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Proposed Rulemaking

Title

Promulgated by:
Arkansas State Board of Nursing

Title 17. Professions, Occupations, and Businesses

Chapter XXII. Arkansas State Board of Nursing, Department of Health

Subchapter A. Generally

Part 126. Rules of Procedure

Subpart 1. Generally

17 CAR § 126-101. Arkansas Administrative Procedure Act.

Rules, rulemaking, notice of hearing, hearings, judicial review, declaratory orders, adjudications, and other procedures authorized by the Arkansas Nurse Practice Act are governed by the Arkansas Administrative Procedure Act, Arkansas Code § 25-15-201 et seq.

17 CAR § 126-102. Disciplinary proceedings — Definitions.

As used in this part:

(1) "Fraud or deceit" shall include but not be limited to:

(A) False representation of facts on an application for licensure by examination or licensure by endorsement without examination or on application for prescriptive authority, full practice authority, or renewal of license;

(B) False representation by having another person in his or her place for the licensing examination or any part thereof;

(C) Forged or altered documents or credentials as required for the application for:

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- (i) Original license;
- (ii) Renewal of license; or
- (iii) Certificate of prescriptive authority;

(D) Disclosing the contents of the licensing examination or soliciting, accepting, or compiling information regarding the examination before, during, or after its administration;

(E) Aiding, abetting, assisting, or hiring an individual to violate or circumvent any law or duly promulgated rules intended to guide the conduct of a nurse or other healthcare provider;

(F) Prescribing any drug, medicine, or therapeutic device unless certified by the Arkansas State Board of Nursing as having prescriptive authority;

(G) Engaging in the practice of nursing without a valid license; or

(H) Payment for any license, renewal license, fine, civil penalty, service, or item purchased by any method or device that results in nonpayment to the Arkansas State Board of Nursing or its agents;

(2) "Gross immorality" shall include, but not be limited to, acts and conduct inconsistent with the rules and principles of morality that relate to the:

(A) Practice of nursing; and

(B) Responsibilities of the licensee;

(3) "Habitually intemperate or addicted" shall include but not be limited to the use of hallucinogenics, stimulants, depressants, or intoxicants that could result in behavior that interferes with the practice of nursing;

(4) "Has had a license, privilege to practice, certificate, or registration revoked, suspended, or placed on probation or under disciplinary order" refers to actions in any jurisdiction;

(5) "Has voluntarily surrendered a license, privilege to practice, certification, or registration and has not been reinstated" refers to actions in any jurisdiction;

(6) "Mental incompetence" shall include those situations where a court has judged a licensee as incompetent;

(7)(A) "Negligence" means the:

(i) Failure to do some act of nursing that a licensee should do, guided by those ordinary considerations that regulate the practice of nursing; or

(ii) Doing of something that a reasonable and prudent licensee would not do under the same or similar facts and circumstances in the practice of nursing.

(B)(i) The term "gross negligence" is an exercise of such minimal care as to justify the belief that there was a conscious disregard or indifference for the health, safety, or welfare of the patient or the public and shall be considered a substantial departure from the accepted standard of care;

(ii) "Other causes" shall include but not be limited to the inability to practice nursing because of physical and/or psychological impairment;

(8) "Unprofessional conduct" includes, but is not limited to, the conduct listed below:

(A) Failing to assess and evaluate a patient's status or failing to institute nursing intervention which might be required to stabilize a patient's condition or prevent complications;

(B) Failing to accurately or intelligibly report or document a patient's symptoms, responses, progress, medications, and/or treatments;

(C) Failing to make entries, destroying entries, and/or making false entries in records pertaining to the giving of:

(i) Narcotics;

(ii) Drugs; or

(iii) Nursing care;

(D) Unlawfully appropriating medications, supplies, equipment, or personal items of the patient or employer;

(E) Failing to administer medications and/or treatments in a responsible manner;

(F) Performing or attempting to perform nursing techniques and/or procedures in which the nurse is untrained by experience or education, and practicing without the required professional supervision;

