

Agenda Item #13.A.



STATE AND CONSUMER SERVICES AGENCY • ARNOLD SCHWARZENEGGER, GOVERNOR
BOARD OF VOCATIONAL NURSING & PSYCHIATRIC TECHNICIANS
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DATE: September 1, 2010

TO: Board Members

FROM: 
Angelina Martin
Enforcement Division Chief

SUBJECT: Proposed Regulations to Implement the Consumer Protection Enforcement Initiative

STATEMENT OF ISSUES

The Board is mandated to protect consumers from licensees who practice in an unsafe, incompetent, or impaired manner. In accordance with the Business and Professions Code sections 2841.1 and 4501.1, protection of the public shall be the Board's highest priority in exercising its licensing, regulatory, and disciplinary functions.

The Board is authorized to investigate the criminal conviction history of applicants, subsequent arrests, and allegations of unprofessional conduct, unsafe and incompetent practice by licensed vocational nurses (VNs) and psychiatric technicians (PTs). If allegations are substantiated, the Board is authorized to discipline licensees and applicants who may jeopardize the health, safety and welfare of the consumer. However, the existing enforcement process contains systemic problems that limit the Board's abilities to investigate and act on cases in a timely manner.

The Department of Consumer Affairs (DCA) launched the Consumer Protection Enforcement Initiative (CPEI) to overhaul the enforcement process of the healing arts boards. The Board must add or amend regulatory language in Division 25 of Title 16 of the California Code of Regulations to implement provisions of CPEI (see Attachment A).

BACKGROUND AND SUBJECT REVIEW

In 2009, various media articles reported that most DCA health care boards were taking over three years to complete the investigations and take appropriate disciplinary actions against licensees. As a result, Governor Arnold Schwarzenegger directed the State and Consumer Services Agency (SCSA) to conduct an internal review of all the health care board's enforcement programs and the DCA Division of Investigations (DOI). The SCSA found that most of the health care boards face significant complaint investigation backlogs and processing delays. The Governor charged the DCA Director with reforming the current enforcement process for the health care boards.

The DCA reviewed the existing enforcement process and found systemic problems that limit the boards' abilities to investigate and act on cases in a timely manner. These problems range from legal and procedural challenges to inadequate resources. In response, the DCA launched the CPEI to overhaul the enforcement process at the healing arts boards. Once fully implemented, the DCA expects the healing arts boards to reduce the average enforcement completion timeline to between 12-18 months.

On February 17, 2010, Senate Bill (SB) 1111 (Negrete McLeod) was introduced and sponsored by the DCA. The proposed legislation was introduced to establish the Consumer Health Protection Enforcement Act and make enforcement processes more efficient. However, on April 22, 2010, SB 1111 failed to make it out of the Senate Business, Professions and Economic Development Committee. On April 26, 2010, DCA Director Brian Stiger reported that CPEI would continue to be the Department's highest priority and the DCA will move forward implementing process improvements, staff development, performance measures, and adding enforcement resources. The DCA believes that many provisions of SB 1111 can be adopted as regulations and the Director encouraged boards/bureaus to develop proposed regulations.

The proposed regulatory language is necessary to implement provisions of CPEI.

Recommendations:

1. The Board approve the regulatory proposal to amend Division 25 of Title 16, California Code of Regulations, to amend sections 2503 and 2524; renumber section 2524.1 to 2524.5; and add sections 2509, 2524.1 and 2518.8 (VN Regulations); and amend sections 2563 and 2579.10; renumber section 2579.11 to 2579.20; and add sections 2568, 2576.8 and 2579.11 (PT Regulations).
2. Direct staff to prepare a rulemaking file for notice and comment.
3. Authorize the Executive Officer to make changes consistent with the intent of the above proposal.

