PLSE PARDON PROJECT

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Via email: RA-STRegulatoryCounsel@pa.gov

December 14, 2022

Re: 16A-66 (Consideration of Criminal Convictions)
Comments re: Proposed Regulations Implementing Act 53 of 2020
Occupational Licensing Reform Bill – IRCC No. 3361

Thank you for giving us the opportunity to comment on the proposed regulations. As our name indicates, we focus on helping low-income Pennsylvanians obtain pardons from the Governor for crimes they committed years if not decades ago, who completed their sentences, but who remain in "paper prisons" because their criminal convictions are used to deny them opportunities for jobs, housing, training, education, financing, and so many other opportunities for which they are qualified. We now have affiliates in almost 20 counties where the supporters and volunteers range from District Attorneys and legal aid attorneys to peer specialists to community non-profits to bar association leaders to workforce development agencies to communities of faith: www.PardonMePA.org.

Pardons take several years to process. They are a solution that is caused in a great many cases by the acts of individuals who use criminal records (available online in just three clicks) because they wish to avoid an unknown, possible civil liability.[1] As such, proposed regulations offer the possibility not only of structuring the Commonwealth's view towards licensing decisions, but also guidance to private employers, which is an incredibly important and valuable service.

Unfortunately, the proposed regulations are fundamentally misconceived and, if implemented, would cause untold damage to tens of thousands of individuals, their families and their communities. To that point, we offer the following comments and specific proposals for alternative language.

1. **Reconsider and redefine "directly related"**

In part 26 of the Regulatory Analysis Form (RAF), the Department acknowledges the alternative of "placing time limits in the schedules on how long a particular crime is considered to be 'directly related' to a particular profession or occupation". The proposals reject this alternative

[1] This is documented in SHRM Foundation, *Getting Talent Back To Work: A Workplace Survey on Hiring and Working with People with Criminal Records* (2021) https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW_Report.pdf and McElhatton, David, *The Exception as the Rule: Negligent Hiring Liability, Structured Uncertainty, and the Rise of Criminal Background Checks in the United States*, 47 Law & Social Inquiry 1: 132–161 (Cambridge University Press: February 2022) https://doi.org/10.1017/lsi.2021.35

as being "inconsistent with the legislative intent of Act 53 and amounts to a basic policy decision that is best left to the General Assembly." This is fundamentally mistaken.

Every definition of "direct" and most of the examples included in the Merriam-Webster dictionary of the word as an adjective includes proximity:

- proceeding from one point to another in time or space without deviation or interruption; proceeding by the shortest way
- stemming immediately from a source
- natural, straightforward
- marked by absence of an intervening agency, instrumentality, or influence
- characterized by close logical, causal, or consequential relationship; and here, the example is most pertinent: "direct evidence".

Moreover, when using the term "directly related" the General Assembly **surely** did **not** mean to permit considerations that were "insubstantial," "immaterial," "remote," or "not proximate." Yet that is precisely what the proposed Regulations permit. Doing so would be contrary to well-established Pennsylvania law.

As the courts have begun their analysis of the use of criminal convictions in hiring decisions, so to must the Department: with Article I, Section 1 of the Pennsylvania Constitution ("Inherent Rights of Mankind"), which states:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Over seventy years ago, the Pennsylvania Supreme Court made it clear that laws that purport to limit the rights of individuals "in the public interest" must be truly *necessary*, and bear a "**real and substantial"** relationship to the harm sought to be avoided:

> By a host of authorities, Federal and State alike, it has been held that aa law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.

Gambone v. Commonwealth, 375 Pa. 547, 551 (Pa. 1954). By its terms, this constitutional prohibition applies not just to outright bans but to the creation of "rebuttable presumptions" such as the one that the Department proposes. Indeed, that presumption violates the individual's "inherent and **indefeasible**" constitutional right to reputation, by declaring that "the individual would pose a substantial risk to the health and safety of the individual's patients or clients or the public or a substantial risk of further criminal convictions" unless the individual proves otherwise. The harm to the individual, and the violation of rights, from such a branding is obvious.

