

Agenda Item #10.A.



STATE AND CONSUMER SERVICES AGENCY • GOVERNOR EDMUND G. BROWN JR.

BOARD OF VOCATIONAL NURSING & PSYCHIATRIC TECHNICIANS

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DATE: October 10, 2012

TO: Board Members

FROM: 
Alice Delvey-Williams
Enforcement Program Manager

SUBJECT: Proposed Regulatory Action to Implement SB 539, Mandatory Reporting Requirements

STATEMENT OF ISSUES

The Board is mandated to protect consumers from licensees who practice in an unsafe, incompetent, or impaired manner. In accordance with Business and Professions Code (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.

SB 539 (Price, Chapter 338, Statutes of 2011) amended Sections 2878.1 (VN) and 4521.2 (PT) of the Code by expanding the reporting requirements of employers of licensed vocational nurses (LVNs) and psychiatric technicians (PTs) to include "resignation for cause" under any of the circumstances listed in subdivision (d) of the respective code sections. The statutes were also amended to extend all reporting requirements to employment agencies and nursing registries, by including them within the definition of "employer" and by requiring employment agencies and nursing registries to report when a licensee is rejected from assignment at a health facility or home health care due to the acts that would be cause for suspension or termination as listed in subdivision (d).

The acts that would trigger the reporting requirement if they result in a suspension, termination, resignation for cause, or rejection from assignment are defined as any of the following:

- (1) Use of controlled substances or alcohol to the extent that it impairs the licensee's ability to safely practice vocational nursing / as a psychiatric technician.
- (2) Unlawful sale of a controlled substance or other prescription items.
- (3) Patient or client abuse, neglect, physical harm, or sexual contact with a patient or client.
- (4) Falsification of medical records.
- (5) Gross negligence or incompetence.
- (6) Theft from patients or clients, other employees, or the employer.

BACKGROUND AND SUBJECT REVIEW

The proposed regulatory amendments expand the definition of employer to include employment agencies and nursing registries; add "rejection from assignment" and "resignation for cause" to the requirements of Employer Mandatory Reporting; and add "rejection from assignment" and "resignation for cause" to the Board's authority to issue Class A violation citations.

At its May 11, 2012 Board Meeting, the Board approved draft proposed regulatory language amending sections 2520.5 and 2523.2 (VN); and sections 2577.6 and 2579.4 (PT) of the California Code of Regulations (CCR) and directed staff to prepare a rulemaking file for notice and comment. The notice of proposed regulations was published on August 17, 2012, and a public hearing was held on October 2, 2012.

During the public comment period, written comments were received from Pamila Lew, Staff Attorney, Disability Rights California, and Bonnie Castillo, Director Government Relations, California Nurses Association (see Attachment A). Disability Rights California supports the proposed regulatory changes. California Nurses Association finds the proposed modifications to be consistent with the statutory requirements of SB 539. It should be noted that, although the subject line in the California Nurses Association letter correctly references SB 539 (Price), there are transposition errors within the body of the letter. SB 359, which is referenced throughout the letter, is clearly in error because SB 359 is unrelated to the Board's proposed regulatory amendments. It addresses a Health and Safety Code amendment dealing with hospital billing for emergency services and care.

No oral or written comments were received during the public hearing held on October 2, 2012.

The comments received by the Board were reviewed and considered and, as a result, the originally noticed text remains static (see Attachment B). The Board's responses will be included in the Final Statement of Reasons as part of the rulemaking file.

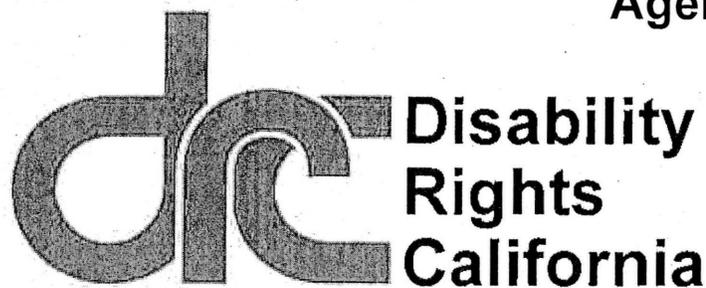
RECOMMENDATIONS:

1. The Board approve the regulatory proposal to amend Division 25 of Title 16, California Code of Regulations, Sections 2520.5 and 2523.2 (VN); and Sections 2577.6 and 2579.4 (PT);
2. Direct staff to submit the rulemaking file to DCA and to the Office of Administrative Law (OAL) for final approval; and
3. Authorize the Executive Officer to make non-substantive changes as are required by the Director of DCA and OAL.

