

From: [Sunset Advisory Commission](#)
To: [Cecelia Hartley](#)
Subject: FW: Public Input Form for Agencies Under Review (Public/After Publication)
Date: Friday, October 21, 2016 4:43:51 PM

-----Original Message-----

From: sundrupal@capitol.local [<mailto:sundrupal@capitol.local>]
Sent: Friday, October 21, 2016 4:19 PM
To: Sunset Advisory Commission
Subject: Public Input Form for Agencies Under Review (Public/After Publication)

Agency: TEXAS BOARD NURSING TBN

First Name: Elizabeth

Last Name: Higginbotham

Title: Nurse Attorney

Organization you are affiliated with: Higginbotham & Associates LLC

Email: lizh@texasnurse-law.com

City: San Antonio

State: Texas

Your Comments About the Staff Report, Including Recommendations Supported or Opposed:

With regard to the over prosecution of cases, this Agency has refused to give commissions for subpoenas necessary to a fair hearing at SOAH . Moreover, there is an overuse of Motion(s) to Dismiss without prejudice--which gives the BON a two year continuance with an open season fishing pass. Many discrimination/ civil rights suits are also the subject of board complaints made by employers to exhaust short limitations periods for retaliation causes of action under the Health & Safety Code and Texas Occupations Code 301.413.

There is a conflict of interest in keeping the pipeline of complaints wide open employers have a "defense" for retaliation.

I got a call from an employer Administrator that said the employees who were working with another client were getting called and bullied from an Investigator who was not the investigator of record over a weekend--making thinly veiled threats against the witnesses for "not cooperating" in the investigation because they REFUSED to lie about the nurse under investigation. The employer hired me to represent ALL of their employees as the individual employees feared retaliation from the BON. The Agency filed and got a Motion to Dismiss GRANTED without prejudice before I ever got back to my office or had a chance to respond to the Motion under SOAH procedural rules.

Contrary to the Rules of Evidence, the Agency regularly uses their own employees as "experts", they claim statutory privilege for what the "expert" reviewed for the purposes of testifying and openly threaten mandamus of the SOAH ALJ if a ruling to produce the materials reviewed by the expert is ordered.

This Agency also has a "rule" that anything said at an Informal Settlement Conference can and will be used against the licensee while claiming Rule 408 privilege for "Agreed Orders" which would prove that increase in sanction level is retaliation for seeking a contested case hearing.

This Agency also resists any proposal for decision that is in favor of the licensee and overturns the decisions in contravention of the Government Code claiming that the Agency is the only decision maker with regard to sanction.

This Agency has used evidence of a former employee's confidential personnel file as evidence in a contested case hearing to intimidate the former employee who was testifying as a witness against the Agency for another licensee. The information that was offered could not have been obtained by any means except internal access to the information.

I have a license granted by this Agency and have my own concerns about reprisal; however, I am an officer of the Court with a duty to zealously represent my clients and will not be intimidated into silence.

Any Alternative or New Recommendations on This Agency:

The procedural and evidentiary decisions need to be made by SOAH in accordance with the Rules of Evidence and Procedure as opposed to the Executive Director.

Dismissal of Cases without prejudice should be subject to Motions to Confer.

Final decisions should be made by the Agency assigned to hear the case--SOAH, not the Agency (the BON) who has a conflict of interest in perpetuating "precedent" that has no legal basis save for the fact that the licensee could not afford to appeal.

My Comment Will Be Made Public: I agree

From: [Sunset Advisory Commission](#)
To: [Cecelia Hartley](#)
Subject: FW: Public Input Form for Agencies Under Review (Public/After Publication)
Date: Friday, October 21, 2016 11:26:09 AM

-----Original Message-----

From: sundrupal@capitol.local [<mailto:sundrupal@capitol.local>]
Sent: Friday, October 21, 2016 11:14 AM
To: Sunset Advisory Commission
Subject: Public Input Form for Agencies Under Review (Public/After Publication)

Agency: TEXAS BOARD NURSING TBN

First Name: Elizabeth

Last Name: Higginbotham RN,J.D.

Title: Nurse Attorney

Organization you are affiliated with: Higginbotham & Associates LLC

Email: lizh@texasnurse-law.com

City: San Antonio

State: Texas

Your Comments About the Staff Report, Including Recommendations Supported or

Opposed: With regard to the issue of over-prosecution of matters by this Agency, I agree with the Sunset Commission's analysis which is corroborated by the SOAH. One such issue that arises frequently in my practice of civil rights litigation as well as administrative contested case matters involves what I believe to be breach of applicants'/licensees' rights under the ADA (Title II) and the Rehabilitation Act with regard to persons who have medical diagnoses of either chemical dependency in recovery, and chronic pain. This Agency regularly substitutes its own unqualified opinions for that of treating professionals and subsequently makes determinations that unnecessarily limit and violate the rights of applicants and licensees who are qualified to do the essential functions of their jobs (to be licensed) with or without reasonable accommodation. Specifically, the BON has made arbitrary determinations that the affected nurses are "impaired" or "pose a direct threat to the public" and based on those determinations have forced abstinence from alcohol as well as extended periods of supervision and drug testing on applicants and licensees without any reasonable basis, much less any objective determination of direct threat. This Agency requires applicants and licensees to undergo "forensic evaluation" but only follows the recommendations and evaluations with its "approved providers" when they are in line with Staff's diagnosis. When applicants and licensees "resist"

"Agreed Orders" and assert their right to trial at SOAH, the level of sanction sought by Staff increases without any basis at law. This is discrimination as well as reprisal. At SOAH, this Agency has objected to the opinion of one of its own approved providers that they required the licensee to be evaluated by and attempted to disqualify the provider under Daubert and its progeny because the opinion of the approved qualified professional was not consistent with Board Staff's "diagnosis" and desired outcome.

Any Alternative or New Recommendations on This Agency: The Agency needs to be educated on the contours of the ADA (Title II) and technical assistance guidance for public licensing entities. They must adhere to the law and not substitute its own judgment for the expert opinion of a qualified provider with regard to whether or not an applicant or a licensee poses a direct threat to the public, making him or her "unqualified" for licensure as well as what, if any, restrictions are appropriate with regard to the grant or renewal of licensure for individuals with

disabilities. The fact of a medical condition requiring medication for a person to function normally must not be treated as an automatic reason to unreasonably limit or restrict access to licensure. These determinations must be based on specific objective medical evidence that such person is unable to meet the essential functions criteria for licensure, or otherwise poses a direct threat of harm to the public.

My Comment Will Be Made Public: I agree