

BOARD OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS

INITIAL STATEMENT OF REASONS

Hearing Date: No hearing has been scheduled for the proposed action.

Subject Matter of Proposed Regulations:

Substantial Relationship and Rehabilitation Criteria

Section(s) Affected:

Vocational Nursing (VN): Amend California Code of Regulations (CCR), title 16, Division 25, Chapter 1, Article 4, sections 2521, 2522

BACKGROUND AND STATEMENT OF THE PROBLEM:

The Board of Vocational Nursing and Psychiatric Technicians (BVNPT) oversees licensed vocational nurses (LVNs) and psychiatric technicians (PTs) and enforces the Vocational Nursing Practice Act and Psychiatric Technician Law. Existing statutes mandate the BVNPT to protect consumers by ensuring the education, licensure, and practice of safe and competent LVNs and PTs. Applicants for licensure are required to demonstrate possession of the minimum level of competence required for safe and effective client care upon entry into professional practice and must continue to practice in a safe and effective manner.

In accordance with the statutory amendments implemented by Assembly Bill 2138 (AB 2138) (Chiu, Chapter 995, Statutes of 2018), by July 1, 2020, Business and Professions Code (BPC) section 481, requires the BVNPT to develop criteria, when considering the denial, suspension, or revocation of a license and to determine whether a crime, professional misconduct, or act is substantially related to the qualifications, functions, or duties of the professions it regulates. Further, BPC section 493, will require the BVNPT to determine whether a crime, professional misconduct, or act is substantially related to the qualifications, functions, or duties of the profession it regulates by using criteria, including the nature and gravity of the offense, the number of years elapsed since the date of the offense, and the nature and duties of the profession. The substantial relationship requirement stems from the due process principle that a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 448; *Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.)

In addition, BPC section 482 will require the BVNPT to develop criteria to evaluate the rehabilitation of a person when considering the denial, suspension, or revocation of a license. In the context of professional licensing decisions, the courts have said that, “[r]ehabilitation . . . is a state of mind and the law looks with favor upon rewarding with the

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opportunity to serve, one who has achieved reformation and regeneration.” (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058, internal punctuation omitted.) Additionally, the Legislature’s “clear intent” in enacting AB 2138 was “to reduce licensing and employment barriers for people who are rehabilitated.” (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.)

16 CCR 2521 establishes the criteria for determining when a crime, professional misconduct, or act is substantially related to the qualifications, functions and duties of a licensee. 16 CCR 2522 establishes the criteria for determining rehabilitation of an applicant or licensee when considering denial, suspension, or petition for reinstatement of a license on the ground of a criminal conviction.

At the BVNPT’s April 30, 2019, meeting, the present regulatory proposal was presented to the full Board for its review and approval (see *Underlying Data* section on page 12). The Board approved the proposed language and directed staff to proceed with the formal rulemaking process. The full Board then adopted the April 30, 2019, meeting minutes, at its May 17, 2019, Board meeting (see *Underlying Data* section on page 12). Following this approval, staff moved forward with the proposed language and, thereafter, added additional language to 16 CCR 2521(c), to be consistent with the AB 2138 regulations amended, in 2019, by other healing arts boards, which was approved, by the full Board, at its February 3, 2020, Board Meeting.

As required under AB 2138, the BVNPT proposes amending 16 CCR sections 2521 and 2522, to adhere to AB 2138’s mandates and revise its criminal conviction substantial relationship and rehabilitation criteria for considering the denial, suspension, or revocation of a license of an LVN.

SPECIFIC PURPOSE, ANTICIPATED BENEFIT, AND RATIONALE:

Amend section 2521 of Article 4, Chapter 1 of Division 25 of Title 16 of the CCR (Substantial Relationship Criteria)

16 CCR 2521(a):

Purpose: The purpose of amending 16 CCR 2521, subsection (a), is to expand the regulation to include discipline, under BPC section 141, because the substantially related acts that are the basis for discipline in an out-of-state jurisdiction may be used to discipline a licensee under BPC section 141. This subsection will also include substantially related “professional misconduct,” since the BVNPT may consider such misconduct in denying licenses under BPC section 480. The subsection will be amended to reword and move to subsection (b) the phrase, “[s]uch crimes or acts shall include but not be limited to those involving the following:”

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Anticipated Benefit: The proposed revisions to 16 CCR 2521, subsection (a), will provide clarity to license applicants and licensees that the BVNPT is statutorily authorized to deny, suspend, or revoke a license, as applicable, on the basis of professional misconduct and discipline in an out-of-state jurisdiction. The proposal will also make aware relevant parties to any administrative appeal arising from a licensing decision (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s counsel) that, when disciplining applicants or licensees for a criminal conviction, the BVNPT is required to determine whether the act is substantially related to the practice of vocational nursing using the listed criteria in this regulation.

