

# PROPOSED RULEMAKING

## STATE BOARD OF MEDICINE

[49 PA. CODE CH. 16]

### Sexual Misconduct

The State Board of Medicine (Board) proposes to adopt § 16.110 (relating to sexual misconduct) to read as set forth in Annex A.

#### *Effective Date*

The proposed regulation will be effective upon final-form publication as in the *Pennsylvania Bulletin*.

#### *Statutory Authority*

Under sections 8 and 41(8) of the Medical Practice Act of 1985 (63 P. S. §§ 422.8 and 422.41(8)), the Board has authority to establish standards of professional conduct for Board regulated practitioners under its jurisdiction. These individuals include physicians, physician assistants, nurse midwives, certified registered nurse practitioners (jointly regulated with the State Board of Nursing), respiratory care practitioners, drugless therapists and acupuncturists. The proposed regulation identifies when sexual contact by Board regulated practitioners with patients, and under certain circumstances, immediate family members of patients, will be deemed unprofessional conduct.

#### *Background and Purpose*

It should be axiomatic that it is unprofessional conduct for a health care practitioner to engage in sexual contact with patients. Past decisions of the Board upheld by the Commonwealth Court, the Code of Medical Ethics, as published by the American Medical Association and responsible professional publications addressing the issue denounce sexual contact between practitioner and patient. Nevertheless, complaints are filed each year by consumers who have been harmed by Board regulated practitioners who engage in this conduct.

#### *Description of Proposed Regulation*

The proposed regulation seeks to better protect patients by providing guidance to the profession and the public as to prohibited conduct relating to sexual contact between practitioners and patients. The proposed regulation would prohibit any sexual contact between a Board regulated practitioner and a current patient. The proposed regulation would further prohibit any sexual contact between a Board regulated practitioner and a former patient prior to the 2-year anniversary of the termination of the professional relationship when the Board regulated practitioner has been involved with the management or treatment of a patient for a mental health disorder. This 2-year period was developed from professional literature which indicates that an imbalance of power between health care practitioners and patients continues after the professional relationship ends.

The proposed regulation would also prohibit sexual exploitation by a Board regulated practitioner of a current or former patient or immediate family member of a patient. "Sexual exploitation" is defined by the proposed regulation as sexual behavior that uses the trust, knowledge, emotions or influence derived from the professional relationship. The Board believes that it is appropriate to

protect immediate family members from sexual exploitation by Board regulated practitioners because immediate family members are often as vulnerable as the patients.

The proposed regulation would also provide that Board regulated practitioners who engage in prohibited sexual contact with patients or former patients will not be eligible for placement in the Board's impaired professional program in lieu of disciplinary or corrective actions. The impaired professional program is unable to effectively monitor Board regulated practitioners who have engaged in sexual misconduct.

The proposed regulation would also provide that patient consent will not be considered a defense to disciplinary action in these cases. The imbalance of power inherent in the health care practitioner-patient relationships not only serves as the basis for the prohibition but also undermines the patient's ability to consent to the sexual contact as an equal. Indeed, the Board's experience in adjudicating these cases has repeatedly demonstrated the reality of the inherent imbalance of the relationship and the patient's inability to give meaningful consent to sexual contact.

#### *Fiscal Impact and Paperwork Requirements*

The proposed regulation should have no fiscal impact on the Commonwealth or its political subdivisions. Likewise, the proposed regulation should not necessitate any legal, accounting, reporting or other paperwork requirements.

#### *Sunset Date*

The Board continuously monitors the cost effectiveness of its regulations. Therefore, no sunset date has been assigned.

