

BEFORE THE BOARD OF NURSING
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of)
ARM 24.159.501 definitions, the)
adoption of New Rule I enhanced)
nurse licensure compact rules, and)
the repeal of ARM 24.159.504)
issuance of a license by a compact)
state, 24.159.507 limitations on)
multistate licensure privilege -)
discipline, and 24.159.510 information)
system)

TO: All Concerned Persons

1. On March 30, 2018, the Board of Nursing (board) published MAR Notice No. 24-159-85 regarding the proposed amendment, adoption, and repeal of the above-stated rules, at page 624 of the 2018 Montana Administrative Register, Issue No. 6. On May 11, 2018, the board published a notice of public hearing on the amendment, adoption, and repeal of the above-stated rules at page 947 of the 2018 Montana Administrative Register, Issue No. 9.

2. On June 5, 2018, a public hearing was held on the proposed amendment, adoption, and repeal of the above-stated rules in Helena. Several comments were received by the June 8, 2018, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments and the board responses are as follows:

PROPONENTS

COMMENT 1: Several commenters generally supported the proposed rule changes in MAR Notice No. 24-159-85.

RESPONSE 1: The board appreciates all comments received during the rulemaking process and is proceeding with the changes exactly as proposed.

COMMENT 2: Many commenters supported the amendment of ARM 24.159.501, stating that the new definitions are the verbatim definitions adopted by the Interstate Commission of Nurse Licensure Compact Administrators (Commission) related to the Enhanced Nurse Licensure Compact, codified at 37-8-501, MCA (eNLC).

RESPONSE 2: The board intends to adopt the definitions exactly as proposed by the Commission.

COMMENT 3: Many commenters supported the repeal of ARM 24.159.504, 24.159.507, and 24.159.510, as the rules apply to the original NLC, which is no longer in effect.

RESPONSE 3: The board agrees that the old rules pertain to the original Nurse Licensure Compact (NLC). The board further notes the statutory authority for those rules was repealed when the eNLC became effective on January 19, 2018.

COMMENT 4: Numerous commenters supported the proposed adoption of New Rule I, opining that since Montana is a party state to the compact, the board is bound by the rules adopted by the Commission.

RESPONSE 4: The board agrees that, pursuant to Article VII(7)(a), and Article VIII of the eNLC, the Commission has been invested with rulemaking authority regarding rules to facilitate and coordinate implementation of the eNLC, and that Montana, as a party state, is bound by those rules.

OPPONENTS

COMMENT 5: Several commenters asserted the board is using the adoption of the eNLC to eliminate rules in favor of allowing the Commission to adopt rules for Montana, and that this was not the legislative intent of entering the eNLC.

RESPONSE 5: The board must enact rules consistent with legislative intent. The board has determined, under the plain language of the eNLC, that the Commission has authority to enact rules to facilitate and coordinate implementation of the eNLC if those rules are promulgated pursuant to the procedures defined in Article VIII of the eNLC. The board notes that it retains rulemaking authority in all other aspects of licensure and enforcement. The board further notes, as evidenced by the rulemaking process followed regarding this rule proposal, the board is still observing appropriate rulemaking procedures. The board still accepts public comment on proposed rule changes and will not enact those changes without public input.

COMMENT 6: Many commenters specifically opposed adoption of New Rule I, asserting that the eNLC does not require the board to be bound by rules not otherwise adopted in Montana.

RESPONSE 6: Article VII(7)(a) and Article VIII of the eNLC discuss the rulemaking provisions of the eNLC. These provisions invest the Commission with authority to enact rules to facilitate and coordinate implementation of the eNLC, and that Montana, as a party state, is bound by those rules.

COMMENT 7: Several commenters stated that New Rule I does not provide sufficient notice to the public to notify individuals of rules and rulemaking, and may not comply with Montana's public notice laws.

RESPONSE 7: The board understands the public's right to participate in the board's and the Commission's rulemaking. Under Article VIII of the eNLC, the Commission must issue a notice of proposed rulemaking and request for public comment at least 60 days before holding a public meeting at which the rule changes will be considered. The board will continue to encourage public participation in this rulemaking process. Additionally, the board will publish the Commission's notice of proposed rulemaking in the Montana Administrative Register to adequately notify the public of the proposed changes.

COMMENT 8: Numerous commenters opposed the amendment of ARM 24.159.501 stating the elimination of the definitions for "public" and "primary state of residence" may cause confusion as to when Montana would be considered a primary state of residence and when individuals would need to become licensed in Montana.

RESPONSE 8: The board has concluded that statutory definitions within the eNLC sufficiently cover these terms, and, in some cases, may be much clearer.

COMMENT 9: Many commenters specifically opposed the repeal of ARM 24.159.504(1)(f), which states that a nurse changing primary state of residence may continue to practice under the former state's multistate licensure privilege for 90 days. The commenters expressed concerns that the rules as proposed will not adequately address how the board will track multistate practice privileges, and whether nurses residing in Montana are complying with the requirement that they apply for a Montana nursing license. One commenter stated this may allow nurses to practice in Montana without maintaining competency because, as licensees of another state, they may not be required to take continuing education courses.

