

TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING
CHAPTER 23 RESPIRATORY CARE PRACTITIONERS
PART 17 GROUNDS FOR DISCIPLINARY ACTION AND DISCIPLINARY PROCEEDINGS

16.23.17.1 ISSUING AGENCY: New Mexico Regulation and Licensing Department in consultation with the Advisory Board of Respiratory Care Practitioners.
[16.23.17.1 NMAC - Rp, 16.23.17.1 NMAC, 04/21/2022]

16.23.17.2 SCOPE: The provisions in Part 17 of Chapter 23 apply to any person found to be in violation of the Respiratory Care Act, Section 61-12B-1 through 61-12B-17 NMSA 1978 or the department's regulations governing the practice of respiratory care, Title 16, Article 23 NMAC.
[16.23.17.2 NMAC - Rp, 16.23.17.2 NMAC, 04/21/2022]

16.23.17.3 STATUTORY AUTHORITY: Part 17 of Chapter 23 is promulgated pursuant to Section 61-12B-6 NMSA 1978 and the Uniform Licensing Act, Section 61-1-1 through Section 61-1-36 NMSA 1978.
[16.23.17.3 NMAC - Rp, 16.23.17.3 NMAC, 04/21/2022]

16.23.17.4 DURATION: Permanent.
[16.23.17.4 NMAC - Rp, 16.23.17.4 NMAC, 04/21/2022]

16.23.17.5 EFFECTIVE DATE: April 21, 2022 unless a later date is cited at the end of a section.
[16.23.17.5 NMAC - Rp, 16.23.17.5 NMAC, 04/21/2022]

16.23.17.6 OBJECTIVE: The objective of Part 17 of Chapter 23 is to set forth the grounds which subject the applicant, licensee, or permittee to disciplinary action such as permit or license denial, suspension, or revocation, or to any other penalty provided by the Uniform Licensing Act.
[16.23.17.6 NMAC - Rp, 16.23.17.6 NMAC, 04/21/2022]

16.23.17.7 DEFINITIONS: All definitions related to this section are in 16.23.1.7 NMAC.
[16.23.17.7 NMAC - Rp, 16.23.17.7 NMAC, 04/21/2022]

16.23.17.8 DISCIPLINARY GUIDELINES: The superintendent of the department may refuse to issue or may suspend or revoke any permit or license for any cause listed below:

A. Making fraudulent representations to any respiratory care licensing board in any jurisdiction in the procurement of an initial or a renewal temporary permit or practitioner's license.

B. Having had a temporary permit or practitioner's license denied, suspended or revoked by a respiratory care licensing board in another licensing jurisdiction for any cause listed in this rule. However, the disciplinary action imposed by the department shall not exceed the length of time or severity of the action imposed by the other licensing jurisdiction.

C. Having been convicted of a crime, which substantially relates to the qualifications, functions or duties of a respiratory care practitioner. The record of conviction or the certified copy of the record of conviction shall be conclusive evidence of the conviction.

D. Engaging in the habitual or excessive use of alcohol or controlled substances.

E. Using or being under the influence of alcohol, controlled substances, or drugs that impair judgment, while on duty in any facility of employment.

F. Obtaining, possessing, administering, or using any narcotic or controlled substance in violation of any federal or state criminal law.

G. Being responsible for gross negligence in the performance and delivery of health care while engaged in the practice of respiratory care.

H. Violating any provision of the Respiratory Care Act or the rules and regulations governing respiratory care adopted by the department, or aiding or abetting any other person in violating these laws.

I. Engaging in acts of unprofessional conduct such as, but not limited to, the following:

- (1) Failing to maintain minimum acceptable and prevailing standards of respiratory care practice.
- (2) Performing procedures and functions beyond which the respondent is individually competent to perform or which are outside the scope of accepted and responsible practice of respiratory care.
- (3) Failing to respect and protect the legal and personal rights of the patient, including the right to informed consent and refusal of treatment.
- (4) Intentionally or negligently causing physical or emotional injury to a patient.
- (5) Assaulting or committing battery on a patient.
- (6) Abandoning or neglecting a patient requiring immediate respiratory care without making reasonable arrangements for continuation of such care.
- (7) Failing to maintain for each patient a record which accurately reflects the respiratory care treatment of the patient.
- (8) Failing to take appropriate action to safeguard the patient's welfare or to follow policies and procedures established by the respiratory care practitioner's employer.
- (9) Divulging confidential information regarding any patient or family unless disclosure is required for responsible performance of duty, or as required by law.
- (10) Failing or refusing to provide health care to a patient for reasons of discrimination.
- (11) Failing to protect the health, safety, and welfare of the patient by abiding by and practicing established policies of disease prevention.
- (12) Failing to take appropriate action in the health care setting to protect a patient whose safety or welfare is at risk from incompetent health care practice including, but not limited, to reporting such practice to employment and licensing authorities.
- (13) As a supervisor, failing to supervise persons under one's direction or assigning the performance of functions governed by the Respiratory Care Act to persons who are untrained and unqualified to perform those functions.
- (14) Removing narcotics, drugs, supplies, or equipment from any health care facility or other work place location without authorization.