Attachment A – Proposed Regulatory Language

**Board of Vocational Nursing and Psychiatric Technicians
Proposed Regulatory Language
Title 16, California Code of Regulations, Division 25
Vocational Nursing Regulations**

1. Amend section 2503 to Article 1 to read as follows:

2503. Delegation of Certain Functions.

The power and discretion conferred by law upon the Board to receive and file accusations; issue notices of hearing, statements to respondent and statements of issues; receive and file notices of defense; determine the time and place of hearings under Section 11508 of the Government Code; issue subpoenas and subpoenas duces tecum; set and calendar cases for hearing and perform other functions necessary to the efficient dispatch of the business of the Board in connection with proceedings under the provisions of Sections 11500 through 11528 of the Government Code, prior to the hearing of such proceedings; to approve settlement agreements for the revocation, surrender or interim suspension of a license; and the certification and delivery or mailing of copies of decisions under Section 11518 of said code are hereby delegated to and conferred upon the executive officer, or, in the absence of the executive officer from the office of the Board, the assistant executive officer.

Note: Authority cited: Section 2854, Business and Professions Code. Reference: Section 2847, Business and Professions Code.

2. Add section 2509 to Article 2 to read as follows:

2509. Evaluation of Applicants.

(a) In addition to any other requirements for licensure, whenever it appears that an applicant for a license may be unable to practice safely because the applicant's ability to practice may be impaired due to mental illness, or physical illness affecting competency, the board may require the applicant to be examined by one or more physicians and surgeons or psychologists designated by the board. The board shall pay the full cost of such examination. An applicant's failure to comply with the requirement shall render his or her application incomplete.

(b) The report of the evaluation shall be made available to the applicant.

NOTE: Authority cited: Section 2854, Business and Professions Code. Reference: Sections 820, 822, 2841.1, 2866, 2878, 2878.9, and 2879, Business and Professions Code.

3. Add section 2518.8 to Article 4 to read as follows:

2518.8. Unprofessional Conduct.

In addition to the conduct described in Section 2878(a) of the Code, "unprofessional conduct" also includes, but is not limited to, the following:

(a) Including or permitting to be included any of the following provisions in an agreement to settle a civil dispute arising from the licensee's practice, whether the agreement is made before or after the filing of an action:

(1) A provision that prohibits another party to the dispute from contacting, cooperating, or filing a complaint with the board.

(2) A provision that requires another party to the dispute to attempt to withdraw a complaint the party has filed with the board.

(b) Failure to provide to the board, as directed, lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee is unable to provide the documents within this time period for good cause, including but not limited to, physical inability to access the records in the time allowed due to illness or travel. This subsection shall not apply to a licensee who does not have access to, and control over, medical records.

(c) Failure to cooperate and participate in any board investigation pending against the licensee. This subsection shall not be construed to deprive a licensee of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subsection shall not be construed to require a licensee to cooperate with a request that would require the licensee to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's practice. Any exercise by a licensee of any constitutional or statutory privilege shall not be used against the licensee in a regulatory or disciplinary proceeding against the licensee.

(d) Failure to report to the board within 30 days any of the following:

(1) The bringing of an indictment or information charging a felony against the licensee.

(2) The arrest of the licensee.

(3) The conviction of the licensee, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.

(4) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(e) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

NOTE: Authority cited: Section 2854, Business and Professions Code. Reference: Sections 490, 2841.1 and 2878, Business and Professions Code.

4. Amend section 2524 to Article 4 to read as follows:

2524. Disciplinary Guidelines.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.) the Board shall consider the disciplinary guidelines entitled "Disciplinary Guidelines", (Rev. 6/19/07), which are hereby incorporated by reference. Deviation from these guidelines, including the standard conditions of

probation, is appropriate where the Board, in its sole discretion, determines that the facts of the particular case warrant such a deviation - for example: the presence of mitigating factors; the age of the case; evidentiary problems.

Notwithstanding the disciplinary guidelines, any proposed decision issued in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that contains any finding of fact that the licensee engaged in any act of sexual contact, as defined in subdivision (c) of Section 729 of the Code, with a patient, or has committed an act or been convicted of a sex offense as defined in Section 44010 of the Education Code, shall contain an order revoking the license. The proposed decision shall not contain an order staying the revocation of the license.