(G) Violating the confidentiality of information or knowledge concerning the patient except where required by law;

(H) Causing suffering, permitting or allowing physical or emotional injury to the patient, or failing to report the same in accordance with the incident reporting procedure in effect at the employing institution or agency;

(I) Leaving a nursing assignment without notifying appropriate personnel;

(J) Failing to report to the Arkansas State Board of Nursing within a reasonable time of the occurrence, any violation or attempted violation of the Arkansas Nurse Practice Act or duly promulgated rules or orders;

(K) Delegating nursing care functions and/or responsibilities in violation of the Arkansas Nurse Practice Act and the Arkansas State Board of Nursing Rules, Delegation, 17 CAR pt. 124;

(L) Failing to supervise persons to whom nursing functions are delegated or assigned;

(M) Practicing nursing when unfit to perform procedures and make decisions in accordance with the license held because of physical, psychological, or mental impairment;

(N) Failing to conform to the Standard Precautions for preventing contact with blood or other potentially infectious materials;

(O) Providing inaccurate or misleading information regarding employment history to an employer or the Arkansas State Board of Nursing;

(P) Failing or refusing a drug screen as requested by employer or Arkansas State Board of Nursing;

(Q) Engaging in acts of dishonesty that relate to the practice of nursing;

(R) Failure to display appropriate insignia to identify the nurse during times when the nurse is providing health care to the public;

(S) Failure to repay loans to the Nursing Student Loan Program as contracted with the Arkansas State Board of Nursing;

(T) Failure to comply with the terms and conditions of the Letter of Reprimand, Board Order, Consent Agreement, or the Alternative to Discipline contract;

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(U) Failure to establish and maintain a professional boundary;

(V) Performing a healthcare related act that is prohibited by statute or rule, or failing to perform a healthcare related act that is required by statute or rule; and

(W) Any other conduct that, in the opinion of the Arkansas State Board of Nursing, is likely to deceive, defraud, injure, or harm a patient or the public by an act, practice, or omission that fails to conform to the accepted standards of the nursing profession; and

(9) "Willfully" shall include but not be limited to:

(A) Continuing action after notice by the Arkansas State Board of Nursing;

(B) Disregarding the expiration date of the license;

(C) Providing false, incorrect, or incomplete information to the employer regarding the status of the license;

(D) Performing acts beyond the authorized scope of the level of nursing for which the individual is licensed, and practicing without required professional supervision; and

(E) Failing to follow the Nurse Practice Act of the State of Arkansas and its rules.

Subpart 2. Procedure on Denial, Reprimand, Probation, Civil Penalties, Suspension, or Revocation

17 CAR § 126-201. Grounds for discipline.

(a) The Arkansas State Board of Nursing shall have sole authority to deny, suspend, revoke, or limit any license or privilege to practice nursing or certificate of prescriptive authority issued by the board or applied for in accordance with the provisions of this part, or to otherwise discipline a licensee upon proof that the person:

(1) Is guilty of fraud or deceit in procuring or attempting to procure a license to practice nursing or engaged in the practice of nursing without a valid license;

(2) Is guilty of crime or gross immorality;

- (3) Is unfit or incompetent by reason of:
 - (A) Negligence;
 - (B) Habits; or
 - (C) Other causes;
 - (4) Is habitually intemperate or addicted to the use of habit-forming drugs;
 - (5) Is mentally incompetent;
 - (6) Is guilty of unprofessional conduct;
 - (7) Has had a license, certificate, or registration:
 - (A) Revoked;
 - (B) Suspended;
 - (C) Placed on probation; or
 - (D) Under disciplinary order in any jurisdiction;
 - (8) Has voluntarily surrendered a license, certification, or registration and has not been reinstated in any jurisdiction; or
 - (9) Has willfully or repeatedly violated any of the provisions of this part.
- (b) The board shall refuse to issue or shall revoke the license of any person who is found guilty of or pleads guilty or nolo contendere to any offense listed in Arkansas Code § 17-3-102(a) unless the person requests and the board grants a waiver pursuant to Arkansas Code § 17-3-102(b).
- (c) Proceedings under this subpart shall be as provided in the Arkansas Administrative Procedure Act, as amended, Arkansas Code § 25-15-201 et seq.

