduct its own investigation into the underlying conduct of an arrest, the evidence obtained must suggest that the underlying conduct violates the Nursing Practice Act or rules of the Board in order to justify Board action.

In situations where a misdemeanor charge has been dismissed outright or where the prosecution of the charge has been denied by a district attorney's office (oftentimes, due to lack of evidence or full restitution being made), Staff believes it is unlikely that a licensure action for the arrest alone could be justified. In such cases, Staff believes it is appropriate to close the matter without further investigation or Board action.

Prior Criminal History

While multiple past criminal offenses may be relevant to an individual's ability to practice nursing safely and should be carefully reviewed, Staff believes that certain matters involving three or fewer prior misdemeanors should be closed without further investigation or Board action. Specifically, Staff believes closing such matters is appropriate when: (1) each of the prior misdemeanor offenses is a misdemeanor offense contained in the Board's approved list; (2) the most recent misdemeanor offense is at least ten years old; and (3) there has been no further criminal history since the last misdemeanor offense. Closing such matters without further investigation or Board action is unlikely to pose a risk of harm to the public, especially when the individual's prior criminal conduct involves misdemeanor offenses that have already been determined by the Board to be minor in nature and to have little affect on the individual's ability to practice nursing. Further, there must be at least a ten year time period (from the date of the last misdemeanor offense) in which the individual has not committed any other offenses. In situations where these requirements are met, Staff believes it is unlikely that a licensure action for the prior misdemeanor offenses could be sufficiently justified.

Attachment "B" contains Staff's proposed changes to the Board's current categories of minor criminal history that rarely result in further investigation or Board action and Staff's current review process for minor criminal history.

Staff's Recommendation: Move to approve the categories of minor criminal history that rarely result in further investigation or Board action and Staff's review process for minor criminal history as outlined in Attachment "B".

REPORT ON STAFF APPROVAL OF APPLICANTS WITH MINOR CRIMINAL HISTORY:
REVISED FROM JANUARY 2008 BOARD MEETING

This Report is for informational purposes only and may require Board action.

Background:

At the January 2008 Board meeting, Staff presented a report to the Board that listed those crimes (when isolated or singular) that rarely lead to an investigation or probationary order. These single incident or minor crimes have historically had little impact on the ability to practice a profession safely or predict how the nurse might treat vulnerable clients in his or her care must be considered as part of a licensing decision.

Below is the list of the single incident criminal behavior (conviction/deferred adjudication) which rarely results in an investigation or probationary stipulations on petitions for declaratory order or applications for licensure:

1. One misdemeanor DWI/DUI (not on probation)
2. One misdemeanor offense of possession of marijuana
3. Up to two misdemeanor theft by check
4. One misdemeanor domestic/ family violence
5. One misdemeanor theft over \$20 less than \$250 (normally assoc. with shoplifting)
6. One misdemeanor shop lifting
7. One misdemeanor criminal mischief
8. Misdemeanor graffiti
9. One misdemeanor criminal trespass
10. One misdemeanor disorderly conduct
11. Up to two misdemeanor Public Intoxication
12. Up to two misdemeanor Pan handling
13. Misdemeanor "loud noise" violations
14. One misdemeanor Reckless driving
15. Misdemeanor minor in possession of tobacco
16. One misdemeanor selling alcohol to a minor
17. Failure to appear
18. Vehicular molestation (slashing tires)

Board's Response to the Staff's January 2008 report:

After review of this report, Staff was instructed to revisit the propriety of declining (by policy) whether to investigate or take action on these crimes. For example, it was noted by Board members that DUI/DWI crimes and Public Intoxication Crimes, even if isolated, should be examined to determine whether a person is safe to practice given this nature of the criminal behavior and its potential impact on nursing practice. Similarly, isolated crime involving domestic/family violence may justify further scrutiny before a person is licensed without stipulations.

It was noted that even petty theft crimes may need further scrutiny if the victim was in a health care setting.

Staff's Recommendation:

As a result of the discussions, Staff has reviewed its processes and intends to implement the following procedures for single incident criminal behavior. Each positive hit for criminal behavior will not be closed until such time as the applicant/petitioner has provided a copy of the underlying court documents or an explanation as to why the documents are not available. The applicant/petitioner must provide a letter of explanation regarding the criminal charge along with any other material to verify the minor nature of the conduct or the lack of nexus to nursing practice.

Before a matter is closed without further investigation or action, Staff will review the documents, information and explanation. From a cumulative review, the matter will not be closed unless it is established;

1. There appear to be no material omissions or misrepresentations.
2. The incident is isolated or minor
3. No recency of conduct or other evidence of failure to rehabilitate; and
4. No reasonable basis to conclude the behavior will effect applicant's ability to practice nursing safely.

RECOMMENDATION:

MOVE TO APPROVE THE STAFF REVIEW PROCESS FOR MINOR CRIMINAL HISTORY AS OUTLINED ABOVE.