Rationale: BPC section 141 authorizes the BVNPT to discipline a license on the basis of substantially related out-of-state discipline. BPC section 480 also authorizes the BVNPT to deny a license application on the basis of substantially related formal discipline by a licensing Board in or outside of California. The regulation seeks to implement, interpret, and make specific BPC sections 141 and 480, by adding their relative provisions to the BVNPT’s substantial relationship criteria regulation. Accordingly, the proposed revision is necessary to provide the appropriate notice to license applicants and licensees that discipline in an out-of-state jurisdiction and professional misconduct are grounds for license denial, suspension, or revocation, and implement the requirements of BPC sections 141 and 480. The proposal is also necessary to consolidate, into one regulation, the criteria the BVNPT will apply in evaluating whether a crime, professional misconduct, or act is substantially related to the licensed profession.

16 CCR 2521(b):

Purpose: The purpose of adding 16 CCR 2521(b) is to implement AB 2138 and the revised BPC Section 481, which require each Board to develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime, professional misconduct, or act is substantially related to the qualifications, functions, or duties of the professions regulated by the Boards.

Anticipated Benefit: The proposed revisions to 16 CCR 2521(b) will provide clarity and transparency to applicants and licensees by listing the specific criteria the BVNPT must consider when making the substantial relationship determinations applicable to criminal convictions. The proposal will also make aware relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s counsel), of the specific criteria used by the BVNPT to determine whether a criminal conviction is substantially related to the vocational nursing profession.

Rationale: Boards must consider these three criteria when evaluating whether a crime, professional misconduct, or act is “substantially related” to the regulated business or profession:

- (1) the nature and gravity of the offense[;]
- (2) the number of years elapsed since the date of the offense[; and,]
- (3) the nature and duties of the profession in which the applicant seeks licensure

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or in which the licensee is licensed.” (BPC, § 481, subd. (b), as added by AB 2138, § 7; see also BPC, § 493, subd. (b), as added by AB 2138, § 13.)

Accordingly, the proposed regulation lists each of these criteria for the BVNPT to consider when making this important substantial relationship determination. This proposed addition is necessary to conform the regulation to AB 2138.

16 CCR 2521(c):

Purpose: The purpose of amending 16 CCR 2521(c) is to provide an understanding that the BVNPT will consider certain crimes, professional misconduct, or acts should be considered to be substantially related to the qualifications, functions, or duties of a licensee. These crimes, professional misconduct, or acts include, but are not limited to, convictions for child, dependent adult, or elder abuse; convictions for sex offenses requiring a person to register as a sex offender; convictions for assault, battery, or other violence; convictions for lewd conduct or sexual misconduct; convictions for using drugs or alcohol in a manner dangerous to the individual or the public; convictions for harassment, trespassing, or stalking; and/or failing to comply with mandatory reporting requirements related to the forgoing crimes, professional misconduct, or acts and/or the denial, suspension or revocation of a license by the BVNPT. The proposal also makes amendments to renumber subsections.

Anticipated Benefit: The proposed revisions to 16 CCR 2521(c) will provide clarity to applicants and licensees of the specific crimes, professional misconduct, or acts that the BVNPT considers to be substantially related to the qualifications, functions, or duties of a vocational nurse. The proposal will also make aware relevant parties to any administrative appeal arising from a license denial or revocation (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s counsel) that substantially related crimes, professional misconduct, and acts can include the listed crimes, professional misconduct, or acts listed in this regulation.

