

KENTUCKY BOARD OF NURSING

DISCIPLINARY PROCESS: NURSES, DIALYSIS TECHNICIANS, AND LICENSED CERTIFIED PROFESSIONAL MIDWIVES



The Kentucky Board of Nursing protects the public by development and enforcement of state laws governing the safe practice of nurses, dialysis technicians, and licensed certified professional midwives.

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Introduction

The General Assembly has authorized the Kentucky Board of Nursing to regulate the nursing profession to protect and safeguard the health and safety of the citizens of the Commonwealth of Kentucky. *See*, Kentucky Revised Statutes (KRS) 314.021(1).

All individuals licensed or privileged under provisions of this chapter shall be responsible and accountable for making decisions that are based upon the individuals' educational preparation and experience in nursing and shall practice nursing with reasonable skill and safety.

Id. at (2).

Similar language is codified in regulation for dialysis technicians (DTs) and licensed certified professional midwives (LCPMs). This article will focus on the disciplinary process for the three license types that are within the jurisdiction of the Kentucky Board of Nursing.

Kentucky is a Mandatory reporting state in which any person, including the licensee, that has knowledge that a violation of laws, pertaining to nurses or DTs is required to report it to the Board pursuant to KRS 314.031(4) (nurses) and KRS 314.035(3) (dialysis technicians). A LCPM or an employer of an LCPM, must report any violation of KBN regulations by an LCPM to the Board pursuant to KRS 314.408(4). Any violations detailed in KRS 314.091(1), 201 KAR 20:470, and 201 KAR 20:630 are subject to these reporting requirements.

I have received a complaint, what happens then?

If the complaint establishes a colorable violation, the Board staff notifies the licensee via mail. The licensee is sent a Notice of Complaint letter, a copy of the complaint, and an Official Response Form to the address of record with the Board. The licensee must provide a written, legible, verified response to the Board within 30 days of receipt of the complaint. *Id.* at §1(4). The Board expects the licensee to cooperate fully with these requests. *See*, KRS 314.095.

Please be sure your address of record is correct! The licensee “is deemed to have consented to service of notices or orders of the board at the mailing address on file with the board” and correspondence “mailed or delivered to the mailing address on file with the board constitutes valid service of the notice or order.” *See*, KRS 314.107; 201 KAR 20:370 §1(10), 201 KAR 20:470 §13(1), 201 KAR 20:630 §4(1).

If the Board has “reasonable cause” to believe that the licensee is unable to practice with reasonable skill and safety, or that the individual has abused alcohol, drugs, or controlled substances, the Board has the authority to order the licensee to undergo a mental health, neuropsychological, psychosocial, psychosexual, substance use disorder, or physical evaluation. *See* KRS 314.085. It is worth noting that every licensee is deemed to have consented to this authority. Moreover, the licensee is responsible for paying the cost of the evaluation and selecting the appropriate evaluator from a list approved by the Board.

Moreover, Board staff may also request an informal meeting with the licensee to discuss the allegations. *See*, 201 KAR 20:161 §1(4)(c). Investigative meetings are routine, and the licensee may have private counsel attend, as well.

Potential Actions by the Board

Not all complaints are equal.

Working While Under Investigation

Generally, if the license is current, the licensee is allowed to maintain employment in Kentucky during the investigation. The Online Validation for nurses and LCPMs will reflect that the licensee is under investigation, that the details of the investigation are confidential until final resolution, and that the licensee may practice without restrictions provided the license expiration date is current and no active discipline. The status of a DT credential cannot be verified through the online validation; however, the same information is conveyed if an employer or other interested person contacts the KBN to determine if a DT is under investigation. No other information about the investigation is shared at that time. The employer may submit a written request to the KBN to be notified of the outcome. The exception to this is if an Immediate Temporary Suspension is issued.

Immediate Temporary Suspensions

In rare cases, the allegations rise to a level that may require an immediate temporary suspension of the license. This an emergency action, taken unilaterally by the Board, against an individual's license when there is an urgent need to protect the health and safety of the public.

The President of the Board may determine that an Immediate Temporary Suspension of a license is to be issued when "disciplinary action or an investigation is pending," and such immediate or emergency action is necessary in order to protect the public. The Executive Director of the Board, or designee, may issue the Order of Immediate Temporary Suspension ("ITS Order"). *See*, KRS 314.089. In addition to allegations that involve public protection, immediate temporary suspensions may also be ordered for failure to pay a license fee (*see*, KRS 314.075); for failure to pay court ordered child support (*see*, KRS 205.712); or for failure to comply with a request for a Board ordered evaluation as described in the following paragraph.