17 CAR § 126-202. Proceedings.

Proceedings shall be as follows:

(1) Opportunity for licensee or applicant to have hearing.

(A) Except as provided in subdivision (2) of this section, every licensee or applicant for a license shall be afforded notice and an opportunity to be heard before the Arkansas State Board of Nursing.

(B) The board shall have authority to take any action the effect of which would be to:

- (i) Deny permission to take an examination for licensing for which application has been duly made;
- (ii) Deny a license after examination for any cause other than failure to pass an examination;
- (iii) Withhold the renewal or reinstatement of a license for any cause;
- (iv) Revoke a license;
- (v) Suspend a license;
- (vi) Probate a license;
- (vii) Reprimand a licensee; or
- (viii) Levy civil penalties;

(2) **Suspension of license without prior notice or hearing.** If the board finds that the continued practice by a licensee of the occupation or profession for which he or she is licensed will create an immediate hazard to the public, the board may suspend the license pending a hearing without prior notice of hearing; and

(3) **Notice of action or contemplated action by the board — Request for hearing — Notice of hearing.**

(A) When the board contemplates taking any action of a type specified in subdivisions (1)(B)(i) and (ii) of this section, it shall give written notice to the applicant at the last address of record in the board office, including a statement:

- (i) That the applicant has failed to satisfy the board of his or her qualifications to be examined or to be licensed, as the case may be;
- (ii) Indicating in what respects the applicant has failed to satisfy the board; and
- (iii) That the applicant may secure a hearing before the board by depositing in the mail, within twenty (20) days after service of said notice, a registered letter addressed to the board containing a request for a hearing.

(B) In any proceeding of the board involving the denial of a duly made application to take an examination or refusal to issue a license after an applicant has taken and passed an examination, the burden of satisfying the board of the applicant's qualifications shall be upon the applicant.

(C) When the board contemplates taking any action of a type specified in subdivisions (1)(B)(iii) – (v) of this section, it shall give a written notice to the licensee at the last address of record in the board office, through the board’s attorney, that contains a statement:

(i) That the board has sufficient evidence that, if not rebutted or explained, will justify the board in taking the contemplated action;

(ii) Indicating the general nature of the evidence and detailed allegations of violation of Arkansas Code § 17-87-309(a)(1) – (9) the licensee is charged with; and

(iii) That a hearing will be held on a date certain, no sooner than twenty (20) days after the mailing of the notice to the last address of record in the board office, and at that hearing the board will receive evidence.

(D) When the board shall summarily suspend a license pending a hearing, as authorized in subdivision (2) of this section, it shall give written notice of the general nature of the evidence and detailed allegations of violation of Arkansas Code § 17-87-309(a)(1) – (9) the licensee is charged with:

(i) That the board has sufficient evidence that, if not rebutted or explained, will justify revocation of the license by the board;

(ii) Indicating the general nature of the evidence against the licensee;

(iii) That, based on the evidence indicated, the board has:

(a) Determined that the continuation of practice of the occupation or profession of the licensee will create an immediate hazard to the public; and

(b) Therefore suspended the license of the licensee effective as of the date such notice is served; and

(iv) The board will then set an immediate hearing for a full evidentiary presentation by the licensee and the board.

(E) In any hearing before the board involving the suspension or revocation of a license, the burden shall be on the board to present competent evidence to justify the action taken or proposed by the board.

17 CAR § 126-203. Civil penalties.

(a) The Arkansas State Board of Nursing may, after providing notice and a hearing, levy civil penalties in an amount not to exceed one thousand dollars (\$1,000) for each violation against those individuals or entities found to be in violation of Arkansas Code § 17-87-101 et seq., or rules promulgated thereunder.