Attachment A – Written Comments Received
Attachment B – Proposed Regulatory Language

Agenda Item #10.A. – Attachment A

Written Comment #1



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California's protection and advocacy system

September 27, 2012

Sent via email: linda.ruyters@dca.ca.gov
alice.delvey-williams@dca.ca.gov

Board of Vocational Nursing and Psychiatric Technicians
2535 Capitol Oaks Drive, Suite 205
Sacramento, CA 95833

**RE: Proposed Regulations: Title 16 CCR 2520.5 (VN), 2577.6 (PT),
Title 16 CCR 2523.2 (VN), 2579.4 (PT)**

Dear Board of Vocational Nursing and Psychiatric Technicians:

Disability Rights California submits this letter in support of the proposed amendments to Title 16 CCR 2520.5 (VN), 2577.6 (PT) and Title 16 CCR 2523.2 (VN), 2579.4 (PT). Disability Rights California (DRC) is California's designated disability advocacy agency, established under federal law to protect, advocate for, and advance the human, legal, and service rights of Californians with disabilities. DRC provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq.*; the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801 *et seq.*; the Rehabilitation Act, 29 U.S.C. § 794e; the Children's Health Act of 2000, 42 U.S.C. § 300d-53, and Welf. & Inst. Code § 4900 *et seq.*

Disability Rights California is mandated under state and federal law to investigate allegations of abuse and neglect against people with disabilities. We have investigated cases involving psychiatric technicians (PTs) and licensed vocational nurses (LVNs) who resigned from employment after allegedly committing abuse against people with disabilities. In many instances, these PTs and LVNs found employment at a subsequent facility.

The proposed regulations would ensure that employees who have resigned for cause for committing abuse would be promptly reported to the Board, thereby enabling it to take corrective disciplinary action against these individuals, and protecting vulnerable individuals from harm.

Disability Rights California also supports the regulations for broadening the category of employers to include employment agencies and nursing registries. Given the profusion of employment agencies and nursing registries, it is important that these entities are also held responsible to report PT and LVN misconduct. We also appreciate the inclusion of "rejection from assignment" as an act to be reported directly to the Board. Finally, we fully endorse the expansion of Class A violations to include failure to report rejection from assignment and resignation for cause.

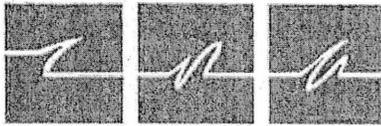
Thank you for giving us the opportunity to comment on these proposed regulations.

Sincerely



Pamila Lew
Staff Attorney

Agenda Item #10.A. – Attachment A



CALIFORNIA
NURSES
ASSOCIATION



Written Comment #2

NATIONAL NURSES
ORGANIZING COMMITTEE

A Voice for Nurses. A Vision for Healthcare.
www.calnurses.org / www.nnoc.net

October 2, 2012

Linda Ruyters, Administrative Analyst
Board of Vocational Nurses and Psychiatric Technicians
2535 Capitol Oaks Drive Suite 205
Sacramento, California 95833
linda.ruyters@dca.ca.gov
FAX: 916-263-7859

RE: Proposed Regulations on "Reporting" Implementing SB 539 (Price) Ch. 338, Statutes of 2011

Dear Ms. Ruyters:

The California Nurses Association has reviewed the proposed regulations that are being modified to implement recent legislation requiring some changes in employer reporting requirements of Licensed Vocational Nurses and Psychiatric Technicians licensed under the Board of Vocational Nurses and Psychiatric Technicians (BVNPT).

As noted in the Initial Statement of Reasons, SB 359 expands the existing requirement that employers notify the BVNPT of a licensee who is suspended or terminated for cause (as defined in Business and Professions Code Section 2878.1 (d) ¹) to include notice of a rejection from assignment of an LVN or LPT to an employment agency or nursing registry due to acts by the licensee that would be cause for suspension or termination under B&P §2878.1(d). SB 359 also adds a reporting requirement for employers for "resignation for cause" in lieu of termination or suspension for cause under BP §2878,1 (d) and expands the reporting requirement to include employment agencies and registries who employ LVNs and PTs. .

¹ B&P Code Section 2878.1 (d) For purposes of the section, "suspension, termination, or resignation for cause" or "rejection from assignment" are defined as suspension, termination, or resignation from employment, or rejection from assignment, for any of the following reasons:

- (1) Use of controlled substances or alcohol to the extent that it impairs the licensee's ability to safely practice vocational nursing.
- (2) Unlawful sale of a controlled substance or other prescription items.
- (3) Patient or client abuse, neglect, physical harm, or sexual contact with a patient or client.
- (4) Falsification of medical records.
- (5) Gross negligence or incompetence.
- (6) Theft from patients or clients, other employees, or the employer.

