



TO: Members, Ohio Board of Nursing

FROM: The Ohio Nurses Association

DATE: November 18, 2009

RE: Proposed Revisions to Chapter 4723-16 Ohio Administrative Code

Thank you the opportunity to provide comments with respect to the rules you are considering at this public hearing. Thanks too for giving the Ohio Nurses Association (ONA) an opportunity to provide feedback to Board staff members earlier this year when the rules were in draft format. ONA members appreciate the changes you made in response to several issues that were identified at that time.

The focus of this statement is on the rules in Chapter 4723-16 of the Administrative Code, particularly the changes being proposed that establish a "board committee" authorized to conduct disciplinary hearings and generally act as a hearing officer for disciplinary matters. This change is addressed in many of the rules in that chapter. Where possible ONA has identified concerns with specific rules, but first this statement highlights general concerns about the overall concept. (These concerns were also expressed to Board staff in previous discussions).

ONA is aware that there is nothing in law precluding the Board from doing what it is proposing to do with respect to this committee. (Obviously, the Board has moved ahead with the Board Committee concept even before the rules have completed the approval cycle). However, simply because something can be done does not necessarily mean it should. ONA does not believe the current hearing officer approach to conducting adjudication proceedings is problematic and questions the Board's rationale behind the proposed change.

When the idea of a Board Committee was first raised at a Board meeting earlier this year, Board staff members intimated that it would save money; however, there appears to be no anticipated decrease in expenditures if the Rule Summary and Fiscal Analysis (RSFA) document filed with the rules is accurate. It would in fact seem potentially to add expenses. For example, three people (rather than one) would

incur travel, meals, and possible overnight expenses plus hourly wages for time spent performing duties. That time may exceed what an experienced hearing officer would need, especially given the understandable lack of experience committee members will have with these types of quasi-legal procedures. There will also be expenses associated with training members of the Board Committee.

ONA has reviewed the document prepared for the upcoming Board meeting (agenda item 5.4.3) detailing a cost savings realized by using the committee. The analysis, however, does not factor in the committee members' time to prepare the Report and Recommendation. If that amount is subtracted from the hearing officer totals, the committee costs a fraction **more** than the current approach. If the plan is to utilize Board employees rather than the committee to prepare the Report & Recommendation, multiple concerns, both fiscal and otherwise, arise. From a fiscal perspective, at a minimum, Board staff time/costs to prepare the Report & Recommendation should be factored into the overall cost analysis. Whether Board employees are available to take on this additional time consuming responsibility given the workload and backlog they already have is debatable. If additional staff must be employed, that cost should be part of the fiscal analysis prepared for this rule filing.

As you know, the Rule Summary and Fiscal Analysis statements that accompany a rules filing must be complete and accurate. ONA believes the statements filed with these rules fall short of that requirement, which could lead to issues when the Joint Committee on Agency Rule Review (JCARR) reviews these rules in December. As you know, failure to prepare complete and accurate RSFAs is grounds for JCARR to propose invalidation.

On a different, but somewhat related note, the original concept for using a Board Committee was portrayed as very limited in scope—something that would be used only for the more straight-forward cases. However, the rules as filed do not contain any language limiting the use of a Board Committee. How will cases be assigned? Will respondents be given choices? How will that affect the dynamics of the proceedings?

Because these committee members generally will have no legal background, they will of necessity be relying on the Board of Nursing's employees or "staff attorneys" for guidance in what could be complex matters affecting how a case is presented. As referenced above, if Board employees are going to prepare the Report and Recommendation rather than the committee, ONA's concerns are further compounded. The potential for over-involvement of these individuals raises significant issues for the public regarding the fairness/integrity of the proceedings.

Board employees are deeply involved in compliance processes and are privy to much information that may or may not be admissible in an adjudication proceeding. Would the staff member charged with preparing the Report & Recommendation bring a certain bias to the project based on the inside knowledge he/she has? Even if guarantees would be forthcoming that this would not be a problem, in the public's eye, the process is compromised.