(b) Each day of violation shall be a separate offense.

(c) These penalties shall be in addition to other penalties which may be imposed by the board pursuant to Arkansas Code § 17-87-101 et seq.

(d) Unless the penalty assessed under this section is paid within fifteen (15) calendar days following the date for an appeal from the order, the board shall have the power to file suit in Pulaski County Circuit Court to obtain a judgment for the amount of penalty not paid.

17 CAR § 126-204. Encumbrance or suspension of Drug Enforcement Administration registration.

The APRN shall submit his or her Drug Enforcement Administration registration to the Arkansas State Board of Nursing upon request following the disciplinary hearing in which the registration is encumbered or suspended.

17 CAR § 126-205. Method of serving notice of hearing.

(a) Any notice required by 17 CAR § 126-202(3) may be served either:

(1) Personally or by an officer authorized by law to serve process; or

(2) By registered mail or certified mail with return receipt requested, directed to the licensee or applicant at his or her last known address as shown by the records of the Arkansas State Board of Nursing.

(b) If notice is served personally, it shall be deemed to have been served at the time when the officer delivers the notice to the person addressed.

17 CAR § 126-206. Venue of hearing.

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Arkansas State Board of Nursing hearings held under the provisions of this part shall be conducted:

- (1) At the board office; or
- (2) Elsewhere in Pulaski County.

17 CAR § 126-207. Public hearings.

(a) **Use of hearing office.** All hearings under this subpart shall be open to the public.

(b) At all such hearings at least a quorum of the Arkansas State Board of Nursing shall be present to hear and determine the matter.

17 CAR § 126-208. Rights of persons entitled to hearing.

A person entitled to be heard pursuant to this subpart shall have the right to:

- (1) Be represented by counsel;
- (2) Present all relevant evidence by means of:
 - (A) Witnesses;
 - (B) Books;
 - (C) Papers; and
 - (D) Documents;
- (3) Examine all opposing witnesses on any matter relevant to the issues;
- (4) Have subpoenas and subpoenas duces tecum issued to compel the attendance of witnesses and the production of relevant books, papers, and documents upon making written request therefore to the Arkansas State Board of Nursing; and
- (5) Have a transcript of the hearing made at his or her own expense.

17 CAR § 126-209. Powers of the board in connection with hearing.

In connection with any hearing held pursuant to the provisions of this subpart, the Arkansas State Board of Nursing or its hearing officer shall have power to:

- (1) Have counsel to develop the case;
- (2) Administer oaths or affirmations to witnesses called to testify;

- (3) Take testimony;
- (4) Examine witnesses;
- (5) Have a transcript of the hearing made at the expense of the board; and
- (6) Direct a continuance of any case.

17 CAR § 126-210. Rules of evidence.

(a) In proceedings held pursuant to this part, the Arkansas State Board of Nursing may admit any evidence and may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs.

(b) The board may in its discretion exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

17 CAR § 126-211. Fees — Witnesses.

Witness fees and mileage, if claimed, shall be allowed the same as for testimony in a circuit court.

17 CAR § 126-212. Manner and time of rendering decision.

(a) After a hearing has been completed, the members of the Arkansas State Board of Nursing shall:

- (1) Proceed to consider the case; and
- (2) As soon as practicable, render their decision.

(b) If the hearing was conducted by a hearing officer, the decision shall be rendered by the board at a meeting where a quorum of the members of the board is present and participating in the decision.

(c) In any case the decision must be rendered within ninety (90) days after the hearing.

17 CAR § 126-213. Service of written decision.

(a) Within a reasonable time after the decision is rendered, the Arkansas State Board of Nursing shall serve upon the person whose license is involved a written copy

of the decision, either personally or by registered mail, to the last address of record in the board office.

(b) If notice is served personally, it shall be deemed to have been served at the time when the officer delivers the notice to the person addressed.

