

# When a BON disciplinary process is based on substance use disorder

This first in a two-part series reviews the complaint process and approach alternatives.

By Nancy J. Brent, MS, JD, RN

**WHEN** *Melissa Welsh\**, a certified nurse assistant (CNA), renewed her CNA certificate, she self-reported her arrest and conviction for delivery of cocaine. She willingly entered into a settlement agreement with the state board of nursing (BON), which placed her CNA certificate on a 24-month conditional status. In addition, she entered a guilty plea agreement to the criminal charges and was placed on 5-year supervised probation. Melissa successfully completed a nurse monitoring program (NMP) and was given a positive evaluation by a physician and a certified addiction professional in-

*dicating she required no further treatment. As a result of her NMP success and the favorable evaluation, the BON placed Melissa's CNA license on an unrestricted status after 24 months.*

*Years later, Melissa completed a nursing program, but she was concerned that her past would prevent her from receiving her RN license, even though her NMP report stated no current concerns related to substance abuse issues. Her application was referred to an application review committee for further investigation and recommendations.*

*The BON offered Melissa a con-*

*ditional license through a settlement agreement. After consulting with her attorney, Melissa waived her right to a hearing and accepted the agreement. The conditions included abstaining from use of all mind-altering drugs or medications, professional monitoring by the NMP for 2 years, and a substance abuse evaluation within 1 year from the effective date of her agreement with the BON.*

*Two years later, having met all the requirements of the settlement agreement, the BON approved Melissa's application to have her license reinstated to full status.*





## Ending throw away nurse syndrome

Melissa's experience allowed her to maintain a certificate as a CNA, obtain a conditional RN license, and eventually reinstate her RN license without conditions. All this was accomplished without a BON hearing. If Melissa had contested either settlement agreement and had a hearing, she would have provided the BON with grounds for disciplinary action and denial of her application.

Melissa's success took place at a time when attitudes changed about those with substance use disorders, access to treatment programs became more available, and professional licensure disciplinary proceedings became less punitive. (See *Ending throwaway nurse syndrome*.)

### Substance use disorders and nursing

According to the National Survey on Drug Use and Health, 21.5 million adults (age 12 and older) battled a substance use disorder in 2014. The American Nurses Association estimates that 6% to 8% of nurses use alcohol or drugs to an extent that it impairs professional performance.

The *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5)* lists several levels of severity of substance use disorder, but all involve recurring use of drugs or alcohol that causes significant clinical and functional impairment, such as health problems and a failure to meet major responsibilities. For nurses, that means a breakdown in professional practice that can lead to a complaint filed against them with the state BON.

Part 1 of this two-part series reviews the BON complaint process, including alternative approaches to discipline. Part 2 will discuss recent developments that aid nurses who are facing BON actions stemming from substance misuse allegations.

### BON complaint submission

Each state, through its legislature, establishes a specific procedure for

Society frequently perceives anyone (including nurses) with substance use disorder to be weak, immoral, unable to exert control over their problem, and even criminals. Bissell and Jones described the "throwaway nurse" syndrome in which nurses with an alcohol use disorder were simply fired. Without treatment, these nurses moved from job to job, and the cycle of misuse and firing continued.

#### Punitive approach

During the late 20th century, many nurses who had a substance use disorder were arrested, charged with a crime applicable to the situation (for example, possession of a controlled substance, diversion of controlled substances from the employer), and convicted of state and federal violations.

Once found guilty, these nurses went before their state's board of nursing (BON) with at least one violation of the state nurse practice act. Violations included conviction of a crime, theft of property from the employer, and/or unprofessional conduct likely to deceive, defraud, or harm the public. Because the main goal of BONs is to protect the public, in the late 1970s, they began to focus on substance use disorders and established approaches to meet that goal. Primarily, that meant removing a nurse from practice, which is disciplinary and punitive.

Regardless of the defense or circumstances surrounding the allegations, nurses had their licenses suspended. The BON didn't require treatment, so many of these nurses never received it and they never petitioned the board for a license renewal.

#### ANA takes action

Some professional assistance programs were developed in the late 1980s and 1990s, but the American Nurses Association (ANA) recommendation that state BONs develop alternative-to-discipline programs prompted the provision of treatment, rehabilitation, and monitoring for nurses with a substance use disorder.

submitting a complaint against a nurse to the BON. The state's nurse practice act (NPA) defines when a nurse can be reported to the board. Grounds for a complaint vary from state to state but conduct by a nurse that might lead to a complaint include a conviction of driving under the influence, drug diversion, a positive drug screen when no lawful prescription exists, and absent or questionable documentation of administered controlled substances.