Rationale:

- 16 CCR 2521(c)(1):
Procuring a license by fraud, misrepresentation, or mistake.
The language of this subsection is unchanged. It is moved from subsection (a) to subsection (c)(1) to the non-exclusive list of substantially related crimes, professional misconduct, or acts.
- 16 CCR 2521(c)(2): *A conviction of practicing medicine without a license in violation of Division 2, Chapter 5 of Division 2 (commencing with Section 2000) of the Business and Professions Code.*
The language of this subsection has been changed to revise the description of the location of the specific statute and include a specific code section to provide clarity to the reader. It is moved from subsection (b) to subsection (c)(2) to the non-exclusive list of substantially related crimes, professional misconduct, or acts.

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- 16 CCR 2521(c)(3): *Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision or term of Division 2, Chapter 6.5, Division 2 Article 1 (commencing with Section 2840) of the Business and Professions Code.*

The language of this subsection has been changed to revise the description of the location of the specific statute and include a specific code section to provide clarity to the reader. It is moved from subsection (c) to subsection (c)(3) to the non-exclusive list of substantially related crimes, professional misconduct, or acts.

- 16 CCR 2521(c)(4): *Aiding or assisting, or agreeing to aid or assist any person or persons, whether a licensed physician or not, in the performance of or arranging for a violation of any of the provisions of Division 2, Chapter 5, Article 13 12, Chapter 5, Division 2 (commencing with Section 2220) of the Business and Professions Code.*

The language of this subsection has been changed to revise the description of the location of the specific statute and include a specific code section to provide clarity to the reader. It is moved from subsection (d) to subsection (c)(4), to the non-exclusive list of substantially related crimes, professional misconduct, or acts. The Article number was also changed from “13” to “12”, since the Article numbering was revised, apparently in 1979, but not in this regulation. This has now been corrected.

- 16 CCR 2521(c)(5): *Conviction of a crime or act involving theft, fiscal dishonesty, fraud or deceit.*

This amendment adds the conviction of a crime involving theft, fraud, and deceit to the categories of conduct that would be considered to be substantially related to the qualifications, functions or duties of a vocational nurse. It is moved from subsection (e), to subsection (c)(5), to the non-exclusive list of substantially related crimes, professional misconduct, or acts.

Nursing services may be performed on vulnerable populations. A vocational nurse occupies a position of trust over these individuals and has access to property of others, including property of vulnerable (and potentially unconscious) patients. (*Moustafa v. Board of Registered Nursing, supra*, at p. 1140.) In addition, elder or dependent adult abuse includes financial abuse. (Welf. & Instns. Code, § 15610.30, subd. (a).) Vocational nurses may also be involved in billing government entities or insurance companies. Reporting of accurate services is a duty required by licentiates. Conduct involving fraud or deceit, like the current regulatory-listed conviction for fiscal dishonesty, erodes trust that the services will be accurately billed to the appropriate parties. To enhance trust in the profession, then, crimes involving fraud or deceit should be considered to be substantially related to the duties of licensure. For instance, a conviction for tax evasion / income tax fraud was considered related to the practice of medicine in *Windham v. Bd. of Med. Quality Assurance* (1980) 104 Cal. App. 3d 461; Medi-Cal fraud by a dentist was upheld as cause for revocation in *Hanna v. Dental Bd. of California* (2012) 212 Cal. App. 4th 759, 765, citing a previous Medical Board action which held that

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convictions for Medi-Cal fraud are substantially related to a professional's fitness or capacity to practice her profession. (*Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 305–306, 144 Cal.Rptr. 826 (*Matanky*) [“Intentional dishonesty ... demonstrates a lack of moral character and satisfies a finding of unfitness to practice medicine”].)

Given these circumstances, the BVNPT has determined that a crime or act involving theft, fraud, or deceit should be considered to be substantially related to the qualifications, functions, or duties involved in vocational nursing.

- 16 CCR 2521(c)(6): Any conviction for a crime or act involving the sale, gift, administration, or furnishing of “narcotics or dangerous drugs or dangerous devices”, as defined in Section 4022 of the Business and Professions Code.

The language of this subsection is unchanged. It is moved from subsection (f), to subsection (c)(6), to the non-exclusive list of substantially related crimes, professional misconduct, or acts.

- 16 CCR 2521(c)(7): Conviction for a crime or act involving child, dependent adult, or elder abuse.