(c) Where notice is served by registered mail, it shall be deemed to have been served on the date borne by the return receipt showing delivery of the notice to the addresses or refusal to accept the notice.

(d) An attempt to serve notice at the last address of record shall constitute official notice.

17 CAR § 126-214. Procedure where person fails to request or appear for hearing — Reopening hearing.

(a)(1) If a person duly notified fails to appear for a disciplinary hearing and no continuance has been granted, the Arkansas State Board of Nursing or its hearing officer shall hear the evidence of such witnesses as may have appeared, and the board shall proceed to consider the matter and dispose of it on the basis of the evidence before it in the manner required by 17 CAR § 126-212.

(2) Failure of the licensee to keep the board informed of a change of address shall not be grounds to have the hearing reopened.

(b)(1) Where because of accident, sickness, or other cause a person fails to appear for a hearing which has been scheduled by the board, the person may, within a reasonable time, apply to the board to reopen the proceeding, and the board, upon finding such cause sufficient, shall:

(A) Immediately fix a time and place for hearing; and

(B) Give such person notice thereof as required by this subpart.

(2) At the time and place fixed, a hearing shall be held in the same manner as would have been employed if the person had appeared in response to the original notice of hearing.

17 CAR § 126-215. Contents of decision.

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The decision of the Arkansas State Board of Nursing shall contain:

- (1) Findings of fact made by the board;
- (2) Conclusions of law reached by the board;
- (3) The order of the board based upon these findings of fact and conclusions of law; and
- (4) A statement informing the person whose license is involved of:
 - (A) His or her right to request a judicial review; and
 - (B) The time within such request must be made.

Subpart 3. Enforcement

17 CAR § 126-301. Civil action.

The Arkansas State Board of Nursing may institute such civil suits or other legal proceedings as may be required for enforcement of any provisions of Arkansas Code §§ 17-87-101 – 17-87-711 (Nurse Practice Act), as amended, and related acts.

17 CAR § 126-302. Criminal action.

If the Arkansas State Board of Nursing has reason to believe that any person has violated any provisions of the Nurse Practice Act, as amended, or related acts for which criminal prosecution would be in order, it shall so inform the prosecuting attorney in whose district any such purported violation may have occurred.

Subpart 4. Declaratory Orders

17 CAR § 126-401. Purpose and use of declaratory orders.

- (a) A declaratory order is a means of resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the Arkansas State Board of Nursing has authority.

(b) A petition for declaratory order may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances.

(c) A declaratory order is not the appropriate means for:

(1) Determining the conduct of another person; or

(2) Obtaining a policy statement of general applicability from the board.

(d) A petition for declaratory order must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

17 CAR § 126-402. The petition.

The process to obtain a declaratory order is begun by filing with the Arkansas State Board of Nursing a petition that provides the following information:

(1) The caption shall read: "Petition for Declaratory Order before the Arkansas State Board of Nursing";

(2) The name, address, telephone number, and facsimile number of the petitioner;

(3) The name, address, telephone number, and facsimile number of the attorney of the petitioner;

(4) The statutory provision or provisions, agency rule or rules, or agency order or orders on which the declaratory order is sought;

(5) A description of how the statutes, rules, or orders may substantially affect the petitioner and the petitioner's particular set of circumstances, and the question or issue on which petitioner seeks a declaratory order;

(6) The signature of the petitioner or petitioner's attorney;

(7) The date; and

(8) Request for a hearing, if desired.

17 CAR § 126-403. Board disposition.

(a) (1) The Arkansas State Board of Nursing may hold a hearing to consider a petition for declaratory order.

(2) If a hearing is held, it shall be conducted in accordance with:

(A) Arkansas Code §§ 25-15-208 and 25-15-213; and

(B) The board's rules for adjudicatory hearings.

(b) (1) The board may rely on the statements of fact set out in the petition without taking any position with regard to validity of the facts.

(2) Within ninety (90) days of the filing of the petition, the board will render a final order:

(A) Denying the petition; or

(B) Issuing a declaratory order.