RESPONSE 9: Since the eNLC was enacted, the board has not had issues with nurses failing to apply for licensure upon changing primary state of residence. The board agrees that it does not have a method to track whether each nurse complies with this requirement. However, although the board attempts to educate nurses as much as possible regarding current licensure laws, the board expects nurses to follow those laws. If the board receives complaints that nurses are not complying with eNLC requirements, the board has authority to take disciplinary action against a nurse's privilege to practice in Montana and has the authority to issue cease and desist orders against any nurse found to be in violation of the eNLC.

Moreover, although the board requires its nurses to obtain continuing education and has determined that CE is important to the public, the board understands that there is no evidence of a correlation between continuing education and continued competency.

COMMENT 10: Several commenters questioned how disciplinary action will be taken and communicated under the eNLC, and expressed concern that the rules adopted by the Commission do not adequately address this issue.

RESPONSE 10: The board's disciplinary authority has not changed, and the board will continue to follow similar processes as it did under the original nurse licensure

compact. The board also notes that whether an individual is practicing under a multistate practice privilege or a Montana license, the board has authority to take disciplinary action against the individual's permission to practice in Montana.

COMMENT 11: Many commenters questioned what checks and balances, if any, will ensure the board's executive officer will vote in the Commission in a manner that represents the interests of Montana and its licensed nurses.

RESPONSE 11: The board agrees that part of its mission is to protect the health, safety, and welfare of Montana and understands that the Commission will work collaboratively in the interest of public health, welfare, and safety. Pursuant to the eNLC, the board's executive officer (EO) will vote on behalf of the board at Commission meetings, but the board will continue to monitor the EO's participation in the Commission to ensure that the EO is acting in a manner that represents Montana's interests.

COMMENT 12: Numerous commenters questioned whether the Commission is a public agency, subject to state transparency requirements, including the Montana Public Records Act.

RESPONSE 12: The board notes that the Commission is a public agency. A determination as to whether the Commission is subject to the provisions of the Montana Public Records Act is beyond the scope of these rules.

COMMENT 13: Many commenters requested the board vote not to adopt, repeal, and amend the rules as proposed and instead requested the board form a subcommittee to review the issues raised by opponents of the rule proposal.

RESPONSE 13: The board discussed the proposed rule changes at several open board meetings before issuing a rule proposal notice. The board followed all statutory rulemaking procedures of the Montana Administrative Procedure Act when determining whether to make these rule changes. The board is proceeding with the rule changes exactly as proposed.

OTHERS

COMMENT 14: Several commenters responded to claims that the board is using the adoption of the eNLC to eliminate rules in favor of allowing the Commission to adopt rules for the state of Montana. These commenters stated that the Commission only has the authority to adopt rules related to the eNLC and cannot enact rules that impact the Montana Nurse Practice Act. As such, the board's rules and the eNLC rules can exist simultaneously.

RESPONSE 14: The board agrees.

COMMENT 15: Several commenters responded to claims that New Rule I does not provide sufficient notice to the public to notify individuals of rules and rulemaking,

and may not comply with Montana's public notice laws. The commenters provided the notice procedures required by Article VIII of the eNLC.

RESPONSE 15: The board agrees. The board further notes that it will publish all proposed eNLC rule changes in the Montana Administrative Register, as authorized by eNLC Article VII(3)(b).

COMMENT 16: Several commenters responded to questions regarding whether the Commission is a public agency, subject to state transparency requirements, stating that the Commission is a public, governmental agency and that the Commission subjects itself to open meeting laws and follows guidelines based on the Federal Administrative Procedure Act.

RESPONSE 16: The board agrees.

COMMENT 17: Several commenters responded to claims that Montana has ceded many of its rights and responsibilities regarding nurse licensure to a private organization. These commenters believed that Montana has not ceded any rights or responsibilities to a private organization, and that the Commission can only make rules related to the compact.

RESPONSE 17: The board agrees.

COMMENT 18: Several commenters responded to concerns that the proposed rules do not adequately address how the board will track multistate practice privileges, and whether nurses residing in Montana are complying with the requirement to apply for a Montana nursing license. The commenters noted that the eNLC Final Rules, Section 402 adequately addresses this issue and that it is not necessary to implement a rule requiring all Montana-based health care providers and other employers to provide the board with the names and license information of all nurses subject to the compact that are providing nursing care in Montana.

RESPONSE 18: Please see RESPONSE 9.

COMMENT 19: Some commenters expressed support for the eNLC.

RESPONSE 19: The Montana Legislature enacted the eNLC, which became effective on January 19, 2018, six months after the 26th state enacted the eNLC. The board must comply with statutory provisions. As such, the eNLC is beyond the scope of this rule proposal.

COMMENT 20: Several commenters opposed the eNLC and raised concerns as to specific provisions of the eNLC.

RESPONSE 20: The Montana Legislature enacted the eNLC, which became effective on January 19, 2018, six months after the 26th state enacted the eNLC.

The board must comply with statutory provisions. As such, the eNLC is beyond the scope of this rule proposal.

4. The board has amended ARM 24.159.501 exactly as proposed.
5. The board has adopted New Rule I (24.159.502) exactly as proposed.
6. The board has repealed ARM 24.159.504, 24.159.507, and 24.159.510 exactly as proposed.

BOARD OF NURSING
SHARON SWEENEY FEE, RN
PRESIDENT

/s/ DARCEE L. MOE
Darcee L. Moe
Rule Reviewer

/s/ GALEN HOLLENBAUGH
Galen Hollenbaugh, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State August 28, 2018.