J. Committing any fraudulent, dishonest, or unscrupulous act which substantially relates to the qualifications, functions, or duties of a respiratory care practitioner. Such acts shall include, but not be limited to:

- (1) Engaging in fraud, misrepresentation, or deceit in writing the national licensing exam.
- (2) Impersonating an examination candidate in order to write a certification or licensing examination for him or her.
- (3) Impersonating another licensed practitioner.
- (4) Practicing respiratory care without a current license.
- (5) Permitting or allowing another person to use his or her license for any purpose.

[16.23.17.8 NMAC - Rp, 16.23.17.8 NMAC, 04/21/2022]

16.23.17.9 GROSS NEGLIGENCE: In performing respiratory care functions, a temporary permittee or licensed practitioner is under the legal duty to possess and to apply the knowledge, skill, and care that is ordinarily possessed and exercised by other temporary permittees and licensed practitioners and required by the generally accepted standards of the profession. The failure to possess or to apply to a substantial degree such knowledge, skill, and care constitutes gross negligence.

A. Charges of gross negligence may be based upon a single act of gross negligence or upon a course of conduct or series of acts or omissions which extend over a period of time and which, taken as a whole, demonstrate gross negligence.

B. It shall not be necessary to show that actual harm resulted from the act or omission or series of acts or omissions so long as the conduct is of such a character that harm could have resulted to the patient or to the public from the act or omission or series of acts or omissions.

C. Proof of intent will not be necessary to establish gross negligence.

D. The following shall be deemed prime examples of activities which demonstrate that the temporary permittee or licensed practitioner has engaged in an act or acts of gross negligence. The department, in consultation with the board, shall not be limited to this list in determining whether an act or acts constitute gross negligence.

- (1) Acting in a manner inconsistent with the care for the welfare, health, or safety of patients set forth by the facility in which the temporary permittee or licensed practitioner is employed.
- (2) Performance or conduct that substantially departs from, or fails to conform to, the minimal reasonable standards of acceptable and prevailing practice of respiratory care.

- (3) Failure to adhere to the facility's quality assurance standards and risk management recommendations.
- (4) Failure to maintain an appropriate standard of care.
- (5) Failure to follow established policies and procedures.
- (6) Performing procedures beyond the scope of one's training and education.
- (7) Attempting to treat too many patients simultaneously, resulting in harm to one or more patients.

[16.23.17.9 NMAC - Rp, 16.23.17.9 NMAC, 04/21/2022]

16.23.17.10 CRIMINAL CONVICTIONS:

A. Convictions for any of the following offenses, or their equivalents in any other jurisdiction, are disqualifying criminal convictions that may disqualify an applicant from receiving or retaining a license issued by the department in consultation with the board:

- (1) conviction for a felony violation of the Controlled Substances Act, 30-31 NMSA 1978;
- (2) conviction of a felony involving intentionally violent acts, use of a deadly weapon, criminal sexual exploitation or contact; and
- (3) conviction of a felony involving Medicaid billing, Medicare billing, or health insurance billing related fraud.

B. The department shall not consider the fact of a criminal conviction as part of an application for licensure unless the conviction in question is one of the disqualifying criminal convictions listed in Subsection A of this section.

C. The department shall not deny, suspend or revoke a license on the sole basis of a criminal conviction unless the conviction in question is one of the disqualifying criminal convictions listed in Subsection A of this rule.

D. Nothing in this rule prevents the department from denying an application or disciplining a licensee on the basis of an individual's conduct to the extent that such conduct violates the Respiratory Care Act or the Impaired Health Care Provider Act, regardless of whether the individual was convicted of a crime for such conduct or whether the crime for which the individual was convicted is listed as one of the disqualifying criminal convictions listed in Subsection A of this rule.

E. In connection with an application for licensure, the department shall not use, distribute, disseminate, or admit into evidence at an adjudicatory proceeding, criminal records of any of the following:

- (1) an arrest not followed by a valid conviction;
- (2) a conviction that has been sealed, dismissed, expunged or pardoned;
- (3) a juvenile adjudication; or
- (4) a conviction for any crime other than the disqualifying criminal convictions listed in

Subsection A of this rule.