Fifty years ago, the Supreme Court of Pennsylvania considered this issue in the context of employment and held that lifetime bans on employment are unconstitutional:

> While a state may regulate a business which affects the public health, safety and welfare, it may not, through regulation, deprive an individual of his right to conduct a lawful business unless it can be shown that such deprivation is reasonably related to the state interest sought to be protected….
>
> To interpret Section 403(2) as a blanket prohibition barring anyone who has been convicted of a crime of moral turpitude **without regard to the remoteness of those convictions** or the individual's subsequent performance would be unreasonable.

Secy. of Revenue v. John's Vending Corp., 453 Pa. 488, 492, 494 (Pa. 1973) (citations omitted; emphasis supplied) (conviction was for selling untaxed liquor 20 years earlier).

The rationale used by the Supreme Court in reaching this result is not only instructive but binding on the Department here. The Court noted

> the deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders. This State in recent years has been unalterably committed to rehabilitation of those persons who have been convicted of criminal offenses. To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.

Id. at 494-95.

As a result of these decisions and others, Article I, Section 1, has been interpreted as guaranteeing an individual's right to engage in any of the common occupations of life. The right to engage in a *particular* occupation has been held to be an important right but not a fundamental right and, for that reason, is subject to the rational basis test, *i.e.*, a state may not deprive an individual of that right unless it can be shown that such deprivation is reasonably related to the state interest that is sought to be protected.

The Commonwealth Court examined this issue, and utilized this test, twenty years ago in the context of a profession (child care) that is responsible for a very vulnerable population. It held:

> the CPSL [Child Protective Services Law]'s lifetime ban of previously convicted applicants from employment in child-care is unconstitutional. Such a ban "runs afoul of the deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders." "To forever foreclose a permissible means of gainful employment because of an improvident act in the **distant past** completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation."

Warren County. v. State Civil Serv. Commission, 844 A.2d 70, 74 (Pa. Cmmw. Ct. 2004) (citations omitted; emphasis supplied) (conviction was for aggravated assault 20 years earlier).

For these reasons, the Department's decision to reject the "alternative regulatory provisions" specifying time limits to the consideration of certain convictions solely on the basis that they were not explicitly and specifically included in the four corners of Act 53 was plain error. The proposed regulations must be reconsidered and rewritten to include time limitations.

2. Specify presumptions that further the well-established policies of the Commonwealth and rights of its people

Even if the convictions were "directly related" to the license and could permissibly be considered, it is clear that some time limits are not just necessary but constitutionally required. Twenty years was the common denominator in both *Warren County* and *St. John's Vending* and should be the absolute minimum included in the regulations. But freed from the erroneous limitation that the limitation needed to be Assembly-imposed, the Department should seriously consider the time limit recommended unanimously just one year ago by the Pennsylvania Workforce Development Board (WDB) in adopting a Resolution that speaks almost exactly to the regulations to implement Act 53 of 2020:

> The Commonwealth should take all requisite steps, including, if necessary, promulgating new regulations, to ensure the prompt review (within one year) by the Board of Pardons of all applications for pardon from Pennsylvanians who completed their sentences **five or more years ago** on convictions that did not include crimes of violence and who have remained arrest-free ever since.

https://www.dli.pa.gov/Businesses/Workforce-Development/wdb/Documents/11-9-21-WDB-Briefing-Book.pdf at 63-64 (emphasis supplied). As recommended by the PA WDB, if the crime did not involve violence, if at least five years had passed since the individual completed the sentence imposed by the judge,[2] and if the individual had not committed another crime during that five year period or been arrested on suspicion of having committed one, there would then arise a presumption that the individual should be forgiven for the crime and allowed to return fully to society as if they had never broken the law in the first place.[3] This five-year period comports with decisions of the Commonwealth Court that have held bans of seven or eight years were impermissible, as noted below.