When the complaint is submitted, the nurse generally is given the opportunity to respond, either orally (through an interview with an investigator) or in writing. After a BON receives the complaint and re-

sponse, it has several options:

- If a disciplinary proceeding isn't warranted, the complaint is dismissed, with or without prejudice. If the complaint is dismissed with prejudice, the BON can't initiate disciplinary proceedings against the nurse in the future based on the same allegations. If the case is dismissed without prejudice, the BON retains the power to initiate disciplinary proceedings on the same allegations, as long as it does so within the time frame allowed in the state NPA.
- If more information is needed, the BON conducts an investigation through its established procedures.
- If enough evidence exists to sup-

## Alternative-to-discipline programs

Confidentiality of state boards of nursing (BONs) proceedings isn't automatic; outcomes are usually accessible to the public. In addition, state BON discipline is reported to several data banks, including the National Practitioner Data Bank. Alternative-to-discipline programs (ADPs), in contrast, provide a nonpunitive, nondisciplinary, and usually confidential approach. They offer treatment and after-care monitoring.

### ADP administration

ADPs vary from state to state. Some are administered by BON staff, others are administered by a different state agency (for example, the department of health) or are managed by a professional association or a peer-assistance entity.

### ADP eligibility

Eligibility for ADPs also varies. Although voluntary participation in any ADP is the rule, nurses who've caused patient harm or who have diverted a controlled substance with the intent of selling or supplying the substance to others aren't eligible.

### ADP requirements

In most cases, nurses who are eligible for an ADP and successfully complete the required screening process sign a written, binding agreement with the BON to undergo treatment and adhere to the program's requirements while still practicing (or practicing with restrictions). Note that this is not true in all ADPs. Some, for example, require nurses to surrender their license until they complete the program. After nurses successfully complete the ADP and after-care monitoring, they can return to work without a public disciplinary action and with an unencumbered license.

ADPs have a high success rate of long-term recovery for nurses treated successfully. The result is a win for the nurse, the BON, and the public.

the case. In Melissa's case, when she was granted a conditional RN license by the state board, the Settlement, Stipulation and Order for Conditional License—Registered Professional Nurse included findings of facts, conditional license terms and conditions (for example, professional monitoring by an NMP, required self-reports, and restrictions on dispensing or administering controlled substances), and consequences of any significant violation of the agreement.

A BON may deny a request for a consent order or settlement agreement if the nurse had a previous discipline or criminal conviction for substance use disorder, if a patient was harmed due to the nurse's behavior (for example, diverting a patient's pain medication for his or her own use and substituting medication with saline), or if a nurse violated a previously negotiated settlement agreement. In these cases, a full hearing may be the only option.

In some states, a hearing may not be an initial option. In Pennsylvania, a conviction or a plea of *nolo contendere* (no contest) in a criminal matter, or a conviction of a misdemeanor, requires an automatic suspension by the applicable licensing board for 1 year. During that year, the BON has no jurisdiction, and therefore no discretion, to consider the case.

### A difficult situation

No nurse wants to face BON actions related to substance misuse. Alternative-to-discipline programs help nurses obtain the treatment they need instead of being "thrown away." Learn about other developments that have helped nurses in part 2 of this two-part series. ★

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\*Name is fictitious.

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Note: This article is not intended to provide legal advice.

port a disciplinary action, the BON begins disciplinary proceedings.

Other BON options include offering the nurse an agreed-to order (such as a consent order or settlement agreement, as in Melissa's case).

BONs also can offer alternatives to discipline. (See *Alternative-to-discipline programs*.) For example, the board may require treatment in a professional assistance program (PAP). If this requirement is completed, the case is closed and no disciplinary action occurs. PAPs can help nurses get treatment, remain clean and sober, and return to practice while, at the same time, protect the public's safety.

If a disciplinary process is initiated, and no settlement occurs between the nurse and the board, a formal hearing may be the next step.

Hearings aren't always the best option. They're adversarial, cumbersome, and expensive. A final determination on the allegations can take months to reach due to the unavailability of witnesses, burdens of proof (preponderance of the evidence), and difficulty scheduling a

hearing. For all these reasons and more, a negotiated consent order or settlement agreement is a better alternative in many instances.

The nurse always has the right to a hearing, even after settlement negotiations or conferences have occurred and are unsuccessful. The right to a hearing isn't waived during informal settlement conferences or negotiations. It's waived, in writing, only as part of an agreed-to consent order or settlement agreement.

### Consent orders and settlement agreements

A negotiated consent order or settlement agreement is a written decision that's regulated by state laws, such as the Administrative Procedure Act (APA) and the state's NPA. These laws allow the parties to come to an agreement about the nurse's violation and what discipline (or alternative to discipline), if any, will take place. The agreement must then be approved by the entire BON or other persons specified in the APA and/or state NPA and entered as a final consent order or settlement agreement in