Under the rules as filed, the three Board Committee members are to assume multiple roles throughout the entire adjudication process. They would act as **referees** in pre-hearing encounters with the parties, **judges** in the actual hearing, and finally as **jury** when participating in deliberations and voting. The same

committee members who prepared the report and recommendations—if they do—and who heard arguments about witnesses and evidence prior to and during the hearing, essentially will be in a position to argue the merits of the case in closed session deliberations with their Board colleagues. ONA believes this blurring and overlapping of roles is highly irregular and improper. At a minimum, it would place other Board members in the uncomfortable position of challenging the Report and Recommendation of their peers (or Board employees with whom they interact on a regular basis) rather than a neutral hearing officer if they have concerns about the content or conclusions produced by those individuals. As currently structured, the Board's Supervising Member for Disciplinary Matters does not vote or participate in deliberations in order to preserve the integrity of the process. That same concern for the integrity of the process should be reflected in the roles assigned to the Board Committee members and Board employees. At a minimum, committee members should not be part of deliberations or allowed to vote on the disciplinary action imposed (which admittedly could potentially raise quorum and other issues).

This change in how the Board conducts its adjudications is full of potential unanticipated, and perhaps largely undesirable, consequences and deserves much more thought before being allowed to move forward. It is ONA's position that the perception of "fairness" in these types of proceedings must be scrupulously maintained. A legal system such as ours only works if the people affected by the laws have respect for the law itself as well as for the processes used to enforce those laws. While the Board's sole mission is protection of the public, it must also be mindful of the need to carry out that mission in a way that does not erode the public's confidence in the fairness and integrity of its actions.

As a very esteemed Ohio hearing officer, Christopher McNeil wrote in an article entitled, *Perceptions of Fairness in Agency Hearings: What Helps and What Hurts*, "winning in the context of a hearing that appears to be corrupt or wasteful tends not to engender a sense of fairness in the process or the outcome... . (W)e also know that winning or losing isn't everything, and that the use of fair procedures can increase satisfaction of all concerned." ONA is in no way implying that the Board Committee would be corrupt in its actions or decisions or that you must go out of the way to satisfy those licensees who are parties to the adjudication proceedings. When the public believes, however, that the scale of justice has tipped too far one way or another, even perceptually, the resulting imbalance imperils the entire process and could ultimately undermine the public protection mission of the Board.

In conclusion, ONA asks you to reconsider whether the current system is so "broken" that it is worth the risks associated with the proposed "fix". Ideally, we would ask that you re-file the rules in Chapter 4723-16 after deleting all references to the Board Committee. Should the Board decide to proceed with the proposal to establish a Board Committee, please develop revisions to the rules as filed to establish appropriate roles for Board Committee members and Board employees so as to minimize the public's perception that the proceedings are inherently biased. Finally, ONA asks that the accompanying RSFAs be revised to completely and accurately reflect the fiscal implications of the committee so that a JCARR challenge need not be raised.

Following are specific questions related to the identified rules.

Rule 4723-16-01 (A)(4) defines the Board Committee and authorizes the Board to appoint the members at a public meeting. Nothing in the definition sets out any parameters as to who should serve on that committee. For example, the Supervising Member for Disciplinary Matters has rightfully abstained from voting on the level of disciplinary action to be imposed because of the role this individual has played in bringing the case forward. Would that person be eligible for the Board Committee?

Rules 4723-16-03, 4723-16-04, 4723-16-05, 4723-16-08 all contain language granting the Board Committee similar responsibilities as those exercised by a hearing officer; however, the rules are silent as to whether the committee as a whole will be making those types of decisions or whether only the "presiding member" will do so. If the full committee is to be involved, is the decision made by majority vote? Who decides which of the three appointees will be the presiding member?

Rule 4723-16-13 –paragraph (C) of this rule is very confusing. It grants the presiding Board Committee member responsibility for "approving the report and recommendation" required by this rule in paragraph (F). The report and recommendation is to be provided by the hearing officer when there is one or by the Board Committee. Who will actually prepare the committee report and what is there to approve if the report has been provided by a hearing officer? Isn't that the role of the full Board? Exactly what is the expectation of the presiding committee member with respect to the report the committee is to prepare?

Again, thank you for the opportunity to present these comments.