That such an approach would further the explicit intentions of Pennsylvania can be seen in this April 2020 comment by Pennsylvania's Secretary of Labor and Industry, W. Gerard Oleksiak, about the harm that criminal records impose on the Commonwealth's workforce and economy:

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[2] Note that Delaware has a similar disqualification period, providing that "for a waiver of a felony conviction, more than 5 years have elapsed since the date of the conviction." New Jersey uses the same 5-year period for most crimes. Maine's disqualification period is just 3 years. Maryland's is 7. (FAR at page 4, 5, 6, 7. See below.

[3] It has been the law in Pennsylvania since at least 1895 that a pardon "blots out the very existence of his guilt, so that, in the eye of the law, he is thereafter as innocent as if he had never committed the offense." Commonwealth v. C.S, 534 A.2d 1953 (Pa. 1987) (citation omitted).

> One of our department's key objectives is to make Pennsylvania's workforce globally competitive, and that means preparing job seekers through employment and job training services. It's enormously frustrating that a criminal record from 5, 10, even 15 years ago can stop them from getting good jobs today. This report shows that getting past those histories is key to Pennsylvania's economic future. I applaud Lt. Governor Fetterman and the Board of Pardons for what they have already done to make pardons more accessible, and encourage them to keep going.

This quote and others supportive of pardons including by Jeff Brown, Chair of the WDB, can be found on the website of the Economy League: https://economyleague.org/driving-regional-change/campaigns-projects/the-impact-of-pardons They are there because the Economy League published **Pardons as an Economic Investment Strategy: Evaluating a Decade of Data in Pennsylvania** (April 2020). A groundbreaking report in many ways, it found that $16.7 million flowed to communities across Pennsylvania over that decade simply as a result of the Governor signing pardons. It concluded that pardons were "no-cost workforce development and neighborhood investment tools." https://economyleague.org/uploads/files/518454652334570386-impactofpardons-final.pdf at p. 28; also pp. 7, 36.

We note these statements of policy because they are directly at odds with the approach taken by the Commissioner and the Department in reviewing the laws in other jurisdictions that are similar to Act 53. They did so with the comment that "the Commissioner does not believe that these [proposed] regulations will put Pennsylvania at a competitive disadvantage, and in fact, will bring the Commonwealth in line with other surrounding states." (RAF Section 12 at p. 10)

That should not be the point; rather, the goal of the regulations ought to be to put Pennsylvania at a competitive *advantage*.

The backwards approach adopted by the Commissioner appears in this specific regulation:

> If the individual was convicted of a crime that is on the applicable schedule, there shall be a rebuttable presumption that licensure of the individual would pose such a risk, which may be rebutted by the individual using the factors in paragraph (3).

(Proposed § 43b.404(a)(2)(i)). Further, in explaining why the Regulations are needed, the Department wrote:

> It is also intended to level the playing field at application hearings, because all parties will be aware of which crimes arc deemed to be directly related to the professions/occupations, resulting in a rebuttable presumption that licensure of the individual would pose a significant risk to the health and safety of the individual's patients or clients or a significant risk of further criminal convictions.

(RAF at Section 10, p. 2)

This does not "level the playing field" (as claimed) at all. To the contrary, the proposed regulations make permanent the space that had allowed prejudice, bias and ignorance – proven now by all the research about desistance and recidivism – to be expressed as "bad moral character," the injustice that Act 53 of 2020 was enacted to eliminate.

This is precisely what the Commonwealth Court found in *Ake v. Bureau of Professional and Occupational Affairs*, 974 A.2d 514 (Pa. Cmwlth. 2009), where the Board's determination focused whether the individual had proven himself to have been "rehabilitated" – as will be the case here, when the regulations are implemented. The Court in *Ake* was clear that denial of a license ("the most drastic of sanctions") should be "reserved for the worst offenders," and that seven years between the offense (harassment) and the license denial (CPA) was both a "substantial interval of time" and constitutionally too remote for a conviction to be used to deny a license.[4]

Instead, utilizing the approach that is encouraging of people getting back to work wherever they are qualified unless there are specific risks, and freed from having to look only at the four corners of Act 57, the Department can review the other states' frameworks for proposed time limits. Included among them are:

- Delaware: (1) for a waiver of a felony conviction, more than **5 years** have elapsed since the date of the conviction. At the time of application, the applicant may not be incarcerated, on work release, on probation, on parole, or serving any pan of a suspended sentence, and must be in substantial compliance with all court orders pertaining to tines, restitution and community service; (2) for a waiver of a misdemeanor conviction, at the time of the application, the applicant may not be incarcerated, on work release, on probation, on parole, or serving any part of a suspended sentence, and must be in substantial compliance with all court orders pertaining to fines, restitution and community service
- Maine: These procedures apply to most crimes within **3 years** of an applicant's final discharge, if any, from the correctional system. Beyond the 3-year period, ex-offender applicants with no additional convictions are to be considered in the same manner as applicants possessing no prior criminal record for the purpose of licensing decisions. For health-related boards, these procedures apply for consideration of prior criminal convictions within 10 years of the applicant's final discharge, if any, from the correctional system. Beyond the 10-year period, ex-offender applicants with no additional convictions must be considered in the same manner as applicants possessing no prior criminal record for the purposes of licensing decisions. There is no time limit for consideration of an applicant's conduct that gave rise to the criminal conviction if that conduct is otherwise a ground for disciplinary action
- Maryland: Since 2019. the law has provided that a person may not be denied a license based on conviction. even if the disqualifying standards in § 1-209(d) apply if **7 years** or more have passed since completion of sentence without other charges, unless a person is required to register as a sex offender

[4] More recently, the Commonwealth Court held that a school district could not reasonably or rationally use a seven year-old criminal conviction to terminate an employee's job, and upheld the individual's claim that doing so violated his constitutional rights. *Megraw v. School District of Cheltenham Township*, 2018 WL 2012130 (Pa. Cmwlth. 2018).

- New Jersey: However, the law also precludes granting a license to "an individual who has, within the **five years** of preceding the submission of an application for a certificate, registration or license, been convicted of embezzlement, fraud, crimes involving public corruption. or theft" and for individuals convicted of murder or particular sex offenses, it creates "a rebuttable presumption that the crime or offense has a direct or substantial relationship to the activity regulated by the board"

Pennsylvania's Constitution, the law, and public policy require that if the conviction was longer ago than a specific time period, there then arises a rebuttable presumption that the crime or offense does not have a direct relationship to the activity regulated by the Board. For that reason, we propose that amending the Proposed § 43b.404(a) and (a)(2) as follows [proposed additions underscored; proposed deletions ~~stricken~~]:

(a) General rule. A license cannot be denied because of a prior conviction of a crime in and of itself.[5] It is the deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders. This State in recent years has been unalterably committed to rehabilitation of those persons who have been convicted of criminal offenses.[6] In particular, Act 57 of 2020 was intended to remove barriers to their ability to demonstrate fitness for occupational licenses or certifications required by the State. Accordingly, e[E]xcept as provided in subsections (b), (c) or (d), when determining whether an individual with a criminal conviction qualifies for a license, certificate, permit or registration, a licensing board or commission within the Bureau will engage in a two-stage analysis of an applicant's criminal conviction, as follows:

(1) First stage. …

(2) Second stage — individualized assessment.

(i) If the individual's criminal conviction is on the applicable board's or commission's schedule, the board or commission will then determine whether the conviction involved a crime of violence[7] as that term is defined in { }.

(a) If it did not and if the applicant has not been arrested for a period of at least five years since completing their sentence, and/or

(b) If it did and if the applicant has not been arrested for a period of at least ten years since completing their sentence,

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[5] This language appears in the statutes of both Massachusetts and New Hampshire. (RAF Section 12 at 6)

[6] The preceding two sentences are directly quoted from the Pennsylvania Supreme Court's opinion in *Secy. of Revenue v. John's Vending Corp.*, 453 Pa. 488, 494-5 (Pa. 1973) Compare the language found in Maryland's law: "[i]t is the policy of the State to encourage the employment of nonviolent ex-offenders and remove barriers to their ability to demonstrate fitness for occupational licenses or certifications required by the State" (RAF Section 12 at 5); and Rhode Island, noting "the state's legitimate interest in equal access to employment for individuals who have had past contact with the criminal justice system" (id. at 8)

[7] We note that the vast majority of the crimes listed in the proposed Regulations as "presumptively disqualifying" are not crimes of violence: many non-violent crimes – theft, forgery, fraudulent practices, false swearing, filing false tax returns, mail fraud, and the like.

then a rebuttable presumption shall be established that the conviction is not directly related to the license being sought.