If the Board has entered an ITS Order against a license, the licensee may seek prompt review by requesting an emergency hearing "to determine the propriety of the Order." An emergency hearing is scheduled within ten (10) "working days" of the request for hearing, and the Board has the burden of proof to affirm the propriety of the Order by presenting "substantial evidence." *See*, KRS 314.089, KRS 13B.125. The emergency hearing is conducted by a Hearing Officer. If the ITS Order is affirmed, it becomes a "Final Order." The licensee may appeal to the Jefferson Circuit Court. *Id.* Regardless, the cost of the emergency hearing may be imposed upon the licensee. *See*, 201 KAR 20:162 §7

How are complaints resolved?

Closed: The Board may find that the claim is unsubstantiated: that there is no basis or proof of the allegation. When this occurs, the complaint is closed by Board staff.

Letter of Concern: The Board may find that there is a basis for the complaint, but it does not rise to the level of a civil penalty, continuing education hours, reprimand, suspension, or revocation. In this case, the Board may issue a Letter of Concern, which expresses concern regarding an issue discovered during the investigation. Letters of Concern are not considered discipline action against the license.

Consent Decree: If the Board finds that the incident was minor or non-intentional, it may enter into a Consent Decree with the licensee. The licensee waives the right to a formal administrative hearing and agrees to pay a civil penalty. Additional continuing education related to the nature of the complaint may be a term. Consent Decrees are considered informal action.

Agreed Order: Board staff may offer a negotiated settlement. An “Agreed Order” is a settlement under which the licensee admits the violation, and negotiates with the Board staff the specific terms of the discipline. Agreed Orders have to be approved by and executed by the KBN Executive Director. Once they are, they have the full force and effect of a decision rendered through the hearing process and are considered a formal disciplinary action. Like a Consent Decree, the licensee waives the right to a formal hearing, as well as the due process rights afforded under KRS Chapter 13B.

Civil Penalties of up to \$10,000 may be imposed by the Board.

What are the possible actions that can be taken against a license?

Reprimand: Reprimands are discipline, but they may not affect the licensee’s ability to practice. They generally impose a civil penalty and require completion of additional continuing education. If appropriate, it may be necessary for the licensee to submit to drug screening.

Limitation/Probation: In other cases, the license to practice is limited or probated. The licensee continues to practice, subject to conditions determined by KBN. Restrictions may include: the area in which the licensee is allowed to practice; practicing with supervision; and/or having limited or no access to narcotics or other medication. Probation may include: meetings with KBN staff; random drug/alcohol screens; substance abuse treatment; and employer reports.

Voluntary Surrender: A licensee can agree to surrender the license for a period, but it may be reinstated after certain conditions are met, unless the licensee has signed a permanent voluntary surrender.

Suspension: The licensee loses the right to practice nursing for a specific amount of time. The Board’s order will specify conditions that must be met prior to reinstatement of the license, which may include: a substance use disorder, mental health, neuropsychological, and/or physical

evaluation; counseling reports; random drug/alcohol screens; and letters of recommendation. A hearing may be required to consider reinstatement of a license.

Reinstatement Denied: Reinstatement of a lapsed/suspended license can be denied by KBN until specific conditions are met.

Licensure Denied The applicant is denied licensure in the commonwealth of Kentucky.

Revocation: The licensee loses the ability to practice in the commonwealth of Kentucky. A licensee may reapply for a license after the period of time specified by the Board's Order unless a permanent revocation is entered. A nurse will be required to retake and successfully pass the National Council Licensure Examination (NCLEX).

Failure to comply with the terms entered will result in the license being suspended or denied reinstatement. If the Board and the licensee fail to reach a resolution to the allegations, the Hearing process may be initiated.

Formal Administrative Hearings

Investigations proceed to the administrative hearing process if the licensee chooses not to respond to the allegations or chooses not to accept the proposed settlement. The hearing process is initiated by the issuance of the Notice of Hearing and Statement of Charges. The Notice of Hearing informs the licensee, or "Respondent," that the Board of Nursing, the "Petitioner," is bringing formal action against the licensee. The notice lists the specific charges or violations of law, provides the date, time, and location of the hearing, and a statement of the licensee's legal rights. The Respondent is required to file a response or answer to the charges within twenty days of receipt of the Notice of Hearing and Statement of Charges; the failure to do so may result in an admission of those unanswered charges. If the Respondent fails to respond or participate in the Hearing Process, the Hearing Officer has the authority to grant a Default Order in favor of the prosecution. It is not a defense to state the licensee did not respond because the licensee did not receive the Notice – if Board staff sent it to the address of record.