Under the proposed amendment, a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions or duties of a licensee if to a substantial degree it evidences the present or potential unfitness of a licensee to perform the functions authorized and/or mandated by the license.

Nursing services may be performed on vulnerable populations including children, dependent adults, and elderly individuals. A vocational nurse occupies a position of trust over these individuals, and touches patients to perform nursing services. These categories of patients are particularly susceptible, based on their ages and dependency, and must be protected. In addition, elder or dependent abuse includes financial abuse. (Welf. & Instns. Code, § 15610.30, subd. (a).) Vocational nurses have access to property of others, including property of vulnerable patients. (*Moustafa v. Board of Registered Nursing, supra*, at p. 1140.) Given these circumstances, the BVNPT has determined that any conviction or act of child, elder, and/or dependent adult abuse should be considered to be substantially related to the qualifications, functions, or duties involved in vocational nursing.

- 16 CCR 2521(c)(8): Conviction of sex offenses requiring a person to register as a sex offender pursuant to section 290 of the Penal Code

16 CCR 2524.1 provides that certain acts of sexual contact and certain acts or convictions of sex offenses shall result in the revocation of a license. Section 290 of the Penal Code specifies acts by which a person must register as a sex offender. Therefore, the BVNPT deems such acts to be directly related to the duties of licensure. In addition, a court of appeal has held that a dentist’s sexual conduct with patients was substantially related to his functions and duties as a dentist and warranted disciplinary action. (*Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 800-01 [“During the times he found the women most vulnerable,

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Green incorporated erotic and manipulative touching of intimate parts of their bodies into the treatments. He then violated the patients' trust and exceeded the scope of their consent for treatment by seducing them into a sexual relationship.”].)

Similarly, nursing services can be performed in a private room or a patient’s home, where the consumer entrusts the vocational nurse with certain types of examination with intimate parts of the patient’s body. Given these circumstances, the BVNPT has determined that sex offenses requiring a person to register as a sex offender should be considered to be substantially related to the qualifications, functions, or duties involved in vocational nursing.

- 16 CCR 2521(c)(9): Conviction of a crime or act involving assault, battery, or other violence including, but not limited to, those violations listed in subsection (d) of Penal Code section 11160.

Under the proposed amendment, assault, battery, or other violence shall be considered to be substantially related to the qualifications, functions or duties of a licensee if, to a substantial degree, it evidences the present or potential unfitness of a licensee to perform the functions authorized and/or mandated by the license. This amendment adds language to include the specific offenses of “assault” and “battery.” Section 11160(d) of the Penal Code further defines the terms “assaultive or abusive conduct” to include various types of assault and battery as offenses.

Nursing services may be performed on vulnerable populations. A vocational nurse occupies a position of trust over these individuals and touches patients to perform nursing services. Given these circumstances, the BVNPT has determined that any conviction or act involving assault, battery, or other violence listed in subsection (d) of Penal Code 11160 should be considered to be substantially related to the qualifications, functions, or duties involved in vocational nursing.

- 16 CCR 2521(c)(10): Conviction for a crime or act involving lewd conduct or sexual misconduct as defined in Business and Professions Code section 726.

16 CCR 2524.1 provides that certain acts of sexual contact and certain acts or convictions of sexual offenses shall result in the revocation of a license. Therefore, the BVNPT deems such acts to be directly related to the duties of licensure. In addition, a court of appeal has held that a dentist’s sexual conduct with patients was substantially related to his functions and duties as a dentist and warranted disciplinary action. (*Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 800-01 [“During the times he found the women most vulnerable, Green incorporated erotic and manipulative touching of intimate parts of their bodies into the treatments. He then violated the patients' trust and exceeded the scope of their consent for treatment by seducing them into a sexual relationship.”].)

Similarly, nursing services can be performed in a private room or a patient’s home, where the consumer patient entrusts the vocational nurse with certain types of examination with intimate parts of the patient’s body. Given these circumstances, the BVNPT has determined that any conviction or act of lewd conduct or sexual misconduct should be

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considered to be substantially related to the qualifications, functions, or duties involved in vocational nursing.

- 16 CCR 2521(c)(11): Conviction for a crime or act involving the use of drugs or alcohol to an extent or in a manner dangerous to the individual or the public.