Note: Authority cited: Section 2854, Business and Professions Code; and Section 11425.50(e), Government Code. Reference: Sections 729, 2875, 2876 and 2878, Business and Professions Code; Section 44010 of the Education Code; and Sections 11400.20 and 11425.50(e), Government Code.

5. **Existing section 2524.1, Consumer Complaint Disclosure, is renumbered to section 2524.5.**
6. **A new section 2524.1 is added to Article 4 to read as follows:**

2524.1. Required Actions Against Registered Sex Offenders.

(a) Except as otherwise provided, if an individual is required to register as a sex offender pursuant to Section 290 of the Penal Code, or the equivalent in another state or territory, or military or federal law, the board shall:

(1) Deny an application by the individual for licensure, in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) Promptly revoke the license of the individual, in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and shall not stay the revocation nor place the license on probation.

(3) Deny any petition to reinstate or reissue the individual's license.

(b) This section shall not apply to any of the following:

(1) An individual who has been relieved under Section 290.5 of the Penal Code of his or her duty to register as a sex offender, or whose duty to register has otherwise been formally terminated under California law or the law of the jurisdiction that required registration.

(2) An individual who is required to register as a sex offender pursuant to Section 290 of the Penal Code solely because of a misdemeanor conviction under Section 314 of the Penal Code; provided, however, that nothing in this paragraph shall prohibit the board from exercising its discretion to deny or discipline a license under any other provision of state law based upon the licensee's conviction under section 314 of the Penal Code.

(3) Any administrative proceeding that is fully adjudicated prior to the effective date of this regulation. A petition for reinstatement of a revoked or surrendered license shall be considered a new proceeding for purposes of this paragraph, and the prohibition in subsection (a) against reinstating a license shall govern.

NOTE: Authority cited: Section 2854, Business and Professions Code. Reference: 2841.1, 2866, 2876, 2878, and 2878.7

Board of Vocational Nursing and Psychiatric Technicians
Proposed Regulatory Language
Title 16, California Code of Regulations, Division 25
Psychiatric Technician Regulations

1. Amend section 2563 Article 1 to read as follows:

2563. Delegation of Certain Functions.

The power and discretion conferred by law upon the Board to receive and file accusations; issue notices of hearing, statements to respondent and statements of issues; receive and file notices of defense; determine the time and place of hearings under Section 11508 of the Government Code; issue subpoenas and subpoenas duces tecum; set and calendar cases for hearing and perform other functions necessary to the efficient dispatch of the business of the Board in connection with proceedings under the provisions of Sections 11500 through 11528 of the Government Code, prior to the hearing of such proceedings; to approve settlement agreements for the revocation, surrender or interim suspension of a license; and the certification and delivery or mailing of copies of decisions under Section 11518 of said code are hereby delegated to and conferred upon the executive officer, or, in the absence of the executive officer from the office of the Board, the assistant executive officer.

Note: Authority cited: Section 4504, Business and Professions Code. Reference: Section 4503, Business and Professions Code.

2. Add section 2568 to Article 2 to read as follows:

2568. Evaluation of Applicants.

(a) In addition to any other requirements for licensure, whenever it appears that an applicant for a license may be unable to practice safely because the applicant's ability to practice may be impaired due to mental illness, or physical illness affecting competency, the board may require the applicant to be examined by one or more physicians and surgeons or psychologists designated by the board. The board shall pay the full cost of such examination. An applicant's failure to comply with the requirement shall render his or her application incomplete.

(b) The report of the evaluation shall be made available to the applicant.

NOTE: Authority cited: Section 4504, Business and Professions Code. Reference: Sections 820, 822, 4501.1, 4511, 4521, 4521.1, 4521.6, and 4522, Business and Professions Code.

3. Add section 2576.8 to Article 4 to read as follows:

2576.8. Unprofessional Conduct.

In addition to the conduct described in Section 4521(a) of the Code, "unprofessional conduct" also includes, but is not limited to, the following:

(a) Including or permitting to be included any of the following provisions in an agreement to settle a civil dispute arising from the licensee's practice, whether the agreement is made before or after the filing of an action:

(1) A provision that prohibits another party to the dispute from contacting, cooperating, or filing a complaint with the board.