The Respondent may elect to proceed to a hearing without counsel; however, the Respondent has a right to hire counsel to represent them.

A pre-hearing conference will be scheduled. This is a meeting between the Respondent and her/his attorney, if applicable, the investigator, the prosecuting attorney, and the Hearing Officer to discuss preliminary matters prior to the actual hearing date. If requested, the Hearing Officer can issue subpoenas for witnesses to testify on behalf of the Respondent. The prosecuting attorney is the counsel for the Board responsible for bringing the Statement of Charges and presenting the case before the Hearing Panel, as well as any post-hearing process. The Respondent, and counsel for the Respondent have a right to be present at all times except during deliberations of the Hearing Panel.

The Kentucky Rules of Evidence may not apply in the Board's disciplinary hearings. For example, hearsay evidence is admissible at the discretion of the Hearing Officer. The Board's Executive Director and the Hearing Officer have authority to issue subpoenas.

A panel consisting of two Board Members and the Hearing Officer conduct the hearing, which is open to the public. The Board Members on the hearing panel act as the "finders of the fact" (i.e., jurors), and base their decision in the case solely upon the evidence properly admitted

at the hearing. At the conclusion of the hearing, the panel goes into closed session to deliberate the case. The Hearing Officer's primary role is to conduct the hearing and rule on legal issues raised by the parties, much like a judge. Moreover, at the hearing's conclusion, the Hearing Officer votes as a tiebreaker if the Board members are split regarding a ruling. In the case of an emergency hearing, only the Hearing Officer presides. *See*, KRS 13B.

If found guilty of at least one of the charges, the Respondent shall bear the costs of the Hearing Officer fee, court stenographer fee, civil penalty, and the cost of the Board hired expert witness, if applicable.

COVID-19

During the Pandemic, the Hearing Officer has ordered that the panel, parties, and witnesses attend the hearing via video conference, unless either party objects.

Due Process of Law

The Respondent's rights are guaranteed by the strict adherence to the constitutional principles of Due Process. The Respondent has the right to representation by an attorney of his or her own choice and retention; the right to confront and cross-examine witnesses; the right to present witnesses and evidence; and the right to present rebuttal testimony.

The Board has the "Burden of Persuasion." The Board must prove its case by a "preponderance of evidence" or in the case of an emergency hearing, by "substantial evidence."

Both parties may make an opening statement, present evidence, and make a closing argument before the Panel deliberates.

Deliberation and Recommended Order

At the conclusion of the evidence, the Hearing Panel deliberates in a closed session. The Hearing Panel issues a "recommended order," which is not final until it has been reviewed and "ratified" (i.e., approved) by the full Board at the next regular Board meeting. The Hearing Officer prepares the recommended Findings of Fact, Conclusions of Law, and Order, and the parties have 15 days after the Hearing Officer has mailed the Recommended Order to file "exceptions" to the Recommended Order.

Final Order

The Recommended Order and any exceptions are submitted to the full Board for review, and ratification. The Board has 90 days after the receipt of the Recommended Order to issue its Final Order. The Final Order must be based solely on the testimony and exhibits introduced as evidence at hearing.

Right to Appeal

Should the ruling be adverse to the Respondent, she or he has the right to appeal to the Jefferson County Circuit Court. The party filing the appeal, now the "Appellant," must file the appeal within 30 days after the Final Order is mailed to the parties. Appeals are solely based on

the record of the Hearing and on relevant legal objections raised during the hearing. Appeals are not new hearings – no new evidence is presented. Should the appeal before the Jefferson Circuit Court be unsuccessful, the appellant may seek further appeals before the Kentucky Court of Appeals, and the Kentucky Supreme Court (at its discretion).

Final Dispositions

All final KBN disciplinary actions are subject to the Kentucky Open Records Act. In addition, disciplinary actions are published in the *KBN Connection* and, when required by law, are reported to the National Council of State Boards of Nursing Data Bank; National Practitioners Data Bank; Health and Human Services, Office of Inspector General; and other state or federal agencies.

The information provided is intended as an overview of the KBN disciplinary process. The licensee should refer to the applicable statutes and regulations.

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