Although specifically related to registered nurses and not licensed vocational nurses, in BPC Section 2762, the Legislature has determined that unprofessional conduct includes the use of alcoholic beverages in a manner dangerous or injurious to himself or herself. (Bus. & Prof. Code, § 2762, subd. (b).) In *Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195, for example, the court of appeal held that a nurse’s single conviction of driving with a blood alcohol of .08 or higher related to the practice of his profession and demonstrated an unfitness to practice that profession. The court held that “there is a nexus or logical relationship between the professional fitness of a registered nurse and the alcohol-related misconduct defined by section 2762, subdivisions (b) and (c). In light of this nexus, section 2762 comports with due process and supplies a basis for discipline even in the absence of a finding of professional unfitness in a particular case. The ALJ’s finding that Sulla’s conduct was not substantially related to his professional qualifications for purposes of the allegations under sections 490 and 2761, subdivision (f) cannot be used to circumvent the conclusive presumption that the conduct described by section 2762 amounts to unprofessional conduct.” (*Id.*, pp. 1204-05; see also, *Watson v. Superior Court* (2009) 176 Cal.App.4th 1407, 1421 [“[W]hile there must be a nexus or ‘logical connection’ between the type of misconduct that forms the basis for physician discipline and the ability of the physician to practice medicine, that nexus is established for constitutional purposes if the conduct enumerated, here the use of alcohol to the extent, or in such manner as to be dangerous or injurious to the licensee, or to any other person or to the public, is logically connected to a physician’s fitness to practice medicine.”]; *Krain v. Med. Bd.* (1999) 71 Cal.App.4th 1416, 1424 [whether a conviction is “substantially related” to professional qualifications is question of law, not fact].)

The dangerous use of alcohol has also been found substantially related to the duties and functions of other healing arts professionals, such as doctors and physical therapists. In *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, the court concluded that driving under the influence “reflect[s] a lack of sound professional and personal judgment,” threatens the safety of the public, and demonstrates both a disregard of the medical knowledge of the effects of alcohol and the legal prohibitions against drinking and driving. This is true for doctors and other medical professionals. In *Walker v. Physical Therapy Bd. of California* (2017), 16 Cal. App. 5th 1219, 1229, the court cited *Watson, supra*, to hold that the Legislature had made an implied finding that the use of alcohol in a dangerous manner was de facto unprofessional conduct that substantially related to the physician's fitness to practice medicine.

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Given these circumstances and the similarities between licensed vocational nurses, registered nurses and other healing arts professionals, the BVNPT has determined that any conviction of using drugs or alcohol to an extent dangerous to the individual or to the public should be considered to be substantially related to the qualifications, functions, or duties involved in vocational nursing.

- 16 CCR 2521(c)(12): Conviction for a crime or act involving harassment, trespassing, or stalking.

Under the proposed amendment, a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions or duties of a licensee if, to a substantial degree, it evidences the present or potential unfitness of a licensee to perform the functions authorized and/or mandated by the license.

Nursing services may be performed in intimate environments such as patients' residences. These types of patient examinations may place licensees in situations where they may have unmonitored access to patients and their living areas. This access may facilitate harassment, trespassing, or stalking, especially with the most vulnerable patients. Given these circumstances, the BVNPT has determined that any conviction or act involving harassment, trespass, or stalking should be considered to be substantially related to the qualifications, functions, or duties involved in vocational nursing because of these nurses' access to patients in these potentially unguarded situations.

- 16 CCR 2521(c)(13): Failure to comply with any mandatory reporting requirements related to any of the foregoing convictions or the denial, suspension, or revocation of a license by the Board.

Under BPC Section 2878, the BVNPT may suspend or revoke a license if it has determined that a licensee failed to report any act prohibited by the section. LVNs are required to document and report patient information (for instance, in the charts of the patient(s) to whom they are providing care), the failure of which could result in serious harm to the patient. If an LVN is unable to comply with the mandatory reporting requirements necessary to remain in compliance with maintaining their own personal LVN license, or imposed by a court or other judicial body as a means to fulfil a legal obligation necessary to comply with a court order, etc., the BVNPT does not believe that the LVN will be able to complete the required tasks of an LVN, such as accurately and timely charting in a manner necessary to ensure patient safety. For this reason, this requirement is substantially related to the practice of an LVN.

