

Comments of the Independent Regulatory Review Commission



Bureau of Professional and Occupational Affairs Regulation #16A-4413 (IRRC #3100)

Schedule of Civil Penalties - Podiatrists

August 5, 2015

We submit for your consideration the following comments on the proposed rulemaking published in the June 6, 2015 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Bureau of Professional and Occupational Affairs (Bureau) to respond to all comments received from us or any other source.

Section 43b.27. Schedule of civil penalties – podiatrists. – Statutory authority; Whether the regulation is consistent with the intent of the General Assembly; Implementation procedures; Reasonableness; Clarity.

Section 5(a) of Act 48 of 1993 (Act 48) authorizes the Commissioner of the Bureau to promulgate a schedule of civil penalties for violations of the acts or regulations of the licensing boards that fall under its jurisdiction. 63 P.S. § 2205(a). This proposed rulemaking establishes a schedule of civil penalties for licensees of the State Board of Podiatry (Board) for practicing on a lapsed license and for failure to complete 50 hours of approved continuing education. The Preamble to this proposal notes that the Commissioner of the Bureau and the Board believe it is necessary to implement the civil penalties to streamline the disciplinary process. We raise the following issues for each of the violations described below.

Failure to complete required hours of continuing education during the 2 years preceding renewal or reactivation.

The Podiatry Practice Act (Act) requires licensees to attend continuing education conferences and to furnish proof of attendance to the Board. Licensees that fail to comply with these requirements will be denied license renewal. We specifically note the following provision of the Act:

No licensee shall be registered for the ensuing biennial licensure if he fails to comply with the provisions of this section relating to attendance at educational conferences.

63 P.S. § 42.9a.

This proposed rulemaking would impose civil penalties on licensees of the Board that fail to complete continuing education requirements. Is it the Board and Bureau's intent to impose civil penalties *and* not renew a license when a licensee fails to complete continuing education requirements when this fact is known to the Board at the time it is considering the renewal application? In the Preamble to the final-form rulemaking, we ask the Bureau to explain how this provision will be implemented.

In addition, the above-cited provision of the Act contains the following language: "Provided, that the Board may, at its discretion, register any licensee if he proves subsequent compliance with the provisions of this section." Not only does this language further evidence the General Assembly's intent that a person not have their registration renewed until they have completed the continuing education requirement but further appears to evidence intent that a person whose registration has been renewed but is later discovered to have not completed the continuing education requirement not be permitted to practice until he completes the continuing education, i.e. suspension of registration until completion. The only discretion that appears to be granted to the Board in Section 42.9a is the discretion to register a person after he complies with the continuing education requirement. In the Preamble to the final-form rulemaking, we ask the Bureau to explain how this provision will be implemented in this situation.

If the intent of the proposal is to allow a licensee to continue practicing by paying a civil penalty without the meeting continuing education requirements of the Act, we question the Bureau's statutory authority for it. We believe that allowing a licensee to renew a license without obtaining the necessary continuing education or failure to suspend the license of someone subsequently found to have not complied with the continuing education requirement would be a violation of 63 P.S. § 42.9a and is not consistent with the intent of the General Assembly. If it is the Bureau's intent to only impose a civil penalty in lieu of non-renewal or suspension of a license, we ask the Bureau to explain why it believes it has the statutory authority for this action.

Practicing or offering to practice podiatry by a person whose license is expired.

We raise two concerns related to the clarity and reasonableness of the schedule of civil penalties being proposed for this type of violation. First, under the penalties for a first offense, would a licensee practicing on an expired license for one day and five months be subject to a \$500 fine (2 – 5 months) or \$1000 (over 5 – 12 months)? Does the term "month" mean a whole month? This should be clarified in the final-form rulemaking.

Second, as written, it would appear that a licensee being charged with a first offense for practicing on an expired license for five months and one day could be subject to a \$1,000 fine (over 5 – 12 months), but a licensee being charged with a second offense would only be subject to a \$500 fine (less than 6 months). In addition, the penalties for a first offense and second offense for a licensee practicing on an expired license for three months or four months is the same - \$500. This scheme does not progressively increase civil penalties for continuing violations. We believe it would be more reasonable if penalties for second offenses are higher than penalties for first offenses. We ask the Bureau to consider this approach as it drafts the final-form rulemaking.