#### *Compliance with Executive Order 1996-1, Regulatory Review and Promulgation.*

In compliance with Executive Order 1996-1, the Board extended an invitation to comment on early drafts of the proposed regulation to numerous parties who have indicated an interest in the Board's regulatory activities. The list of these persons is available upon request from the contact person. Only the Pennsylvania Medical Society (PMS) commented on the early version. PMS agreed that sexual exploitation of patients is improper and should subject the Board regulated practitioner to disciplinary action. PMS was concerned that innocent behavior may be prohibited by the proposed regulation and only the issue of exploitation should be addressed. PMS suggested that the Board retain § 16.110(a), (e) and (f) and delete § 16.110(b), (c) and (d). The Board disagrees, believing that § 16.110(b), (c) and (d) are necessary to address the inherent imbalance of power between Board regulated practitioners and patients, vulnerable former patients and immediate family members of patients.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on November 7, 2001, the Board submitted a copy of the proposed regulation to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Professional Licensure Committee and the Senate Consumer Protection and Professional Licensure Committee. In addition to submitting the proposed regulation, the Board has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Board in compliance with Execu-

tive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRRC has objections to any portion of the proposed regulation, it will notify the Board within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed regulation to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to publication of the final-form rulemaking, by the Board, the General Assembly and the Governor of objections raised.

#### *Public Comment*

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed regulation to Amy L. Nelson, Counsel, State Board of Medicine, 116 Pine Street, P. O. Box 2649, Harrisburg, PA 17105-2649, within 30 days of publication of this proposed rulemaking.

CHARLES D. HUMMER, Jr., M.D.,  
*Chairperson*

**Fiscal Note:** 16A-497. No fiscal impact; (8) recommends adoption.

#### **Annex A**

### **TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS**

#### **PART I. DEPARTMENT OF STATE**

#### **Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

#### **CHAPTER 16. STATE BOARD OF MEDICINE—GENERAL PROVISIONS**

#### **Subchapter H. SEXUAL MISCONDUCT**

#### **§ 16.110. Sexual misconduct.**

(a) *Definitions.* The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

*Immediate family member*—A parent or guardian, child, sibling, spouse or other family member with whom a patient resides.

*Sexual behavior*—Any sexual conduct which is non-diagnostic and nontherapeutic; it may be verbal or physical and may include expressions of thoughts and feelings or gestures that are sexual in nature or that reasonably may be construed by a patient as sexual in nature.

*Sexual exploitation*—Any sexual behavior that uses trust, knowledge, emotions or influence derived from the professional relationship.

(b) *Sexual exploitation.* Sexual exploitation by a Board regulated practitioner of a current or former patient, or of an immediate family member of a patient, constitutes unprofessional conduct, is prohibited, and subjects the practitioner to disciplinary action.

(c) *Current patients.* Sexual behavior that occurs with a current patient constitutes unprofessional conduct, is prohibited and subjects the practitioner to disciplinary action.

(d) *Mental health patients.* When the practitioner is involved with the management or treatment of a patient for a mental health disorder, sexual behavior with that former patient which occurs prior to the 2-year anniversary of the termination of the professional relationship

constitutes unprofessional conduct, is prohibited and subjects the practitioner to disciplinary action.

(e) *Impaired professional program.* A practitioner who engages in conduct prohibited by this section will not be eligible for placement into an impaired professional program in lieu of disciplinary or corrective actions.

(f) *Consent.* Consent is not a defense to conduct prohibited by this section.

[Pa.B. Doc. No. 01-2104. Filed for public inspection November 21, 2001, 9:00 a.m.]

## **STATE CIVIL SERVICE COMMISSION**

**[4 PA. CODE CH. 95]**

**Promotion Procedure**

The State Civil Service Commission (Commission) proposes to amend Chapter 95 (relating to promotion procedures). The Commission is publishing this amendment as a notice of proposed rulemaking under the authority of section 208 of the Civil Service Act (act) (71 P. S. § 741.208).

#### *A. Effective Date*

The proposed amendment, if approved on final-form rulemaking, will go into effect upon publication of an order adopting the amendment in the *Pennsylvania Bulletin*.

#### *B. Contact Person*

For further information on the proposed amendment, contact Randall C. Breon, whose contact information appears in the "Public Comments" section of this Pre-ambule.

This proposal is available electronically through the Commission's website (<http://www.scsc.state.pa.us>).

#### *C. Statutory Authority*

The statutory authority for the proposal is section 203(1) of the act (71 P. S. § 741.203(1)).