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Amend section 2522 of Article 4, Chapter 1 of Division 25 of title 16 of the CCR (Rehabilitation Criteria)

16 CCR 2522(a):

Purpose: The purpose of amending 16 CCR 2522(a) is to comply with the requirements of AB 2138, section 9, and BPC section 482(b)(1), which requires the BVNPT to consider whether an applicant or licensee has made a showing of rehabilitation if the applicant or licensee has completed the criminal sentence, at issue, without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific list of criteria for the BVNPT to consider for these applicants and licensees. The list of criteria is narrow in scope and limited to considerations relevant to the crime, professional misconduct, or act and the criminal sentence, since AB 2138 requires the BVNPT to consider rehabilitation in the narrow context of an applicant or licensee who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other Boards under the DCA.

Anticipated Benefit: The proposed revisions to 16 CCR 2522(a) will provide transparency and clarity to applicants and licensees who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria will help these persons understand the facts and documents necessary to present to the BVNPT to demonstrate their rehabilitation. This proposal will also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, an Administrative Law Judge, the applicant or licensee and their counsel) in advocating for or against, or deciding upon, those whom have criminal convictions and have completed their parole or probation, without a violation, by listing the specific rehabilitation criteria applicable to them.

Rationale: Existing law requires Boards to develop criteria to evaluate the rehabilitation of an applicant or licensee when considering denying or disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) A Board may not deny an applicant a license based, solely, on a misdemeanor conviction, if the applicant met the applicable requirements of the criteria of rehabilitation that the Board has developed. (BPC, § 480, subd. (b).)

Operative July 1, 2020, BPC section 480 will prohibit the BVNPT from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or on the basis of the facts underlying a conviction, if the applicant “made a showing of rehabilitation pursuant to Section 482.” (BPC, § 480, subd. (b), as added by AB 2138, § 4.) In deciding whether to deny a license based on a conviction, the BVNPT must consider evidence of the applicant’s rehabilitation, pursuant to the process established in the Act, or its regulations, and as directed under BPC section 482. (BPC, § 481, subd. (c), as added by AB 2138, § 7; see also BPC, § 493, subd. (b)(2), as added by AB 2138, § 13 [“A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation”].)

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To implement AB 2138, it is necessary for the BVNPT to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny or discipline a license based on a criminal conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.) The BVNPT must also decide whether an applicant or licensee “made a showing of rehabilitation,” if the applicant or licensee completed the criminal sentence, at issue, without a violation of parole or probation. (BPC, § 482, subd. (b), as added by AB 2138, § 9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the BVNPT must consider when denying or disciplining a license. The extent to which a person has complied with the terms of parole or probation is already a factor that Boards often consider when evaluating rehabilitation, and it is currently considered by the BVNPT in evaluating rehabilitation. (16 CCR 1445, subd. (a)(4).) But courts have historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the BVNPT must now consider whether an applicant or licensee, who complied with the terms of parole or probation, has made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

The present proposal specifies the following criteria for the BVNPT to consider when making the determination that the applicant or licensee, who has successfully completed the criminal sentence, has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the reason for granting probation and the length of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms conditions of parole, or probation, and the extent to which they bear on the applicant’s rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

These criteria are necessary to assist the BVNPT in evaluating rehabilitation. Since the purpose of evaluating an applicant’s and licensee’s rehabilitation is to determine whether they are sufficiently reformed to be licensed, but AB 2138 requires the BVNPT to evaluate rehabilitation in the narrow context of a person who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and will provide, to the BVNPT, information specific to the applicant’s criminal sentence and terms or conditions of parole or probation, so that the BVNPT knows the relevant criteria it must consider to make the determination as to the applicant’s rehabilitation.

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The BVNPT will consider the nature and gravity of the crime because this is the offense against which the applicant’s rehabilitative efforts will be evaluated.

The BVNPT will consider the length of the applicable parole or probation period, because the length of time that the applicant served probation or parole, without a violation, is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future. (*In re Conflenti* (1981) 29 Cal.3d 120, 124-125 [“a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice”].)

The BVNPT will consider the extent to which the parole or probation period was shortened or lengthened, and the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the applicant is sufficiently rehabilitated.