REPORT ON STAFF APPROVAL OF APPLICANTS WITH MINOR CRIMINAL HISTORY

This Report is for informational purposes only and does not require Board action.

Background:

Crimes that have a potential impact on the ability to practice a profession safely or predict how the nurse might treat vulnerable clients in his or her care must be considered as part of a licensing decision. Texas Government Code provides that the Board of Nurse Examiners is entitled to receive criminal background checks from the Texas Department of Public Safety (DPS) and the Federal Bureau of Investigation (FBI) for any licensed nurse, any applicant for licensure or any person requesting a determination of eligibility for license from the board.

The number of **positive hits** (i.e. an individual with a reported crime on his or her criminal background record) reviewed or investigated by the Board has grown to approximately 3000 annually since the implementation of criminal checks through the F.B.I.

The Texas Government Code, Chapter 53, recognizes that there are some forms of criminal behavior which may have little potential impact on licensed occupational competency, and therefore should not affect an agency's licensure decisions.

The Board has historically recognized the lack of public risk for many minor criminal offenses when they have been committed when the person was young and naive. For example, Rule 213.28(I) outlines the criteria for "youthful indiscretions" which would not impede a decision to license a nurse.

There are a number of minor crimes reported to the Board that appear to have little impact on the ability of an individual to practice nursing safely. Some crimes by their nature do not relate to nursing or there is little potential to associate the crime to the practice of nursing in a manner that would justify a licensure action.

Therefore, Staff believes that when confronted with a positive hit related to minor criminal conduct that meets a criteria similar to "youthful indiscretion" or does not justify application of chapter 53 there should be no impediment to licensure or license renewal. These crimes would not be listed on the Board's Disciplinary Guidelines for Criminal Conduct.

BELOW IS A LIST OF THE SINGLE INCIDENT CRIMINAL BEHAVIOR (CONVICTION/DEFERRED ADJUDICATION) WHICH DOES NOT RESULT IN AN INVESTIGATION OR PROBATIONARY STIPULATIONS ON PETITIONS FOR DECLARATORY ORDER OR APPLICATIONS FOR LICENSURE:

1. One misdemeanor DWI/DUI (not on probation)
2. One misdemeanor offense of possession of marijuana
3. Up to two misdemeanor theft by check
4. One misdemeanor domestic/ family violence
5. One misdemeanor theft over \$20 less than \$250 (normally assoc. with shoplifting)
6. One misdemeanor shop lifting
7. One misdemeanor criminal mischief

8. Misdemeanor graffiti
9. One misdemeanor criminal trespass
10. One misdemeanor disorderly conduct
11. Up to two misdemeanor Public Intoxication
12. Up to two misdemeanor Pan handling
13. Misdemeanor "loud noise" violations
14. One misdemeanor Reckless driving
15. Misdemeanor minor in possession of tobacco
16. One misdemeanor selling alcohol to a minor
17. Failure to appear
18. Vehicular molestation (slashing tires)

These listed crimes are the types of crimes that staff has chosen not to open an investigation on based on the positive hit when the explanation for the conduct had no relation to patient care.

Attachment "B"

Minor Criminal History Review Policy

Below is the list of the criminal behavior (conviction/deferred adjudication) which rarely results in an investigation or further Board action:

1. One misdemeanor DWI/DUI (not on probation)
2. One misdemeanor offense of possession of marijuana
3. Up to two misdemeanor theft by check
4. One misdemeanor domestic/ family violence
5. One misdemeanor theft over \$20 less than \$250 (normally assoc. with shoplifting)
6. One misdemeanor shop lifting
7. One misdemeanor criminal mischief
8. Misdemeanor graffiti
9. One misdemeanor criminal trespass
10. One misdemeanor disorderly conduct
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13. Misdemeanor "loud noise" violations
14. One misdemeanor Reckless driving
15. Misdemeanor minor in possession of tobacco
16. One misdemeanor selling alcohol to a minor
17. Failure to appear
18. Vehicular molestation (slashing tires)
19. An arrest for a misdemeanor (must be a misdemeanor included in this list) that has been dismissed outright or where prosecution has been denied
20. Up to three prior misdemeanors (each misdemeanor must be a misdemeanor included in this list), where the most recent misdemeanor is at least 10 years old

Each positive hit for criminal behavior will not be closed until such time as the individual has provided a copy of the underlying court documents or an explanation as to why the documents are not available. The individual must provide a letter of explanation regarding the criminal charge, along with any other material to verify the minor nature of the conduct or the lack of nexus to nursing practice.

Before a matter is closed without further investigation or action, Staff will review the documents, information, and explanation. From a cumulative review, the matter will not be closed unless it is established:

1. There appears to be no material omissions or misrepresentations;
2. The incident is isolated or minor;
3. There is no recency of conduct or other evidence of a failure to rehabilitate; and
4. There is no reasonable basis to conclude the behavior will affect the individual's ability to practice nursing safely.