

Consideration of Adoption of Proposed Repeal of 22 Tex. Admin. Code §217.16, relating to Reporting of Minor Incidents and Proposed New 22 Tex. Admin. Code §217.16, relating to Minor Incidents, including Written Comments Received and Results of Public Hearing, if any

Background: The proposed repeal of §217.16 and new §217.16 were approved by the Board at its January 2018 meeting for submission to the *Texas Register* for public comment. The proposals were published in the *Texas Register* on March 2, 2018, and the comment period ended on April 2, 2018. The Board received two written comments on the proposed new section. The Board did not receive any comments on the proposed repeal or any requests for a public hearing. A copy of the written comments received are attached hereto as Attachment “A”.

The Board received one comment from a representative of the Coalition for Nurses in Advanced Practice (CNAP) recommending a minor grammatical change in subsection (h) of the rule text. Staff recommends making this change as suggested.

A second comment was received from a representative of the Texas Nurses Association (TNA). The commenter states that the language in subsection (d) of the rule text as proposed is confusing, as it relates to the meaning of the word ‘conduct’. Further, the commenter recommends that the Board clarify its intended use of the word ‘conduct’ in this subsection of the rule text. Staff recommends clarifying this subsection of the rule.

A summary of the comments received and Staff’s proposed responses to the written comments are attached as Attachment “B”. The relevant portion of the proposed rule text, as approved by the Board and published in the *Texas Register*, is included in Attachment “C” for comparison. Staff’s recommended changes, with highlighted changes responsive to the written comments, are included in Attachment “D”.

Board Action: Move to adopt new 22 Texas Administrative Code §217.16, relating to Minor Incidents, with changes, as set out in Attachment “D”. Further, authorize Staff to publish the summary of comments and response to comments attached hereto as Attachment “B”.

**The proposed repeal was approved by the Board for adoption at the January 2018 Board meeting, so long as no negative comments or a request for a public hearing were received. The repeal will be adopted simultaneously with new §217.16.



April 9, 2018

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

Re: Rulemaking, March 2, 2018

TNA would like to thank the BON for taking the initiative to reassess these rules. We believe that the new language and organization will provide much more clarity for the public. We also appreciate the BON taking the time to seek stakeholder input throughout the process.

Our only concern in the entire rulemaking is in §217.16. *Minor Incidents*, specifically subsection (d). That subsection explains when a nurse must be reported to either a Nursing Peer Review Committee or, in practice settings without one, to the Board. Subdivision (1) says, “the nurse’s *conduct* shall be evaluated to determine whether *deficit(s)* in knowledge, judgment, skills, professional responsibility, or patient advocacy contributed to the incident.”

The confusion comes in at (B): “if it is determined that the nurse’s *conduct* contributed to the error...” Going back to Subdivision (1), the term “conduct” is used as an umbrella term for conduct where there was a deficit and where there wasn’t. If the Board intends for the word “conduct” in (B) to only mean conduct where there was a deficit, then the Board should just replace “conduct” in (B) and “contribution” in (A) with the word “deficit.”

On the other hand, if the Board meant to use the broad meaning of conduct in (B), then we have some concerns about how that will impact the process. According to the rule, if it is determined that the nurse’s conduct contributed to the error, then there are only two options: either there will be a remediation plan or the nurse will be reported. It seems, to us, that there would be scenarios where a nurse’s conduct contributed to the error, but a remediation plan would be unnecessary and reporting to NPR or the Board would be overkill.

For example, a simple human error would technically contribute to the error. While this is not a “deficit,” it certainly is “conduct” as that word is used in Subdivision (1). However, for a simple human error remediation may not be appropriate in a high performer with no previous history of error. Patient safety principles emphasize human errors will occur and remediation is not likely to prevent a similar issue in the future. Because remediation would be impossible, the rule would require the nurse to be reported to NPR or BON.