The BVNPT will consider the terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation, because the actual parole or probation terms can inform the BVNPT on whether the applicant is rehabilitated. For instance, in cases where an applicant was convicted of a crime involving alcohol, probation terms requiring the applicant to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the applicant’s rehabilitation. (*In re Billings* (1990) 50 Cal.3d 358, 368 [“An alcoholic’s rehabilitation is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous”].)

The BVNPT will consider the extent to which the terms or conditions of parole or probation were modified and the reason for modification, because this may be relevant to the BVNPT’s determination. For instance, if correctional authorities removed terms of parole or probation due to the applicant’s good behavior, this would bear on the BVNPT’s evaluation of the applicant’s rehabilitation and willingness to conform to the rules of licensure.

Changing the word “eligible” to “fit” is necessary to clarify for applicants and licensees that the BVNPT must determine if the individual is suitable to practice registered nursing, rather than evaluating whether the person satisfied a set of conditions (i.e. being eligible to practice nursing).

16 CCR 2522(b):

Purpose: The purpose of amending 16 CCR 2522(b) is to comply with the requirements of AB 2138, section 9, and BPC section 482(b)(2), which requires the BVNPT to consider whether an applicant has made a showing of rehabilitation if: (1) the applicant has not completed the criminal sentence at issue without a violation of parole or probation; (2) the BVNPT does not find that the applicant made a sufficient showing of rehabilitation based on the narrow criteria in subsection (a); or, (3) the denial is based on something other than a crime, such as professional misconduct. The BVNPT would apply the same criteria

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for licensees, during the disciplinary process, for purposes of uniformity between the two processes.

As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a more comprehensive, list of criteria for the BVNPT to consider for these applicants and licensees, which is not limited to the applicable parole or probation. The list of criteria incorporates the criteria from subsection (a) for those convicted of a crime, so that similarly-situated applicants and licensees have the opportunity to be evaluated by the BVNPT under the same set of criteria. The list of criteria also anticipates that the BVNPT may be considering “act(s)” that are the basis for the denial or discipline, since the BVNPT may be evaluating the rehabilitation of an applicant or licensee where the ground for denial involves acts of misconduct, rather than a conviction. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to 16 CCR 2522(b) will provide transparency and clarity to applicants and licensees who have not completed their criminal sentence without a violation of parole or probation or, otherwise, do not qualify for consideration under subsection (a). Providing the list of rehabilitation criteria will help applicants and licensees understand the facts and documents necessary to present to the BVNPT to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial or discipline (e.g., the Deputy Attorneys General, the Administrative Law Judge, and the person’s counsel) in advocating for or against, or deciding upon, applicants or licensees who do not qualify for consideration under subsection (a), by listing rehabilitation criteria applicable to them.

Rationale:

- 16 CCR 2522(b)(1): Nature and severity of the ~~act(s), offense(s), or crime(s)~~ crime(s), professional misconduct, or act(s) under consideration
This subsection is amended to add “professional misconduct”, and to remove “offense(s)” to be consistent with provisions of AB 2138, and because the offense is synonymous with crime and, therefore, redundant.
- 16 CCR 2522(b)(2): *Actual or potential harm to the public.*
The language of this subsection is unchanged.
- 16 CCR 2522(b)(3): *Actual or potential harm to any patient.*
The language of this subsection is unchanged.
- 16 CCR 2522(b)(4): *Overall disciplinary record.*
The language of this subsection is unchanged.
- 16 CCR 2522(b)(5): *Overall criminal actions taken by any federal, state or local agency or court.*
The language of this subsection is unchanged.