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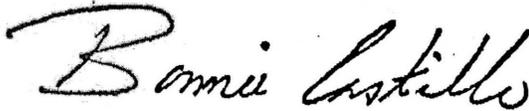
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These proposed regulations are necessary to update existing regulations found in 16 CCR § 2520.5 and §2532.2 (VN) and §2577.6 §2579.4 (PT) and to implement and make specific those regulations in compliance with SB 359. Without these modifications, the regulatory sections would be incomplete and not in compliance with the existing statute. Our initial review of the proposed modifications finds them to be consistent with the statutory requirements of SB 359.

CNA did not submit take a position on SB 359 but we noted that the BVNPT actively supported this legislation and indicated that the changes would assist them in protecting consumers from unsafe practitioners. We believe that many of the recent changes in disciplinary guidelines for healing boards are unnecessarily punitive and reduce the discretionary decision making of healing boards. CNA is not convinced that these inflexible guidelines will be more effective at protecting consumers than the previous disciplinary standards. We are especially concerned about disciplinary actions by employers who provide inadequate staff and or resources for licensed healthcare providers and then scapegoat licensees for substandard care.

Thank you for the opportunity to review these mandated modifications. CNA respectfully requests to be notified of any subsequent modifications that are made as a result of comments submitted or decisions made by the BVNPT relevant to this rulemaking proposal.

Sincerely,

A handwritten signature in black ink that reads "Bonnie Castillo". The signature is written in a cursive, flowing style.

Bonnie Castillo
Director, Government Relations

Agenda Item #10.A. - Attachment B

Board of Vocational Nursing and Psychiatric Technicians

PROPOSED LANGUAGE

Vocational Nursing Regulations

2520.5. Employer Mandatory Reporting.

Employers of licensed vocational nurses shall report, in writing, to the Board the rejection from assignment, suspension, ~~or termination~~, or resignation for cause (as defined in Business and Professions Code Section 2878.1(ed)) of any licensed vocational nurse in its employ. The resignation for cause provision only applies to a licensed vocational nurse's resignation submitted in lieu of receiving a rejection from assignment, suspension, or termination for cause (as defined in Business and Professions Code Section 2878.1 (d)). An employment agency or nursing registry shall report to the Board the rejection from assignment of a licensed vocational nurse by a health facility or home health care provider due to acts that would be cause for suspension or termination (as defined in Business and Professions Code Section 2878.1 (d)). The report shall be made within 30 calendar days from the effective date of the suspension, ~~or termination~~, or resignation for cause, or, where a licensee was rejected from assignment, within 30 calendar days from the date the health facility or home health care provider first notified the employment agency or nursing registry of the rejection. Failure to make a report to the Board as required under this section shall constitute a violation of Business and Professions Code Section 2878.1.

For purposes of this section, "employer" also includes employment agencies and nursing registries.

Note: Authority cited: Sections 2854, Business and Professions Code. Reference: Sections 2859, 2878, 2878.1, and 2878.5, Business and Professions Code.

2523.2. Violation Classifications.

(a) There shall be three classes of violations:

- (1) Class "A";
- (2) Class "B"; and
- (3) Class "C."

(b) In determining the violation class for licensee violations, the following factors shall be considered:

- (1) Nature and severity of the violation.
- (2) Length of time that has passed since the date of the violation.
- (3) Consequences of the violation, including potential or actual patient harm.
- (4) History of previous violations of the same or similar nature.
- (5) Evidence that the violation was willful.

(c) The fine for each Class "A" violation shall not exceed \$10,000 per violation. A Class "A" violation is the failure of an employer to report to the Board, as specified in Section 2520.5, the rejection from assignment, suspension, ~~or termination~~, or resignation for cause of a licensed vocational nurse.

(d) The fine for each Class "B" violation shall be no less than \$1,001 and not more than \$2,500. A Class "B" violation includes:

- (1) A violation that results in or could have resulted in patient harm and where there is no evidence that revocation or other disciplinary action is required to ensure consumer safety. Such violations include but are not limited to patient abandonment and falsifying nursing notes;
 - (2) Any violation that is neither directly or potentially detrimental to patients nor directly or potentially impacts their care. Such violations include, but are not limited to, a violation committed for personal and/or financial gain, or fraud;
 - (3) A minor or technical violation that continues for six months or more in duration; or
 - (4) A minor or technical violation with one or more Class "C" citations.
- (e) The fine for each Class "C" violation shall not exceed \$1,000. A Class "C" violation is a minor or technical violation that is neither directly or potentially detrimental to patients nor directly or potentially impacts their care and which continues for less than six months duration. Such violations include but are not limited to practicing with an expired license, precharting, charting errors, or verbal abuse.
- (f) Notwithstanding the administrative fine amounts specified in subsections (d) and (e), a Class B or Class C citation may include a fine of no more than \$5,000 if one or more of the following circumstances apply:
- (1) The cited person has a history of two or more prior citations of the same or similar violations.
 - (2) The citation involves a violation that has a substantial risk to the health and safety of another person.
 - (3) The citation involves multiple violations that demonstrate a willful disregard of the law.
 - (4) The citation involves a violation perpetrated against an elder, disabled, or dependent person.