[16.23.17.10 NMAC - Rp, 16.23.17.10 NMAC, 04/21/2022]

16.23.17.11 REQUEST FOR REINSTATEMENT:

A. One year from the date of the revocation of a temporary permit or practitioner license, the permittee or licensee may apply to the superintendent of the department for reinstatement, restoration, or modification of the terms of the judgment order.

B. The Superintendent, in consultation with the board, shall have the discretion to accept or deny the application for reinstatement, restoration, or modification when it is deemed appropriate.

C. Denial of reinstatement will be made pursuant to the Uniform Licensing Act.

[16.23.17.11 NMAC - Rp, 16.23.17.11 NMAC, 04/21/2022]

16.23.17.12 DISCIPLINARY PROCEEDINGS: An investigation may be instituted by the department, in consultation with the board, upon the receipt of a written, complaint filed by any person, and signed under penalty of perjury, including any member of the board.

A. A complaint filed, with the department, will be received by the compliance liaison who will process the complaint and will determine how the complaint will be handled.

B. In cases where it is clearly evident that the complaint does not fall within the board's statutory authority or jurisdiction, the compliance liaison will not process the complaint and will inform the complainant of the reasons.

C. If the complaint appears to contain violations of the board's statute or its rules, the compliance liaison will process the complaint.

D. If the complaint is not lengthy, the compliance liaison may elect to present the processed complaint to the entire board in a redacted form.

E. If the complaint is lengthy or complicated, the compliance liaison shall refer it to the board's complaint committee for review, consideration, and possible investigation.

F. The department may provide the respondent with a copy of the complaint and allow a reasonable time for a response to the allegations in the complaint.

G. The foregoing notwithstanding, the department will not be required to provide the respondent with a notice of the complaint filing, or a copy of the complaint, or any related investigatory evidence prior to the notice of contemplated action if it determines that disclosure may impair, impede, or compromise the efficacy or integrity of an investigation into the matter.

[16.23.17.12 NMAC - Rp, 16.23.17.12 NMAC, 04/21/2022]

16.23.17.13 COMPLAINT COMMITTEE:

A. The complaint committee will review all documentation provided to it in reference to the subject complaint.

B. The complaint committee may be authorized by the board to consult with, without prior board approval, an investigator or other persons determined by the committee to be necessary in order to expedite the investigation of a complaint. If necessary, in such cases, the board administrator will contract for any such required services once budgetary availability is determined.

C. Upon completion of its investigation, the complaint committee shall present a summary of the complaint to the board, in a redacted form, for the purpose of enabling the board to act upon the complaint committee's recommendations concerning the disposition of the subject complaint.

D. The complaint committee may be authorized by the board to discuss a settlement agreement with the respondent as a means of resolving the complaint.

(1) The settlement shall be presented to the board for consideration and approval.

(2) Depending on the board's decision and action on any settlement agreement presented, the board may make recommendation for further action to the department superintendent.

E. Members of the complaint committee who participate in the preparation of recommendations on complaints shall not participate further in any actions initiated by the department or the board against the permittee, licensee, or applicant who is the subject of the complaint.

[16.23.17.13 NMAC - Rp, 16.23.17.13 NMAC, 04/21/2022]

16.23.17.14 BOARD ACTION CONCERNING COMPLAINT DISPOSITION: After consideration, the board shall vote upon the proposed recommendations and either uphold, reverse, or modify the complaint committee's recommendations.

A. If the board determines that the department lacks jurisdiction, or that there is insufficient evidence or cause to issue a notice of contemplated action, the board may vote to recommend to the department that the complaint be dismissed and closed.

B. If the board determines that there is sufficient evidence or cause for the department to issue a notice of contemplated action, it may vote to recommend to the department that the complaint be referred to the attorney general's office for possible prosecution in accordance with the provisions contained within the Uniform Licensing Act.

C. The board may recommend that the department take any other action with regard to a complaint which is within the department's authority and which is within the law, including referring the complaint to the attorney general for injunctive proceedings; or referring it to the attorney general or the district attorney for prosecution of persons alleged to be practicing without a valid license, including:

(1) Formal letters of reprimand. The department, in consultation with the board, shall have discretionary authority to issue formal letters of reprimand or warning instead of license revocation or suspension. Issuance of formal letters of reprimand shall be subject to the provisions of the Uniform Licensing Act and shall be a matter of public record.