(ii) The board or commission will then determine whether licensure of the individual would pose a substantial risk to the health and safety of the individual's patients or clients or the public or a substantial risk of further criminal convictions by conducting an individualized assessment using the factors set forth in paragraph (3). If the individual was convicted of a crime that is on the applicable schedule and not included within subsection (i) above, there shall be a rebuttable presumption that licensure of the individual would pose such a risk, which may be rebutted by the individual using the factors in paragraph (3).

(ii) If the individual's criminal conviction is not on the applicable board's or Commission's schedule or included within subjection (i) above, then a rebuttable presumption shall be established that the conviction is not directly related to the license being sought. the board or commission will then determine whether, due to the nature of the criminal conviction. Licensure of the individual would pose a substantial risk to the health and safety of the individual's patients or clients or the public or a substantial risk of further criminal convictions. If so, the board or commission will conduct an individualized assessment using the factors set forth in paragraph (3). ~~The individual may rebut the determination by showing evidence of rehabilitation as specified in the factors in paragraph (3).~~

(2) In determining that a conviction "relates directly" to a particular license or certificate such that an applicant is thereby disqualified, the board or commission shall explain in writing how the factors in paragraph (3) relate to the license or certificate sought.

This final paragraph is essential, because it will ensure that the law is followed, and not force upon the individual the time, fees and costs incurred in appeals.

3. Include in the regulations a specific provision that allows automatic waiver of any fees or costs for people who are indigent, and specify the criteria that create a presumption of indigency and automatic waiver of the fees.

Finally, and following upon the lattermost comment, we recommend and request the addition of a specific provision that specifies a waiver of the proposed $45 fee for the indigent.

Earlier this month, the National Center for Access to Justice published its report on **Fines and Fees** https://ncaj.org/state-rankings/justice-index/fines-and-fees. In introducing the report, the authors write:

> Fines and fees can keep people in a cycle of poverty, causing people to lose their jobs, their homes, and sometimes their children. The same monetary sanction that trivially inconveniences an affluent person can prevent a low-income family from paying the rent. In fact, fines and fees are often set without regard to a person's actual financial situation. In short, they create a two-tiered system, placing justice out of reach for millions of people, including a disproportionate number of people of color.

The report identifies many specific ways that states can reduce the barriers to access for people of low income. Among them is this:

> The state has codified standards that trigger a presumption that a person is indigent and unable to pay fines, fees, costs, surcharges or assessments, in cases involving a violation of law. This presumption must be triggered by at least one of the following: receipt of means-tested public assistance, income below an enumerated threshold, and/or eligibility for court-appointed counsel.

While licensing boards don't have court-appointed counsel, the other two criteria could easily be adopted. As to income, we urge you to adopt the standard of 200% of the national poverty guidelines that is generally used by Clerks of Court and Pardon Projects around the state https://www.healthcare.gov/glossary/federal-poverty-level-fpl/ or, at a minimum, 187.5% of the poverty line that is used by the Pennsylvania Supreme Court's IOLTA Board in funding legal services for low-income people: https://www.paiolta.org/grants/eligibility-applications/#specialized-legal-services.

§ 43b.202. Waiver [new section]

Any fees chargeable under this Chapter shall be waived upon submission of information indicating that the applicant is receiving means-tested public assistance or that the applicant's household income is at or below 200% of the federal poverty guidelines.

Again, we thank you for the opportunity to submit, and your thoughtful consideration of, these comments and proposals. Inasmuch as criminal records are a major contributor to intergenerational poverty, the issuance of reasonable, informed regulations are of unquestioned importance to the futures of people whose pasts include experience in the Pennsylvania criminal justice system.

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