(2) A provision that requires another party to the dispute to attempt to withdraw a complaint the party has filed with the board.

(b) Failure to provide to the board, as directed, lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee is unable to provide the documents within this time period for good cause, including but not limited to, physical inability to access the records in the time allowed due to illness or travel. This subsection shall not apply to a licensee who does not have access to, and control over, medical records.

(c) Failure to cooperate and participate in any board investigation pending against the licensee. This subsection shall not be construed to deprive a licensee of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subsection shall not be construed to require a licensee to cooperate with a request that would require the licensee to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's practice. Any exercise by a licensee of any constitutional or statutory privilege shall not be used against the licensee in a regulatory or disciplinary proceeding against the licensee.

(d) Failure to report to the board within 30 days any of the following:

(1) The bringing of an indictment or information charging a felony against the licensee.

(2) The arrest of the licensee.

(3) The conviction of the licensee, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.

(4) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(e) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

NOTE: Authority cited: Section 4504, Business and Professions Code. Reference: Sections 490, 4501.1 and 4521, Business and Professions Code.

4. Amend section 2579.10 to Article 4 to read as follows:

2579.10 Disciplinary Guidelines.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code Section 11400 et seq.) the Board shall consider the disciplinary guidelines entitled "Disciplinary Guidelines", (Rev. 6/19/07), which are hereby incorporated by reference. Deviation from these guidelines, including the standard conditions of probation, is appropriate where the Board, in its sole discretion, determines that the facts of

the particular case warrant such a deviation - for example: the presence of mitigating factors; the age of the case; evidentiary problems.

Notwithstanding the disciplinary guidelines, any proposed decision issued in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that contains any finding of fact that the licensee engaged in any act of sexual contact, as defined in subdivision (c) of Section 729 of the Code, with a patient, or has committed an act or been convicted of a sex offense as defined in Section 44010 of the Education Code, shall contain an order revoking the license. The proposed decision shall not contain an order staying the revocation of the license.

Note: Authority cited: Section 4504, Business and Professions Code; and Section 11425.50(e), Government Code. Reference: Sections 729, 4520 and 4521, Business and Professions Code; Section 44010 of the Education Code; and Sections 11400.20 and 11425.50(e), Government Code.

5. Existing section 2579.11, Consumer Complaint Disclosure, is renumbered to section 2579.20.

6. A new section 2579.11 is added to Article 4 to read as follows:

2579.11. Required Actions Against Registered Sex Offenders.

(a) Except as otherwise provided, if an individual is required to register as a sex offender pursuant to Section 290 of the Penal Code, or the equivalent in another state or territory, or military or federal law, the board shall:

(1) Deny an application by the individual for licensure, in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) Promptly revoke the license of the individual, in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and shall not stay the revocation nor place the license on probation.

(3) Deny any petition to reinstate or reissue the individual's license.

(b) This section shall not apply to any of the following:

(1) An individual who has been relieved under Section 290.5 of the Penal Code of his or her duty to register as a sex offender, or whose duty to register has otherwise been formally terminated under California law or the law of the jurisdiction that required registration.

(2) An individual who is required to register as a sex offender pursuant to Section 290 of the Penal Code solely because of a misdemeanor conviction under Section 314 of the Penal Code; provided, however, that nothing in this paragraph shall prohibit the board from exercising its discretion to deny or discipline a license under any other provision of state law based upon the licensee's conviction under section 314 of the Penal Code.

(3) Any administrative proceeding that is fully adjudicated prior to the effective date of this regulation. A petition for reinstatement of a revoked or surrendered license shall be considered a new proceeding for purposes of this paragraph, and the prohibition in subsection (a) against reinstating a license shall govern.

NOTE: Authority cited: Section 4504, Business and Professions Code. Reference: 4501.1, 4511, 4521.6, 4522, and 4524.

(9/1/2010)