Note: Authority cited: Sections 125.9, 148, and 2854, Business and Professions Code. Reference: Sections 125.9, 148, 2878, and 2878.1, Business and Professions Code.

Board of Vocational Nursing and Psychiatric Technicians

PROPOSED LANGUAGE

Psychiatric Technicians Regulations

2577.6. Employer Mandatory Reporting.

Employers of psychiatric technicians shall report, in writing, to the Board the rejection from assignment, suspension, or termination, or resignation for cause (as defined in Business and Professions Code Section 4521.2(ed)) of any psychiatric technician in its employ. The resignation for cause provision only applies to a psychiatric technician's resignation submitted in lieu of receiving a rejection from assignment, suspension, or termination for cause (as defined in Business and Professions Code Section 4521.2 (d)). An employment agency or nursing registry shall report to the Board the rejection from assignment of a psychiatric technician by a health facility or home health care provider due to acts that would be cause for suspension or termination (as defined in Business and Professions Code Section 4521.2 (d)). The report shall be made within 30 calendar days from the effective date of the suspension, ~~or termination,~~ or resignation for cause, or, where a licensee was rejected from assignment, within 30 calendar days from the date the health facility or home health care provider first notified the employment agency or nursing registry of the rejection. Failure to make a report to the Board as required under this section shall constitute a violation of Business and Professions Code Section 4521.2.

For purposes of this section, "employer" also includes employment agencies and nursing registries.

Note: Authority cited: Sections 4504, Business and Professions Code. Reference: Sections 101.6, 108, 4502, 4503, 4520, 4521, and 4521.2(b), Business and Professions Code.

2579.4. Violation Classifications.

- (a) There shall be three classes of violations:
- (1) Class "A";
 - (2) Class "B"; and
 - (3) Class "C."
- (b) In determining the violation class for licensee violations, the following factors shall be considered:
- (1) Nature and severity of the violation.
 - (2) Length of time that has passed since the date of the violation.
 - (3) Consequences of the violation, including potential or actual patient harm.
 - (4) History of previous violations of the same or similar nature.
 - (5) Evidence that the violation was willful.
- (c) The fine for each Class "A" violation shall not exceed \$10,000 per violation. A Class "A" violation is the failure of an employer to report to the Board, as specified in Section 2577.6, the rejection from assignment, suspension, or termination, or resignation for cause of a psychiatric technician.
- (d) The fine for each Class "B" violation shall be no less than \$1,001 and not more than \$2,500. A Class "B" violation includes:

- (1) A violation that results in or could have resulted in patient harm and where there is no evidence that revocation or other disciplinary action is required to ensure consumer safety. Such violations include but are not limited to patient abandonment and falsifying nursing notes;
 - (2) Any violation that is neither directly or potentially detrimental to patients nor directly or potentially impacts their care. Such violations include, but are not limited to, a violation committed for personal and/or financial gain, or fraud;
 - (3) A minor or technical violation that continues for six months or more in duration; or
 - (4) A minor or technical violation with one or more Class "C" citations.
- (e) The fine for each Class "C" violation shall not exceed \$1,000. A Class "C" violation is a minor or technical violation that is neither directly or potentially detrimental to patients nor directly or potentially impacts their care and which continues for less than six months duration. Such violations include but are not limited to practicing with an expired license, precharting, charting errors, or verbal abuse.
- (f) Notwithstanding the administrative fine amounts specified in subsections (d) and (e), a Class B or Class C citation may include a fine of no more than \$5,000 if one or more of the following circumstances apply:
- (1) The cited person has a history of two or more prior citations of the same or similar violations.
 - (2) The citation involves a violation that has a substantial risk to the health and safety of another person.
 - (3) The citation involves multiple violations that demonstrate a willful disregard of the law.
 - (4) The citation involves a violation perpetrated against an elder, disabled, or dependent person.

Note: Authority cited: Sections 125.9, 148, and 4504, Business and Professions Code. Reference: Sections 125.9, 148, 4521, and 4521.2, Business and Professions Code.