(2) Pre-referral settlement agreements. Prior to the issuance of a notice of contemplated action, the department, in consultation with the board, may enter into a settlement agreement with the respondent as a means of resolving a complaint.

[16.23.17.14 NMAC - Rp, 16.23.17.14 NMAC, 04/21/2022]

16.23.17.15 DISCIPLINARY HEARING:

A. The superintendent shall appoint a hearing officer preside over a disciplinary hearing. The hearing officer may decide non-dispositive motions filed prior to the hearing.

B. Following the issuance of a notice of contemplated action, the department, may enter into a settlement agreement with the respondent as a means of resolving a complaint.

C. Any temporary permit, wall license and renewal license issued by the department must be returned to the department subsequent to revocation or suspension. The permit or license(s) must be returned in person or by registered mail no later than 20 days after the suspension or revocation order by the department.

D. The respondent shall bear all costs of disciplinary proceedings unless the respondent is excused by the department from paying all or part of the fees, or if the respondent prevails at the hearing and an action specified in Section 61-1-1-3 NMSA 1978 of the Uniform Licensing Act is not taken by the department.

[16.23.17.15 NMAC - Rp, 16.23.17.15 NMAC, 04/21/2022]

16.23.17.16 PRIVATE CAUSE OF ACTION: Neither the action nor inaction of the department or board on any complaint shall preclude the initiation of any private cause of action by the complainant.

[16.23.17.16 NMAC - Rp, 16.23.17.16 NMAC, 04/21/2022]

16.23.17.17 FEDERAL FRAUD AND ABUSE DATA BANK:

A. In accordance with federal requirements imposed by the enactment of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, the department, in consultation with the board, shall report any final adverse actions taken against a licensee or applicant, which contain an admission or finding of guilt or liability, to the federal fraud and abuse data bank established under HIPAA.

B. The department, in consultation with the board, has the discretion not to report any final adverse action taken against a licensee or applicant, which does not contain an admission or finding of guilt or liability, to the federal fraud and abuse databank established under HIPAA.

[16.23.17.17 NMAC - Rp, 16.23.17.17 NMAC, 04/21/2022]

16.23.17.18 NATIONAL RESPIRATORY CARE DISCIPLINARY DATABASE: All final adverse actions shall also be reported by the department, in consultation with the board, to the national respiratory care disciplinary database established by the NBRC and the AARC in accordance with the provisions in this rule.

[16.23.17.18 NMAC - Rp, 16.23.17.18 NMAC, 04/21/2022]

16.23.17.19 UNLICENSED PRACTICE OF RESPIRATORY CARE - DISCIPLINARY GUIDELINES:

In accordance with the provisions contained within the Uniform Licensing Act, the department may take disciplinary action as provided in Section 61-1-3.2, NMSA 1978, if the department, in consultation with the board, determines that the respondent has violated the Respiratory Care Act or the department's rules and regulations governing respiratory care by practicing respiratory care in New Mexico without a valid New Mexico license.

A. The department, in consultation with the board, may impose a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against a person who, without a license, engages in the practice of respiratory care.

B. The department, in consultation with the board, may impose a civil penalty in an amount not to exceed one thousand dollars (\$1,000) against a company or other business entity that requires an unlicensed person to engage in the practice of respiratory care without a license. The penalty shall be imposed in the amount of one thousand dollars (\$1,000) for each individual that the company or business entity employs and who is performing respiratory care scope of practice procedures or protocols without benefit of a valid New Mexico respiratory care license or permit.

C. In addition, the department, in consultation with the board may assess the person, company, or other business entity for administrative costs, including investigative costs and the cost of conducting a hearing.

[16.23.17.19 NMAC - Rp, 16.23.17.19 NMAC, 04/21/2022]

HISTORY OF 16.23.17 NMAC:

PRE-NMAC HISTORY: None

HISTORY OF REPEALED MATERIAL:

16.23.17 NMAC, “Grounds for Disciplinary Action”, filed 12/30/2002 - Repealed effective 04/21/2022.

Other History: 16 NMAC 23.17, “Grounds for Disciplinary Action”, filed 11/10/1997, renumbered and reformatted to 16.23.17 NMAC, “Grounds for Disciplinary Action”, effective 1/30/2003.

16.23.17 NMAC, “Grounds for Disciplinary Action”, filed 12/30/2022 was replaced by 16.23.17 NMAC, “Grounds for Disciplinary Action”, was replaced by 16.23.17 NMAC, “Grounds for Disciplinary Action and Disciplinary Proceedings”, effective 04/21/2022.