#### *D. Purpose and Background*

A change in the procedures for promotions was requested by the State agency "clients" of the Commission. Currently the State's personnel system has civil service and noncivil service employees. Many are initially hired into noncivil service positions. These employees often work for the State for years, and sometimes are promoted from one noncivil service position to another. In many instances, however, they reach a point when their logical and natural career progression would call for a promotion to a particular position, but that position is covered by the act. Currently our rules require that the noncivil service employees compete with and be treated in the same fashion as non-Commonwealth employees being newly hired into the civil service system. The result is that some career State employees who started their employment as noncivil service reach a "career ceiling" prematurely. If not for the barrier presented by our current rules, their skills, knowledge and abilities would allow for further promotion.

The proposed amendment gives the employing agency of State government an option to consider both civil

service and noncivil service employees for promotion on an equal basis. This would replace the current rule that precludes an agency from considering noncivil service Commonwealth employees for promotion into civil service positions. To be promoted, the noncivil service employees would be required to take and pass an examination for the title, and compete against other similarly situated Commonwealth employees both civil service and noncivil service. The goal is to enhance the employment opportunities for all Commonwealth employees.

E. Summary of Proposal

The proposed amendment is designed to permit additional promotion methods by which noncivil service State employees may compete with civil service State employees for civil service covered positions. Noncivil service State employees would be required to take and pass civil service examinations, and be appointable in accordance with the "rule of three" described by the act.

F. Paperwork

The proposed rulemaking will not add to existing paperwork requirements.

G. Fiscal Impact

The proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its appointing authorities.

H. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on November 13, 2002, the Commission submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Committees on State Government. In addition to submitting the proposed rulemaking, the Commission has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Commission in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed rulemaking, it will notify the Commission within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed rulemaking to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Commission, the General Assembly and the Governor of objections raised.

I. Public Comments

Interested persons are invited to submit written comments, objections or suggestions about the proposed rulemaking to Randall C. Breon, Deputy for Operations, State Civil Service Commission, (717) 787-5343 or (717) 772-2685 (TT), P. O. Box 569, 320 Market Street, 4th Floor, Strawberry Square Complex, Harrisburg, PA 17108-0569, within 30 days after publication of this notice in the Pennsylvania Bulletin. Comments may be submitted by facsimile to (717) 783-8736.

Comments also may be submitted electronically at rbreon@state.pa.us. A subject heading of the proposal and a return name and address must be included in each transmission. In addition, all electronic comments must

be contained in the text of the transmission, not in an attachment. If an acknowledgement of electronic comments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt.

The Commission invites comments from interested persons, agencies and organizations at its public hearings on the proposed amendment to be held as follows:

Western Regional Office, 1503 State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222-1210  
November 29, 2001, noon

Eastern Regional Office, 10 South 11th Street, 2nd Floor, Philadelphia, PA 19107-3618  
December 3, 2001, noon

Public Hearing Room in the Commission's Main Office Strawberry Square Complex, 4th Floor, Bowman Worth Building, 320 Market Street, Harrisburg, PA 17108-0569  
December 12, 2001, noon

RONALD K. ROWE,  
Executive Director

**Fiscal Note:** 61-04. No fiscal impact. (8) recommends adoption.

Annex A

TITLE 4. ADMINISTRATION

PART IV. CIVIL SERVICE COMMISSION

CHAPTER 95. SELECTION OF [EMPLOYEES] EMPLOYEES FOR ENTRANCE TO, OR PROMOTION IN, THE CLASSIFIED SERVICE

EXAMINATIONS REQUISITE FOR APPOINTMENT AND PROMOTION

§ 95.7. Promotion procedure.

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(b) *Methods of promotion.* Vacancies may be filled by promotion in the following ways:

(1) By appointment of probationary or regular [employees] employees of a given appointing authority or between appointing authorities from an appropriate employment list.

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(3) By appointment of [probationary or regular] Commonwealth [employees from employees] employees of a given appointing authority or between appointing authorities, who appear on an appropriate employment list and who meet eligibility criteria as established by the Director.

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[Pa.B. Doc. No. 01-2105. Filed for public inspection November 21, 2001, 9:00 a.m.]