Again, if the Board intended a dual meaning for the word “conduct” in this subsection, then we suggest a simple fix by changing the second usage to “deficit.” This will provide clarity to the end users. But if the Board did intend to mean that *any* conduct that contributed to error must be remediated or reported, we hope that the BON will contact us before adoption to have a more robust discussion about the implications of this rule.

Thank you again for your hard work on all of these rules and for taking the time to read and respond to our concerns.

Sincerely,

A handwritten signature in black ink that reads "Jeff Watson". The signature is written in a cursive style with a large, looping initial "J".

Jeff Watson, DNP, RN-BC, NEA-BC, NE-BC, CRRN
President

From: Johnston, Dusty
Sent: Monday, April 2, 2018 9:28 AM
To: Abel, Jena <Jena.Abel@bon.texas.gov>
Subject: FW: Comment on 22 TAC 217.16

From: Lynda Woolbert [<mailto:lynda.woolbert@gmail.com>]
Sent: Sunday, April 1, 2018 7:14 PM
To: Johnston, Dusty <Dusty.Johnston@bon.texas.gov>
Subject: Comment on 22 TAC 217.16

Dusty,

The Coalition for Nurses in Advanced Practice (CNAP) agrees that proposed reorganization of the Minor Incident and Nursing Peer Review Rules will improve clarity. CNAP would like to propose one minor editorial change at the beginning of §217.16(h)(5). We propose the statement should read as follows: (5) actions that ~~which~~ indicate ~~that~~ the nurse lacks knowledge,

Lynda

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Please visit CNAP's Website at cnaptexas.com

Attachment “B”

Summary of Comments Received

Subsection (d)

Summary of Comment: A commenter representing the Texas Nurses Association states that the language in subsection (d) of the rule text is confusing. Specifically, the commenter states that, if the Board intends for the word ‘conduct’ in (B) to only mean conduct where there was a deficit, then the Board should just replace ‘conduct’ in (B) and ‘contribution’ in (A) with the word ‘deficit’. However, if the Board meant to use the broad meaning of ‘conduct’ in (B), then the commenter has concerns about how that will impact the process, specifically where a nurse’s conduct contributed to an error, but a remediation plan would be unnecessary, and reporting to the Board or a nursing peer review committee would be overkill.

Agency Response: The Board agrees that the language in subsection (d) of the rule text could be more clear. Therefore, the Board has changed some of the rule text as amended to clarify that, when evaluating whether a nurse’s error will be viewed as a minor incident, a combination of factors must be reviewed, including the nurse’s overall conduct, which could include a nurse’s actions or omissions, factors viewed to be beyond the nurse’s control, and the relationship between the two that influenced or impacted the nursing practice breakdown. Further, a nurse’s overall conduct, which again, could include a nurse’s actions or omissions, must also be evaluated to determine whether a deficit in the nurse’s knowledge, judgment, skills, professional responsibility, or patient advocacy contributed to the incident. If a nurse’s practice has no deficit(s), then the incident may not reach the level of a minor incident. If, however, the nurse’s practice deficit(s) contributed to the error, then a determination of whether remediation will address the deficit(s) is required under the rule.

Further, the rule does not define what kind of remediation must be provided to the nurse. Thus, a remediation plan may be specifically tailored to address an individual nurse’s practice deficit(s), and may be as simple as documentation of completed verbal counseling, or encompass a more complex written plan.

Subsection (h)

Comment: A representative of the Coalition for Nurses in Advanced Practice suggests a grammatical change in subsection (h)(5) of the rule text to replace the word “which” with the word “that”.

Response: The Board agrees and has amended the text as adopted accordingly.

Attachment “C” (relevant portion of rule text as originally proposed)

Subsection (d)

(d) In evaluating whether conduct is a minor incident, a combination of factors must be reviewed, including the nurse’s conduct, those factors viewed to be beyond the nurse’s control, and the relationship between the two that influenced or impacted the nursing practice breakdown.