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- 16 CCR 2522(b)(6): *Prior warnings on record or prior remediation.*
The language of this subsection is unchanged.
- 16 CCR 2522(b)(7): *Number and/or variety of current violations.*
The language of this subsection is unchanged.
- 16 CCR 2522(b)(8): *Mitigation evidence.*
The language of this subsection is unchanged.
- 16 CCR 2522(b)(9): *In case of a criminal conviction, compliance with terms of sentence and/or court-ordered probation.*
The language of this subsection is unchanged.
- 16 CCR 2522(b)(10): Time passed since the ~~act(s) or offense(s)~~ crime(s), professional misconduct, or act(s) occurred.
This subsection is amended to add “crime(s)” and “professional misconduct”, and to remove “offense(s)” to be consistent with provisions of AB 2138, and because crimes is synonymous with offense, and the term crime will make the regulation internally consistent.
- 16 CCR 2522(b)(11): *If applicable, evidence of proceedings to dismiss a conviction pursuant to Penal Code section 1203.4.*
The language of this subsection is unchanged.
- 16 CCR 2522(b)(12): *Cooperation with the Board and other law enforcement or regulatory agencies.*
The language of this subsection is unchanged.
- 16 CCR 2522(b)(13): *Other rehabilitation evidence.*
The language of this subsection is unchanged.

UNDERLYING DATA:

- April 30, 2019 Board Meeting Minutes
- May 17, 2019 Board Meeting Minutes
- February 3, 2020 Board Meeting Minutes

BUSINESS IMPACT:

The proposed regulations will not have a significant adverse economic impact on businesses as the regulations do not directly affect businesses. This initial determination is based on the purpose of AB 2138, which seeks to reduce barriers to licensure for applicants and licensees with criminal histories or licensure discipline. It is also based on the lack of testimony at the BVNPT’s meeting that the regulation will impact businesses. The BVNPT anticipates that the proposed regulations will only impact businesses to the extent that individual applicants or licensees are able to be licensed or retain licensure

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under the proposal. The BVNPT does not know how many applicants will gain or retain licensure but does not anticipate the number to significantly impact businesses.

ECONOMIC IMPACT ASSESSMENT:

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs, within the State of California, because the regulations are aimed at reducing barriers to licensure and make it easier for license applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure;
- It will not create new businesses or eliminate existing business, within the State of California, because the regulations are aimed at reducing barriers to licensure and make it easier for license applicants and licensees, with criminal histories or licensure discipline, to obtain and maintain licensure;
- It may have a minor impact upon the expansion of businesses, currently doing business within the State of California, because the regulations are aimed at reducing barriers to licensure and make it easier for license applicants and licensees, with criminal histories or licensure discipline, to obtain and maintain licensure.
- This regulatory proposal benefits the health and welfare of California residents because it would increase their access to licensed professionals to treat patients in California;
- This regulatory proposal does not affect worker safety because it establishes criteria, based upon recent statutory mandates for licensure following the applicant’s or licensee’s criminal conviction. It does not involve worker safety;
- This regulatory proposal does not affect the state’s environment because it only regulates license applicants and licensees and their qualifications for licensure following a criminal conviction or disciplinary action. It does not involve environmental issues; and
- Housing: This regulation does not affect housing in California.

SPECIFIC TECHNOLOGIES OR EQUIPMENT:

This regulatory proposal does not mandate the use of specific technologies or equipment.

CONSIDERATION OF ALTERNATIVES:

No reasonable alternative to the regulatory proposal will be either more effective in carrying out the purpose for which the regulation is proposed, be as effective or less burdensome to affected private persons than the proposed regulation, or equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth, below, are the alternatives that were considered and the reason the alternative was rejected or adopted:

- Option 1: To pursue a regulatory change that requires the BVNPT to find rehabilitation if the applicant or licensee has completed the terms of their criminal

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probation or parole. Courts give little weight to the fact that an applicant did not commit additional crimes, professional misconduct, or acts or continue addictive behavior while in prison or while on probation or parole, since they are under the direct supervision of correctional authorities and are required to behave in an exemplary fashion. As such, the BVNPT believes that reviewing each individual on the basis of multiple criteria is the better indicator whether individuals are rehabilitated and not a danger to the public’s health, safety, and welfare. For these reasons, the BVNPT rejected this option.

- Option 2: Do nothing, meaning the BVNPT would not adopt the proposed regulations. The BVNPT opted not to pursue this option because, per AB 2138, the BVNPT is mandated to adopt proposed regulations by July 1, 2020.

Any interested person may submit comments to the BVNPT, in writing relevant to the above determinations, at 2535 Capitol Oaks Drive, Suite 205, Sacramento, California 95833 or by email to: BVNPT.Rulemaking@dca.ca.gov.

END OF DOCUMENT

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