(1) Initially, the nurse’s conduct shall be evaluated to determine whether deficit(s) in knowledge, judgment, skills, professional responsibility, or patient advocacy contributed to the incident.

(A) If it is determined there is no contribution by the nurse, the incident may not reach the level of a minor incident.

(B) If it is determined that the nurse’s conduct contributed to the error, then a determination of whether remediation will address any identified deficit(s) is required.

(i) If remediation will address the deficit(s), a remediation plan shall be developed to address the deficit(s).

(ii) If remediation will not address the deficit(s), then the conduct cannot be considered a minor incident and must be reported to the nursing peer review committee or, in practice settings with no nursing peer review, to the Board.

(iii) If the determination is that the nurse could be remediated and the nurse does not complete the required remediation, then the nurse must be reported to a nursing peer review committee or the Board.

(2) Additionally, the presence of factors beyond the nurse’s control shall also be evaluated for contribution to the incident, and if found, reported to the patient safety

committee, or if the facility does not have a patient safety committee, to the chief nursing officer.

(3) When there are factors beyond the nurse's control, the relationship between the nurse's contribution to the incident and the factors beyond the nurse's control shall be evaluated.

(A) If factors beyond the nurse's control are identified, the incident should be evaluated to determine if the error would have occurred in the absence of such factors.

(B) If the error would not have occurred but for the factors beyond the nurse's control, the incident may not be reviewable under this rule.

(C) The presence of factors beyond the nurse's control does not automatically exclude the possibility that the nurse's conduct also contributed to the error. Any identified deficits by the nurse must be addressed in accordance with subsection (d)(1)(B) of this section, even if factors beyond the nurse's control are also identified.

(4) Mis-classifying to Avoid Reporting. Intentionally mis-classifying an incident to avoid reporting may result in a violation of the mandatory reporting statute (see subsection (h) of this section).

Subsection (h)

(h) Some conduct falls outside the definition of a minor incident and must be reported to a nursing peer review committee or to the Board. This includes:

(1) conduct that ignores a substantial risk that exposed a patient or other person to significant physical, emotional or financial harm or the potential for such harm;

(2) conduct that violates the Texas Nursing Practice Act or a Board rule and contributed to the death or serious injury of a patient;

(3) a practice-related violation involving impairment or suspected impairment by reason of chemical dependency, intemperate use, misuse or abuse of drugs or alcohol, mental illness, or diminished mental capacity;

(4) a violation of Board Rule 217.12 with actions that constitute abuse, exploitation, fraud, or a violation of professional boundaries; or

(5) actions which indicate that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.

Attachment “D” (changes highlighted in rule text)

Subsection (d)

(d) In evaluating whether an error is a minor incident, a combination of factors must be reviewed, including the nurse’s conduct, those factors viewed to be beyond the nurse’s control, and the relationship between the two that influenced or impacted the nursing practice breakdown.

(1) Initially, the nurse’s conduct shall be evaluated to determine whether deficit(s) in knowledge, judgment, skills, professional responsibility, or patient advocacy contributed to the incident.

(A) If it is determined that the nurse’s practice has no deficit(s), as described in paragraph (1) of this subsection, the incident may not reach the level of a minor incident.

(B) If it is determined that the nurse’s practice deficit(s), as described in paragraph (1) of this subsection, contributed to the error, then a determination of whether remediation will address any identified deficit(s) is required.

(i) If remediation will address the deficit(s), a remediation plan shall be developed to address the deficit(s).

(ii) If remediation will not address the deficit(s), then the error cannot be considered a minor incident and the nurse must be reported to the nursing peer review committee or, in practice settings with no nursing peer review, to the Board.

(iii) If the determination is that the nurse could be remediated and the nurse does not complete the required remediation, then the nurse

must be reported to a nursing peer review committee or the Board.

Subsection (h)

(h) Some conduct falls outside the definition of a minor incident and must be reported to a nursing peer review committee or to the Board. This includes:

(5) actions **that** indicate the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.

